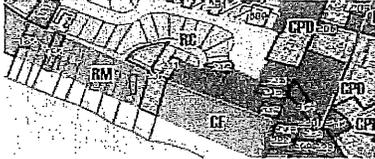


Town of Fort Myers Beach
Department of Community Development



MEMORANDUM

To: Local Planning Agency

CC: Anne Dalton, LPA Attorney
Jack Green, Interim Town Manager

From: Frank Shockey, Interim Community Development Director

Date: November 5, 2009

RE: Recommendations to Town Council regarding alcoholic beverage uses

The LPA has been working on developing some recommendations for amendments to LDC Chapter 34, Article IV, Division 5 (alcoholic beverages). After the recent joint LPA and Town Council meeting, the direction desired by Council for such amendments remained somewhat unclear except that there was some expression of desire for a recommendation regarding the possibility of an amendment to allow for consumption-on-premises uses on the sandy beach (i.e. in the EC (Environmentally Critical) zoning district) seaward of licensed establishments.

A former Town Manager commissioned an in-depth study of this question by a consultant. The report was presented to the LPA last year and was redistributed to the LPA and Town Council for the recent joint meeting. The report contains some valuable information that should be considered in any recommendation and any decision regarding the matter of amending the LDC to allow consumption-on-premises uses on the sandy beach. The consultant's discussion of the various factors related to this question is on pages 1 through 26 of the report. LPA and Town Council should consider these factors in deciding whether to make such a policy change, even if some outweigh others in the end.

In addition, the consultant's summary on pages 40 through 42 of the report highlights some changes that seemed prudent considerations at the time, such as amending the LDC to fit actual policy of the Town Council and conform to Florida Beverage Law. Even if no policy changes are desired and most establishments are still to be required to seek public hearing approval, at minimum the regulations should be made to conform to Florida Beverage Law.

Murphy Planning

Murphy Planning
8420 Charter Club Circle
Unit 1
Fort Myers, FL 33919-5881
Email: jerry@murphyplanning.com

Phone: (239) 322-8510
Fax: (239) 590-9755

Policy Considerations and Options: Consumption of Alcoholic Beverages

Potential Modifications to the Town of Fort
Myers Beach Regulations for Off- and On-
Premises Consumption of Alcoholic
Beverages

Report to the Town of Fort Myers Beach Local Planning Agency

November 2008

Introduction

The Town of Fort Myers Beach ("Town") recently consulted with Murphy Planning ("Consultant") to research and review provisions of the Town's Comprehensive Plan ("Plan") and Land Development Code ("LDC"). The Town initially requested the Consultant to investigate the possibilities of permitting businesses licensed for on-premises consumption of alcoholic beverages ("COP") and having frontage on the Gulf beaches to extend this approved COP use onto the sandy beach. This initial request included investigating possible performance measures to address potential problems associated with extending this use. This request also included exploring procedural options for expeditiously curtailing the privilege and the opportunity to profit commercially from such extended use in the event a permit-holder failed to perform in accordance with the adopted performance measures. **Section 2 of this Report addresses these issues**

Subsequent to the Town's Local Planning Agency ("LPA") meeting of October 14, 2008, the initial request was expanded to include providing a comprehensive review of the Town's regulation of alcoholic beverages, including the Town's Plan, LDC, and the State of Florida's regulations on alcohol they apply to the Town. **Section 3 of this Report summarizes the Consultant's research and review of the relevant regulations. Section 4 summarizes options for the Town to consider regarding these issues.** After the Town determines a general policy direction, the Consultant is committed to assisting the Town by drafting an amending ordinance including regulatory options for determination and adoption by Town Council following review and recommendations by the LPA.

Regulatory issues associated with alcoholic beverages predate the founding of the United States. These issues include: sales, service, taxation, manufacturing, quality, distribution, licensure, bonding, conveyance, packaging, locations associated with consumption, associated businesses, possession, age of consumption, under-age consumption, alcoholism, and a period in this country's history know simply as "Prohibition". A pantheon of federal regulations address much of this subject-matter, as does a sizable body of Florida state law encompassing six chapters of Florida Statutes ("Florida Beverage Law"). However weighty these state and federal regulations may be, a number of policy determinations and options are relegated to local governments in Florida under their inherent Home Rule authority, Police Powers, and by state statute. In light of this background, the Town is wise to approach this subject matter cautiously and comprehensively. The Consultant is grateful for the opportunity to assist the Town in this effort.

October 14, 2008

On-Premises Consumption of Alcoholic Beverages on the Gulf Beaches

Review of Relevant Policies and Regulations

Threshold Regulatory Considerations

A threshold issue the Town may wish to consider prior to revising or adopting any additional land use regulations is the regulations' consistency or "accordance" with the Town's adopted Comprehensive Plan ("Plan"). Florida is a "Plan is law" state, which means that the provisions and prohibitions adopted in the Plan are legally binding on both the Town and all persons subject to the Town's jurisdiction. The provisions of the Plan are formulated as adopted Goals, Objectives, and Policies based on background planning research that precedes them in the Plan. Prior to the Plan's lawful effectiveness, the Plan is reviewed by the Florida Department of Community Affairs for consistency with the State Comprehensive Plan. Local regulations that are inconsistent with the Goals, Objectives and Policies in the Plan are legally prohibited. Public or private development that is inconsistent with the Plan cannot be approved.¹ Whenever the requirements or provisions of the Plan are in conflict with any other regulations, the most restrictive requirements apply.²

The Town adopts regulatory ordinances to effectuate the requirements and provisions of the Plan. The majority of these regulations are subsequently codified and published in the Fort Myers Beach Land Development Code ("LDC"). When considering amendments to the LDC, the Town Council is required to consider the Plan and the recommendations of the LPA.³ In making recommendations on LDC amendments to Town Council, the LPA has a duty to review the proposed changes for consistency with the Plan.⁴ For these reasons, consistency with the Plan is a significant threshold consideration in the matter of expanding on-premises consumption of alcoholic beverages ("COP") onto the Gulf beaches.

¹ See Fort Myers Beach Land Development Code [hereinafter LDC] § 1-11(c)(1); Town of Fort Myer Beach Comprehensive Plan [hereinafter Plan] p. 1--2; Florida Statutes [hereinafter F.S.] § 163.3161(5).

² See LDC § 1-11(c)(2).

³ See *id.* § 34-83(2).

⁴ See *id.* § 34-120(4).

If the Town determines that the expansion of COP onto the Gulf beaches is *inconsistent* with the Plan, then that use cannot be expanded by amending provisions in the LDC. In that case, i.e., if the Town were determined to make such a change, the Plan itself would need to be amended as a preliminary step to allow such a provision. However, plan amendments proceed through a statutory process that is, by design, thoroughly complex and time-consuming. Comprehensive land use planning came as a legislative response to Florida's explosive growth in the second half the Twentieth Century. Were county and municipal comprehensive plans able to be rapidly and easily changed, the legislature's intention to manage would be vitiated. The requirement of comprehensive planning came to the Town of Fort Myers Beach as a result of municipal incorporation. Incorporation came, in no small part, as a result of popular frustration with Lee County's poor management of commercial expansion on Estero Island.⁵

Existing Conditions

The Gulf beaches are primarily within the "Recreation" Future Land Use Map ("FLUM") category established in the Plan. The use of the Gulf beaches for COP exists currently at a very few locations. There is little if any information to indicate if, when, or how this use was ever approved at these locations, but in most instances it predates incorporation of the Town and adoption of the Plan and LDC. If this use of the Gulf beaches is *not consistent* with the Plan, then the existing uses could remain only as a non-conforming use,⁶ barring the adoption of a provision to amortize or "sunset" the non-conforming use⁷ or amend the Plan. However the Town decides to move forward, the focus should further the goals, objectives, and policies of the Plan and favor a level playing field for all businesses.

Land Use Planning Considerations

If the use of the Gulf beaches for COP is *consistent* with the Plan, the next issue for determination by the Town is whether the expansion of this use at other properties is prohibited by current LDC provisions. If *not* prohibited by the LDC, then the next issue would be how to permit such expansion to assure that the expansion is compliant with the LDC and other applicable regulations. If changes to the LDC were to be necessary, the Town may wish to consider any potentially negative ramifications from such changes. In developing this policy, the Town may wish to establish other requirements to address potential problems that could arise from such an expanded use, such as litter, noise, underage consumption, consistent property maintenance, etc. This Report discusses these issues in greater detail below.

⁵ See Plan 1-1, 4-2, 26-29, OBJECTIVE 4-B, POLICY 4-B-1; see also Plan 4-2, 7-15 (discussing issues associated with the development of the Diamondhead resort).

⁶ See LDC §§ 34-3202(c), 3241-46.

⁷ See *id.* § 34-3204.

Consistency Considerations

Plan Considerations and Guidance: Alcoholic Beverages

The Plan says little of substance regarding the consumption of alcoholic beverages. As part of the overall discussion of transportation problems, the Plan recognizes that alcohol factors into careless speeding at the south end of the island.⁸ The Plan also explains that approximately 38 percent of the fees paid for state issued alcoholic beverages licenses is returned to the Town by the state Division of Alcoholic Beverages and Tobacco in accordance with Florida Statutes §561.342.⁹ Finally, as part of intergovernmental coordination, the Plan notes that the state Department of Children and Families directs services to special needs populations including people with alcohol or drug dependency.¹⁰

The LDC has several pages of provisions regarding alcoholic beverages.¹¹ These regulations are derived primarily from the Lee County Land Development Code.¹² These provisions were adopted upon incorporation of the Town and revised only for scribes' considerations prior to the adoption of the entirety of LDC Chapter 34 in 2003. Prior to this Report, these regulations have not been reviewed by the Town for policy considerations, consistency with the Florida Beverage Law, or internal consistency with the other provisions of the LDC. A review and discussion of the LDC alcoholic beverage regulations is provided in Section 3 this Report.

Plan Considerations and Guidance: Gulf Beaches

The Gulf beaches factor significantly throughout the Plan, as an important natural resource that should be preserved,¹³ and for providing "incomparable recreational and environmental benefits"¹⁴ that should be carefully managed to increase both recreational and environmental benefits.¹⁵ The majority of the Gulf beaches—one major focus of this Report—is within the "Recreation" Future Land Use Map (FLUM) category, which includes all of the Gulf beaches seaward of the 1978 Coastal Construction Control Line (CCCL).¹⁶ The application of this FLUM category does not affect any party's ownership rights to the beach.¹⁷

⁸ See Plan 7-2.

⁹ See id. 11-9.

¹⁰ See id. 14-12.

¹¹ See LDC §§ 34-1261-64.

¹² Compare id. with Lee County Land Development Code §§ 34-1261-64.

¹³ See Plan POLICY 4-A-5

¹⁴ Id. POLICY 4-A-6.

¹⁵ See id. POLICY 4-A-6.

¹⁶ See id. POLICY 4-B-8.

¹⁷ See id. 4-40.

