

Town of Fort Myers Beach
Agenda Item Summary

Blue Sheet Number: 2012-035

1. Requested Motion: Motion to adopt Ordinance 12-02
Amending Parasail and Personal Watercraft vendor regulations

Meeting Date: 5/07/12

Why the action is necessary: Amends Parasail and Personal Watercraft vendor regulations

What the action accomplishes: Complies with State law to hold a public hearing for adoption of ordinances.

2. Agenda:

Consent
 Administrative
 Public Hearing

3. Requirement/Purpose:

Resolution
 Ordinance
 Other

4. Submitter of Information:

Council
 Town Staff
 Town Attorney

5. Background: The parasail and personal watercraft regulations are being amended to clear up some inconsistencies and conflicting provisions. The cap on the number of Parasailing vendor license is being increased from 6 to 7, to be consistent with the number of existing vendors. Further, the revisions will allow existing vendors to move their license from one property to another, as may be necessary to accommodate changes in property rental arrangements. These revisions will not change any location or other performance standards. The proposed amendments were reviewed by the LPA in a public hearing and they have recommended approval. Copies of Ordinance 12-02, LPA Resolution, LPA Minutes and Staff Report are attached.

6. Alternative Action: Decline to adopt the proposed ordinance or continue the hearing to another date certain.

7. Management Recommendations: Adopt ordinance 12-02

8. Recommended Approval:

Town Manager	Town Attorney	Finance Director	Public Works Director	Community Development Director	Parks & Recreation Director	Town Clerk
						

9. Council Action:

Approved Denied Deferred Other

ORDINANCE 12-02

AN ORDINANCE AMENDING CHAPTER 27, ARTICLE IV OF THE TOWN OF FORT MYERS BEACH LAND DEVELOPMENT CODE, "ADDITIONAL RULES AND PROCEDURES APPLYING TO BOTH PERSONAL WATERCRAFT AND PARASAILING," AMENDING SECTION 27-52, "PWVL AND PAL APPLICATIONS; REGULATORY FEES," TO CLARIFY THE NUMBER OF PWVL AND PAL LICENSES THAT ARE PERMITTED; AMENDING SECTION 27-55, "TRANSFERABILITY OF PWVL AND PAL LICENSES; GRANDFATHER CLAUSE," TO CLARIFY THE CONDITIONS UNDER WHICH SUCH LICENSES MAY BE TRANSFERRED TO A DIFFERENT LOCATION; PROVIDING SEVERABILITY AND AN EFFECTIVE DATE.

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

Section 1. Section 27-52 of the Fort Myers Beach Land Development Code is hereby amended as follows:

Sec. 27-52. PWVL and PAL applications; regulatory fees.

...

(d) **Cap on number of licenses.** PWVLs and PALs and license renewals shall be issued on an annual basis coinciding with the town's fiscal year, October 1 through September 30.

(1) ~~The town manager may issue~~ There shall be no more than ten (10) PWVL licenses outstanding at any point of in time.

(2) ~~The town manager may issue~~ There shall be no more than seven (7) ~~6~~ PAL licenses outstanding at any point of in time.

(3) See § 27-55 for regulations on transfers of existing PWVLs and PALs.

Section 2. Section 27-55 of the Fort Myers Beach Land Development Code is hereby amended as follows:

Sec. 27-55. Transferability of PWVL and PAL licenses; grandfather clause.

(a) **Transferability.** Provided that this chapter has been complied with, the PWVL or PAL is transferable to a new owner and/or to a different location if:

(1) The location of the business will be transferred to complies with the minimum separation requirements of this chapter, ~~or is "grandfathered in" under subsection (b) below;~~ and

(2) The new business owner files an amended application with the town providing the information required in this chapter; and

(3) Transferability of a PALs to a new conforming locations ~~may is~~ only be allowed when there are seven (7) or fewer licenses fall below 6 outstanding. ~~If there are 6 or fewer PALs issued, then a license at a nonconforming location can move that license to a conforming location and surrender the nonconforming location which still results in 6 or fewer total licenses.~~

(4) Transferability of a PWVLs to a new conforming locations ~~may is~~ only be allowed when there are ten (10) or fewer licenses fall below 10. ~~If there are 10 or fewer PWVLs issued, then a license at a nonconforming location can move that license to a conforming location and surrender the nonconforming location which still results in 10 or fewer total licenses.~~

(b) ***Nonconforming PWVLs.*** Personal watercraft vendors that ~~have~~ who established or commenced business at their ~~existing~~ a locations on or before December 2, 1996, ~~but which may or may not~~ that does not comply with the location requirements set forth in this chapter and ~~the remainder of this code may continue to operate as a nonconforming use after December 2, 1996, unless terminated for failure to obtain the~~ a PWVL or renewal as required by this chapter, voluntary discontinuation of business for a period of thirty (30) days or more, or revocation of the PWVL permit.

(c) ***Nonconforming PALs.*** Parasail operators that ~~have~~ who established or commenced business at their ~~existing~~ a locations on or before January 21, 1997, and ~~which are in conformity with the location requirements of this code, but which may or may not~~ that does not comply with the location requirements set forth in this chapter, may continue to operate as a nonconforming use after January 21, 1997, unless terminated for failure to obtain the a PAL or renewal as required by this chapter, voluntary discontinuation of business for a period of thirty (30) days or more, or revocation of the PAL permit.

Section 3. Severability. If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions hereof.

