

NEMO'S

Hearing Examiner Report from September 28, 1995

Town Resolution No. 07-13

Town Staff Report from June 8, 2010

LPA Resolution No. 2010-06

LPA Minutes from June 8, 2010

Town Resolution No. 10-15

Nemos
1154 Estero Blvd

1995 - Special Permit for
outdoor seating w/
COP, Sec. 34-1264(a)
95-07-161.025

2007 - FMB ADM 2007-00001
- Admin interp on pkg.
& COP

2010 - SE Res. 10-15
- Acknowledges COP
in EC

9:18:23 AM 7/27/2011

Complaint Details

Below is a listing of public complaints regarding the person or entity selected. This may not reflect all public complaints filed with the Department. The Department is also precluded from disclosing any complaints which are confidential pursuant to Florida Statutes.

If you would like a full list of public complaints against an individual or entity or to make a public records request for complaints listed please visit our **Public Records page**.

You can search for public records pertaining to unlicensed activity complaints through an additional database by visiting our **Search Unlicensed Activity Complaints page**.

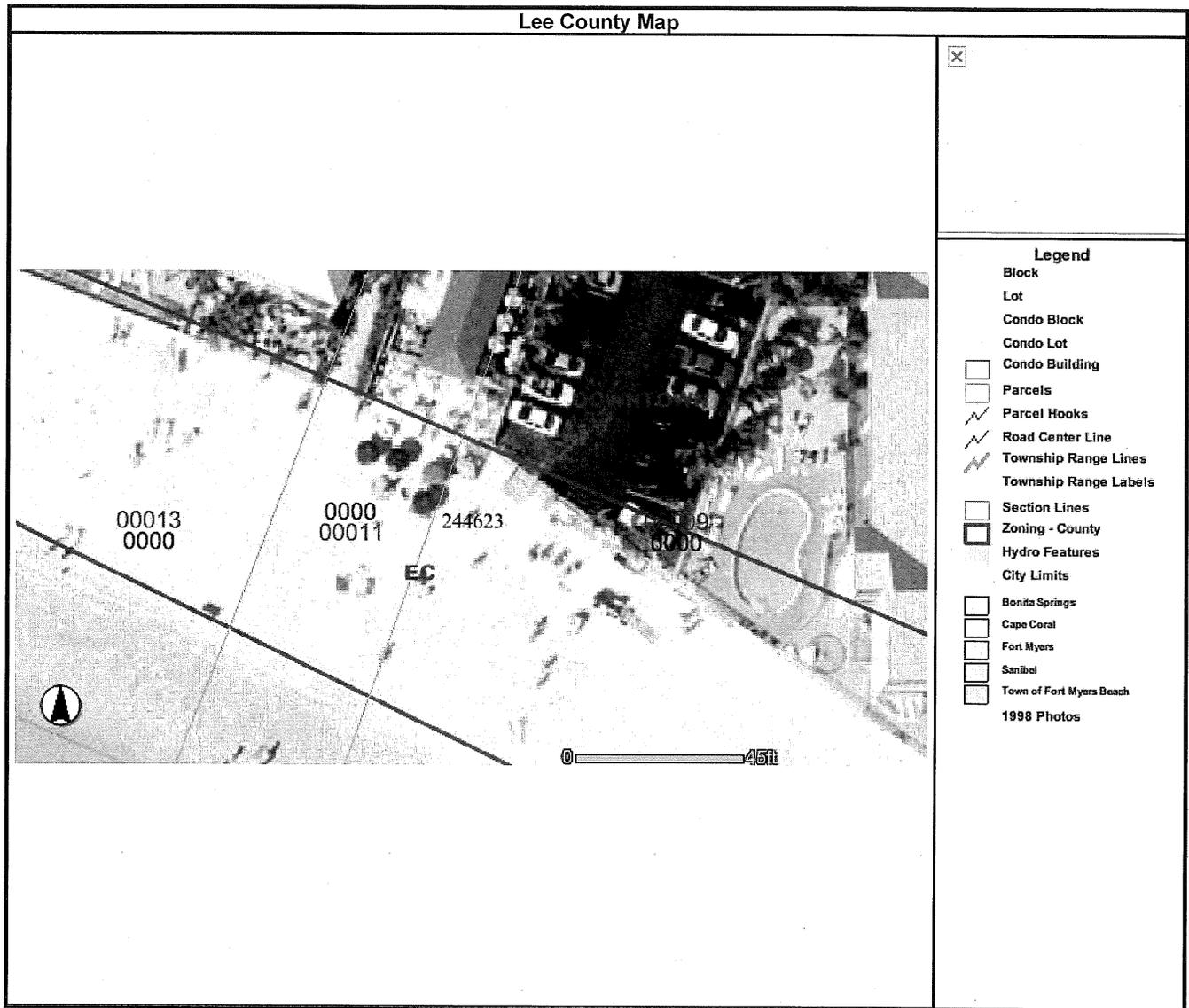
Name: COLORADO EAST LLC

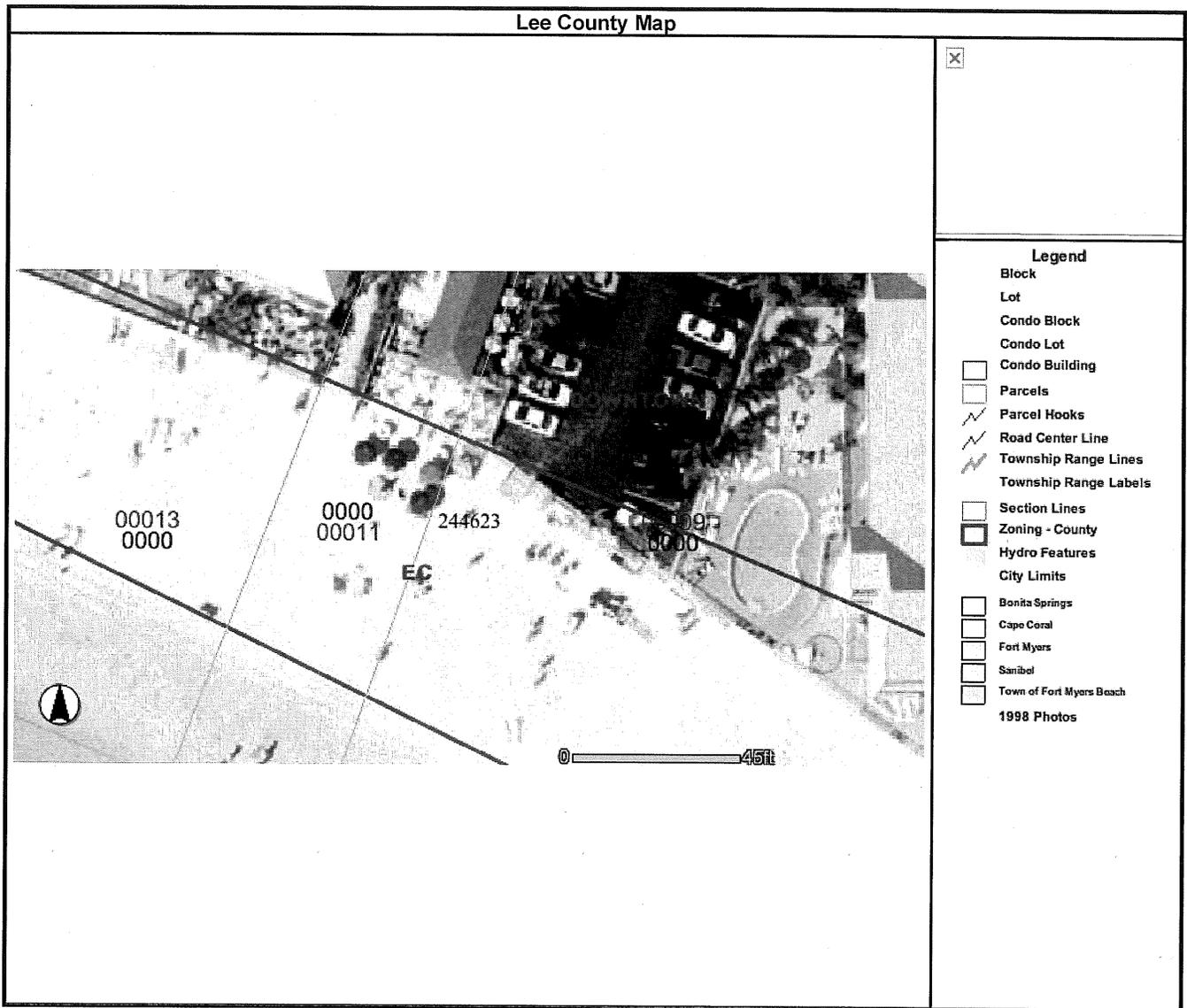
Number	Class	Incident Date	Status	Disposition	Disposition Date	Discipline	Discipline Date
2011003470	Enforcement	01/21/2011	Inv. Complete - No Action	Official Notice	01/21/2011		
2010017081	Enforcement	03/31/2010	Inv. Complete - No Action	Official Notice	03/31/2010		
2010030066	Enforcement	06/04/2010	Inv. Complete - No Action	Official Notice	06/07/2010		
2009033885	Inspection	06/22/2009	Inv. Complete - No Action	Compliance	06/22/2009		

Contact Us :: **1940 North Monroe Street, Tallahassee FL 32399** :: **Call.Center@dbpr.state.fl.us** :: Customer Contact Center: 850.487.1395

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RESOLUTION OF THE TOWN COUNCIL OF
THE TOWN OF FORT MYERS BEACH, FLORIDA
RESOLUTION NUMBER 07-13

WHEREAS, Estero Beach Holdings LLC (hereafter "Appellant") is owner of one (1) platted lot, with a street address of 1154 Estero Boulevard, Fort Myers Beach, Lee County, Florida and legally described in Exhibit "A", which is attached hereto and hereby incorporated by reference; and

WHEREAS, Appellant requested an administrative determination from the Town of Fort Myers Beach in Case Number FMBADD2006-00004 regarding the expansion of alcoholic beverage consumption on-premises and reduction of parking on the subject property (and related issues of seating capacity on the subject property) from that approved pursuant to SP 95-07-161.02S, without public hearing approval; and

WHEREAS, in response to Appellant's request, the Town Director of Community Development Department found that the Town did not approve expansion of the area for on-premises consumption of alcoholic beverages and that the Town did not approve a reduction of the parking required by SP 95-07-161.02S for the subject property (with related findings regarding seating capacity on the subject property) and issued an administrative determination in Case Number FMBADD2006-00004 with such findings; and

WHEREAS, Appellant thereafter filed an appeal of the Town's administrative determination, styled as Case Number FMBADM2007-00001 for a public hearing before Town Council of the Town of Fort Myers Beach, Lee County, Florida; and

WHEREAS, the public hearing on FMBADM2007-00001 was properly noticed and duly held on February 20, 2007, before the Town Council; and

WHEREAS, following consideration of testimony from the Appellant, staff, the public, and further consideration of all documentary evidence presented by all persons, the Town Council granted Appellant's appeal.