The vision for the future of the Town of Fort Myers Beach is a result of the beautiful natural surroundings of beaches and dunes, wildlife habitat, historic and archaeological sites, boating opportunities, and places for people to come together for recreation, visiting, dining, and shopping within the park-like setting of the entire island. The Community Design Element describes how the town can ensure that the physical components of the community (natural areas, open spaces, buildings, streets, paths) can work together to achieve a coherent whole, reinforcing and enhancing its small-town character and as a place where permanent residents coexist comfortably with tourism. Policies emphasize walkability, promote streets as the neighborhood realm, plan for interconnected foot paths throughout the island and improve linkages to the town's natural resources and active recreation areas. These linkages and "people-gathering places" become part of the town's system of recreation, open space, and cultural amenities.¹⁸

Future Land Use Element

POLICY 4-B-8 provides that the Recreation FLUM category is "applied to public parks, schools, undevelopable portions of Bay Beach, and those parts of the Gulf beaches that lie seaward of the 1978 [CCCL]."¹⁹ "Allowable uses are parks, schools, libraries, bathing beaches, beach access points, and related public facilities."²⁰ POLICY 4-B-12 establishes limitations on land uses for purposes of the Plan. This policy states: "Recreational uses include beaches, parks, playgrounds, and similar uses."²¹

The importance of the FLUM and FLUM categories cannot be overstated. The intent of the FLUM categories provided in Objective 4-B is to:

— Reduce the potential for further overbuilding through a new [FLUM] that protects remaining natural and historic resources, preserves the small-town character of Fort Myers Beach, and protects residential neighborhoods against commercial intrusions.²²

Because the use of the Gulf beaches under consideration is neither specifically allowed nor prohibited, the policy considerations with regard to Objective 4-B involve determining whether expansion of COP to areas of the Gulf beaches within the Recreation FLUM category is consistent with the Plan or whether that expansion would be further development inconsistent with the Plan. This consideration involves the evaluation of whether such use could and would:

1. protect remaining natural resources, and
2. preserve the small-town character of the Town, and

¹⁸ *Id.* 10—1.

¹⁹ *Id.* POLICY 4-B-8.

²⁰ *Id.* POLICY 4-B-8.

²¹ *Id.* POLICY 4-B-12.

²² *Id.* OBJECTIVE 4-B.

3. protect residential neighborhoods against commercial intrusions.²³

This evaluation is discussed in greater detail below in this Report. In addition to evaluating the consistency of the expanded use with the "Recreation" FLUM category, the Town may wish to evaluate its consistency with the FLUM categories of the properties that might benefit from the availability of this expanded use. This Report also discusses this matter.

As noted above, the majority of the Gulf beaches are located within the Recreation FLUM category, but the businesses that are currently allowed COP operate within buildings located in other FLUM categories. The majority are within the "Pedestrian Commercial" FLUM category, but others are located in the "Boulevard" and "Mixed Residential" FLUM categories. The adjacent FLUM categories are discussed below in the section of this Report discussing protecting residential neighborhoods from commercial intrusions.

Protecting Natural Resources

Florida Law requires that local governments in coastal areas adopt Coastal Management Elements as part of their comprehensive plans. The Town's Coastal Management Element is contained in Chapter 5 of the Plan. GOAL 5, the primary goal of the Coastal Management Element is:

To keep the public aware of the potential effects of hurricanes and tropical storms and to plan a more sustainable redevelopment pattern that protects coastal resources, minimizes threats to life and property, and limits public expenditures in areas subject to destruction by storms.²⁴

In furtherance of this Goal, Objective 5-D specifically addresses the Gulf beaches, requiring the Town to conserve and enhance the shoreline of Estero Island to counter natural erosion, and reducing negative man-made impacts on beaches and dunes.²⁵

Plan POLICY 5-E-7 minimizes the potential for land use conflicts between waterfront uses and other land uses by establishing priorities for development and redevelopment of the shoreline.²⁶ Future development or redevelopment of shoreline land uses must ensure compatibility with surrounding lands and provide proper buffering where needed.²⁷ To determine consistent land uses for a site, POLICY 5-E-7 requires the Town give priority to water-dependent land uses in the following order

²³ See *id.*

²⁴ *Id.* GOAL 5.

²⁵ See *id.* OBJECTIVE 5-D.

²⁶ See *id.* POLICY 5-E-7.

²⁷ See *id.*

- Conservation uses[;]
- Water-dependent uses such as marinas which are available for use by the general public;
- Recreational uses; and
- Other uses that are compatible with the surrounding neighborhood.²⁸

To further the Goal, Objectives, and Policies of the Coastal Management Element of the Plan, the Town may wish to require any proposal to expand the use of COP onto the Gulf beaches to include provisions to further:

1. a more sustainable redevelopment pattern that protects coastal resources, minimizes threats to life and property, and limits public expenditures in areas subject to destruction by storms;
2. conserve and enhance the shoreline of Estero Island by increasing the amount of dunes, renourishing beaches to counter natural erosion, and reducing negative man-made impacts on beaches and dunes;
3. ensure compatibility with surrounding lands and provide proper buffering where needed; and
4. prioritize conservation uses; water-dependent uses available for use by the general public; recreational uses; and other users that are compatible with the surrounding neighborhood—in that order.²⁹

With regard to the Gulf beaches, numerous provisions in the Conservation Element of the Plan favor the preservation and restoration of the low, vegetated dunes that historically occupied the area subject to active gain or loss of sand because of the sea or wind.³⁰ "Many of the dunes at Fort Myers Beach have been removed by development or by continuing management practices that inhibit their restoration by natural processes."³¹

Some practices that have been forbidden in many coastal communities are still common at Fort Myer Beach. For instance, dunes sometimes recreate themselves even when they have been removed during the development process. This restoration ought to be valued and assisted, but many property owners at Fort Myers Beach continually destroy the re-emerging dunes. This activity destroys sea turtle nesting habitat and eliminates a natural blockage that protects upland property from extreme tides, in addition to eliminating a valued scenic resource.³²

²⁸ See *id.*

²⁹ See generally *id.* GOAL 5, OBJECTIVE 5-D, POLICY 5-3-7.

³⁰ See *id.* 6—27, 29, 37, 43-44; OBJECTIVE 6-E, POLICY 6-H-5, POLICY 6-J-1, POLICY 6-J-3.

³¹ *Id.*

³² *Id.* 6—29. ³² *Id.* 6—27.

³² *Id.* 6—37.

A potential means of balancing the increased intensity of use resulting from expanding the area for COP to the Gulf beaches would be a reciprocal requirement that the property owner protect and improve the beach with native vegetative buffers between the pedestrian foot-traffic along the public beach. This would also serve to separate this adult-oriented COP activity from families with children transiting the beach who might be averse to such activities.

Preserving the Small-Town Character of Fort Myers Beach

Much has been made of the Town's "small-town character," but it isn't always easy to describe it in definitive terms. The Plan's Community Design Element (Chapter 3) "reinforces"

the small-town character of Fort Myers Beach, a place where permanent residents coexist comfortably with tourism. The policies reflect an appropriate balance among neighborhood needs, economic vitality, and tourist development, and the balance between the need to move cars and all other types of movement (on foot or by bicycle or boat).³³

The background material for the Future Land Use Element (Chapter 4) speaks of "overwhelming" the small-town character with density multipliers that are too high.³⁴

GOAL 4 of the Plan is:

To keep Fort Myers Beach a healthy and vibrant "small town," while capitalizing on the vitality and amenities available in a beach-resort environment and minimizing the damage that a hurricane could inflict.³⁵

In furtherance of GOAL 4, OBJECTIVE 4-A: SMALL-TOWN CHARACTER requires the Town to:

Maintain the small-town character of Fort Myers Beach and the pedestrian-oriented "public realm" that allows people to move around without their cars even in the midst of peak-season congestion.³⁶

³² *Id.* 6-44.

³² See *id.* POLICY 6-J-1.

³² See *id.* POLICY 6-J-3.

³² *Id.* 6-43.

³³ *Id.*, p. 3-1.

³⁴ *Id.*, p. 4-22.

³⁵ *Id.* GOAL 4.

³⁶ *Id.* OBJECTIVE 4-A.

To achieve this objective, certain policies follow to specifically address how new development can maintain and contribute to the pedestrian-oriented public realm in order to preserve that "small-town" character:

POLICY 4-A-1 provides: "Maintaining the town's current 'human scale' is a fundamental redevelopment principle. POLICY 4-A-2 states:

The Town of Fort Myers Beach values its vibrant economy and walkable commercial areas. Through this plan, the town will ensure that new commercial activities, when allowed, will contribute to the pedestrian-oriented public realm.³⁷

POLICY 4-A-3 requires the Town to "protect residential neighborhoods from intrusive commercial activities" and references Policies 4-C-2 and 4-C-3.³⁸ This aspect is discussed in greater detail below the heading devoted to protecting residential neighborhoods.

POLICY 4-A-4 identifies as "undesirable" development trends that inhibit easy walking access to the beach, which is important as a "key element of the town's human scale."³⁹ Obviously a development trend that promotes or improves easy walking access to the beach would be desirable. If expanding COP onto the Gulf beaches will further GOAL 4 and OBJECTIVE 4-A in this manner, that would be an important determination. This may involve some dimensional provisions, as referenced in POLICY 4-A-8i.⁴⁰

POLICY 4-A-5 harkens back to the importance of protecting the Town's many important natural resources despite its urbanized character. "Preservation of those resources is of the highest importance and is a frequent theme throughout this plan."⁴¹ This is discussed in greater detail above in this Report, but it bears additional consideration that in accordance with POLICY 4-A-5, the enhancements discussed under the topic of "protecting natural resources" further preserve the Town's "small-town" character.

POLICY 4-A-6 states:

The beaches provide incomparable recreational and environmental benefits to the town; careful management of the beach, including renourishment when necessary, can increase both. Frequent beach accesses are essential to the

³⁷ *Id.* POLICY 4-A-1.

³⁸ *See id.* POLICY 4-A-3. This policy is discussed in greater detail below in the section on protecting residential neighborhoods from commercial intrusions.

³⁹ *Id.* POLICY 4-A-4.

⁴⁰ *See id.* POLICY 4-A-8i.

⁴¹ *Id.* POLICY 4-A-5.

town's character and shall be maintained and expanded where possible.⁴²

This policy also bolsters the possibilities discussed under the "protecting natural resources" topic, above.

POLICY 4-A-8 provides some "nuts and bolts" type direction for the Town. It requires the Town establish "clear and consistent rules and processes that govern private and public development" and incorporate these rules and processes into an illustrated LDC.⁴³ Given the inconsistencies that Town staff and the LPA have identified, the Town's request for this Report and the review from which it results is a timely undertaking in furtherance of the Plan.

POLICY 4-A-8 requires that the LDC define permitted uses and describe the dimensions needed to implement the Plan.⁴⁴ If the Town considers expanding COP to areas of the Gulf beaches, the Town may wish to consider appropriate dimensional requirements to assure that the Plan Goals, Objectives, and Policies this LDC change will further are established.

POLICY 4-A-8 requires the Town to ensure "the availability of public facilities at the levels of service specified in this plan concurrently with the impacts of development," referring the reader to the Capital Improvements Element for a summary of these levels of service and guidelines for the town's Concurrency Management System.⁴⁵ The potential demand for additional vehicular traffic and associated parking that could likely result from expanding COP onto area of the Gulf beaches is discussed below under the heading: "LDC Considerations".