Section 4. Effective Date. This ordinance shall take effect immediately upon adoption by the Town Council.

The foregoing Ordinance was adopted by the Town Council upon a motion by _____ and seconded by _____ and upon being put to a vote, the result was as follows:

Larry Kiker, Mayor
Joe Kosinski
Alan Mandel

Bob Raymond, Vice Mayor
Jo List

DULY PASSED AND ADOPTED THIS ____ DAY OF _____ 2012, BY THE
TOWN COUNCIL OF THE TOWN OF FORT MYERS BEACH

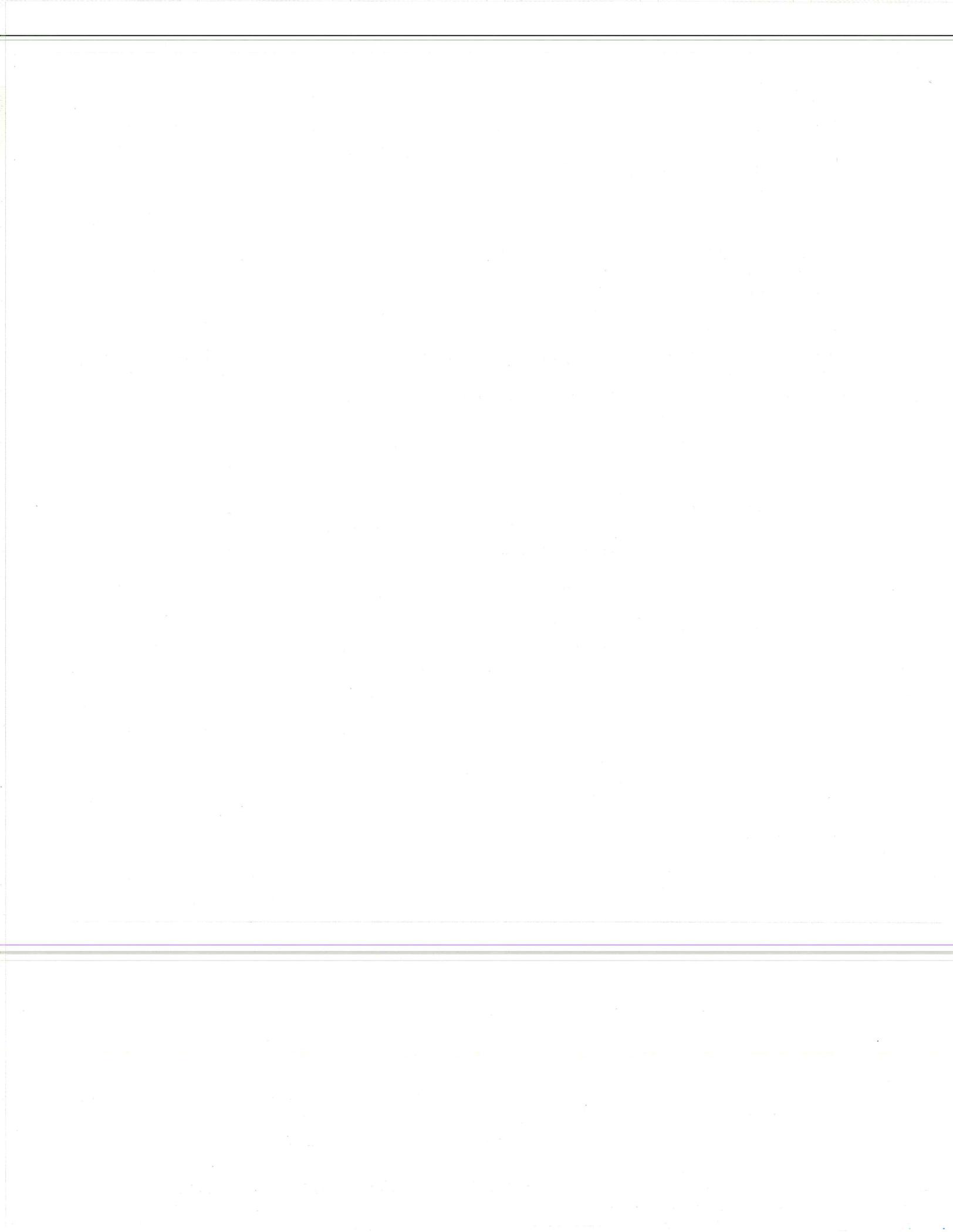
ATTEST:

By: _____
Larry Kiker, Mayor

By: _____
Michelle D. Mayher, Town Clerk

Approved as to form and legal sufficiency:

By: _____
FOWLER WHITE BOGGS, Town Attorney





MINUTES

**FORT MYERS BEACH
LOCAL PLANNING AGENCY
TOWN HALL – COUNCIL CHAMBERS
2523 ESTERO BOULEVARD
FORT MYERS BEACH, FLORIDA 33931**

October 11, 2011

I. CALL TO ORDER

Meeting was called to order at 9:00 a.m. by Joanne Shamp; other members present:

Alan Smith
John Kakatsch
Bill Van Duzer
Hank Zuba
Al Durrett
Jane Plummer

LPA Attorney, Marilyn Miller
Staff Present: Walter Fluegel, Community Development Director
Tina Ekblad, Planning Coordinator
Keith Laakkonen, Environmental Sciences Coordinator

II. PLEDGE OF ALLEGIANCE

III. INVOCATION – Bill Van Duzer

Local Planning Agency Members introduced themselves and gave a brief synopsis of their background and experience.