NOW THEREFORE, BE IT RESOLVED BY THE TOWN COUNCIL OF THE TOWN OF FORT MYERS BEACH, FLORIDA, AS FOLLOWS:

SECTION 1. Finding of Fact and Conclusions. The Town Council makes the following Findings of Fact and Conclusions: The Town Council draws an inference from the evidence provided that a parking agreement was in existence at all relevant times and the staff report is therefore without merit. The Town Council directs Town staff to determine the seating capacity of the subject property, including the addition thereto, after due consideration of Town requirements and life/safety requirements set forth by the Fort Myers Beach Fire Control District and otherwise.

.SECTION 2. Determination by the Town Council. The Town Council finds as follows:

- A. The Town did previously properly approve expansion of the area for on-premises consumption of alcoholic beverages in accordance with Appellant's appeal; and
- B. The Town did previously properly approve a reduction of the parking required by SP 95-07-161.02S for the subject property.

The foregoing resolution was adopted by the Fort Myers Beach Town Council upon motion by Councilmember Meador and second by Councilmember Reynolds and ,being put to a vote, the result was as follows:

Dennis Boback, Mayor	AYE
Don Massucco, Vice Mayor	AYE
Garr Reynolds	AYE
Charles Meador, Jr.	AYE
William Shenko, Jr.	AYE

APPEAL DULY **GRANTED** this 20th day of February, 2007.

ATTEST:

TOWN OF FORT MYERS BEACH

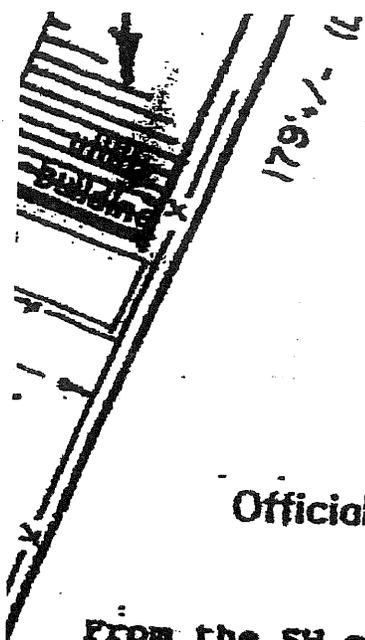
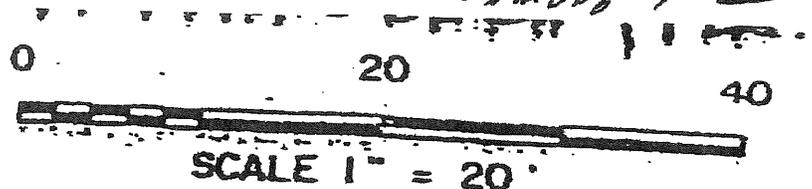
By: 
Michelle D. Mayher, Town Clerk

By: 
Dennis C. Boback, Mayor

Approved as to form by:


Anne Dalton, Town Attorney

Exhibit 7-2



LEGAL DESCRIPTION
 Official Record Book 2475, Page 1432

From the SW corner of Block E, CRESCENT PARK ADDITION, as recorded in Plat book 4, Page 46 of the Public Records of Lee County, Florida, on the East line of Section 24, Township 46 South, Range 23 East, run along said line for 53.28 feet to the South line of existing county road (Estero Blvd.) right-of-way 50 feet wide; thence run Northwesterly at an included angle of 69-48'15" with said section line, along the South side of said right-of-way for 122.63 feet to the Point of Beginning of the land hereby conveyed; thence continue along the South line of said right-of-way for a distance of 35 feet; thence run Southwesterly perpendicular to said road a distance of 179 feet, more or less, to the Gulf of Mexico; thence run Southeasterly along said Gulf of Mexico to a point perpendicular to the Point of Beginning of the lands hereby conveyed, being approximately 35 feet, more or less, thence run Northerly and perpendicular with the right-of-way of the existing county road 179 feet, more or less, to the Point of Beginning; together with all Riparian rights thereunto belonging, being on Estero Island, Lee County, Florida.

STRAP 24-46-23-00-00011.0000

R.U. - Overhead Utility	U.P. - Utility Pole	A.C. - Asphalt Concrete	Conc. - Concrete
U.U. - Underground Utility	Tel. - Telephone Box	S.D. - Storm Drain	H.T. - Hydrant
D. - Drainage	TV - Cable Television	S.S. - Sanitary Sewer	M.Y. - Water Yank
U. - Utility	V.E. - Valley Eutter	M.H. - Man Hole	W.H. - Water Meter
E. - Easement	C.E. - Curb & Gutter	Ele. - Electric	Rel. - Relative
P. - Public		Lic. - Licensed Business	
P.C.P. - Parcel Control Point		P.O.C. - Point of Commencement	

**FORT MYERS BEACH, FLORIDA
DEPARTMENT OF COMMUNITY DEVELOPMENT
ZONING STAFF REPORT**

TYPE OF CASE: Special Exception

CASE NUMBER: FMBSEZ2010-0007 (Nemos on the Beach)

LPA HEARING DATE: June 8, 2010

LPA HEARING TIME: 9:00 AM

I. APPLICATION SUMMARY:

Applicant: Estero Beach Holdings LLC

Request: Special Exception in the DOWNTOWN zoning district to allow consumption-on-premises of alcoholic beverages in a restaurant providing an outdoor seating area that is within 500 feet of a dwelling unit under separate ownership, including an existing patio surfaced with paver blocks located landward of an existing retaining wall but within the EC zoning district; to include beer, wine, and liquor.

Subject property: Legal description is attached as **Exhibit A**.

Physical Address: 1600 Estero Boulevard, Fort Myers Beach, FL 33931

STRAP #: 24-46-23-W3-0011.0000

Future Land Use designation: Pedestrian Commercial (landward) and Recreation (seaward)

Zoning: DOWNTOWN (landward) and EC (Environmentally Critical) (seaward)

Current use(s): Restaurant with 2COP beverage license and outdoor seating, including existing patio in EC zoning district.

Adjacent zoning and land uses:

Adjacent properties are designated as Pedestrian Commercial Future Land Use Map (FLUM) category (except Gulf of Mexico beach, designated Recreation FLUM)

- North: Shopping center (Seafarers Plaza and Helmerich Plaza), zoned DOWNTOWN
- South: Undeveloped beach, zoned EC
- East: Pierview Hotel, zoned DOWNTOWN
- West: Vacant lots currently occupied by a commercial recreation facility (inflatable waterslide), then a commercial parking lot, then a bar/cocktail lounge, all zoned DOWNTOWN.

II. RECOMMENDATION

Staff recommends **APPROVAL** of the requested Special Exception to allow consumption on premises of alcoholic beverages in a restaurant providing outdoor seating areas that are within 500 feet of a dwelling unit under separate ownership.

If the Town Council chooses to approve the requested special exception, staff recommends that approval be subject to the following conditions:

1. The area of the subject establishment used for consumption on premises must be confined entirely to the areas shown on the floor plan attached hereto and incorporated herein by reference as **Exhibit B**, including the interior of the first floor of the building, the front porch, and the rear patio.
2. Music and other audible entertainment are prohibited before 10:00 AM and after 10:00 PM of each day in outdoor seating areas, and must comply at all times with applicable ordinances.
3. Sales, service, and consumption of alcoholic beverages must not begin earlier than 7:00 AM and must end no later than 2:00 AM during each day.
4. The use must comply at all times with the provisions of LDC Section 34-1264(k), as may be amended from time to time, and must at all times in operation be licensed as a permanent public food service establishment with seating, in accordance with Chapter 509, *Florida Statutes*, and applicable state agency rules.
5. The use must comply at all times with lighting standards, including the regulations for the protection of Sea Turtles provided in LDC chapter 14, article II.
6. The special permit approved by the Lee County Hearing Examiner in case 95-07-162.02S is hereby declared null and void.

7. Approval of this special exception does not create a vested right to reconstruct or replace the brick patio or retaining wall located in the EC zoning district on the subject property, which are limited by LDC Sections 34-3242 and 34-3245. New construction and/or replacement of existing structures in the EC zoning district must comply with all requirements of the LDC and Comprehensive Plan at the time of permitting.

Recommended Findings and Conclusions

1. *Whether there exist changed or changing conditions [that] make approval of the request appropriate.*

The location of the request was approved in 1995 for consumption of alcoholic beverages on the premises in conjunction with a restaurant, and the allowable seating areas were established through the 2007 appeal. The Comprehensive Plan and Land Development Code do not distinguish classes of restaurants that (in addition to non-alcoholic beverages and food) serve beer only, beer and wine only, or beer, wine, and liquor. The applicant's request does not implicate a change in use except insofar as the approved use was limited by special conditions attached to a prior special permit, subsequently modified by a Town Council decision of an administrative appeal. The modifications to the allowable seating area through the 2007 appeal have made it possible for the establishment to obtain a special restaurant (SRX) series beverage license. Staff recommends the finding that there **do exist** changed or changing conditions and that they **do make** approval of the request appropriate.

2. *Whether the request is consistent with the goals, objectives, policies, and intent of the Fort Myers Beach Comprehensive Plan.*

The subject property is in the Pedestrian Commercial FLUM category, on Estero Boulevard and near other restaurants, bars, hotels and retail stores. Comp Plan **Policy 4-B-6**, regarding the Pedestrian Commercial FLUM, states that commercial activities must contribute to the pedestrian-oriented public realm. The beach and streets northward to Lynn Hall Park and southward to the Lani Kai are heavily traveled by pedestrian beachgoers. The existing restaurant is oriented toward this foot traffic, though it has essentially no parking area for patrons arriving by automobile. The outdoor seating areas are located on porches and patios separated by railings and elevation from the sidewalks and the beach. Staff recommends the finding that the request, as conditioned, **is consistent** with the goals, objectives, policies, and intent of the Comprehensive Plan with regard to this commercial area.