Protecting Residential Neighborhoods from Commercial Intrusions

Given the mixed-use nature of the Town's existing inventory of buildings and uses, it's hard to go anywhere in the Town without being within shouting distance of a residential use. This situation is not unusual in mature coastal resort communities. These close proximities also raise issues with private rights to the "quiet enjoyment" of residential property versus the perceived property value and potential economic gain sought by expanding commercial uses.

⁴² *Id.* POLICY 4-A-6.

⁴³ *See id.* POLICY 4-A-8.

⁴⁴ *Id.* POLICY 4-A-8i.

⁴⁵ *See id.* POLICY 4-A-8vi.

The Plan's Future Land Use Element recognizes that commercial expansion and intrusion is a common problem in many mature resort communities—not just Fort Myers Beach—and if improperly approached such intrusions can threaten existing residential areas.⁴⁶ In examining the issue, the background for the Future Land Use Element asks, "How much more commercial is too much? Or is it the *type* of commercial, or its physical form, that is the problem?"⁴⁷ In response the Plan identifies:

The most difficult conflicts in potential commercial development lie along Estero Boulevard from the Key Estero Shops to Donora Boulevard. Commercial uses catering to tourists that might extend into this area from Times Square have the potential to conflict with residential areas, and with the civic uses that are making this the center of the island for residents.⁴⁸

The Future Land Use Element of the Plan probably states the polarizing potential of this situation best:

Successful resort communities attract increasing numbers of merchants who cater to tourists and day visitors. Residents often fear that commercial development will continue to expand into previously residential areas and result in more commercial space than is needed to serve the peak capacity of residents and visitors.

New commercial establishments can interfere with the "private realm" of a community (the personal spaces in and around homes and condominiums). At the same time, these establishments often contribute little or nothing to a community's "public realm," which includes streets, sidewalks, and plazas where residents and visitors interact. The town can insist on the protection of its private realms and the enhancement of its public realm when evaluating proposals for new commercial development.⁴⁹

Because any expansion of COP onto the Gulf beaches is *new* commercial development, the operative sentence in the caption bears repeating: "The Town can insist on the protection of its private realm and the enhancement of its public realm when evaluating proposals for new commercial development."⁵⁰

Commercial Uses and New Commercial Development. In developing the Plan the Town reached a consensus on commercial uses⁵¹ and new policies for commercial development in the Town.⁵² These Town policies for commercial development are promulgated in Plan POLICY 4-C-2 and POLICY 4-C-3.

⁴⁶ See *id.* 4–2.

⁴⁷ *Id.* (emphasis in original).

⁴⁸ *Id.*

⁴⁹ *Id.* 4–26.

⁵⁰ *Id.* (emphasis supplied).

⁵¹ See *id.* 4–27.

⁵² See *id.* 4–28-29.

POLICY 4-C-2 provides that commercial intensity in any FLUM category is limited by provisions of the Plan and the LDC. POLICY 4-C-2 requires standards in the LDC to encourage more intense commercial uses only in the "Pedestrian Commercial" FLUM category. POLICY 4-C-2 requires the LDC to specify maximum commercial intensities using floor-area-ratios ("FAR"), and allows higher FAR for properties in the "Pedestrian Commercial" FLUM category.⁵³

POLICY 4-C-3 addresses commercial locations, and requires the Town to apply certain principles when evaluating proposals for new or expanded commercial uses in categories where they are permitted. In relevant respect, these principles provide:

- The LDC will specify the permitted form and extent for new or expanded commercial uses in the "Pedestrian Commercial" category, and establish a streamlined approval process.⁵⁴
- In the "Mixed Residential" category, commercial uses are limited to lower-impact uses such as offices, motels, and public uses, and must be sensitive to nearby residential uses, complement any adjoining commercial uses, contribute to the public realm as described in the Plan, and meet the design concepts of the Plan and the LDC. It provides that landowners may seek commercial zoning changes only through the public hearing zoning planned development process.⁵⁵
- In the "Boulevard" category, where mixed-use development including some commercial uses may be permissible, landowners may seek commercial zoning changes only through the public hearing zoning planned development process. Proposals must be sensitive to nearby residential uses, complement any adjoining commercial uses, contribute to the public realm as described in the Plan, and meet the design concepts of the Plan and the LDC.⁵⁶
- Shopping and services for residents and overnight guests are strongly preferred over shopping and services that will attract additional day visitors during peak-season congestion.⁵⁷
- Shopping and services that contribute to the pedestrian character of the town are strongly preferred over buildings designed primarily for vehicular access.⁵⁸

⁵³ *Id.* POLICY 4-C-2.

⁵⁴ *See id.* POLICY 4-C-3ii.

⁵⁵ *See id.* POLICY 4-C-3iii.

⁵⁶ *See id.* POLICY 4-C-3iv.

⁵⁷ *See id.* POLICY 4-C-3va.

⁵⁸ *See id.* POLICY 4-C-3vb.

- The neighborhood context of proposed commercial uses is of paramount importance. The sensitivity of a proposed commercial activity to nearby residential areas can be affected by: the type of commercial activities (such as traffic to be generated, hours of operation, and noise); the physical scale (such as the height, and bulk of proposed buildings); and the orientation of the buildings and parking.⁵⁹

Policy 4-C-3 prohibits commercial activities that will intrude into a residential neighborhood because of their type, scale, or orientation.⁶⁰

Conclusion

In exploring a policy to expand COP onto the Gulf Beaches, the Consultant advises the Town to make a threshold determination of the uses consistency with the Plan. If the Town determines the use is *inconsistent* with the Plan, the use may not be provided through modifications to the LDC, but will require amendment of the Plan itself to go forward. If the Town determines the use is *consistent* with the Plan, the use may be provided through modifications to the LDC.

In approaching this consistency determination, the Plan provides little guidance on the COP use, but much with regard to the natural resource of the Gulf beaches and overall compatibility with other land uses in the Town. For areas in the "Residential" FLUM category, the Plan requires the Town to determine if this expanded use will:

- (1) protect natural resources;
- (2) preserve the small-town character of the Town; and
- (3) protect residential neighborhoods against commercial intrusions.

In considering the Town's policy toward this expanded COP use with regard to the Gulf beaches, the Plan requires the Town to

- (a) ensure compatibility with surrounding lands and provide proper buffering where needed;
- (b) further a more sustainable redevelopment pattern that protects coastal resources, minimizes threats to life and property, and limits public expenditures in areas subject to destruction by storms;

⁵⁹ See *id.* POLICY 4-C-3*vi.*

⁶⁰ See *id.*

(c) conserve and enhance the shoreline of Estero Island by increasing the amount of dunes, renourishing beaches to counter natural erosion, and reducing negative man-made impacts on beaches and dunes;

(d) ensure compatibility with surrounding lands and provide proper buffering where needed; and

(e) prioritize conservation uses, water-dependent uses available for use by the general public, recreational uses, and other users that are compatible with the surrounding neighborhood—in that order.

In considering the Town's policy toward this expanded use with regard to preserving the small-town character of the Town, the Plan requires the Town to

(a) determine that expanded COP uses will contribute to the pedestrian-oriented public realm;

(b) determine that expanded COP uses will protect and preserve important natural resources;

(c) determine that expanded COP uses will not inhibit easy walking access to the Gulf beaches;

(d) determine that public facilities to support the demands of impacts associated with expanded COP uses will be available concurrently with its expansion;

(e) provide clear and consistent rules and processes to govern the expansion of COP uses onto the Gulf beaches with appropriate dimensional requirements.

In considering the Town's policy toward this expanded COP use with regard to protecting residential neighborhoods from commercial intrusion, the Plan requires the Town to

(a) specify in the LDC the permitted form and extent for new or expanded COP uses in conjunction with the "Pedestrian Commercial" FLUM category, and establish a streamlined approval process;

(b) assure that any expansion in the "Mixed Residential" FLUM category is sensitive to nearby residential uses, complements any adjoining commercial uses, contributes to the public realm as described in the Plan, and meets the design concepts of the Plan and the LDC; the Town must also provide procedural protection comparable to the public hearing process;

(c) assure that any expansion in the "Boulevard" FLUM category is sensitive to nearby residential uses, complements any adjoining commercial uses, contributes to the public realm as described in the Plan, and meets the design concepts of the Plan and the LDC; as in the "Mixed Residential" FLUM category, here to, the Plan requires the Town provide procedural protections comparable to the public hearing process;

(d) determine the expanded use will prefer residents and overnight guests rather than attract additional day visitors during peak-season congestion;

(e) assure the expansion will contribute to the pedestrian character of the Town;

(f) assure that the expanded use will be sensitive to nearby residential areas; and

(g) prohibit commercial activities that will intrude into a residential neighborhood because of their type, scale, or orientation.

Finally, if the Town determines expanding COP onto the Gulf beaches is consistent with the provisions of the Plan, the Town may wish to establish certain requirements to address potential problems that may arise from this expansion.

LDC Considerations

Once the Town has addressed the threshold Plan considerations, the next step in the process to expand COP onto the Gulf beaches involves maintaining consistency with the current requirements of the LDC. This step includes reviewing the requirements of the zoning district in which the use is proposed for expansion. It also includes considering relevant supplemental regulations and any additional considerations important to the successful expansion of the use. These considerations are reviewed in detail below.

EC (Environmentally Critical) Zoning District

Following the adoption of the Plan provisions discussed above, the Town adopted a new LDC to implement the Plan, as required by the Plan. As part of the Town's new LDC, new zoning districts were established and a new

zoning map was approved.⁶¹ Among these new zoning districts established by the LDC was the EC (Environmentally Critical) zoning district.

Gulf beaches and significant wetlands whose preservation is deemed critical to the Town through the Plan are designated EC zoning on the official zoning map.⁶² This includes all Gulf beaches that have been designated in the "Recreation" category on the FLUM.⁶³ These include all portions of the Gulf beaches seaward of the 1978 CCCL, as discussed above in the section on the "Recreation" FLUM category. LDC §34-620(f)(3) prohibits development seaward of the 1978 CCCL (referencing Plan Policy 5-D-1.v.), except for minor structures as provided in §34-1575.

The Town's intent of zoning certain lands EC is:

to prevent a public harm by precluding the use of land for purposes for which it is unsuited in its natural state and which injures the rights of others or otherwise adversely affects a defined public interest.⁶⁴

Under the LDC, allowable uses of land are allocated to and provided for in LDC Tables 34-1 and 34-2.⁶⁵ While the allowable uses in most conventional zoning districts are categorized into use groups and sub-groups in LDC Tables 34-1 and 34-2, the row in LDC Table 34-2 for the EC district references LDC §34-652(d) and (e).⁶⁶ LDC §34-652(d) addresses uses permissible by right; subsection (e) addresses uses and structures permissible by special exception.⁶⁷

LDC § 34-652(d) provides:

In the EC district, no land or water use shall be permitted by right except for those uses and developments permitted by the Fort Myers Beach Comprehensive Plan in wetlands, beaches, or critical wildlife habitats, as applicable, including:⁶⁸

boating,⁶⁹ fishing,⁷⁰ removal of certain vegetation and pest control,⁷¹ hiking and nature study,⁷² outdoor education,⁷³ and wildlife management.⁷⁴ None of

⁶¹ See generally Ord. 03-03 (adopting the new LDC Ch. 34); see also LDC § 34-611, 614

⁶² See LDC § 34-652(a).