IV. MINUTES

A. Minutes of September 13, 2011

MOTION: Mr. Zuba moved to approve September 13, 2011 minutes; second by Mr. Kakatsch.

Ms. Shamp noted a minor scrivener's error on Page 15 to be corrected – "...she recommended having one scheduled~~one~~ as outlined in their procedural manual."

VOTE: Motion passed 7-0

V. Evaluation and Appraisal Report (EAR) Presentation

Community Development Director Fluegel introduced Mr. Jim LaRue of LaRue Planning and Management Services, Inc. who conducted the visioning services for the Town.

Mr. Jim LaRue, LaRue Planning and Management Services, Inc., distributed a handout and reviewed some legislative changes such as but not limited - previously an EAR was necessary every seven years and now the Town would only need a letter in 2014; the State would no longer have a Department of Community Affairs; expedited review; and optional concurrency. He summarized the visioning process which was conducted to assist in updating the Comprehensive Plan; and reported there was a great response and attendance at the two Visioning Workshops by the residents. He briefly discussed the results of the information garnered from the public at the Workshops and noted the Town's "community character". Mr. LaRue's presentation consisted of a review of the "Vision Our Town – The Results" which was a summary report outlining the input received at the Visioning Sessions that included comments on items such as:

- 'Keep it funky'; protect residential from commercial; Town Hall questions; consolidation of public facilities; protection of natural resources – water quality; infrastructure – bridge widening, transportation, parking improvements, and 'streetscaping'; sewer and water improvements; art facilities, etc.

He continued his presentation of the data collected from the Visioning Sessions, and reviewed within Section 5 of the Report recommended changes to the Comprehensive Plan based on the outcome statements that had received a 'super majority'. He explained how they based the recommendations on the input received and what seemed the most pressing in terms of Comprehensive Plan changes. He noted the page on legislative changes and reported the Town was now permitted to changes to the Comp Plan under the Expedited Review Process. He mentioned the comparison results on Page 5 of the Report with the 2007 EAR where the relocation of Estero Boulevard and the use of a roundabout were discussed, and the use of TIF within the CRA.

Mr. Smith asked for clarification of the term 'Downtown District' which was used several times within the document.

Community Development Director Fluegel described the approximately boundaries of the 'Downtown District'.

Ms. Shamp noted a map of the area contained in the back of the Comp Plan that indicated boundaries.

Community Development Director Fluegel thanked Mr. LaRue and his team for a great job in collecting all the information, then digesting it and translating it, and the creation of the final report. He noted the document was a good starting point for the conversation of updating the Comp Plan, and suggested the

LPA study the document closely in preparation for their future work related to the EAR and Comp Plan. He reported the second survey was currently on-line and staff was trying to understand and narrow down the issues a little further (i.e. Tax Increment Funding in the Downtown). He discussed the importance of Page 40, Recommended Changes to the Comprehensive Plan, which was basically the results of an outsider reviewing the policies, noting inconsistencies, and suggesting the ones staff should take a look at and consider a change.

Ms. Shamp questioned how the LPA would be involved with the next step in the EAR process.

Community Development Director Fluegel reported staff would be entering into a transition period due to the resignation of Planning Coordinator Ekblad at the end of the month, and then the Town would need to hire a new Planning Coordinator who would then encounter a training process; therefore, it would more than likely be December or January when the LPA would enter into this topic again.

Planning Coordinator Ekblad noted there was a copy of the second survey included in the report from Mr. LaRue, and there was a summary of the survey results based upon the point in time when the packets were compiled.

VI. PUBLIC HEARINGS

A. Parasail Ordinance – Amending Chapter 27, Article IV of the Town of Fort Myers Beach Land Development Code

Ms. Shamp opened the hearing at 9:29 a.m.

Community Development Director Fluegel announced the Ordinance was posted.

LPA Attorney Miller read the title of the ordinance:

AN ORDINANCE AMENDING CHAPTER 27, ARTICLE IV OF THE TOWN OF FORT MYERS BEACH LAND DEVELOPMENT CODE, “ADDITIONAL RULES AND PROCEDURES APPLYING TO BOTH PERSONAL WATERCRAFT AND PARASAILING,” AMENDING SECTION 27-52, “PWVL AND PAL LICENSES THAT ARE PERMITTED; AMENDING SECTION 27-55, “TRANSFERABILITY OF PWVL AND PAL LICENSES; GRANDFATHER CLAUSE,” TO CLARIFY THE CONDITIONS UNDER WHICH SUCH LICENSES MAY BE TRANSFERRED TO A DIFFERENT LOCATION; PROVIDING SEVERABILITY AND AN EFFECTIVE DATE.

Environmental Scientist Laakkonen presented comments on behalf of the Town of Fort Myers Beach. He explained the proposed changes to the Code were the results of a parasail operator, who in 2010, proposed to move a licensed location and upon review of the land development codes it was determined there was conflicting language and inconsistencies in Chapter 27 regarding the cap on licenses and the conditions under which a vendor could move their business to a new location. He pointed out at that time the Town Council had to perform an Administrative Interpretation of the Land Development Code to determine whether the business owner could move their license to another location; and added that the Council did allow the business owner to move the license, and asked the Town Attorney and staff to

review Chapter 27 to propose amendments clarifying existing language and remove conflicts or ambiguities. He discussed minor changes such as but not limited to strike '~~grandfather clause~~' and replace it with non-conforming, and issues with the map. He stated staff had presented the LPA with the proposed changes; and the analysis by the Town Attorney and staff found the proposed language changes had no effect on any of the existing or future vendors, and would allow the Land Development Code to act more efficiently.