3. *Whether the request meets or exceeds all performance and locational standards set forth for the proposed use.*

A restaurant is a use permitted by right in the Downtown zoning district. Because dwelling units under separate ownership are located within 500 feet of the subject property, a special exception is necessary in order to allow an outdoor seating area. Performance and locational standards for the restaurant use were addressed through permitting for prior remodeling activities, and through the 1995 variance as modified by the 2007 appeal. There are no specific performance or locational standards in Town regulations for a restaurant with outdoor seating areas that serves beer, wine, and liquor, that differ from the standards that apply to a restaurant with outdoor seating that serves beer and wine only. Staff recommends the finding that the request, as conditioned, **meets or exceeds** all performance and locational standards set forth for the proposed use.

4. *Whether the request will protect, conserve, or preserve environmentally critical areas and natural resources.*

Construction of additional structures in environmentally critical areas has not been requested or permitted. The existing wood retaining wall is not proposed to be replaced or expanded. As conditioned, the use will be required to comply with current sea turtle protection standards. Staff recommends the finding that approval of the request, as conditioned, **will** protect, conserve, or preserve environmentally critical areas and natural resources.

5. *Whether the request will be compatible with existing or planned uses and not cause damage, hazard, nuisance, or other detriment to persons or property.*

The existing surrounding uses include a hotel, a shopping center, bars and restaurants, and a few dwelling units. Within the Pedestrian Commercial Future Land Use Map category, adjacent lots could potentially be redeveloped with commercial or mixed use buildings in accord with the regulations of the DOWNTOWN zoning district or through planned development rezoning. The recommended conditions clearly restrict the use to specific areas of the floor plan and prohibit any further expansion. Staff recommends the finding that the requested use, as conditioned, **will be** compatible with existing or planned uses and **will not** cause damage, hazard, nuisance, or other detriment to persons or property.

6. *Whether the requested use will be in compliance with applicable general zoning provisions and supplemental regulations pertaining to the use set forth in LDC Chapter 34.*

The existing restaurant use has already received a variance related to parking requirements, and was required to comply with lighting and other similar requirements set forth in LDC Chapter 34 at the time of remodeling. The consumption on premises of alcoholic beverages use, as conditioned, will be

required to comply with the applicable standards in LDC Chapter 34, Article IV, Division 5, for consumption on premises in a restaurant regardless of the type or series of state license. The appropriate limitations on an outdoor seating area for consumption on premises that is allowed by special exception are for Town Council to determine through the hearing process, during which process they should find that the conditions attached are reasonably related to the special exception requested. Staff recommends the finding that the requested use, as conditioned **will be** in compliance with applicable general zoning provisions and supplemental regulations pertaining to the use set forth in LDC Chapter 34.

III. BACKGROUND AND ANALYSIS

Introduction and Background:

Patrick Ciniello, on behalf of Estero Beach Holdings LLC, has requested a special exception in the DOWNTOWN zoning district to allow consumption-on-premises of alcoholic beverages in a restaurant providing an outdoor seating area that is within 500 feet of a dwelling unit under separate ownership, including an existing patio surfaced with paver blocks that is located landward of an existing retaining wall but within the EC zoning district. The applicant has specifically indicated a desire for approval to include sales, service, and consumption of beer, wine, and liquor.

The subject property was granted a special permit for consumption-on-premises of alcoholic beverages ("COP") in a restaurant with outdoor seating by the Lee County Hearing Examiner in 1995, in case 95-07-161.02S. Simultaneously the subject property was granted a variance to reduce the number of parking spaces required by 1995 regulations from 17 spaces to the then-existing 6 spaces. The special permit was subject to the following conditions:

1. The special permit is limited to a 2-COP beverage license for beer and wine in conjunction with a restaurant.
2. The special permit is limited to a 1,106 square-foot restaurant with 12 indoor seats and 50 outdoor seats.
3. Outside entertainment and/or the service of beer and wine in the outside seating area for group parties or special events shall not extend beyond 10:00 PM nightly.

The variance was subject to the following condition:

1. The variance is limited to a 1,106 square-foot restaurant with 12 indoor seats and 50 outdoor seats.

In 2006 the property owner requested an administrative interpretation of the Land Development Code, seeking a determination that the 1995 special permit and variance had been modified between 1995 and 2006 to allow a further reduction

in the number of required parking spaces from the 6 spaces required by the 1995 variance to one single space that remained after construction of a roofed porch between the building and Estero Boulevard. The request also sought an interpretation that the 1995 special permit and variance had been modified between 1995 and 2006 to allow expansion of the restaurant seating area to the new roofed porch, exceeding the limitation on the number of square feet and number of seats in the conditions. Disagreeing with the administrative interpretation issued in response to the request, the property owner appealed the interpretation to the Town Council in early 2007. In Resolution 07-13, Town Council granted the appeal and determined that the required number of parking spaces had been reduced and that the allowable seating area had been expanded. The 2007 appeal did not address the condition limiting the license to a 2-COP for beer and wine with a restaurant, or the limits on the hours for outdoor entertainment.

Analysis:

The subject property is zoned DOWNTOWN and is in the Pedestrian Commercial Future Land Use Map (FLUM) category, except that seaward of the 1978 Coastal Construction Setback Line, the property is zoned EC (Environmentally Critical) and is in the Recreation FLUM category. The existing improvements include a partly enclosed CBS building, originally built about 1958, with about 1100 square feet of floor area on the ground floor and a smaller second floor configured as an apartment. Most of a patio area between the building and the Gulf of Mexico is shaded by flexible awnings. A small portion of this existing patio area extending about twenty feet seaward of the flexible awnings, but landward of an existing retaining wall, is located in the EC zoning district. A roofed porch was constructed between the 1958 building and Estero Boulevard approximately 1997. At the southeast side of the roofed porch is the only remaining portion of the site (other than the beach) that is not covered by a building or patio. This paved area serves as a single parking space and as a walkway for access to the building.

The subject property is generally located between the Pierview Hotel and vacant lots that formerly contained other hotels, and is across Estero Boulevard from a retail store and a fast-food restaurant that are located within an existing shopping center. Dwelling units are located on Crescent Street, to the northeast, and on Canal Street, to the southeast.

The Comprehensive Plan encourages pedestrian-oriented development in the downtown area, generally conceived as the area within the Pedestrian Commercial FLUM category. The Comprehensive Plan was not in effect at the time of the prior special permit approval in 1995, and the Town Council did not evaluate the alcoholic beverage use according to the criteria for a special exception in the 2007 appeal. Since the adoption of the Comprehensive Plan, the Town's zoning has been amended, and the property was rezoned from C-1 to

DOWNTOWN in the general rezoning of all land within the Town to reassign property from County zoning districts to Town zoning districts, which took place on March 3, 2003. The DOWNTOWN zoning district was designed to implement the Comprehensive Plan's community design concepts for the Town's commercial core area, and to accord with the Pedestrian Commercial FLUM category.

The restaurant's outdoor seating areas are located on patios and porches, as required in the DOWNTOWN district in accordance with LDC Section 34-678(e)(4).

Existing patio in the EC zoning district

The existing site development on the subject property includes a brick patio that is seaward of the building. A portion of this patio is shaded by flexible awnings, but a small area of the patio, between the awnings and an existing wood retaining wall, extends seaward of the Coastal Construction Setback Line ("1978 Line"), into the EC (Environmentally Critical) zoning district and the underlying Recreation FLUM category. The ends of the existing wood retaining wall are coterminous with the ends of existing concrete retaining walls on the adjoining properties. The existing building was originally built in the 1950s according to the records of the Lee County Property Appraiser. The patio area seaward of the building was the location for the 50 outdoor seats approved by the Lee County Hearing Examiner in the 1995 special permit.

The applicant has not requested a special exception to expand or replace the patio or retaining wall in the EC zoning district. The patio and retaining wall remain nonconforming with regard to their location.

As LDC Section 34-678 provides, patios and porches may be appropriate locations for restaurants to provide outdoor dining areas on private property. This business has an existing patio with an existing seating area that extends into the Town's EC zoning district and is therefore nonconforming because the seating area's use was specifically approved by Lee County prior to the adoption of the Town's Comprehensive Plan and prior to the Town's rezoning of the area seaward of the 1978 Coastal Construction Setback Line. Regardless of the nonconforming status of the seating area's use, new or expanded structures and uses in the EC zoning district, aside from a very limited group of uses provided in LDC Section 34-652(d), can only be allowed by special exception.

The special exception process is a process by which Town Council can determine if the use of the existing patio can be expanded to include a slightly different form of alcoholic beverage service in the EC zoning district (liquor, in addition to the beer and wine already allowed). Since this is an unusual situation, staff has recommended some additional factual findings to acknowledge and clarify that new development for commercial uses is not

generally allowed in the EC zoning district and that this expansion is arguably *de minimis*.

If removed, the existing patio in the EC district could not be replaced without a special exception. Staff has recommended a condition to make this requirement clear in the event Town Council chooses to approve the current request. LDC Section 34-1264(g) requires that all areas approved at a location must be under the same permit and subject to the same rules and regulations, so it would not be possible to approve the increase in license type to allow liquor sales, service, and consumption outside the EC district and prevent it in the EC district, unless the applicant were willing to forego entirely the use of the EC district area for seating.

Outdoor seating for on-premises consumption of alcoholic beverages

The regulations of the DOWNTOWN zoning district encourage restaurants to provide outdoor seating areas located on porches or patios, largely between enclosed buildings and the street. The use of existing structures and developed areas that are within the EC zoning district is a separate issue, already discussed.

This vicinity is one of the most intensive commercial areas of the Town, and aside from a few dwelling units on Canal Street and Crescent Street, and a few dwelling units located in mixed-use buildings, it is far from residential uses. Other restaurants and bars serving alcohol on the premises, many of which include outdoor seating areas, are located in Times Square and on Old San Carlos Boulevard to the north, and on both sides of Estero Boulevard to the south.

The sidewalks on both sides of Estero Boulevard, the availability of seasonal commercial parking lots, and the popular use of the beach near the County fishing pier and Lynn Hall Park, help to attract beach-going pedestrians to the area. The applicants' restaurant is merely one among a large number of commercial uses in this part of the Town, several of which have outdoor seating near the beach. Although residential buildings are located in the immediate vicinity, on Canal Street, the area of the subject property has been zoned to allow commercial uses for many years, and contains primarily commercial uses. The presence of visiting pedestrians transiting between parking areas, retail stores, restaurants, the beach, and nearby motels, is a long-established custom that will not be altered by approval or denial of the current request. The Comprehensive Plan's vision of this area does not require that it be transformed from an intensively commercial area into a primarily residential district. The immediate vicinity is within the Pedestrian Commercial FLUM category, except for the beach.