⁶³ See *id.* § 34-652(a)(1).

⁶⁴ *Id.* § 34-652(b).

⁶⁵ See *id.* § 34-621; see also *id.* § 34-620 (regarding uses not specifically listed) and § 34-3241-46 (regarding non-conforming uses).

⁶⁶ See *id.* Table 34-2.

⁶⁷ See *id.* §§ 34-652(d), (e).

⁶⁸ *Id.* §34-652(d) (emphasis supplied).

⁶⁹ See *id.* § 34-652(d)(1) ("with no motors permitted except electrical trolling motors.").

⁷⁰ See *id.* § 34-652(d)(2).

⁷¹ See *id.* § 34-652(d)(3).

⁷² See *id.* § 34-652(d)(4) ("including pedestrian boardwalks and dune crossovers.").

⁷³ See *id.* § 34-652(d)(5) ("in keeping with the intent of the district.").

⁷⁴ See *id.* § 34-652(d)(7) ("as wildlife preserves.").

these allowable uses appears to include an opportunity for expansion of COP onto the Gulf beaches in the EC zoning district.

However, an additional provision of LDC § 34-652(d), subsection (6) provides:

Recreational activities, residential accessory uses, and resort accessory uses that are performed outdoors. These activities and uses include passive recreation and active recreation that requires no permanent structures or alteration of the natural landscape (except as may be permitted by special exception (see §6-366 and subsection (e) below)). Any temporary structure used in conjunction with such uses must comply with all provisions of this code (for instance, see chapters 14 and 27). Artificial lighting may not be installed in the EC zoning district unless approved by special exception or as a deviation in the planned development rezoning process.⁷⁵

LDC §34-652(e) provides uses that Town Council may permit by special exception in the EC zoning district, but this list is limited to

1. a noncommercial nature study center and its customary accessory uses;⁷⁶ and
2. a single-family residence and its customary accessory uses at a maximum density of one dwelling unit per twenty acres.

Given the restricted nature of the listed uses, COP on the Gulf beaches in the EC zoning district does not seem to be approvable by Town Council through the special exception process as provided in LDC §34-652(e). It may, however, bear examination of the by-right uses listed in LDC §34-652(d)(6).

The term “recreational activities” is not defined by the LDC. As such, it is a policy decision for the Town to determine if COP aligned with commercial uses is a recreational activity within the provision of LDC §34-652.

Resort accessory use is limited to a resort, that is, a mixed-use facility for transient guests with at least 50 units and providing food service, outdoor recreational activities, and/or conference facilities for their guests.⁷⁷

LDC §34-652(f) references additional regulatory requirements in other sections of the LDC. The relevant provisions are discussed in greater detail below.

⁷⁵ *Id.* § 34-652(d)(6).

⁷⁶ *Id.* § 34-652(e)(2).

⁷⁷ See generally *id.* § 34-2 (defining Resort and Resort accessory use).

Beach and Dune Management

Beach and dune management is a significant aspect of the "Recreation" FLUM category, and thus to the EC zoning district. LDC Chapter 14, Article I⁷⁸ provides definitions and regulations concerning the Gulf beaches. The purpose and intent of these provisions is to encourage a steward-like attitude toward the Town's most valuable asset, the beach, and to preserve and improve the condition of that asset as a place for recreation, solitude, and preservation of beach vegetation and marine wildlife.⁷⁹ Article I includes regulations to address destruction and diminishment of the dune or beach system,⁸⁰ trash and litter,⁸¹ beach furniture and equipment,⁸² beach raking and the Town's wrack line policy,⁸³ vehicular traffic on the beach,⁸⁴ the dune system,⁸⁵ enforcement,⁸⁶ restoration standards for dune vegetation alteration violations,⁸⁷ and special events on the beach.⁸⁸ The Town may find the section on special events on the Gulf beaches most instructive on the issue of COP on the Gulf beaches.

LDC §14-11(a) provides:

Special events on the beach are any social, commercial, or fraternal gathering for the purpose of being entertained, instructed, viewing a competition, or any other reason that would bring them [sic] together in one location that normally would not include such a concentration of people on or near the beach.

These special events, however, are clearly "temporary, short-term activities," that may include sporting events, festivals, competitions, organized parties (e.g., weddings), promotional activities, concerts, film events, and gatherings under tents.⁸⁹ These provisions devote a great deal of attention to the application process to assure no adverse impacts will be visited on the Gulf beaches.⁹⁰ This includes protections for sea turtles and native vegetation.⁹¹

Because the issue of expanding COP onto the Gulf beaches is more akin to a permanent use than the temporary use nature of special events on the beach as addressed in LDC § 14-11, these provisions are probably not directly on

⁷⁸ See *id.* §§ 14-1-11.

⁷⁹ See *id.* § 14-2.

⁸⁰ See *id.* § 14-3.

⁸¹ See *id.* § 14-4.

⁸² See *id.* § 14-5.

⁸³ See *id.* § 14-6.

⁸⁴ See *id.* § 14-7.

⁸⁵ See *id.* § 14-8.

⁸⁶ See *id.* § 14-9.

⁸⁷ See *id.* § 14-10.

⁸⁸ See *id.* § 14-11.

⁸⁹ LDC §14-11(b)

⁹⁰ See *id.* § 14-11(c) and (d).

⁹¹ See *id.*

point, but are instructive as to the nature of considerations when looking to uses compatible with land within the EC zoning district.

Coastal Zone Regulations

LDC §§ 34-1571 through 1577 implements the Plan goals, objectives and policies addressing development as it relates to the preservation, protection, enhancement, and restoration of the natural resources of the Town.⁹² These include the Gulf beaches.⁹³ All areas proposed for development or rezoning are subject to the general as well as the specific regulations set forth in these sections.⁹⁴ Except in instances of overriding public interest, private land development or the expansion of existing facilities on the sandy beaches that are designated in the "Recreation" FLUM category is prohibited.⁹⁵

Zoning Summary

It appears from this analysis that while the Plan does not provide for use of the "Recreation" FLUM category for expansion of permitted COP, it doesn't clearly prohibit it. The EC zoning district established by the LDC to implement the Plan coincides with the "Recreation" category on the FLUM. Unlike the possibly more open language of the Plan this EC zoning district is extremely restrictive in the uses it allows, both by right and special exception. LDC §34-1574 specifically prohibits private land development or the expansion of existing facilities on the beaches in the "Recreation" FLUM category "except in instances of overriding public interest." The use of the Gulf beaches currently provided for in the LDC most analogous to the expansion of COP is possibly the specially permitted temporary events on the beach provided for in LDC §14-11. But this provision clearly does not contemplate anything more than a temporarily permitted special event. In order to best make the finding and conclusions necessary to justify the expansion of COP uses onto the Gulf beaches, the Town may wish to amend the LDC to clearly indicate that this expansion is consistent with the Plan. The processes for doing so and their related considerations are reviewed below.

Supplementary Considerations

In addition to the zoning regulations discussed in the preceding section of this Report, the Town may wish to consider certain supplementary provisions that will help to effectuate whatever policy the Town decides on the expansion of COP onto the Gulf beaches. The supplementary consideration address LDC provisions for the process(es) for approval of this expanded use, provisions addressing outdoor seating, entertainment, and parking requirements

⁹² See *id.* § 34-1571.

⁹³ See *id.* § 34-1571(1)c.

⁹⁴ See *id.* § 34-1572.

⁹⁵ See *id.* §34-1574.

Processes for Approval

From the preceding review and discussion, the Town may decide that the most clear-cut approach to allowing expansion of COP onto the Gulf beaches is for Town Council to amend the LDC to so provide. Part of that process will require a finding that the provision for such use is consistent with the Plan. As reviewed above, several sections of the LDC will need to be amended to make the provision for this use clearly and internally consistent with the existing language of the LDC.

Procedurally, Town Council, as a policy decision, will determine if the use would be of-right, or if the process for approval of the expanded use would be through an administrative or public hearing process, or some combination of the three alternatives. Adequate provisions for limiting the extent and intensity of the use and disciplinary procedures for improper activities, in conjunction with the use, will assure that the expanded use has no potential to harm the public interest in the natural resources of the Gulf beaches, in keeping with the goals, objectives, and policies of the Plan. Potential areas for consideration are discussed below in greater detail in conjunction with additional LDC considerations regarding regulation of alcoholic beverages.

Outdoor Seating

The expansion of COP also would entail associated seating. Necessarily, the expansion of COP onto the Gulf beaches would occur outdoors as the Town and the State of Florida drastically restrict construction on the Gulf beaches. This associated seating, then, would be outdoors on the Gulf beaches.

The LDC currently requires any establishment that provides outdoor seating areas for its patrons consuming alcoholic beverages to apply to have this use approved through the special exception public hearing process.⁹⁶ LDC § 34-1264(a)(2) provides a limited exception for any restaurant not within 500 feet of a church, school, day care center, park, or dwelling unit to be approved administratively, but the criteria are extremely difficult—if not impossible—to satisfy through administrative review and contemporary cases have proceeded through the public hearing zoning special exception process.⁹⁷ Depending how the deliberations on potential expansion of COP progress, and what approval procedures are selected, the Town may wish to reconsider this requirement with regard to the Gulf beaches. The additional seating area also triggers related parking requirements that are discussed in greater detail below.

⁹⁶ See *id.* § 34-1264(a)(2).

⁹⁷ See *id.*

Entertainment

One reason the Town has consistently employed the public hearing process when considering requests to expand COP into outdoor areas is the additional potential for negative impacts on the neighboring property owners. Nowhere is the right to "quiet enjoyment" in real property more zealously defended than in residential neighborhoods. As noted earlier, the Town has very few areas where residential dwelling units aren't close by commercial businesses with COP, so the potential for negative impacts resulting from outdoor expansion are inherent to any application for expanded use.

The public hearing process protects public and private rights to due process in land use decision-making. Everyone affected has an opportunity to be heard and the decision-making body or bodies are afforded an opportunity to hear from everyone affected prior to rendering a decision.

Alcoholic beverages are a legally controlled substance. As the LPA recently rightly observed, the consumption of alcoholic beverages often induces relaxed inhibitions and louder and more boisterous behavior than would normally be the case. People want to party and people on vacation may be more inclined than normal to "cut loose". Add to this situation entertainment, particularly "live" entertainment where the entertainer has a "message" as it were, and can modulate the volume of amplification equipment and the situation is likely to "increase in intensity". As the music volume amplifies, the volume of the patrons' conversation does likewise. In an indoor situation this can better be contained within the building, though not always. However, in an outdoor situation, particularly one proximate to water bodies, the ability to attenuate the sound waves is more problematic. In such situations, buffers are often required to address the problem.

As discussed below in greater detail, the Florida Beverage Law specifically provides that the Town may enact ordinances regulating the type of entertainment and conduct permitted in any establishment licensed for COP.⁹⁸ Except for limited specific legislation by the Town in ordinances and the LDC, the issue of entertainment and other conduct has been addressed by the Town on a case by case basis through the public hearing process with mixed results.