LPA Attorney Miller concurred with the presentation/comments of Environmental Scientist Laakkonen, and agreed there had been some ambiguities. She added that last year Council clearly indicated that the current seven businesses (no additional) would be able to transfer their license to a new location if requested. She stated that if one of the seven existing businesses went out of business, then another one would be allowed.

Public Comment opened.

No speakers.

Public Comment closed.

Environmental Scientist Laakkonen reported the proposed ordinance was reviewed by MRTF on January 12, 2011.

Mr. Durrett discussed his support for the ability of an existing parasail business to transfer their license to another location if needed.

Mr. Kakatsch concurred with Mr. Durrett and noted he strongly felt seven businesses were adequate.

Mr. Zuba questioned the basis for the proposed amendments.

LPA Attorney Miller explained proposed amendments to *Section 27-55, Transferability of PALs to new conforming locations may only be allowed when licenses fall below 6;* and that the problem was there were 7. She noted originally there was no spacing requirement between the businesses.

Discussion ensued regarding spacing and transferability; and LPA Attorney stated the business which was displaced by Crescent Park still needed to meet the spacing requirements.

Mr. Zuba questioned naming requirements in the code and how did the Town kept track of name changes for the owner and/or business names.

Environmental Scientist Laakkonen explained when businesses change owners they were required each September to apply for a new license, and at that point they indicate any change in ownership of the company, which would include information regarding positions such as the chief executive.

Discussion ensued regarding the Town's process concerning licensing changes, ownership changes, insurance requirements, and business location changes.

Mr. Smith questioned Section 27-55 regarding transferability to non-conforming locations and if Section 27-55(3) should be 'non-conforming' and not 'conforming'.

LPA Attorney Miller explained that the section pertained to any location – conforming or non-conforming.

Ms. Plummer concurred with the previous comments of the Board Members.

Mr. Kakatsch questioned if a million dollar insurance liability was sufficient for the Town, or should it be increased to two million dollars.

LPA Attorney Miller explained the Town was responsible for \$100,000/\$300,000 and had sovereign immunity under State law; and noted increased coverage might be needed by the business owner and the owner of the property being leased.

Discussion was held concerning insurance liability and coverage assessment by the Town.

MOTION: Mr. Van Duzer moved to approve that the LPA recommend to Town Council to approve and adopt the proposed Town ordinance amending the Personal Watercraft and Parasailing Article IV, Chapter 27 of the Town Land Development Code and recommend Findings and Fact and Conclusion with regard thereto; second by Mr. Kakatsch.

No discussion.

VOTE: Motion approved, 7-0.

Public legislative hearing on Parasail Ordinance – Amending Chapter 27, Article IV of the Town of Fort Myers Beach Land Development Code closed at 9:45 a.m.

VII. ADMINISTRATIVE AGENDA

A. Consumption on Premises (COP) Report

Ms. Shamp thanked Community Development Director Fluegel, Town staff, and the Town Attorney for such a comprehensive report on the COP.

Community Development Director Fluegel presented the COP Report to the LPA and reviewed highlights of the report:

- Purpose – to provide a comprehensive examination of the Consumption on Premises issue, specifically as it related to extending service from a licensed premise into the Environmentally

Critical (EC) Zoning District which would provide a basis for the critical decision-making regarding formulating an ordinance that would effectively regulate COP.

- Historical–Council rejecting LPA interpretations (COP should not be allowed in the EC Zoning District which is also the Recreation Future Land Use); precedents set by previously approved COPs; and the lack of clear policy prohibition in the Comp Plan. He noted staff's belief the more objective and defensible approach to developing a regulatory framework would be to focus on identifying methods of mitigating impacts of COP in EC (specific conditions of approval that mitigate potentially negative impacts and identify specific geographic areas wherein the potential impacts of COP may be greater).
- Glossary of Terms – reviewed common or frequent terms/acronyms used in the report (i.e. COP was consumption on a licensed premises).
- Timeline - as it pertained to alcohol consumption, sales, and service he discussed the development of the County ordinances and approvals, the post-incorporation Town ordinances and resolutions (i.e. resolution creating the EC Zone in 2004), the treatment of COP in the code both past and present, and how this related to the Town's Comprehensive Plan.
- Overview of the EC and COP –in 2008 a former Town Manager entered into a planning services contract with Murphy Consulting Group to prepare a report on COP. The current discussion about COP was initiated at the October 2008 LPA meeting with a broad dialog on COP in general. At the December 2008 LPA meeting the Policy Considerations and Options Consumption of Alcoholic Beverages Report was presented by Murphy Consulting Group, and while the report was more comprehensive in nature, dealing with the expanse of COP-related issues, including COP in the Recreation Future Land Use category, the discussion by the LPA focused in on COP in Recreation Future Land Use. He noted that at the December 2008 meeting, several LPA members indicated a belief that further expansion of COP in Recreation Land Use should be prohibited. In April 2009, the LPA moved to table the conversation regarding the draft COP ordinances until after a workshop could be held with Town Council. It was noted that in September 2009, a joint workshop of the Town Council and the LPA was held and one of the topics discussed was the COP in the EC; and specific conversation arose from Town Council about developing a more equitable regulatory scheme for dealing with COP in EC. He reported at the October 2009 LPA Meeting, during the Future Work Activities portion of the agenda, the LPA directed staff to draft a statement to Council stated that *“that the LPA, in its consideration of the consultant's report, did not deem that the expansion of open container onto additional properties would not be appropriate...or something to that effect”*. At the November 2009 LPA meeting, staff presented a draft resolution on COP as directed by the LPA which in essence stated *“whereas the LPA finds that the expansion of the on-premises consumption of alcoholic beverages onto the Gulf beaches does not protect remaining natural resources...”*. At the November 15, 2010 Town Council Workshop, staff presented a memo dated November 8, 2010 that reviewed LPA Resolution 2009-24 and provided options for Council's consideration; at the December 6, 2010 Town Council Meeting, Council voted 4-1 to reject the LPA's Resolution and by rejecting the resolution made the determination that COP was a permissible use in EC. Director Fluegel noted that since this action was a legislative interpretation by Council, as provided for in Chapter 15 of the Comp Plan, a text amendment would be required to reverse that determination; and in a subsequent discussion and motion, Council decided that the Land Development Code was the appropriate place to regulate permissible uses such as COP and