The applicant indicates its intent to operate between the hours of 11:00 AM and Midnight, Sunday through Thursday, and 11:00 AM and 2:00 AM, Friday and

Saturday. These hours are within the external limit that prohibits service between 2:00 AM and 7:00 AM daily throughout the Town. Although the applicant has essentially stipulated a willingness to abide by these hours, in order to limit the use to these hours (or any other hours other than 7AM to 2AM daily) the Town Council must find that such a condition is necessary to protect the public health, safety, and welfare. If testimony or evidence pertaining to limiting the hours of the use is introduced in the hearing process, the LPA and Town Council should afford it all due consideration.

The applicant has offered to end live outdoor entertainment at 10:00 PM, in accord with a condition originating in the 1995 special permit. The Town has a noise ordinance that regulates noise both before and after 10:00 PM of each day. Staff has recommended a condition matching the applicant's stated intent to end live outdoor entertainment at 10:00 PM because the Town's noise ordinance requires adherence to stricter noise limits after 10:00 PM. Live outdoor entertainment after 10:00 PM would be likely to violate the noise ordinance.

The building floor area proposed to be used for seating is indicated on the floor plan attached as **Exhibit B**. The floor area includes the interior of the first floor of the building, the covered porch between the building and Estero Boulevard, and the patio seaward of the building, including both the areas shaded by the flexible awnings and the open-air area that is located in the EC zoning district but landward of the existing retaining wall.

In the past, County- and Town-issued location-specific approvals for alcoholic beverage uses have sometimes contained limitations on the number of seats and the type and/or series of license, apparently in an effort to limit potentially adverse effects on the neighboring properties and possibly to aid with enforcement issues involving unauthorized expansions of seating areas. Staff does not recommend conditions be included limiting the number of seats or the type and/or series of state beverage license. The seating area can be limited by reference to the applicant's site plan, which clearly delineates the seating area from other parts of the site such as the open beach seaward of the retaining wall and the second-floor apartment. Changes to the types of seats used in the seating area or amendments to the building code could allow a somewhat different seating capacity within the same floor area in the future. The prior conditions limiting the number of seats were essentially removed (or declared to have been removed through unknown processes) by the 2007 appeal, and the current request does not propose to increase the area used for seating. A future restaurant operator may find it economically advantageous to acquire a different type or series of state beverage license and use it in conjunction with a restaurant use, either to serve beer only, to serve beer and wine, or to serve beer, wine, and liquor. The LDC does not distinguish between restaurants that serve beer, restaurants that serve beer and wine, and restaurants that serve beer, wine, and liquor, except in LDC Section 34-1264(h)(1), which limits expansion in circumstances in which "a legally existing establishment engaged in

the sale or service of alcoholic beverages...is made nonconforming by reason of new regulations contained in this chapter.” Staff has no basis in policy to develop theories or evidence to support the notion that locations serving beer only, beer and wine only, or beer, wine, and liquor, should be regulated differently by the Town.

If Town Council chooses to approve the request, staff recommends that the 1995 special permit be specifically declared null and void to prevent ambiguity over which resolution authorizes the use, and which conditions still apply. The 1995 variance, as affected by the 2007 appeal, should remain in effect, as together the two actions continue to allow the use without requiring additional parking to be provided.

IV. CONCLUSION:

Regulations for the DOWNTOWN zoning district encourage outdoor dining, and many restaurants have followed the vision of the Comprehensive Plan in accordance with these regulations and are providing outdoor seating areas where alcoholic beverages are served as a part of a menu of full-course meals as required by LDC Section 34-1264(b)(2). The current request is essentially a request to change one of the conditions placed on the subject property by prior resolutions approving the use.

If Town Council finds that the requested use is contrary to the public interest or the health, safety, comfort, convenience, and/or welfare of the citizens of the Town, or that the request is in conflict with the criteria of LDC Section 34-88, Town Council should deny the request as provided in LDC Section 34-88(4). So doing would not divest the subject property of the approval provided by Lee County and by the prior Town Council action in 2007 but would merely prevent the applicant from upgrading its beverage license to a different type. If Town Council chooses to approve the request, special conditions necessary to protect the health, safety, comfort, convenience, or welfare of the public may be attached if Council finds that such conditions are reasonably related to the requested special exception. Staff has recommended conditions for the Town Council's convenience. Staff's recommended condition limiting the hours for sales, service, and consumption of alcoholic beverages on the premises is based upon the general policy established by the Town Council in Ordinance 96-06. A condition limiting sales, service, and consumption of alcohol on the premises to more restrictive hours, such as the hours of operation requested by the applicant, could be established if Town Council finds that such a condition is necessary to protect the health, safety, comfort, convenience, or welfare of the public at this particular location.

Staff recommends **APPROVAL** of the requested special exception, as conditioned.

Exhibits:

Exhibit A – Legal Description of Subject Property
Exhibit B – Floor plan

Attachments:

Attachment A – Hearing Examiner Decision in Case 95-07-161.02S
Attachment B – Town Council Resolution 07-13

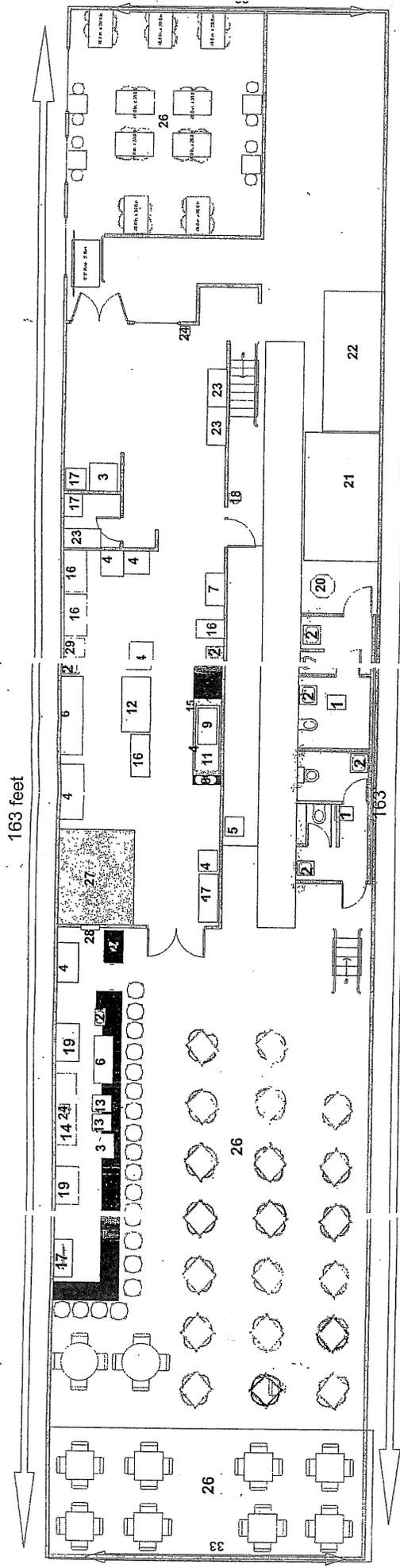
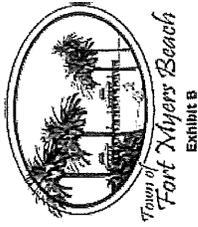
Exhibit A
SEZ2010-0007

A tract or parcel of land lying in Section 24, Township 46 South, Range 23 East, Estero Island, Lee County, Florida, said parcel being more particularly described as follows:

Commencing at the southwest corner of Block E, CRESCENT PARK ADDITION, as recorded in Plat Book 4, Page 46, Public Records of Lee County, Florida, on the east line of Section 24, Township 46 South, Range 23 East; thence S.00°44'25"E. on said east line for 53.28 feet to a point on the southerly right-of-way line of Estero Boulevard; thence N.70°35'51"W. on said southerly line for 122.74 feet to the **Point of Beginning** of the property herein described; thence continue N.70°35'51"W. on said southerly line for 35 feet; thence S.19°24'09"W. for 284.27 feet to the waters of the Gulf of Mexico; thence southeasterly along said waters for 35.17 feet, more or less, to a point on a line perpendicular to aforesaid southerly right-of-way line; thence N.19°24'09"E. for 287.74 feet to the **Point of Beginning**.

Description based on survey by Charles D. Knight, LS6056, BWLK project no. 40032, dated 12/8/08. Basis for bearings: southerly line of Estero Boulevard bearing S.70°35'51"E.

Nemo's On The Beach



Equipment List

- | | |
|------------------------------------|------------------------------|
| 1. Ventilation Fan | 20. Grease Trap |
| 2. Hand Sinks | 21. Propane Tank Area |
| 3. Ice Machine | 22. Dumpster Area |
| 4. Refrigerator/Freezer | 23. Dry Storage |
| 5. Mop Sink | 24. POS System |
| 6. 3-Compartment sink w/drainboard | 25. Bar |
| 7. Steam Table | 26. Table & Chairs |
| 8. 2 Burner Stove | 27. Walk In Cooler |
| 9. Flat - Top Griddle | 28. Draft Beer Taps |
| 10. Fryer | 29. Steamer |
| 11. Char Broiler | 30. Portable Fire Extinguish |
| 12. Sandwich Prep Table | |
| 13. Ice Bins | |
| 14. Bottle Beer Refrigerator | |
| 15. Hood with Suppression System | |
| 16. Work Table | |
| 17. Pepsi Bag N Box System | |
| 18. Water Heater | |
| 19. Bottle Chillers | |

MINUTES
FORT MYERS BEACH
Local Planning Agency

Town Hall – Council Chambers
2523 Estero Boulevard
Fort Myers Beach, FL 33931

Tuesday, June 8, 2010

I. CALL TO ORDER

Meeting was called to order at 9:05AM by Carleton Ryffel. Other members present:

Joe Kosinski
Rochelle Kay
John Kakatsch
Chuck Moorefield
Joanne Shamp-excused
Bill Van Duzer-excused

Staff present: Dr. Frank Shockey
LPA Attorney, Anne Dalton

II. PLEDGE OF ALLEGIANCE and INVOCATION

Rochelle Kay

The Chair recognized the newest member, Joe Kosinski, who then gave a brief resume to the group.