The Town also has a noise ordinance.⁹⁹ The noise ordinance has proven problematic in addressing noise associated with COP for several reasons. Chiefly, because the Sheriff is delegated with responsibility for enforcement and—in the past—has utilized an informational approach to complaints rather than an evidentiary and prosecutorial approach. The specific authorization of the Sheriff as the enforcement authority precludes Town code compliance

⁹⁸ F.S. §662.54(2)(b), (discussed below in the Section of the Report reviewing the state Beverage Law).

⁹⁹ Ord. 96-24.

officers from enforcing the noise ordinance, and typical infractions occur outside of normal Town staff working hours.

An additional problem with the effectiveness of the noise ordinance in addressing noise associated with COP is the use of decibels as measurements of sound. Town staff is not equipped with nor trained to utilize sound meters, and the Sheriff—in the past—has not always been appropriately prepared or equipped to document evidence of an infraction.

A number of possibilities for better regulation of this situation present themselves as options for the Town to consider in addressing this situation in relation to expansion of COP onto the Gulf beaches as well as Town-wide:

- An outright prohibition of amplified sound in conjunction with outdoor seating
- A limited prohibition that would apply only to “live” entertainment.
- A limitation on the hours of operation for outdoor seating (e.g., daylight hours within the licensee's normal operating hours)
- A limitation on the hours for allowing amplified sound in conjunction with outdoor seating
- Some combination of the above.

In considering these options, the Town may consider that special events may be permitted when an opportunity presents itself that may not have been considered in the COP approval process. Several Town businesses and the Greater Fort Myers Beach Chamber of Commerce have been successfully availing themselves to this process for years with complaints from the public that have been subsequently addressed by the Town. Whatever the Town decides, it is advisable that the regulations be uniformly applied. In executing this policy, the Consultant recommends the Town balance flexibility for business operators with ease of effective compliance and enforcement. The successful outcome to be achieved in furthering the vision of the Plan is a reduction, if not elimination, of complaints from residential neighbors whose “quiet enjoyment” is disrupted by this expanded commercial intrusion.

Parking

Except for an extremely limited area within the “Pedestrian Commercial” FLUM category known as “Times Square,”¹⁰⁰ automotive parking is required for every commercial use in the Town.¹⁰¹ The LDC provides a variety of parking classifications to satisfy these parking requirements.¹⁰² The minimum

¹⁰⁰ See LDC Figure 34-6

¹⁰¹ See *id.* § 34-2014, §34-676(a)(3).

¹⁰² See *id.* § 34-2011.

number of parking spaces required varies depending on the related use,¹⁰³ whether the use is in a new development,¹⁰⁴ an existing development,¹⁰⁵ and whether bicycle parking is provided.¹⁰⁶ Certain reductions are also afforded depending on the use's location in the Town.¹⁰⁷

COP licenses are most commonly issued to uses defined in the LDC as "restaurants," "bars and cocktail lounges," and "hotels and motels."¹⁰⁸ The LDC requires a greater number of parking spaces per 1000 square feet of total floor area for "restaurants"¹⁰⁹ and "bars and cocktail lounges"¹¹⁰ than any other commercial uses. Expanding COP onto the Gulf beaches would increase the floor area associated with the related use, thus demanding additional parking spaces to comply with the LDC requirements.¹¹¹ GOAL 7, OBJECTIVE 7-F, related policies, and portions of Transportation Appendix A¹¹² of the Plan detail the opportunities and constraints associated with the limited inventory of automotive parking in the Town.

A policy decision to allow expansion of COP onto the Gulf beaches may wish to address the need for additional required parking spaces. Many potential locations for this expanded use are already constrained for parking and allowing the use in these areas may require amending the LDC to reduce or eliminate the associated parking requirement. Such reduction or elimination, in light of previously codified parking reductions implementing specific Plan policies, bears careful consideration as part of this decision.

Additional Considerations

In addition to the relatively "known" issues discussed above regarding zoning, outdoor seating, and parking, questions are raised in association with extending COP onto the Gulf beaches. Expanding this COP use is a new consideration for the Town; therefore all potentially problematic issues associated with the expanded use can not be known. Because it does exist in a non-conforming state to some extent, however, and because there are other commercial uses of the beach with which the Town has experience, extrapolating from that experience may assist the Town in anticipating future problems potentially associated with the expansion of this use.

Property maintenance and stewardship, maintaining civility standards, and processes for approval will all likely have to be addressed through specific regulations associated with this expanded use of the Gulf beaches. For such

¹⁰³ See *id.* § 34-2020(d).

¹⁰⁴ See *id.* § 34-2020(a).

¹⁰⁵ See *id.* § 34-2020(b).

¹⁰⁶ See *id.* § 34-2020(c).

¹⁰⁷ See *id.* § 34-2020(e); see also §34-676(a), §34-683(m).

¹⁰⁸ See *id.* § 34-2 for definitions.

¹⁰⁹ See *id.* § 34-2020(d)(2)h.

¹¹⁰ See *id.* § 34-2020(d)(2)a.

¹¹¹ See *id.*

¹¹² See Plan, 7-A-19 to 31

regulations to be effective they will need to lend themselves to efficient and effective code compliance and enforcement. A program of education that seeks to let everyone know what the rules are and how they apply could go a long way to accomplishing this, if Town Council decides to expand COP onto the Gulf beaches. These additional issues are addressed below.

Property Maintenance and Stewardship

The Plan establishes the Town as the ultimate steward of the natural resource of the Gulf beaches. Commercial debris and trash are an existing problem on the Gulf beaches, one that increases during the winter/spring tourist season. These manufactured objects, such as cups, cans, straws, and packaging, clutter the beach and give it a "dirty" appearance to vacationers, as well as presenting a long-term problem to wildlife making a living on and along the Gulf beaches.

The LDC currently contains a minimal and somewhat random property maintenance code "to protect the comfort, health, repose, safety, and general welfare of the residents"¹¹³ of the Town. This code establishes minimum standards for property maintenance and the abatement of public nuisances, supplementary to the standards established elsewhere in the LDC and ordinances.¹¹⁴ While certain nuisances are addressed directly in LDC §6-5, which prohibits property-owners and their agents from allowing a nuisance,¹¹⁵ subsection (b)(10) of this section provides:

Any other condition or use that constitutes a nuisance to the public [that] is continually or repeatedly maintained, the abatement of which would be in the best interest of the health, safety, and welfare of the residents of the town . . .¹¹⁶

. . . constitutes a nuisance.¹¹⁷

Arguably this is a high community standard, likely proposed and adopted as a "catch-all" provision useful for addressing a broad variety of unforeseeable problems the community could not anticipate when the maintenance code was crafted. Unfortunately, it is overly-broad and vague and depending on the application, may not withstand a challenge on such grounds.¹¹⁸

LDC §6-7 addresses noise by referencing Ordinance No 96-24, the Town's Noise Ordinance, which is currently problematic as discussed briefly above with regard to outdoor seating and entertainment. Otherwise, there are no

¹¹³ LDC § 6-1(a)

¹¹⁴ See *id.*

¹¹⁵ See *id.* § 6-5(a).

¹¹⁶ *Id.* § 6-5(b), § 6-5(b)(10).

¹¹⁷ See *id.*

¹¹⁸ Town code compliance staff reports that the code compliance special magistrate has stated as much on prior occasions when the provision was used as a basis for bringing certain complaints for publicly perceived nuisances not otherwise enumerated elsewhere in the LDC.

current LDC standards for property maintenance and stewardship that address the potential problems associated with the extension of COP onto the Gulf beaches.

As discussed below with respect to the Florida Beverage Law, nothing in state law should prevent the Town from adopting a reasonable standard or standards for maintaining the property in a specific manner. If COP is extended onto the Gulf beaches, limiting the location to table service may reduce debris to a lesser issue as employees of the business will be serving the public, though whatever service provision is considered it may be advisable to provide a requirement that the premises be maintained in a clean and sanitary, well-maintained manner at all times.

If a vegetative buffer is required to be maintained between the beach COP area and the public portion of the Gulf beach, it could also help keep debris on-site in a wind event or if a storm event suddenly cleared people from the area. A requirement for trash receptacles at any ingress/egress to the public beach may also help to limit littering. Whatever the standard it should be reasonable, desirable to the Town, and readily ascertainable and measurable by observation and from photographic evidence. Regular and random inspections by code officers for compliance with a concurrent provision for revoking the privilege for non-compliance may be helpful to assure good property stewardship for businesses with COP on the Gulf beaches.

Maintaining Order

Plan Chapter 2, "Envisioning Tomorrow's Fort Myers Beach," "takes a peek into the future . . . the future the Town hopes to create by adding its efforts to all others that have shaped this community." It begins:

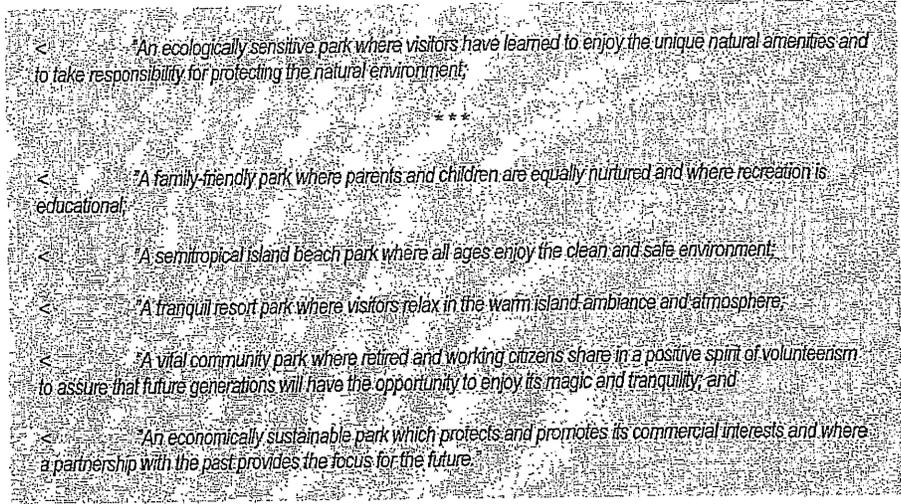
Natural Environment: "The natural features at Fort Myers Beach remain its primary yet most sensitive assets. The beaches are clean and regularly replenished with sand, and sand dunes have been recreated."

"Beach-going residents and visitors select their preference of quiet beaches at Bowditch Point or lively beaches near Lynn Hall Memorial Park."¹¹⁸

Plan Chapter 2 concludes:

FORT MYERS BEACH, A LIVING PARK: "The Town of Fort Myers Beach, through the dedicated efforts of the community, has become a living park, existing for the comfort, safety, and quality of life of its residents and the peaceful enjoyment of its visitors."

¹¹⁸ Plan 2-1.



If the Plan vision is the order of the day, maintaining order clearly seems important. Beyond personal responsibility, code compliance and code enforcement, there is law enforcement. The Town does not have its own police force, which would normally be the municipality's preserver and protector of order. Instead, the Town contracts with the Lee County Sheriff for law and order.