directed staff to prepare an ordinance that treated COP in EC as a permitted ancillary use. He continued to review the historical background of the COP and the EC through today which was included in the COP Report dated October 6, 2011. Director Fluegel noted that staff conducted a comprehensive review and legal assessment of all approved COPs adjacent to EC for the entire length of the beach and reported the following:

- A. 18 establishments of which 12 have been approved for COP in the EC (in some way, shape or form they were approved across that zoning line in the sand into the EC Zone); 7 of the 12 approvals came by special exception or special permits, and 2 of those approvals were by CPD (one State permit and one Administrative Approval). He pointed out that of the 12, 7 were located in the Downtown District and 5 were located outside the Downtown District; 6 were resorts (4 resorts outside of the Downtown District), 4 were restaurant/bars, 1 a restaurant, and 1 a bar; of the 12, 7 were approved for COP directly on the beach (not on a deck or elevated structure above the beach), and 3 approved with deck and railing. He noted 3 had consistency with closing hours (10:00 p.m.); and continued to review the analysis of approved COPs as contained on Page 39 of the COP Report. He cautioned the LPA regarding staff's use of aerial interpretation regarding the EC Zoning line from the County's GIS mapping and there could be physical surveys that contradict the EC Zoning line boundary. He discussed staff's analysis of commonalities in approvals for COP in EC Zones and their observations regarding approved COPs (i.e. outdoor entertainment). He noted that the concentrations of the COPs were contained within the Downtown District. Director Fluegel commented that staff's perception was that there was a lack of appropriate regulatory framework for the conditions of approval related to COP in EC; however, there had been some historic consistency in some limited regards as it related to the approval of COP in EC (i.e. the majority of COP approvals in EC were granted for establishments within the Downtown District and those granted outside the Downtown District were primarily granted to the larger resorts in Town). He explained staff believed there was a strong precedent for requiring future approvals within the Down District to require Special Exception approval and those outside the Downtown District to be limited to resorts by CPD zoning. He discussed staff's recommendation to the LPA to consider in crafting an ordinance as four primary zoning processes to regulate COP in EC:

1. Special Exception
2. Planned Development Zoning
3. Administrative Approval
4. Permitted Use

He reviewed possible location restrictions as described on Page 40 and potential conditions for approval as outlined on Page 41 (1-2a through 2n) of the COP Report.

Ms. Shamp noted the immensity of the COP topic; and she distributed a handout she prepared regarding considerations regarding the COP. She stated the COP Report clearly defined what Town Council had done in interpreting Chapter 15 of the Comp Plan, and it provided detailed information about the number of properties, and supplied a legal review of the existing properties. She explained that the Report would help the LPA determine how much expansion they may want, and how would they regulate it. She noted the importance of the precedents included in the Report. She stated she had

walked the entire length of the Downtown District and encouraged the LPA members to do the same; and she compiled a list of her findings from her walking tour which she also distributed. She reviewed her walking tour findings as it related to COP:

- Sign verbiage; consideration for consistency in wording
- Amount of equipment that covers the beach frontage and how it impacts the appearance of the beach (i.e. jet skis, carts, flags, sandwich signs, picnic tables/chairs, etc.)
- Use of ropes and posts

Question and answer session and discussions ensued between the LPA members and Community Development Director Fluegel and LPA Attorney Miller regarding the COP topic and the COP Report; license transferability; zoning requirements; how special exceptions run with the property; zoning restrictions; legislation by special exception; precedent of granting approvals by special exceptions; ABT licenses and zoning; three businesses with approved special exceptions and the location within each subject property where they were serving alcohol; the difference between COP rules for licensed establishments and private individuals; and the '78 Coastal Construction Control Line.

Planning Coordinator Ekblad explained that all of the properties along the beachfront that have an approved consumption on premises that crosses over the EC Zoning District, in effect, whether it was by the Town, the County or the State, showed that the use of consumption was acceptable in the EC Zoning District. She added that did not mean there could not be conditions of approval added; and the use has been set as a precedent and the Town needed to determine a way to make sure the use was acceptable and it remained contained in an acceptable manner (i.e. use of a deck or rope and post). She noted staff was looking for input on the COP from the LPA.

Discussion ensued regarding permitted uses and the EC line; and potential consistency for conditions or restrictions.