III. MINUTES

A. Minutes of May 11, 2010

Motion: Ms. Kay moved to accept the minutes, as recorded.

Seconded by Mr. Kosinski;

Vote: Motion passed 5-0

IV. PUBLIC HEARINGS

A. SEZ2010-0007 Nemo's on the Beach COP Special Exception

Ms. Dalton prompted the members to declare any ex parte discussion. Mr. Ryffel noted that he had a brief conversation with the applicants and their representative, Mr. Madden, and said that he was the original planner for a special permit at this location in 1995; however, he has no present connection with this applicant in any way. No other members had any communications.

Ms. Dalton swore in witnesses.

Applicant Testimony

Mr. Madden addressed the meeting for the applicant, Estero Beach Holdings, LLC. He thanked the staff for their report and asked that it be made a part of the record, as the applicant agrees with the findings and conclusions in the report. The intention of the special exception is basically to add liquor to the menu, in addition to beer and wine.

Mr. Moorefield asked the applicant if his statement regarding adding 30 employees was an accurate statement. Mr. Ciniello, one of the owners, responded and said that if the amount of customers increases, the number of jobs would increase but he said it is more his hope than an actual estimate.

Ms. Kay asked if the patio is in an environmentally critical zone. Dr. Shockey addressed her question, explaining that the area now zoned EC, which extends out to the seawall, was included in zoning for the alcoholic beverage use that was allowed in the 1995 special permit. The applicant added that the use of the patio was a pre-existing condition.

Mr. Ryffel recalled the original special permit and asked if the inside still has the same seating in the front porch area. The applicant explained that there had been additions since then and that area has about 40 seats inside the building now. In addition, he said there are about 180 seats total, including the patio, porch and covered area under canvas awnings, in accordance with the current permits. Dr. Shockey said that the recommended conditions would not restrict them to a specific type of license but would require them to comply with the Town's requirements for service in conjunction with the restaurant, similar to but not the same as the state's requirements for an SRX series license.

Mr. Kakatsch asked if it is necessary to start serving at 7:00 AM. The applicant stated that they don't actually open for business until 11:00 AM and this was just added for consistency.

Staff Report

Dr. Shockey corrected a few typographical errors in the address (1054 Estero Boulevard instead of 1600 Estero Boulevard) and the strap number in the report, for the record, and gave an overview of the request. The applicant is seeking a special exception in the DOWNTOWN zoning district that would allow "consumption of alcoholic beverages on the premises in a restaurant that provides outdoor seating within 500 ft. of a dwelling that is under separate ownership." This would include the existing patio area, including the part located in the EC zoning district but landward of the existing retaining wall, and applicant specifically requests that it includes beer, wine and liquor.

Staff recommendation is approval with some conditions. The "Findings and Conclusions" discuss the request in some detail, with some history as to the original

alcoholic beverage use permitted in 1995. The seating was limited to a specific floor area in square feet and number of seats and alcohol was limited to a 2COP state license, which allows only beer and wine service. Additionally, there was a restriction on outdoor entertainment. There were physical changes to the property between 1995 and 2006, as well as an appeal in which the Town Council modified some of these conditions, though not the condition limiting the type of state license.

Dr. Shockey suggested that the only condition the LPA might want to discuss would be hours of operation. He said that the Town has an ordinance that prohibits alcoholic beverage sales, service and consumption between the hours of 2:00 and 7:00 AM of each day. If the hours were to be required to be more limited, evidence to show why the limitation was necessary ought to be introduced and discussed. Dr. Shockey asked that the report be entered into the record as staff's testimony.

A suggestion was made to change the hours of service to limit the allowable hours to the actual hours currently proposed by the applicant for operation of the business. Dr. Shockey commented that the close proximity of a few dwelling units might be a factor the LPA could point to if they wished to recommend such a condition. Ms. Kay had a question about page 8 wherein it states "the immediate vicinity is within the Pedestrian Commercial category, except for the beach..." Dr. Shockey explained the boundary between the Pedestrian Commercial land use category and the Recreation category was set decades ago and partly accounted for the locations of buildings, but not always decks, patios, and other smaller objects that may have been in existence at the time. The County's rules for what could take place near the beach also were not exactly the same as the Town's. In this case, a brick patio exists between the wooden retaining wall and the coastal construction setback line, and the County's original approval of the special permit for this location included that area as outdoor seating.

Another question was raised as to where the 2:00 AM to 7:00 AM guideline came from. Dr. Shockey explained that one of the first ordinances passed by the Town set the external boundaries of hours for alcoholic beverage sales, service, and consumption for all establishments in the Town. In approving individual locations, more limited hours can be set for each location, depending on their zoning of the area and as necessary to mitigate effects of the business on the health, safety and welfare of the immediate community. However, he pointed out, some businesses were "Grandfathered" into their current operating conditions and only have to abide by the ordinance that prevents them from serving between 2 AM and 7 AM. Others have applied for zoning approval under more recent rules and received the special exceptions or administrative approvals that limit them to service during more restricted hours.

Mr. Ryffel asked if there had been any letters of objection and Dr. Shockey could not recall any related to this case or during the Town Council appeal a few years ago. Mr. Ryffel opined generally that it would be good to include a section in the staff report noting any letters of objection from the citizens. Ms. Dalton added that this is a good

idea but that it should include all letters, in support or against.

Mr. Ciniello again spoke and elaborated on the hours of operation, assuring that his business will be responsible and probably not use the earlier hours but wants them included because all other businesses have them and he feels it is only fair to keep this consistent.

Mr. Ryffel asked for public comment, and no one came forward. Ms. Kay commented that she did not approve of expanding alcoholic beverage activities into the EC zoning district. There was LPA discussion including whether to change the hours of operation for all business so that all are serving during the same hours, or to restrict individual businesses piecemeal. Mr. Ryffel commented that he didn't feel the request involved expanding into the EC zoning district since the patio was already included in the licensed area, and the applicant was merely asking to change the type of alcohol they would be able to serve.

Motion: Mr. Kosinski moved to recommend approval of the requested special exception SEZ2010-0007, Nemo's on the Beach, selecting the recommended findings and conclusions as stated in the "Findings of Facts" in the draft resolution:

#1. "changed or changing conditions exist that make the request approval, as recommended, appropriate;"

#2. "the request, as conditioned, is consistent with the goals, objectives, policies and intent of the FMB Comp Plan;"

#3. "the request, as conditioned, meets all performance and locational standards set forth for the proposed use;"

#4. "the request, as conditioned, will protect, conserve or preserve environmentally critical areas and natural resources;"

#5. "the request, as conditioned, will be compatible with existing or planned uses and will not cause damage, hazard, nuisance or other detriment to persons or property;"

#6. "the request, as conditioned, will be in compliance with applicable general zoning provisions and supplemental regulations pertaining to the use set forth in the LDC Chapter 34."

Seconded by Mr. Moorefield

Vote: Motion passes 3 to 2, with Mr. Kakatsch and Ms. Kay opposed. Mr. Kakatsch added that he only opposes the hours of operation and it is nothing against this particular applicant, but he would like the times changed for all beach businesses. Ms. Kay feels that this is expansion of alcohol into the EC zone and does not support this.

Hearing closed.

B. Ordinance 10-xx Amending LDC Chapter 34, Article IV, Div. 26 (Parking)

Dr. Shockey referred to the packets given to members which included the draft resolution for recommending the ordinance to Town Council, and an ordinance that references Exhibit A, which is code language that would be adopted. He gave a brief overview of places in the Exhibit A where there are the options regarding different

language for specific sections of the code.

Mr. Ryffel opened the hearing and asked Dr. Shockey to begin with the first recommendation and go through them, with discussion about each. Dr. Shockey began with pg. 2, Parking Plan, and listed the options: "A parking plan is required for..." Option #1-"all uses," or Option #2-"all uses except single family and 2 family dwelling units." There was a consensus for Option #2.

Pg. 3, Sec. 34-201-5, Sub.7, Pedestrian System: Option #1: "Walkways must be provided which accommodate safe and convenient pedestrian movement..." or Option #2: "Walkways must be provided which accommodate safe and convenient pedestrian movement from vehicles to building entrances and other walking destinations..." There was discussion about the differences. There was a consensus for Option #1.

Pg. 4, Sec. 34-201-6, Sub. 4, Delineation of Spaces-sub. 3: "Parking spaces for the disabled must be..." Option #1: "permanently outlined in blue with the outline replenished when necessary..." or Option #2 contains the same language as Option #1 except that "permanently outlined in blue with the outline replenished when necessary..." is removed. There was a consensus for Option #2.

Pg. 10, Requirements for a Seasonal Parking lot that operates for multiple years: "a total of (insert number of years) consecutive or non-consecutive seasonal parking permits may issued for a parcel without requiring compliance with the requirements below." "The subsequent consecutive permit for the parcel, the permit application must comply with the following..." The suggested options are 3 years or 5 years, but upon discussion the LPA could recommend some other period. After discussion, there was a consensus for 3 years.

Mr. Ryffel opened the meeting for public comment. Dr. Jean Matthew asked what "Option 3" is and asked if the members could state what Option #3 is in the Disabled Parking section when making the motion to accept the resolution. Ms. Dalton suggested that Dr. Matthew receive a copy of the draft language and the motion maker call out the option being chosen.

Motion: Ms. Kay moved that Resolution 2010-04 be adopted as stated in the "Proposed findings, facts and conclusions of law":

the proposed amendment is in the best interest of the health, safety and welfare of the citizens...of Ft. Myers Beach; therefore, be it resolved that the LPA does recommend that Town Council approve and adopt the proposed Town Ordinance to amend the regulation of parking within municipal limits as set forth in Div. 26, Article 4 of Chapter 34 of the Town LDC and recommends the following findings of fact: Section 34-2014, Option #2--"all uses except single family and 2 family dwelling units."

Section 34-2015, Sub.7, Pedestrian System- Option #1: "Walkways must be provided which accommodate safe and convenient passing and movement..."

Section 34-2016, Sub. 4, Delineation of Space-sub. -Option 2-"clearly distinguishable as parking space designated for persons of disabilities and must be

posted with a permanent above grade sign bearing international symbol of accessibility and the caption 'parking by disabled permit only'; signs erected after Oct. 1, 1996 must indicate the penalty for illegal use of these spaces..."