In order to maintain order, the Town may wish to consider a provision by which the permit for expansion of COP onto the Gulf beaches would be annually reviewed and renewed (or not). The Town may wish to establish standards for permit revocation and prohibition to address warranted complaints. One such standard might provide that a set number of warranted responses by the Sheriff's deputies or a code compliance officers may be grounds for revocation.

Code Compliance/Enforcement Considerations

Clearly drafted regulations, applications, and permit approvals are essential to ensure accurate and reasonable compliance and enforcement. As discussed above, as many considerations should be included in the regulations to avoid lengthy and inconsistent conditions of permit approval. Some of the considerations that will assist in accomplishing that end are discussed under the following heading.

Approved Permit Documentation

Whatever process the Town chooses to consider applications for expanding COP onto the Gulf beaches, there should be a thorough documentation of location and operating conditions within that location. In the past, commercial use of the Gulf beaches has at times expanded beyond the approved area

depending on the season of year the associated demand and beach width reductions due to erosion. Following beach erosion resulting from storm events, this expansion has at times interfered with the public's access to and lateral transit along the public portion of the beach.

Accurate drawings of the area of the Gulf beaches associated with a given permit or other approval will ensure the Beach and Street Enforcement ("BASE") and code compliance officers can inspect businesses approved for COP expanded onto the Gulf beaches. Such inspections allow these public officials to confirm that businesses are within the extents of their approved permit.

The LDC general submittal requirements for zoning applications can be modified to establish the application requirements for an expanded outdoor seating permit. The Town may wish to eliminate any requirements unnecessary irrelevant to the requested expansion from the application, depending on the process Town Council chooses for review and approval. This information can also provide a basis for determining the amount of parking spaces required for the requested expansion and for any required buffers, etc.

Timing

The only timing issues would appear to be those periods after working hours for Town staff and BASE when a business would be allowed to operate. Arrangements may be possible with the Lee County Sheriff's Office to police the use during those periods.

Summary

It appears from this review that while the Plan does not provide for use of the "Recreation" FLUM category for expansion of permitted COP, it doesn't clearly prohibit it. The EC-zoning district established by the LDC to implement the Plan coincides with the "Recreation" category on the FLUM. Unlike the possibly more open language of the Plan this EC zoning district is extremely restrictive in the uses it allows, both by right and special exception. LDC §34-1574 actually prohibits private land development or the expansion of existing facilities on the beaches in the "Recreation" FLUM category "except in instances of overriding public interest." The use of the Gulf beaches currently provided for in the LDC most analogous to the expansion of COP is possibly the specially permitted *temporary* events on the beach provided for in LDC §14-11. But this provision clearly does not contemplate anything more than a *temporary* special event. In order to best make the finding and conclusions necessary to support the expansion of COP uses onto the Gulf beaches, the Town may wish to amend the LDC to clearly indicate that this expansion is consistent with the Plan. The processes for doing this are reviewed below.

Current Regulations in Regard to Sales and Service of Alcoholic Beverages

Review of Existing Regulations and Possible Options Relevant to Local Land Use Regulations

Florida Beverage Law

The State of Florida "through a comprehensive system of regulatory laws, maintains preeminence in the regulation and control of alcoholic beverages."¹²⁰ These regulations are codified in Title XXXIV of the Florida Statutes, Chapters 561 through 568, known collectively as "The Beverage Law".¹²¹ These chapters provide for administration¹²² and enforcement¹²³ of the Florida Beverage Law, with additional chapters devoted specifically to "Beer",¹²⁴ "Wine",¹²⁵ and "Liquor".¹²⁶ The concluding chapters address local options for prohibiting the sale and service of alcoholic beverages and regulatory provisions for areas where such prohibitions exist.

Provisions for and Limitations on Local Regulations

Fortunately for the Town, the portions of the Florida Beverage Law relevant to local land use regulation are more limited than the Florida Beverage Law itself. F.S. §562.12 regulates the time for sale of alcoholic beverages and prohibits certain uses of licensed premises. Except as provided by a county or municipal ordinance establishing other times, sales and service on licensed premises are prohibited from midnight (12:00 a.m.) to seven (7:00) a.m the following day.¹²⁷

F.S. §562.54 establishes penalties for violating the Florida Beverage Law, addresses local ordinances regulating the sale and service of alcoholic

¹²⁰ Op. Atty. Gen., 073-54, March 13, 1973.

¹²¹ See F.S. § 562.01(6).

¹²² See *id.* Ch. 561 (2008).

¹²³ See *id.* Ch. 562.

¹²⁴ See *id.* Ch. 563.

¹²⁵ See *id.* Ch. 564.

¹²⁶ See *id.* Ch. 565.

¹²⁷ See *id.* §562.14(1).

beverages, prohibits regulation of certain activities or business transactions, and requires nondiscriminatory treatment of licensees by local governments.

Subsection (2)(a) of F.S. §562.54 provides in pertinent part:

Nothing contained in the Beverage Law shall be construed to affect or impair the power or right of any county or incorporated municipality of the state to enact ordinances regulating the hours of business and location of place of business, and prescribing sanitary regulations therefor, of any licensee under the Beverage Law within the county or corporate limits of such municipality.

* * *

The division may not issue a change in the series of a license or approve a change of a licensee's location unless the licensee provides documentation of proper zoning from the appropriate county or municipal zoning authorities.¹²⁸

Subsection (2)(b) of F.S. §562.54 specifically provides that the Town may enact ordinances regulating the type of entertainment and conduct permitted in any establishment licensed for COP, including any bottle club licensed under F.S. 561.14.¹²⁹ F.S. §562.54(2)(c), however, prohibits the Town from enacting any regulation of the "activities" or "business transaction" regulated under the Florida Beverage Law. This section requires that any other regulation "designed to promote and protect the general health, safety, and welfare of the public, shall treat a licensee in a nondiscriminatory manner and in a manner that is consistent with the manner of treatment of any other lawful business transacted in this state

F.S. §562.51 provides that retail alcoholic beverage establishments must comply with any applicable municipal or county ordinance regulating the presence of persons under 21 years of age on the premises of any such establishment.

Bottle Clubs

Bottle clubs are licensed by the State of Florida.¹³⁰ Bottle clubs are defined by the Florida Beverage Law and the Florida Administrative Code as:

- a. a commercial establishment;

¹²⁸ *Id.* § 562.54(2)(a) (emphasis supplied).

¹²⁹ *Id.*, §562.45(2)(b). Bottle clubs are discussed in more detail in the discussion of the LDC below.

¹³⁰ See F.S. § 561.14(6) (2008).

- b. operated for profit, whether or not a profit is actually made;
- c. where alcoholic beverages are not sold but where patrons are allowed to consume alcoholic beverages on the premises; and
- d. located in a building or other enclosed or covered structure.¹³¹

The definition specifically excludes, among other things irrelevant to the Town, *bona fide* restaurants licensed by the state whose primary business is the service of full course meals, or hotels and motels licensed by the state.¹³²

Years ago, in the early days of the Town's incorporation, the use of bottle clubs proved problematic in Lee County.¹³³ So much so, in fact, that Lee County made all existing bottle clubs in the unincorporated areas of the County non-conforming on September 18, 1996, amortized their lawful existence as non-conformities exactly one (1) year later, and prohibited the use of bottle clubs in any zoning district in the unincorporated areas of the County.¹³⁴ The Lee County Land Development Code maintains language to this effect.¹³⁵

The Town LDC makes no reference to "bottle clubs" of any sort. Because the provisions of the LDC regulating alcoholic beverages were modified from the Lee County Land Development Code, it may be assumed that the use is prohibited by not being defined or regulated. More likely, however, this silence may be seen as an oversight and the provisions of LDC §34-620(a) and (b) may be invoked requiring the director to decide if the use is similar to a use specified in the LDC or would require a planned development for approval.¹³⁶

During the comprehensive review of the Town's regulation of alcoholic beverages, the Town may wish to consider and determine a policy on bottle clubs in order to make any such prohibition clear in the LDC rather than relying on an assumption by implication.

The Town's Ordinances

The Town has four (4) stand-alone ordinances that address the consumption of alcoholic beverages: an alcoholic beverage establishment exposure prohibition ordinance,¹³⁷ an open container law,¹³⁸ a liquor license restriction

¹³¹ See *id.* § 561.01(15) (2008), Rule 61A-3.049(1), F.A.C.

¹³² See *id.*

¹³³ See generally DBPR, Div. of ABT v. Easy Way of Lee Co., Inc. d/b/a Hollywood Underground, Case No. 99-2320, (2000), 2000 WL 248399 (Fla. Div. Admin. Hrgs.); 2000 WL 350879 (Fla. Div. Admin. Hrgs.).

¹³⁴ See Lee County Ord. 96-17 §5.

¹³⁵ See Lee County Land Development Code § 34-1264.

¹³⁶ See LDC § 34-620(a), (b).

¹³⁷ See Ord. 96-03.

¹³⁸ See Ord. 96-05.

law,¹³⁹ and a parks and recreation law including a section on alcoholic beverages and controlled substances in Town Parks.¹⁴⁰ These ordinances are discussed below with recommendations for modifications the Town may find desirable and necessary. They are further referenced in the section below discussing possible issues in conjunction with the LDC.

Alcoholic Beverage Establishment Exposure Prohibition Ordinance

Ordinance 96-03, makes illegal for any person licensed to sell or serve alcoholic beverages for on-premises consumption to allow people to, or for people to expose certain body parts, the exposure of which is thereby prohibited.¹⁴¹ It provides an exception for a mother to feed her infant child.¹⁴²

Open Alcoholic Beverage Container Ordinance

Ordinance 96-05, one of a cadre of ordinances the Town adopted following incorporation, makes illegal the consumption, transportation, or possession of any opened alcoholic beverage on any semi-public parking lot, public street, sidewalk, parkway, beach, parking lot, or within an operated vehicle.¹⁴³ It provides certain exemptions for litter removal, commercial transportation by licensed liquor distributors and vendors, clergy performing religious services with wine, and licensed carriers of alcoholic beverages.¹⁴⁴ It also exempts the transportation of any open container of alcoholic beverage in "a compartment of a vehicle such as a locked glove compartment, trunk, container or other non-passenger area of a motor vehicle[.]"¹⁴⁵

Ordinance 96-05 provides definitions for the following terms: "alcoholic beverages," "semi-public parking lot," "package," and "public beach."¹⁴⁶ §6 provides penalties for any person convicted of violation of §3. Ordinance 96-05 was subsequently amended in 1998 to correct a scrivener's error,¹⁴⁷ and again in 1999 to provide an additional exemption to any person in a designated area attending a Town-sponsored event.¹⁴⁸

The Town may wish to revisit Ordinance 96-05. The definitions may be problematic (e.g., the definition of "alcoholic beverages", referencing "more than one percent (1%) of alcohol by weight" is inconsistent with that of the Florida Beverage Law, which references "one-half of 1 percent or more alcohol by volume"). Terms are used such as "compartment" that are arguably vague and problematic for enforcement. There may also be conflicts

¹³⁹ See Ord. 96-06.

¹⁴⁰ See Ord. 97-5.

¹⁴¹ See Ord. 96-03 §§3-5.

