

**COP EXPANSION IN THE ENVIRONMENTALLY CRITICAL ZONE/RECREATION FLUM
AN LDC REVIEW PREPARED BY JOANNE SHAMP, CHAIR, LPA
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The Town Council rejected LPA Resolution 2009-24, deciding that the Land Development Code is the more appropriate place to identify more specific permissible uses relating to the expansion of COP onto the beaches in the EC Zone/Recreation FLUM. The LPA provides its role as described in the LDC as follows: **Sec. 34-120(4)** "The function of the Land Planning Agency in accordance with LDC is to review proposed land development changes and amendments thereto, and make recommendation to the Town Council as to their consistency with the Comprehensive Plan"; and **Sec. 34-120(2)** "the function and duty of the LPA is to prepare policies for guiding land uses in the town in order to preserve the unique and natural characteristics of the island."

In reviewing the LDC, references are found to indicate that the proposed COP expansion is prohibited. LDC **Sec. 14-3(a)(15)** states that it is "unlawful or prohibited for any person to do, conduct or permit any commercial activities on the beach or dunes not explicitly authorized by this code or other town ordinances." There exists no explicit authorization of this COP expansion in the Comp Plan (see report "Policy Considerations and Options: Consumption of Alcoholic Beverages"), the LDC or in Town ordinances.

The Land Development Code's strongest prohibition to the proposed COP expansion is **LDC Sec. 34-1574 (b)** "Except in instances of overriding public interest, new roads, private land development, or the expansion of existing facilities within Wetlands or on the sandy beaches that are designated in the Recreation category in the Fort Myers Beach Comprehensive Plan shall be prohibited." No evidence of overriding public interest has been presented to the LPA.

LDC regulations support the legal relationship between the Comprehensive Plan and the LDC regarding COP expansion on the beaches. LDC **Sec. 34-652(a)** designates the purpose of the EC zoning is to designate that the preservation of beaches is critical to the Town of Fort Myers Beach and restricts the uses. In **Sec. 34-652(b)** the application of the EC district is intended to prevent a public harm by precluding the use of land for purposes that adversely affect a defined public interest. **Sec. 34-609** states that where there are conflicts between the LDC and the Comp Plan regarding development in zoning districts, the Comp Plan will prevail.

The LDC limits COP expansion "by right" in the EC Zone. **Sec. 34-652(d)** states that no land use in the EC Zone shall be permitted by right except those permitted by the Fort Myers Beach Comprehensive Plan and **Sec. 34-613(c)** states that development rights may be limited by other factors such as the Fort Myers Beach Comprehensive Plan and conditions on special exceptions and special permits.

COP expansion is also not permitted as an accessory or ancillary use in the Land Development Code. LDC **Sec. 34-1262** states that premises used for the purpose of the retail sale, service or consumption of alcoholic beverages must conform with all applicable town regulations. Those beachfront COP premises that are parcels split by zoning boundaries are regulated by **Sec. 34-617(b)**: "when a parcel is split between two or more zoning districts each parcel is limited only

to the permitted uses allowed in that portion, plus allowable accessory uses”, while “accessory uses may not be placed on portions of the parcels that do not contain the principal use to which they are incidental and subordinate.”

LDC **Sec. 34-677(b)(3)** refers to the regulation of the sale of alcoholic beverages outdoors in Sec. 34-1264, which states that “the area designated for an alcoholic beverage permit cannot be expanded without filing a new application for an alcoholic beverage permit covering the existing and proposed expanded area” (**Sec. 34-1264(g)**).

With regard to a proposed administrative approval of such COP expansion, **Sec. 34-1264(a)(2)a.2** states that administrative approval may not be granted for outdoor seating within 500 feet of a park or dwelling unit under separate ownership. In addition, **Sec. 34-1264(a)(1)** states that administrative approval of the expansion of on-premises consumption of alcoholic beverages may not be the appropriate action when there is a record of public opposition to a similar use at that location. The **Comp Plan** provides further safeguards, for example requiring the Town to provide procedural protection comparable to the public hearing process in the Mixed Residential FLUM category.

A restriction or prohibition to this commercial expansion is addressed by Comp Plan **POLICY 4-C-2** directing that intensity in any FLUM category is limited by provisions of the Comp Plan and LDC. **Comp Plan POLICY 4-C-2** requires the LDC to specify maximum commercial intensities using the floor-area-ratio (FAR). The maximum intensity may not include land in the Recreation FLUM according to LDC **Sec. 34-633(2)**: *“a site’s lot area includes the gross square footage within the site’s private property line, minus wetlands, canals or other water bodies, and minus any land designated “Recreation” on the Comprehensive Plan’s future land use map.”* Land in the Recreation FLUM Category is not available for commercial expansion.

Expansion of area for this COP service would require additional parking, per **Sec. 34-20209(b)(1)** which states that “existing uses enlarged in terms of floor area shall provide additional parking spaces in accordance with Sec. 34-2020(d)(2)h.2” and **Sec. 34-2020(d)(2)h.2**, which states additional parking is required for outdoor seating for restaurants, bars and cocktail lounges.

COP expansion and beach definitions are limited by the new mean high water line (ECL) and state owned beachfront in the current navigation/re-nourishment project per **(F.S. 161.191 (1))**: “the ECL recorded in accordance with a beach re-nourishment project shall be the new high water line and all land seaward of that line are the sovereign property of the State of Florida.”

Limiting the expansion of COP to specific zoning districts would fall under several regulations of the Comp Plan and LDC. The **FLUM ELEMENT** of the **COMP PLAN** states that the Town can insist on protection of its private realm and the enhancement of its public realm when evaluating for new commercial development, providing for protection of residential interests. Even in the Downtown area, the map in **Sec. 34-672, Figure 34-6** of the Downtown Zoning district shows the beaches and land seaward of the Coastal Construction Line (CL) to be outside the zoning district, as if intentionally protected from land use development.