Section 34-2022, Sub. c, - "a total of 3 consecutive or non-consecutive seasonal parking permits may be issued for a parcel without requiring compliance with the requirements below." "The subsequent consecutive permit for the parcel, the permit application must comply with the following requirements..."

Seconded by Mr. Kosinski.

Vote: Motion passed unanimously, with the absence of Mr. Van Duzer and Ms. Shamp.

Hearing closed.

V. ADMINISTRATIVE AGENDA

A. Update on sign regulations development from June 7 Council Meeting (verbal)

Dr. Shockey gave a brief overview of the results from this meeting and said there was an agreement to schedule time at the next meeting on June 21 for further discussion. He said that he had hoped there would be a public joint workshop so that the LPA and Council could all hear the public comments at the same time. Dr. Shockey gave the Council a few suggestions for moving ahead including a workshop for themselves, a joint workshop or sending it to LPA without holding a workshop, but at the June 7 meeting Council chose the first option, in a way, by deciding to discuss the matter again on June 21.

Motion: Mr. Ryffel moved to adjourn as the LPA and reconvene as the HPB.

Seconded by Mr. Kakatsch;

Vote: Motion passed 5-0.

VI. ADJOURN AS LPA-RECONVENE AS THE HPB

Ms. Kay called the meeting to order at 10:20 AM. She referred to information in the packets regarding the vista signs. She said there was a meeting with the HAC and they discussed the funding for this, as well as discussion about the historic recognition plaques. Dr. Shockey said he spoke to the town manager about the LPA budget for the coming year and he agreed to include the \$2000.00 in a line item for these activities. Dr. Shockey agreed that there should be some work done on developing a concept of where these vistas should be located and what they should be like. He suggested that Theresa Schober be heavily involved since she has a grasp of what would work best as well as a good working relationship with some of the business community.

Motion: Ms. Kay moved that the HPB present their idea to Council to move the project forward.

Seconded by Mr. Kakatsch;

Vote: Motion passed 5-0, with 2 members absent.

Mr. Kakatsch suggested trying to use concrete benches, like the ones located at bus stops, etc., to advertise the historic sites and projects in town. This will be discussed again at a later date.

Motion: Mr. Ryffel moved to adjourn as the HPB and reconvene as the LPA.

Seconded by Mr. Kosinski;

Vote: Motion passed 5-0, with 2 members absent.

VII. ADJOURN AS HPB AND RECONVENE AS LPA

Reconvene at 10:30 AM with all above members still present.

VIII. LPA MEMBER ITEMS AND REPORTS

Mr. Kakatsch presented a few items of concern that he said he just wanted to bring up for discussion. His first concern is the municipal building and he thinks that this is the time to buy property. He asked if the beach has an "action" plan for the oil spill. Another concern is the Seafarer property at the beach and the tax loss involved if the County buys it. He also wonders about the progress on the north end of Estero Blvd. and beach renourishment. Mr. Ryffel advised that beach renourishment was discussed yesterday at the Council meeting and it is slowly moving forward but will not likely progress until after hurricane season. He said that these items are valid concerns but thought they would be better answered by the Council or the Town Manager. Some discussion ensued regarding the Seafarer property and Ms. Dalton updated the group with information she got during a recent meeting with County and other officials. The town was also asked to suggest uses they would be interested in for that property and she sees these items probably coming up for future discussions by the town. Dr. Shockey also advised that Keith Laakkonen is heavily involved in the town's participation in the planning for the oil spill response and further detail from the countywide and regional plans would come from him. Lastly, Dr. Shockey said that the Estero Blvd. project is still ongoing but this is a slow process. Ms. Dalton stated that the council just approved night construction to move it along and referred to a "comprehensive" information packet online regarding this. It was suggested that a newsletter of sorts should be published to keep people advised. Ms. Kay reminded the group that there had been a weekly item in the newspaper by the Town Manager and asked if that was still a possibility. Ms. Dalton said it was last year but the current manager hasn't adopted this practice. The LPA would like to see something like this again and/or ask the town manager to attend the LPA meetings, at least occasionally.

Mr. Ryffel advised that this is Attorney Anne Dalton's last meeting. Ms. Dalton said that the town will now contract the firm of Fowler White, with attorney Jim Humphrey as the principal, to perform town and LPA services, with Ms. Dalton assisting as Special Counsel to the town to finish some specific projects. Mr. Ryffel read Resolution 2010-05, recognizing Ms. Dalton's superior service:

"Whereas Anne Dalton has served as served the LPA as LPA Attorney since April 4, 2005, and whereas Anne Dalton has served as served as Attorney to the Historic Preservation Board since April 4, 2005, and whereas during her tenure as LPA and HPB attorney, Anne Dalton has provided exemplary service to the Town of Fort Myers Beach, it is hereby resolved by the LPA of the Town of Fort Myers Beach, FL as follows: Anne Dalton is recognized for her outstanding work, outstanding guidance and dedicated

service to the Town of Fort Myers Beach. She created a positive and highly professional environment for the LPA and HPB while maintaining an attitude towards colleagues, citizens and staff during all discussions and deliberations. She discharged her duties with grace and highest ethical standards while respecting all laws, rules and regulations of the Town and the LPA. Her contribution to the progress, function and efficiency of the LPA has positively impacted the welfare of the Town of Fort Myers Beach and its citizens.”

Mr. Ryffel said that it is well stated, yet understated. Ms. Dalton thanked the members and commended them on their dedication and service to the community.

Motion: Ms. Kay moved to adopt Resolution 2010-05.

Seconded by Mr. Kakatsch;

Vote: Motion passed 5-0, with 2 members absent.

IX. LPA ATTORNEY ITEMS

Ms. Dalton reported that the new town attorney, Mr. Humphrey may be assisted by Marilyn Miller.

X. COMMUNITY DEVELOPMENT DIRECTOR ITEMS

Nothing to report.

XI. LPA ACTION LIST REVIEW

- Shipwreck-Oct. 12, 2010
- ROW-Residential Connection-TBD; Dr. Shockey
- LDC 613-14 10-25 Storm Water; TBD
- HPB Budget request for Town Council-Ms. Kay
- Resolution of HPB budget request-Ms. Dalton
- Post-disaster reconstruction/recovery-Ms. Dalton said she has provided the most recent draft of the ordinance to Council and will meet with the new attorney to make the change over and she will be sure he realizes that this is an urgent issue. She and Mr. Ryffel agree that this is of the utmost importance.

XII. PUBLIC COMMENT

No comment.

XIII. ADJOURNMENT

Motion: Ms. Kay moved to adjourn.

Seconded by Mr. Kosinski;

Vote: Motion passes 5-0.

Meeting adjourned at 11:17 AM.

Adopted _____ with/without changes. Motion by _____
(DATE)

Vote: _____

- End of document

RESOLUTION OF THE LOCAL PLANNING AGENCY OF
THE TOWN OF FORT MYERS BEACH FLORIDA
RESOLUTION NUMBER 2010-06
FMBSEZ2010-0007 (Nemos on the Beach Resolution)

WHEREAS applicant Estero Beach Holdings, LLC ("applicant") has requested a special exception in the DOWNTOWN zoning district to allow consumption-on-premises of alcoholic beverages in a restaurant providing an outdoor seating area that is within 500 feet of a dwelling unit under separate ownership, including an existing patio surfaced with paver blocks located landward of an existing retaining wall but within the EC zoning district, to include beer, wine and liquor; and

WHEREAS the subject property is located at 1154 Estero Boulevard, Fort Myers Beach, FL 33931; and

WHEREAS the applicant has indicated that the STRAP for the subject property is 24-46-23-W3-000011.0000 and the legal description of the subject property is attached hereto as Exhibit "A" and hereby incorporated by reference; and

WHEREAS a public hearing on this matter was legally advertised and held before the Local Planning Agency (LPA) on June 8th, 2010; and

WHEREAS at the hearing the LPA gave full and complete consideration to the request of Applicant, recommendations of staff, the documents in the file, and the testimony of all interested persons, as required by Fort Myers Beach Land Development Code (LDC) Section 34-88.

IT IS HEREBY RESOLVED BY THE LPA OF THE TOWN OF FORT MYERS BEACH, FLORIDA, as follows:

Based upon the presentations by the applicant, staff, and other interested persons at the hearing, and review of the application and the standards for granting special exceptions, the LPA recommends the following findings of fact, conditions for approval, and conclusions for consideration by the Town Council:

The LPA recommends that the Town Council **APPROVE** the applicant's request for a special exception to permit consumption on premises of beer, wine and liquor in the DOWNTOWN zoning

RECOMMENDED CONDITIONS OF APPROVAL:

1. The area of the subject establishment used for consumption on premises must be confined entirely to the areas shown on the floor plan attached hereto and incorporated herein by reference as **Exhibit B**, including the interior of the first floor of the building, the front porch and the rear patio.

2. Music and other audible entertainment are prohibited before 10:00 am and after 10:00 pm each day in outdoor seating areas and must comply at all times with applicable ordinances.

3. Sales, service, and consumption of alcoholic beverages must not begin earlier than 7:00 AM and must end no later than 2:00 AM during each day.

4. The use must comply at all times with the provisions of LDC Section 34-1264(k), as may be amended from time to time, and must at all times be licensed as a permanent public food service establishment with seating, in accordance with Chapter 509, Florida Statutes, and applicable state agency rules.

5. The use must comply at all times with lighting standards, including the regulations for the protection of Sea Turtles provided in LDC chapter 14, article II.

6. The special permit approved by the Lee County Hearing Examiner in case # 95-07-162.02S is hereby declared null and void.

RECOMMENDED FINDINGS AND CONCLUSIONS:

In accordance with the requirements of LDC Sections 34-84 and 34-88 regarding consideration of eligibility for a special exception, the LPA recommends that the Town Council make the following findings and reach the following conclusions:

1. Changed or changing conditions **exist** that make the requested approval, as conditioned, appropriate.:

The location of the request was approved in 1995 for consumption of alcoholic beverages on the premises in conjunction with a restaurant, and the allowable seating areas were established through the appeal in 1007. The Comprehensive Plan and Land Development Code do not distinguish classes of restaurants that (in addition to non-alcoholic beverages and food) serve beer only, beer and wine only, or beer, wine, and liquor. The applicant's request does not implicate a change in use except insofar as the approved use was limited by special conditions attached to a prior special permit, subsequently modified by Town Council determination of an administrative appeal. The modifications to the allowable seating area through the 2007 appeal have made it possible for the establishment to obtain a special restaurant (SRX) series beverage license.