¹⁴² See *id.* §6

¹⁴³ See Ord. 96-05 §4.

¹⁴⁴ See *id.* §5.

¹⁴⁵ *Id.* §5D.

¹⁴⁶ See *id.* §3.

¹⁴⁷ See Ord. 98-13, see also Ord. 98-10 (amending Ord. 96-05 with the same change on an emergency basis).

¹⁴⁸ See Ord. 99-15 §2.

with a new policy for expansion of COP onto the Gulf beach. Finally, after 12 years a comparison to comparable provisions in the state's criminal statute may be warranted to eliminate any incongruities.

Liquor License Restriction Ordinance

Ordinance 96-06 restricts the sales, consumption, and service of alcoholic beverages in "any place" licensed by the state "except during the hours of 7:00 a.m. and 2:00 a.m. of the following morning every day of the week, including Sundays."¹⁴⁹ It prohibits COP within 500 feet of any church or school, "unless a special permit is first obtained from the Town Council."¹⁵⁰ It establishes a methodology for measuring the 500 feet distance.¹⁵¹

The Town may also wish to revisit Ordinance 96-06. There are no definitions provided. It makes no reference to F.S. §562.45, which may be prudent. The times provided are inconsistent with numerous zoning approvals restricting service times to earlier hours. The location restrictions are inconsistent with those of LDC §§ 34-1263(d) and 34-1264(b)(1). The requirement of a special permit is also inconsistent with the LDC and ignores the statutorily required findings.¹⁵²

Parks and Recreation Ordinance

Ordinance 97-5, among many other provisions related to parks and recreation, establishes a general prohibition against the possession, consumption, use, sales or distribution of alcoholic or intoxicating beverages and illegal substances in any park. It further prohibits anyone from entering or remaining in any park under the influence of alcohol, other intoxicants, or illegal substances. It provides an exception for a person with a written contract with the Town to sell, serve, and/or permit to be sold or served beer and wine, and for persons to consume same on the premises only at designated events. It also authorizes the Town Council to "designate by resolution for a one-time event any recreation facility" to allow the sale and consumption of alcoholic beverages following application for said resolution by a private group with a permit or license authorized by the Florida Beverage Law.¹⁵³ It provides that the Town Manager "may place restriction or limitation."¹⁵⁴ Ordinance 97-5 was amended in 2003 to limit the service of the alcoholic beverages to plastic containers and to clarify that the Town Manager "may place further restrictions and limitations."¹⁵⁵ Ordinance 97-5 provides no definition for alcoholic beverages, so in light of the definitional problem in Ordinance 96-05, the Town may find it wise to clarify that.

¹⁴⁹ See Ord. 96-06 §3.

¹⁵⁰ Ord. 96-06 §4.

¹⁵¹ See *id.*

¹⁵² Cf. F.S. §562.45(2)(a).

¹⁵³ Ord. 97-5 §13A.

¹⁵⁴ *Id.*

¹⁵⁵ Ord. 03-01 §2.

The Town's Land Development Code

Article IV, Supplemental Regulations, Division 5, Alcoholic Beverages

Article IV of LDC Chapter 34 provides regulations that are supplementary to those of the rest of the chapter. Division 5 of this article includes all the Town's regulations in regard to alcoholic beverages that are codified in the LDC. It provides definitions, requires real property used for the retail sale, service, or consumption of alcoholic beverages to conform to all other applicable Town regulations. The majority of the ordinance is located in the remaining two (2) sections, which provide regulations for sales of *off-premises* and sales and service of *on-premises* consumption. Other than a scrivener's review and rectification to the rest of the LDC, these provisions are—in pertinent part—the same as those of Lee County's Land Development Code, and they have not previously been reviewed by the Town for policy, substance, or conformity with state law. These provisions are discussed below with recommendations for modifications the Town may find desirable and necessary.

Definitions

LDC §34-1261 provides certain definitions that are specific to Article IV, Division 5. Some of these definitions vary from those of the Florida Beverage Law and the Town may wish to revise them accordingly. In addition, the Florida Beverage Law provides additional definitions that the Town may wish to include or reference for clearer internal consistency and consistency with the state.

Applicable Regulations

LDC §34-1262 is a simple compliance requirement. It could be re-crafted to better state its intent and policy, but is otherwise unremarkable.

Sale for Off-Premises Consumption

LDC §34-1263 provides regulations for *off-premises* consumption of alcoholic beverages. In the Town, it applies primarily to retail stores selling sealed containers of alcoholic beverages to be consumed elsewhere than the real property of the seller. It requires compliance with all applicable state liquor laws, which is probably an unnecessary restatement of LDC §34-1262. It provides specific location restrictions for package stores—an undefined term.

The location restrictions for package stores expand upon the Florida Beverage Law's required 500 feet from churches and schools to include day care centers, parks, dwelling units, and other establishment engaged in the sale of alcoholic beverages. It provides a standard for measuring this

distance. It provides an exception for "coming to the nuisance," i.e., if the subject retail store is in existence and the church or school, etc. is subsequently located within the 500 foot zone of prohibition, the provisions do not apply. It provides an exemption from the 500 foot zone for a multi-occupancy complex 25,000 square feet or larger. It provides that a planned development may seek a deviation from this required distance, but does not make a similar provision for a special exception for other zoning districts.

Sale or service for On-Premises Consumption

LDC §34-1264 contains the bulk of the Town's regulatory provisions with regard to alcoholic beverages which relate to on premises consumption. The reason for this is probably two-fold: this is the regulatory arena in which the Florida Beverage Law provides local government with its greatest extent of authority, and this is the arena in which local governments have experienced their biggest problems.

Approval process

Subsections (a) and (c) detail the permit approval processes for COP. They are currently separated from each other by the location and parking requirements provided for in subsection (b). The Town may wish to combine these subsections and streamline the provisions. Certain requirements like that for lighting in LDC §34-1264(c)(1)b.2. are addressed in other sections of the LDC¹⁵⁶ and could be referenced rather than expressed. The circumstances under which the director may not administratively approve COP are broad and lend themselves to being construed broadly.¹⁵⁷ The Town may wish to give better direction on what circumstances warrant administrative approval over special exception approval.

Outdoor Seating. Subsection (a)(2) a.2. provides location criteria for outdoor seating as part of the special exception requirements. The Town may wish to consider removing these requirements to the subsection on location, discussed below. Concern for noise and nuisance problems associated with entertainment, both live and otherwise, have been the cause for great concern and case by case conditioning of COP approvals in the past. The Town may wish to provide specific criteria for this conduct in accordance with F.S. §562.45, discussed in the Florida Beverage Law section. Some options for the Town's consideration are

- Provide a definition for "outdoor seating," which is not otherwise defined in the LDC.

¹⁵⁶ See LDC §34-1831-34.

¹⁵⁷ See *id.* §34-1264(a)(1).

- Hours of operation—loud sounds are more problematic when people are trying to sleep;
- Distance separation from residences;
- Separate or special event permitting of outdoor entertainment that may be disciplined or rescinded in a manner less cumbersome than either the code compliance enforcement process or COP revocation procedure for violations of the Noise Ordinance,¹⁵⁸
- Buffering requirements;
- Prohibiting certain forms of entertainment;¹⁵⁹
- Prohibiting outdoor entertainment except by special events;
- Review of regulations in other similarly situated communities for other potentially more technical approaches to measuring nuisance levels of sound and modulating them.

If the Town wishes to pursue the last consideration, the Consultant recommends pursuing this avenue in conjunction with a review of the Noise Ordinance.

Location

Subsection (b) provides location requirements for COP uses. As discussed above in the section on Town Ordinances, these requirements are inconsistent with the requirements of the Town's Liquor License Restriction Ordinance. The Town may wish to modify the restrictions provided to conform to the Florida Beverage Law and for internal consistency with the LDC.

Parking. In addition to location requirements, subsection (b) also provides parking requirements. The Town may wish to revise this to a separate section since both *off-* and *on-premises* uses have minimum parking requirements. Any separate provision for parking in conjunction with COP on the Gulf beaches should be included here if deemed appropriate. Appropriate references to the parking reductions provided for certain properties in the Downtown zoning district may also be referenced here.

Temporary Permits

Subsection (d) provides for the issuance of a one-day temporary permit for the sale of alcoholic beverages in conjunction with a special event. It limits to 12 the number that any one (1) location may be granted in any year and

¹⁵⁸ Ord. 96-24, as amended. The Town may also wish to revisit the Noise Ordinance.

¹⁵⁹ See e.g., Ord. 96-03 (Alcoholic Beverage Establishment Exposure Prohibition)

requires a special exception hearing if more than 12 "are sought". It provides a procedure for administrative review and determination for events lasting not longer than three (3) days, and for Town Council review and determination for events lasting not longer than 10 days.

The Town may wish to revise this subsection to conform it to the provisions of the Florida Beverage Law, the provisions of the LDC regarding special events,¹⁶⁰ and the Special Events Ordinance.¹⁶¹

Expiration of Approval

Subsection (e) provides for the automatic expiration and nullification of approvals for COP no business operation is subsequently commenced. For existing structures, the time period is six months; for new structures it provides for a year and allows the director to grant one (1) extension up to six (6) months if construction is substantially complete. Since many of these approvals are granted as part of the zoning process, and many of the Town's zoning cases are planned developments that have a longer window from expiration, the Town may wish to make this provision more consistent with other provisions of the LDC and the Florida Beverage Law.

Transfer

Subsection (f) provides that alcoholic beverages permits are a privilege running with the land and that sale of the subject real property vests the purchaser with all rights and obligations imposed by the Town on the original permit and that the permit may not be separated from the real property. The Town may wish to modify this subsection to better conform to the Florida Beverage Law, and to provide better internal consistency. The reference to subsection (i) should be modified in conjunction with subsection (i), discussed below.

Expansion

Subsection (g) requires a licensee to receive a new permit from the Town prior to expanding the area currently designated by an existing permit. Other than minor clean-ups, this subsection does not appear to be problematic.

Nonconformities

Subsection (h) addresses nonconformities. It provides for continuation of a nonconforming use but requires a special exception for any expansion of that use. It provides for amortization of the non-conforming use only after abandonment of the use for a continuous nine-month period. Town Council

¹⁶⁰ See LDC §34-2441-42.

¹⁶¹ Ord. 98-01, as amended by Ord. 00-16.

may wish to expand the provisions for amortization to address existing non-conforming uses of the Gulf beaches or relegate this subsection to LDC Article V that deals with all other nonconformities.

Revocation

Subsection (i) authorizes Town Council to revoke approvals for sales and service of alcoholic beverages, outlines the grounds for such revocation and details the process due the licensee, and required of the Town in the event grounds for revocation are found. It prohibits the Town from issuing a subsequent permit for a year after a revocation. It requires a licensee to make an affidavit itemizing sales percentages upon written demand of Town Council, and provides that failure to do so is grounds for revocation.

The Town may wish to modify much of Subsection (i) to:

1. Conform it to the Florida Beverage Law;
2. Make it a separate section that applies to the entire division instead of locating it in §34-1264.
3. Streamline the process so it can be more expeditious and less cumbersome in the event it must be employed.
4. Eliminate unnecessary or redundant provisions that are found in the existing code enforcement provisions of the LDC.
5. Improve its internal consistency.