Community Development Director Fluegel stated that Top O'Mast did not have COP in the EC; they were not approved for it from a Town zoning perspective.

Discussion continued concerning the COP in the EC Zone; possible consideration for bringing current businesses up to present standards and how to do so (i.e. re-memorialize through a special exception, have an administrative process or a blanket coverage on all of them); requirements for all businesses (i.e. biodegradable plastic cups with the businesses name on it); supplemental conditions for a special exception for each applicant; serving alcohol on a deck versus the sand and the EC line; potential restrictions/consistency for outdoor entertainment; and the CPD process.

Community Development Director Fluegel asked if there was consensus of the LPA on any aspects of the COP (i.e. outside the Downtown should it be resorts only, etc.). If possible, he explained he would like to have some 'broad brush' consensus.

Ms. Shamp explained that on her 3-page handout she felt that could be considered – *should COP and EC be limited to an ancillary use and should the method of approval*, in order to give staff an idea of where the LPA was headed.

Ms. Plummer asked if there was an example of a business that had a COP which was not a restaurant, bar or resort.

Discussion ensued regarding various types of ancillary uses; questions of process (i.e. special exception); cost of enforcement of COP; and cost of special exception and planned development application for an applicant.

Ms. Shamp continued to review the list on her 3-page handout for LPA consensus:

- Should COP and EC be limited as an ancillary use and should it be restricted to principle uses such as bars, restaurants, and resorts – 6 ayes, and 1 undecided.
- Should the ancillary use be restricted within specific zoning districts – 5 ayes, 1 nay, and 1 undecided.
- Should resorts have regulations that are specifically different from the bars and restaurants in the Downtown Zoning District – 3 ayes, 3 nays, and 1 undecided.
- Should the method of new approval be special exception – 7 ayes.
- Should the method of CPD be used for rezoning for new resorts or new commercial developments that would require a CPD - 5 ayes, 1 nay, and 1 undecided.

Discussion was held concerning if the LPA was interested in recommending that service and consumption aspects be handled separately; or deal with consumption only.

Ms. Shamp continued to review the list on her 3-page handout for LPA consensus:

- Would you encourage new decks to be built seaward of the '78 Construction Line – 7 nays.
- Would lean toward existing decks and pool areas – 7 ayes.

Discussion was held regarding whether or not to define some type of property line for a business.

Ms. Shamp asked the LPA to continue reviewing the 3-page handout for further discussion at the next meeting.

Community Development Director Fluegel informed the LPA that he welcomed any of the LPA members to meet with him individually to discuss this matter further. He stated he would email the recommended 'conditions of approval' to the LPA for comment.

Ms. Shamp changed the order of agenda items.

VIII. LPA MEMBER ITEMS AND REPORTS

Ms. Shamp distributed a copy of proposed resolutions for past LPA members, Tom Cameron and Rochelle Kay.

MOTION: Mr. Van Duzer moved Rochelle Kay's resolution be approved; second by Mr. Kakatsch.

VOTE: Motion approved, 7-0.

MOTION: Mr. Zuba moved Tom Cameron's resolution be approved; second by Mr. Van Duzer.

VOTE: Motion approved, 7-0.

A. Election of LPA Committee Chair and Vice Chair

LPA Attorney Miller opened the floor for LPA Chair nominations.

Mr. Van Duzer nominated Joann Shamp for Chair.

No other nominations.

LPA Attorney Miller opened the floor for LPA Vice Chair nominations.

Mr. Van Duzer nominated Mr. Zuba.

No other nominations.

MOTION: Mr. Van Duzer moved to adjourn as the LPA and reconvene as the Historic Preservation Board; second by Mr. Zuba.

VOTE: 7-0.

**ADJOURN AS LOCAL PLANNING AGENCY AND RECONVENE AS HISTORIC
PRESERVATION BOARD
11:58 A.M.**

IX. HISTORIC PRESERVATION

Ms. Shamp changed the order of the HAC agenda; and described the responsibilities of the HPB Committee Chair and Vice Chair positions.

C. Election of HPB Committee Chair and Vice Chair

Ms. Shamp asked if there was someone interested in historic preservation.

Ms. Plummer stated she served on that board previously; however, now she had a conflict with Thursday meeting days.

Discussion was held regarding anticipated meeting days and the role of the Chair and Vice Chair.

Mr. Kakatsch stated he would be interested in serving as the Vice Chair.

Ms. Shamp nominated Ms. Plummer as the Chair of the HPB.

Ms. Shamp nominated Mr. Kakatsch as the Vice Chair of the HPB.

A. Appointment of members to the Historic Advisory Committee

Community Development Director Fluegel explained the Board was required to appoint the members from the Estero Island Historic Society which they voted the following names to be submitted to the HAC by the Historic Society members: Roxy Smith, A.J. Bassett, Fran Santini, and Linda Meeter.

MOTION: Mr. Kakatsch to approve Roxy Smith, A.J. Bassett, Fran Santini, and Linda Meeter to the HAC; second by Mr. Smith.

VOTE: Motion approved, 7-0.

B. Summary of St. Raphael's Plaque Presentation

Community Development Director Fluegel reported he attended the St. Raphael's plaque presentation ceremony and he noted his observation regarding the uniqueness of the church in the neighborhood.

MOTION: Ms. Kakatsch moved to adjourn the HPB at 12:08 p.m. and reconvene as the LPA; second by Mr. Smith.

VOTE: 7-0.