2. The requested special exception, as conditioned, **is** consistent with the goals, objectives, policies, and intent of the Fort Myers Beach Comprehensive Plan:

The subject property is in the Pedestrian Commercial FLUM category on Estero Boulevard and other bars, hotels, restaurants and retail stores. Comp Plan **Policy 4-B-6**, regarding the Pedestrian Commercial FLUM, states that commercial activities must contribute to the pedestrian-oriented public realm. The beach and streets northward to Lynn Hall Park and southward to the Lani Kai are heavily traveled by pedestrian beachgoers. The existing restaurant is oriented toward this foot traffic, though it has essentially no parking area for patrons arriving by automobile. The outdoor seating areas are located on porches and patios separated by railings and elevation from the sidewalks and the beach.

3. The requested special exception, as conditioned, **meets or exceeds** all performance and locational standards set forth for the proposed use.

A restaurant is a use permitted by right in the Downtown zoning district. Because dwelling units under separate ownership are located within 500 feet of the subject property, a special exception is necessary in order to allow an outdoor seating area. Performance and locational standards for the restaurant use were addressed through permitting for prior remodeling activities and through the 1995 variance as modified by the 2007 administrative appeal. There are no specific performance or locational standards in Town regulations for a restaurant with outdoor seating areas that serves beer, wine, and liquor, that differ from the standards that apply to a restaurant with outdoor seating that serves beer and wine only.

4. The requested special exception, as conditioned, **will** protect, conserve, or preserve environmentally critical areas and natural resources:

Construction of additional structures in environmentally critical areas has not been requested or permitted. The existing wood retaining wall is not proposed to be replaced or expanded. As conditioned, the use will be required to comply with current sea turtle protection standards.

5. The requested special exception, as conditioned, **will** be compatible with existing or planned uses and **will not** cause damage, hazard, nuisance or other detriment to persons or property:

The existing surrounding uses include a hotel, a shopping center, bars and restaurants, and a few dwelling units. Within the Pedestrian Commercial Future Land Use Map category, adjacent lots could potentially be redeveloped with commercial or mixed use buildings in accord with the regulations of the DOWNTOWN zoning district or through planned development rezoning. The recommended conditions clearly restrict the use to specific areas of the floor plan and prohibit any further expansion.

6. The requested special exception, as conditioned, **will** be in compliance with the applicable general zoning provisions and supplemental regulations pertaining to the use set forth in LDC Chapter 34:

The existing restaurant use has already received a variance related to parking requirements, and was required to comply with lighting and other similar requirements set forth in LDC Chapter 34 at the time of remodeling. The consumption on premises of alcoholic beverages use, as conditioned, will be required to comply with the applicable standards in LDC Chapter 34, Article IV, Division 5, for consumption on premises in a restaurant regardless of the type or series of state license. The appropriate limitations on an outdoor seating area for consumption on premises that is allowed by special exception are for Town Council to determine through the hearing process, during which process they should find that the conditions attached are reasonably related to the special exception requested.

THE REMAINDER OF THIS PAGE IS INTENTIONALLY LEFT BLANK.

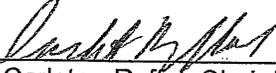
The foregoing Resolution was adopted by the LPA upon a motion by LPA Member Joe Kosinski and second by LPA Member Chuck Moorefield, and upon being put to a vote, the result was as follows:

Joanne Shamp, Chair absent
Carleton Ryffel, Member/Chair Pro Tem aye
Chuck Moorefield, Member aye
John Kakatsch, Member nay

Bill Van Duzer, Vice Chair absent
Rochelle Kay, Member nay
Joe Kosinski aye

DULY PASSED AND ADOPTED THIS 8th day of June, 2010.

LPA of the Town of Fort Myers Beach

By: 
Carleton Ryffel, Chair Pro Tem
For: Joanne Shamp, LPA Chair

Approved as to legal sufficiency:

By: 
Anne Dalton, Esquire
LPA Attorney

ATTEST:

By: 
Michelle Mayher, Town Clerk

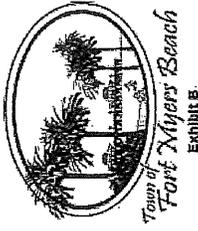
Exhibit A
SEZ2010-0007

A tract or parcel of land lying in Section 24, Township 46 South, Range 23 East, Estero Island, Lee County, Florida, said parcel being more particularly described as follows:

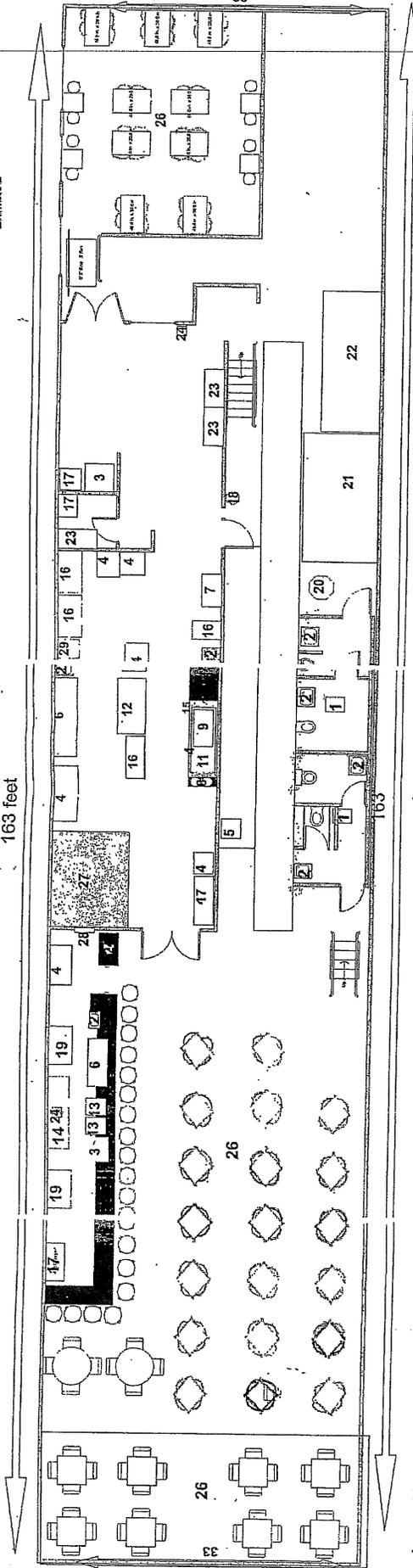
Commencing at the southwest corner of Block E, CRESCENT PARK ADDITION, as recorded in Plat Book 4, Page 46, Public Records of Lee County, Florida, on the east line of Section 24, Township 46 South, Range 23 East; thence S.00°44'25"E. on said east line for 53.28 feet to a point on the southerly right-of-way line of Estero Boulevard; thence N.70°35'51"W. on said southerly line for 122.74 feet to the **Point of Beginning** of the property herein described; thence continue N.70°35'51"W. on said southerly line for 35 feet; thence S.19°24'09"W. for 284.27 feet to the waters of the Gulf of Mexico; thence southeasterly along said waters for 35.17 feet, more or less, to a point on a line perpendicular to aforesaid southerly right-of-way line; thence N.19°24'09"E. for 287.74 feet to the **Point of Beginning**.

Description based on survey by Charles D. Knight, LS6056, BWLK project no. 40032, dated 12/8/08. Basis for bearings: southerly line of Estero Boulevard bearing S.70°35'51"E.

Nemo's On The Beach



163 feet



Equipment List

- | | |
|------------------------------------|------------------------------|
| 1. Ventilation Fan | 20. Grease Trap |
| 2. Hand Sinks | 21. Propane Tank Area |
| 3. Ice Machine | 22. Dumpster Area |
| 4. Refrigerator/Freezer | 23. Dry Storage |
| 5. Mop Sink | 24. POS System |
| 6. 3-Compartment sink w/drainboard | 25. Bar |
| 7. Steam Table | 26. Table & Chairs |
| 8. Burner Stove | 27. Walk In Cooler |
| 9. Flat - Top Griddle | 28. Draft Beer Taps |
| 10. Fryer | 29. Steamer |
| 11. Char Broiler | 30. Portable Fire Extinguish |
| 12. Sandwich Prep Table | |
| 13. Ice Bins | |
| 14. Bottle Beer Refrigerator | |
| 15. Hood with Suppression System | |
| 16. Work Table | |
| 17. Pepsi Bag N Box System | |
| 18. Water Heater | |
| 19. Bottle Chilllers | |

RESOLUTION OF THE TOWN COUNCIL OF
THE TOWN OF FORT MYERS BEACH FLORIDA
RESOLUTION NUMBER 10-15

NEMOS ON THE BEACH COP

WHEREAS applicant Estero Beach Holdings, LLC has requested a special exception in the DOWNTOWN zoning district to allow consumption-on-premises of alcoholic beverages in a restaurant providing an outdoor seating area that is within 500 feet of a dwelling unit under separate ownership, including an existing patio surfaced with paver blocks located landward of an existing retaining wall but within the EC zoning district, to include beer, wine and liquor; and

WHEREAS the subject property is located at 1154 Estero Boulevard, Fort Myers Beach, FL 33931; and

WHEREAS the applicant has indicated that the STRAP for the subject property is 24-46-23-W3-00011.0000 and the legal description of the subject property is attached hereto as Exhibit "A" and incorporated herein by reference; and

WHEREAS a public hearing on this matter was legally advertised and held before the Local Planning Agency (LPA) on June 8, 2010; at which time the LPA gave full and complete consideration to the request of the Applicant, recommendations of staff, the documents in the file, and the testimony of all interested persons, as required by Fort Myers Beach Land Development Code (LDC) section 34-88, and recommended approval of applicant's request, with various recommended conditions of approval as set forth more fully in LPA Resolution No. 2010-06; and

WHEREAS at its meeting of June 8, 2010, the LPA instructed Town staff to bring this application forward to Town Council without the necessity of having approved LPA minutes; and

WHEREAS, a public hearing on this matter was legally advertised and held before the Town council on July 12, 2010, at which time the town council gave full and complete consideration to the request of Applicant, LPA resolution 2010-06, the recommendations of staff, the documents in the file, and the testimony of all interested persons, as required by Fort Myers Beach Land Development Code (LDC) Section 34-88.