Appeals

Subsection (j) provides that the procedure for appeals of administrative decisions under this division is same as for the majority of the LDC. It is instructive, but probably redundant and unnecessary if the Town prefers to remove it. If the Town chooses to keep it, it may wish to provide that the provision be applicable to the division not just LDC §34-1264 as discussed above in the "Revocation" section of this Report.

Restaurants v. Bars/Cocktail Lounges

The LDC differentiates between "restaurants" and "bars/cocktail lounges".¹⁶² Subsection (k) requires alcoholic beverage sales in restaurants to be "incidental" to food service; not to exceed 49% of combined gross sales annually; require the business to keep separate books for alcohol and non-alcohol related sales, and allow the Town to inspect and audit the businesses books; make non-compliance a code violation; and provide for enforcement;

¹⁶² See LDC §34-2 for definitions of "Bar or cocktail lounge" and "Restaurant".

and address reviews for compliance for businesses open for less than 12 months. In general, these regulations follow similar regulations in the Florida Beverage Law, but not exactly. The obvious purpose is to assure that restaurants don't operate as bars or cocktail lounges when they have not been permitted as such in violation of state law and Town zoning provisions. The Town may wish to revise these regulations to conform them to the state regulations for consistency.

Additional Code Considerations

Town staff and the LPA have identified additional concerns with regard to conditions placed on approvals for COP not properly addressed in the LDC. Several of these conditions have been discussed above in conjunction with the COP on the Gulf beaches and LDC review sections. A discussion of the remaining identified issues follows below.

Advertising

Several past COP approvals have prohibited advertisement to be visible from various streets and other places. Without having the specific zoning resolutions or supporting case files immediately available and taking addition time to review them, the Consultant believes these conditions are based in variances from the LDC requirement for 500 feet minimum distance separation from a specific use to mitigate against commercial intrusion and a deviation from minimum parking requirements for hotel/motels containing amenities requiring additional parking that was not—or could not be—provided.¹⁶³

Conditions attached to variances are difficult to foresee and are generally crafted on a case by case basis to address the unique circumstances of a unique property given certain uses. The Town may wish to investigate this further in conjunction with conforming the LDC to the Florida Beverage Law, as discussed above. It is noted that LDC §34-2020 contains various limitations on appearance that could generally be construed as limitations on "advertising,"¹⁶⁴ and it may be desirable for the Town to standardize these to the most reasonable extent possible.

Enclosure and Buffering Requirements

The generally pleasant environmental conditions in the Town and on the Gulf beaches provide desirable conditions for *al fresco* activities including dining, hence a real demand for what the LDC refers to merely as "outdoor seating"

¹⁶³ *Cf. id.* §34-2020(b)(2)a.3. (limiting the location of a bar or cocktail lounge within a restaurant to provide no indication from outside the building that such use is contained therein), b.2. , (limiting the location of a cocktail lounge in a hotel or motel and outside indications of such use), and d.2 (providing similar limitations on a membership organization).

¹⁶⁴ See *infra* fn. 163.

areas. As noted above in the discussion on outdoor seating, this term is not clearly defined. The Town may wish to revise the LDC to clearly distinguish enclosed seating areas from outdoor seating areas. This distinction will make it easier to establish standardized buffering requirements if the Town finds that desirable.

LDC Table 10-8 provides standardized buffer requirements for certain uses. LDC Table 10-9 provides standardized buffer types employed to satisfy the requirements. The Town may wish to revise these tables to provide additional considerations for COP, particularly with regard to outdoor seating with specific buffer requirements suited for the Gulf beaches if the Town decides to explore expanding COP to those areas.

Outdoor Lighting

Standardized requirements for outdoor lighting are currently provided in LDC §§34-1831 through 34-1834. Additional lighting standards required with regard to sea turtle protection are provided in Article II of LDC Chapter 14. These standards seem sufficient to address any concerns for negative impacts from lighting associated COP in absence of any specific concern for problems with these existing regulations. The Town may wish to note that much of the lighting in the Town is non-compliant with these regulations.

As new outdoor lighting is permitted, Town staff is required to assure that it complies with the lighting standards. Lighting fixtures that are replaced also must comply with the Town's current lighting standards.¹⁶⁵ LDC §34-1834 requires existing light fixtures that are not in compliance with the Town's lighting standards must be brought into compliance by January 1, 2010. The Town may wish to establish an outreach program to make property owners aware of this requirement in advance of the compliance deadline.

Conclusion

The following section of this Report provides a summary and conclusions regarding modifications to the LDC and ordinances regulating sale and service of alcoholic beverages.

¹⁶⁵ LDC §34-1834(c).

Summary and Conclusions

Modifying the Town's LDC and Other Regulations in Regard to Alcoholic Beverages

On-Premises Consumption on the Gulf Beaches

The Plan does not clearly provide for expansion of permitted COP onto the Gulf beaches, neither does it clearly prohibit it. The EC zoning district established by the LDC to implement the Plan coincides with the "Recreation" FLUM category. Unlike the possibly more open language of the Plan this EC zoning district is extremely restrictive in the uses it allows, both by right and special exception. Of the uses of the Gulf beaches currently provided for in the LDC the most analogous to COP is possibly the specially permitted *temporary* events on the beach provided for in LDC §14-11.

In order to best make the finding and conclusions necessary to support the *permanent* expansion of COP uses onto the Gulf beaches, the Town may wish to amend the LDC to clearly indicate that this expansion is consistent with the Plan.¹⁶⁶ As detailed below, the Town may wish to revise the existing regulations to address any possible negative affects associated with this expanded use. The Town may also wish to undertake a comprehensive revision of the Town's existing regulations to better conform them with the Florida Beverage Law, the LDC, and other Town regulations regarding activities associated with the sales and service of alcoholic beverages.

Sales and Service of Alcohol Generally

The Town's regulations with regard to alcoholic beverage sales and service have not been reviewed comprehensively since prior to incorporation. Recommendations provided below summarize possible changes the Town may wish to consider making if the Town determines to revise policies with regard to these uses.

¹⁶⁶ As discussed earlier in this Report, the Town may further wish to amend the Plan, but that change is subject to a much more extensive and time-consuming process than an LDC change.

Town Ordinances

The Town has four (4) stand-alone ordinances that bear consideration as part of a comprehensive review of the Town's alcoholic beverage regulations. These are discussed in greater detail earlier in this Report. Though some ordinances are older and more problematic than others, the Town may wish to revise all of these ordinances to provide for a consistent definitional scheme, for accordance with the Florida Beverage Law, and for consistency with the regulations codified in the LDC.

LDC Article IV, Division 5 Regulations

Definitions. The Town may wish to revise these provisions to better accord with the Florida Beverage Law and better internal LDC consistency.

Sales for Off-Premises and Sales and Service for On-Premises Consumption. LDC provisions for *off-premises* consumptions do not appear well-aligned with the Florida Beverage Law. The Town may wish to revise these regulations to provide such alignment. LDC provisions for on-premises consumption are exponentially more complicated and thus are discussed specifically on an issue by issue basis below.

Approval Process. The Town may wish to provide better direction on what circumstances warrant administrative COP approvals, as the current provisions for such approvals are limited in such a way as most requests must be directed to the public hearing special exception process for approval.

Location. The Town may wish to revise these provisions to conform to the Florida Beverage Law, for internal consistency with the LDC, and to better address concerns for problems associated with outdoor seating. Issues associated with outdoor seating include: an adequate definition; standardized hours of operation; distance separation from residences; appropriate approval, compliance, and revocation provisions; buffering requirements; adequate and appropriate provisions with regard to entertainment. Many of the concerns relating to outdoor seating location requirements relate to measuring and modulating associated sound levels. If the Town decides to make revisions associated with the Noise Ordinance, the Consultant recommends a sampling review of regulations in regard to these issues in other similarly situated communities in conjunction with such potential revisions.

Parking. The Town may wish to consider changes to the parking requirements associated with COP. The Consultant recommends that any potential changes carefully consider the potential negative affects of future reductions in the parking area required for commercial uses. Parking constraints in the Town are closely related to traffic conditions. Any revisions

should include appropriate references to the Town's existing parking requirements in other sections of the LDC.

Temporary Permits. The Town may wish to revise this subsection to conform to the provisions of the Florida Beverage Law, the provisions of the LDC relating to special events, and the Town's Special Events Ordinance.

Expiration of Approval and Transfer. The Town may wish to modify this subsection to better conform to the provisions of the Florida Beverage Law and provide for better internal LDC consistency.

Expansion. Though currently not problematic, the Town may wish to authorize minor clean-up revisions to better conform these subsections to the LDC generally.

Nonconformities. The Town may wish to expand the provisions relevant to amortization of non-conformities or remove the provisions to the division of the LDC dealing specifically with nonconformities and reference same accordingly.

Revocation. The Town may wish to modify much of this subsection to conform it to the Florida Beverage Law, eliminate unnecessary provisions found elsewhere in the LDC, streamline the process in the event it must be employed; make it a separate section that applies to the entire division instead of locating it within the *on-premises* provisions of §34-1264, and improve its internal consistency.

Appeals. The Town may wish to eliminate this subsection entirely as redundant of the relevant provisions of LDC §34-86. The provision is, however, instructive to someone who is concerned only with the Town's regulations relating to alcoholic beverages, but if the Town chooses to retain it in this division, the Consultant recommends it be removed to a separate section clearly indicating the provision's applicability to the entire division.

Restaurants, Bars, and Cocktail Lounges. The Town may wish to revise these provisions to conform them to the Florida Beverage Law and make any necessary modifications for internal consistency.

Advertising. To the extent possible, the Town may wish to provide reasonable standards for applicable to all commercial uses in close proximity to residential neighborhood to assure against commercial intrusion into these neighborhoods. Alternatively, the Town may wish to conform the current standards to be consistent to all COP-related uses. In doing so, the Town may wish to conform these regulations to the Florida Beverage Law.

Enclosure and Buffering. The Town may wish to revise the LDC to clearly distinguish enclosed seating areas from outdoor seating areas. The Town may also wish to revise its current buffering requirements to provide standards

for COP, particularly with regard to outdoor seating, with certain standards crafted to address expansion of COP onto the Gulf beaches.

Outdoor Lighting. Current standardized lighting requirement provided in the LDC appear adequate to address lighting issues raised by staff and the LPA. However, there exists within the Town non-compliant lighting fixtures that the LDC requires to be brought into compliance by January 1, 2010. The Town may wish to establish an informational outreach program to educate property owners about this requirement in advance of this compliance deadline.

Conclusion

In conjunction with the Town considering expanding COP onto the Gulf beaches, the Town may wish to consider amending its general regulations regarding the sales and service of alcoholic beverages to comprehensively improve this regulatory schema. Existing provisions are substantially similar to those of Lee County and have not undergone serious reconsideration since incorporation. The existing schema includes several ordinances and an entire division of Chapter 34 of the LDC. Once the requisite policy decisions have been made, the Consultant is committed to assisting the Town by drafting an amending ordinance including regulatory options for determination and adoption by Town Council following review and recommendations by the LPA. The Consultant is grateful for the opportunity to assist the Town in this matter.