HISTORIC PRESERVATION BOARD ADJOURNED AND RECONVENED AS THE LOCAL PLANNING AGENCY 12:08 P.M.

LPA Member Items and Reports – continued.

Mr. Zuba - no items or reports.

Mr. Kakatsch – complimented the bridge painting concept and reported the posts underneath the bridge looked like they were power washed; however, he noted the bars underneath the bridge on top of the posts were filthy. He asked Community Development Director Fluegel to ask the State if they could clean the bars on top of the posts. He also discussed his observation about the new marina adjacent to the bridge and questioned what would it be.

Community Development Director Fluegel reported the marina in question would be part yacht construction and part boat storage. He explained he heard it would be a 'mega yachting facility' (i.e. repairs and storage and other marina storage elements) and they were not within the incorporated Town

limits. He noted they were approved as an Industrial Planned Development by the County, and he believed that the Notice of Hearing was received by his predecessor.

Mr. Kakatsch questioned the appearance of the beach with respect to the re-nourishing of the beach at the north end and the people who were not permitting the equipment to pass through their property.

Discussion was held concerning the vegetation issues and the easements associated with the project.

Mr. Durrett – no items or reports.

Mr. Van Duzer – no items or reports.

Mr. Smith – no items or reports.

Ms. Plummer –asked, in the future, that if any maps were included in a report that it be placed at the beginning of the document and not at the end. She questioned how many times had the State painted the bridge and who paid for the maintenance.

Community Development Director Fluegel stated it was the State DOT.

Ms. Shamp addressed the LPA proposed meeting schedule (second Tuesday of each month) and mentioned they begin promptly at 9:00 a.m. She explained the LPA was required to have 10 meetings per year, so there were times in the summer they drop the August meeting depending on how busy the LPA was at that point.

X. LPA ATTORNEY ITEMS

No items to report.

XI. COMMUNITY DEVELOPMENT DIRECTOR ITEMS

Director Fluegel – no items or report.

XII. LPA/HPB ACTION ITEM LIST REVIEW& ITEMS FOR NEXT MONTH'S AGENDA

Ms. Shamp noted the Action Item List included in the agenda packet and she explained for the benefit of the new members that this was the LPA resolution list which had been passed but not yet presented to Town Council; and she pointed out the LPA sends a representative to those Council meetings in case the Council had any questions. She asked if there was a date for the Surf Club.

Community Director Fluegel stated the Surf Club was approved.

Ms. Shamp questioned the Holiday Inn sign variance.

Community Director Fluegel reported Holiday Inn withdrew their sign variance application; Connecticut Street was still to be determined; La Ola Restaurant and Diamond Head would go before Council on October 17th.

Ms. Shamp asked if there was an LPA member available, who was on the LPA at the time these two resolutions appeared before the LPA, who would be able to attend the Council meeting.

Mr. Kakatsch stated he would be available to represent the LPA and attend the October 17th Town Council Meeting.

She questioned the status of the resolution which passed today on personal watercraft. LPA Attorney Miller reported the resolution would more than likely be introduced at the first meeting in November, and then adopted at the second meeting in November.

Ms. Shamp reviewed the remainder of the LPA/HPB Action List:

- No continued hearings
- Asked if there was anything new or different on the list
- EAR - remain as TBD
- COP in EC - change the date to next month; Director Fluegel stated staff would more than likely create a draft for discussion purposes
- Beach raking – date of September was incorrect; Director Fluegel stated the date would probably be November, and the staff name should be Mr. Laakkonen

Ms. Shamp announced the next meeting of the Town of Fort Myers Beach LPA would be held on Tuesday, November 8, 2011 at 9:00 a.m.

XIII. PUBLIC COMMENT

No comment.

XIV. ADJOURNMENT

MOTION: Motion by Mr. Durrett, seconded by Mr. Smith to adjourn.

VOTE: Motion approved, 7-0.

Meeting adjourned at 12:21 p.m.

Adopted _____ With/Without changes. Motion by _____

Vote: _____

Signature

- End of document.

RESOLUTION OF THE LOCAL PLANNING AGENCY OF THE
TOWN OF FORT MYERS BEACH, FLORIDA
RESOLUTION NUMBER 2011-15
AMENDMENT TO PERSONAL WATERCRAFT AND PARASAILING
ARTICLE IV OF CHAPTER 27
TOWN LAND DEVELOPMENT CODE

WHEREAS, the existence of the Local Planning Agency (LPA) is mandated by Florida Statutes Section 163.3174; and

WHEREAS, the Local Planning Agency (LPA) is statutorily responsible under Chapter 163, Florida Statutes, and the Town of Fort Myers Land Development Code (LDC) Section 34-120 for the review of proposed land development regulations, land development codes, or amendments thereto, and for making recommendations to the Town Council with regard thereto and performing such other reviews as are requested by the Town Council; and

WHEREAS, following proper notice and as required under Florida Statute and the LDC, the LPA conducted a public hearing on March 23, 2010 to consider a proposed Town Ordinance, which is attached hereto as Exhibit A and is hereby incorporated by reference; and

WHEREAS, the aforesaid Ordinance, if passed, would amend the regulation of personal watercraft and parasailing businesses within Town municipal limits, as is more fully set forth in the draft Ordinance; and

NOW THEREFORE BE IT RESOLVED, that the LPA recommends that Town Council approve and adopt the proposed Town Ordinance to amend the Personal Watercraft and Parasailing, Article IV, of Chapter 27 of the Town Land Development Code and recommends the following findings of fact and conclusions with regard thereto:

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW:

1. The proposed amendments are in the best interests of the health, safety and welfare of the citizens, residents, visitors, and business owners of the Town of Fort Myers Beach and the LPA hereby recommends that the Town Council adopt the proposed amendments to the Land Development Code. .