IT IS HEREBY RESOLVED BY THE TOWN COUNCIL OF THE TOWN OF FORT MYERS BEACH, FLORIDA, as follows:

Based upon the presentations by the applicant, staff, and other interested persons at the hearing, and review of the application, LPA Resolution 2101-06 and the standards for granting special exceptions, the Town Council makes the following findings of fact, and reaches the following conclusions:

The Town Council **APPROVES** the applicant's request for a special exception to permit consumption on premises of beer, wine and liquor in the DOWNTOWN zoning district, with such approval subject to the following conditions:

CONDITIONS OF APPROVAL:

1. *The area of the subject establishment used for consumption on premises must be confined entirely to the areas shown on the floor plan attached hereto and incorporated herein by reference as **Exhibit B**, including the interior of the first floor of the building, the front porch and the rear patio.*

2. *Music and other audible entertainment are prohibited before 10:00 am and after 10:00 pm each day in outdoor seating areas and must comply at all times with applicable ordinances.*

3. *Sales, service, and consumption of alcoholic beverages must not begin earlier than 7:00 AM and must end no later than 2:00 AM during each day.*

4. *The use must comply at all times with the provisions of LDC Section 34-1264(k), as may be amended from time to time, and must at all times be licensed as a permanent public food service establishment with seating, in accordance with Chapter 509, Florida Statutes, and applicable state agency rules.*

5. *The use must comply at all times with lighting standards, including the regulations for the protection of Sea Turtles provided in LDC chapter 14, article II.*

6. *The special permit approved by the Lee County Hearing Examiner in case # 95-07-162.02S is hereby declared null and void.*

FINDINGS AND CONCLUSIONS:

In accordance with the requirements of LDC Sections 34-84 and 34-88 regarding consideration of eligibility for a special exception, the Town Council makes the following findings and reach the following conclusions:

1. Changed or changing conditions exist that make the requested approval, as conditioned, appropriate:

The location of the request was approved in 1995 for consumption of alcoholic beverages on the premises in conjunction with a restaurant, and the allowable seating areas were established through the appeal in 1007. The Comprehensive Plan and Land Development Code do not distinguish classes of restaurants that (in addition to non-alcoholic beverages and food) serve beer only, beer and wine only, or beer, wine, and liquor. The applicant's request does not implicate a change in use except insofar as the approved use was limited by special conditions attached to a prior special permit, subsequently modified by Town Council determination of an administrative appeal. The modifications to the allowable seating area through the 2007 appeal have made it possible for the establishment to obtain a special restaurant (SRX) series beverage license.

2. The requested special exception, as conditioned, is consistent with the goals, objectives, policies, and intent of the Fort Myers Beach Comprehensive Plan:

*The subject property is in the Pedestrian Commercial FLUM category on Estero Boulevard and other bars, hotels, restaurants and retail stores. Comp Plan **Policy 4-B-6**, regarding the Pedestrian Commercial FLUM, states that commercial activities must*

contribute to the pedestrian-oriented public realm. The beach and streets northward to Lynn Hall Park and southward to the Lani Kai are heavily traveled by pedestrian beachgoers. The existing restaurant is oriented toward this foot traffic, though it has essentially no parking area for patrons arriving by automobile. The outdoor seating areas are located on porches and patios separated by railings and elevation from the sidewalks and the beach.

3. The requested special exception, as conditioned, **meets or exceeds** all performance and locational standards set forth for the proposed use.

A restaurant is a use permitted by right in the Downtown zoning district. Because dwelling units under separate ownership are located within 500 feet of the subject property, a special exception is necessary in order to allow an outdoor seating area. Performance and locational standards for the restaurant use were addressed through permitting for prior remodeling activities and through the 1995 variance as modified by the 2007 administrative appeal. There are no specific performance or locational standards in Town regulations for a restaurant with outdoor seating areas that serves beer, wine, and liquor, that differ from the standards that apply to a restaurant with outdoor seating that serves beer and wine only.

4. The requested special exception, as conditioned, **will** protect, conserve, or preserve environmentally critical areas and natural resources:

Construction of additional structures in environmentally critical areas has not been requested or permitted. The existing wood retaining wall is not proposed to be replaced or expanded. As conditioned, the use will be required to comply with current sea turtle protection standards.

5. The requested special exception, as conditioned, **will** be compatible with existing or planned uses and **will** cause damage, hazard, nuisance or other detriment to persons or property:

The existing surrounding uses include a hotel, a shopping center, bars and restaurants, and a few dwelling units. Within the Pedestrian Commercial Future Land Use Map category, adjacent lots could potentially be redeveloped with commercial or mixed use buildings in accord with the regulations of the DOWNTOWN zoning district or through planned development rezoning. The recommended conditions clearly restrict the use to specific areas of the floor plan and prohibit any further expansion.

6. The requested special exception, as conditioned, **will** be in compliance with the applicable general zoning provisions and supplemental regulations pertaining to the use set forth in LDC Chapter 34:

The existing restaurant use has already received a variance related to parking requirements, and was required to comply with lighting and other similar requirements set forth in LDC Chapter 34 at the time of remodeling. The consumption on premises of alcoholic beverages use, as conditioned, will be required to comply with the applicable standards in LDC Chapter 34, Article IV, Division 5, for consumption on premises in a restaurant regardless of the type or series of state license. The appropriate limitations on an outdoor seating area for consumption on premises that is allowed by special exception are for Town Council to determine through the hearing process, during which

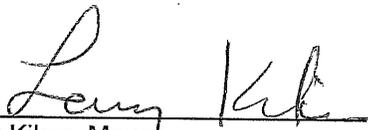
process they should find that the conditions attached are reasonably related to the special exception requested.

Upon Motion made by Vice Mayor Raymond and seconded by Council Member List, this Resolution was

DULY PASSED AND ADOPTED ON THIS 12th DAY OF JULY, 2010.

Larry Kiker, Mayor	aye	Bob Raymond, Vice Mayor	aye
Tom Babcock	absent	Jo List	aye
Alan Mandel	aye		

DULY PASSED AND ADOPTED THIS 12th DAY OF JULY 2010,

By: 
Larry Kiker, Mayor

ATTEST:

By: 
Michelle D. Mayher, Town Clerk

Approved as to form and legal sufficiency:

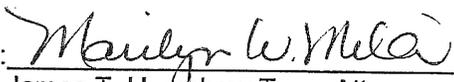
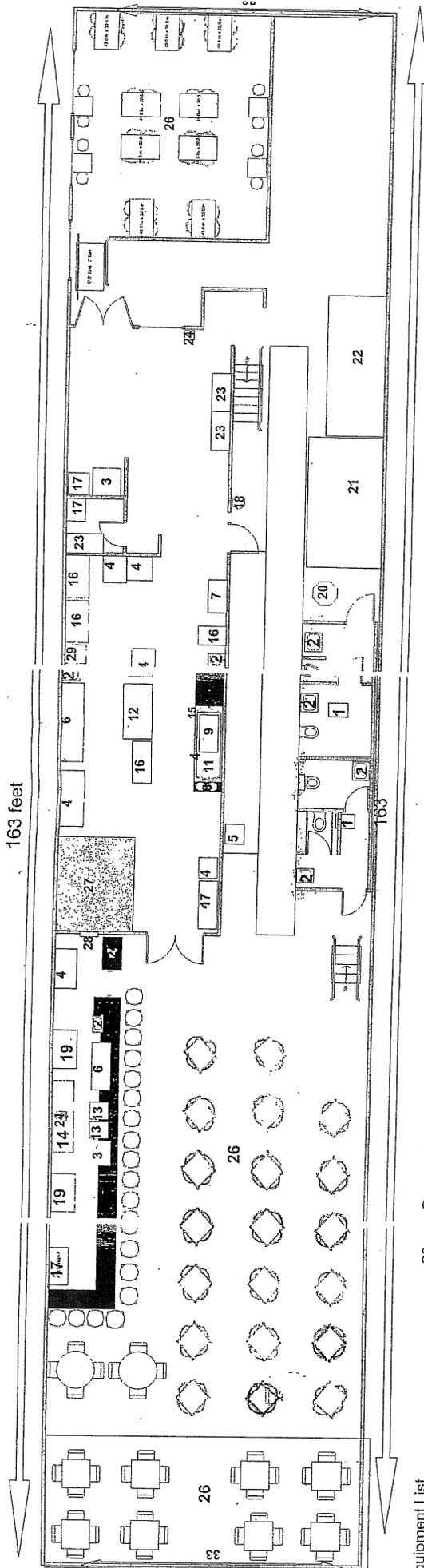
By: 
James T. Humphrey, Town Attorney

Exhibit "A" Attachment

From the SW corner of Block E, CRESCENT PARK ADDITION, as recorded in Plat Book 4, Page 46 of the Public Records of Lee County, Florida, on the East line of Section 24, Township 46 South, Range 23 East, run along said line for 53.28 feet to the South line of existing county road (Estero Blvd.) right of way 50 feet wide; thence run Northwesterly at an included angle of 69 48' 15" with said section line, along the South side of said right-of-way for 122.63 feet to the Point of Beginning of the land hereby conveyed; thence continue along the South line of said right-of-way for a distance of 35 feet; thence run Southwesterly perpendicular to said road a distance of 179 feet, more or less, to the Gulf of Mexico; thence run Southeasterly along said Gulf of Mexico to a point perpendicular to the Point of Beginning of the lands hereby conveyed, being approximately 35 feet, more or less, thence run Northerly and perpendicular with the right-of-way of the existing county road 179 feet, more or less, to the Point of Beginning, being on Estero Island, Lee County, Florida.

Exhibit "B"

Nemo's On The Beach



Equipment List

- | | |
|------------------------------------|------------------------------|
| 1. Ventilation Fan | 20. Grease Trap |
| 2. Hand Sinks | 21. Propane Tank Area |
| 3. Ice Machine | 22. Dumpster Area |
| 4. Refrigerator/Freezer | 23. Dry Storage |
| 5. Mop Sink | 24. POS System |
| 6. 3-Compartment sink w/drainboard | 25. Bar |
| 7. Steam Table | 26. Table & Chairs |
| 8. 2 Burner Stove | 27. Walk In Cooler |
| 9. Flat - Top Griddle | 28. Draft Beer Taps |
| 10. Fryer | 29. Steamer |
| 11. Char Broiler | 30. Portable Fire Extinguish |
| 12. Sandwich Prep Table | |
| 13. Ice Bins | |
| 14. Bottle Beer Refrigerator | |
| 15. Hood with Suppression System | |
| 16. Work Table | |
| 17. Pepsi Bag N Box System | |
| 18. Water Heater | |
| 19. Bottle Chillers | |