The foregoing Resolution was adopted by the LPA upon a motion by LPA Member Bill Van Duzer and seconded by LPA Member John Kakatsch and upon being put to a vote, the result was as follows:

Joanne Shamp, Chair	aye	Hank Zuba, Vice Chair	aye
John Kakatsch	aye	Jane Plummer	aye
Bill Van Duzer	aye	Alan Smith	aye
Al Durrett			

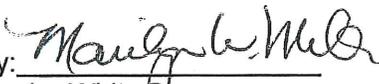
DULY PASSED AND ADOPTED THIS 11th day of October, 2011.

LPA of the Town of Fort Myers Beach

By: 
Joanne Shamp, LPA Chair

Approved as to legal sufficiency:

ATTEST:

By: 
Fowler White Boggs
LPA Attorney

By: 
Michelle Mayher, Town Clerk

DRAFT

ORDINANCE -11

AN ORDINANCE AMENDING CHAPTER 27, ARTICLE IV OF THE TOWN OF FORT MYERS BEACH LAND DEVELOPMENT CODE, "ADDITIONAL RULES AND PROCEDURES APPLYING TO BOTH PERSONAL WATERCRAFT AND PARASAILING," AMENDING SECTION 27-52, "PWVL AND PAL APPLICATIONS; REGULATORY FEES," TO CLARIFY THE NUMBER OF PWVL AND PAL LICENSES THAT ARE PERMITTED; AMENDING SECTION 27-55, "TRANSFERABILITY OF PWVL AND PAL LICENSES; GRANDFATHER CLAUSE," TO CLARIFY THE CONDITIONS UNDER WHICH SUCH LICENSES MAY BE TRANSFERRED TO A DIFFERENT LOCATION; PROVIDING SEVERABILITY AND AN EFFECTIVE DATE.

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

Section 1. Section 27-52 of the Fort Myers Beach Land Development Code is hereby amended as follows:

Sec. 27-52. PWVL and PAL applications; regulatory fees.

...

(d) **Cap on number of licenses.** PWVLs and PALs and license renewals shall be issued on an annual basis coinciding with the town's fiscal year, October 1 through September 30.

(1) ~~The town manager may issue~~ There shall be no more than ten (10) PWVL licenses outstanding at any point of in time.

(2) ~~The town manager may issue~~ There shall be no more than seven (7) ~~6~~ PAL licenses outstanding at any point of in time.

(3) See § 27-55 for regulations on transfers of existing PWVLs and PALs.

Section 2. Section 27-55 of the Fort Myers Beach Land Development Code is hereby amended as follows:

Sec. 27-55. Transferability of PWVL and PAL licenses; ~~grandfather clause.~~

(a) **Transferability.** Provided that this chapter has been complied with, the PWVL or PAL is transferable to a new owner and/or to a different location if:

DRAFT

(1) The location of the business will be transferred to complies with the minimum separation requirements of this chapter, or is "grandfathered in" under subsection (b) below; and

(2) The new business owner files an amended application with the town providing the information required in this chapter; and

(3) Transferability of a PALs to a new conforming locations may is only be allowed when there are seven (7) or fewer licenses fall below 6 outstanding. If there are 6 or fewer PALs issued, then a license at a nonconforming location can move that license to a conforming location and surrender the nonconforming location which still results in 6 or fewer total licenses.

(4) Transferability of a PWVLs to a new conforming locations may is only be allowed when there are ten (10) or fewer licenses fall below 10. If there are 10 or fewer PWVLs issued, then a license at a nonconforming location can move that license to a conforming location and surrender the nonconforming location which still results in 10 or fewer total licenses.

(b) **Nonconforming PWVLs.** Personal watercraft vendors that have who established or commenced business at their existing a locations on or before December 2, 1996, but which may or may that does not comply with the location requirements set forth in this chapter and the remainder of this code may continue to operate as a nonconforming use after December 2, 1996, unless terminated for failure to obtain the a PWVL or renewal as required by this chapter, voluntary discontinuation of business for a period of thirty (30) days or more, or revocation of the PWVL permit.

(c) **Nonconforming PALs.** Parasail operators that have who established or commenced business at their existing a locations on or before January 21, 1997, and which are in conformity with the location requirements of this code, but which may or may that does not comply with the location requirements set forth in this chapter, may continue to operate as a nonconforming use after January 21, 1997, unless terminated for failure to obtain the a PAL or renewal as required by this chapter, voluntary discontinuation of business for a period of thirty (30) days or more, or revocation of the PAL permit.

Section 3. Severability. If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions hereof.

Section 4. Effective Date. This ordinance shall take effect immediately upon adoption by the Town Council.

DRAFT

The foregoing Ordinance was adopted by the Town Council upon a motion by _____ and seconded by _____ and upon being put to a vote, the result was as follows:

Larry Kiker, Mayor
Joe Kosinski
Alan Mandel

Bob Raymond, Vice Mayor
Jo List

DULY PASSED AND ADOPTED THIS ____ DAY OF _____ 2011, BY THE
TOWN COUNCIL OF THE TOWN OF FORT MYERS BEACH

ATTEST:

By: _____
Larry Kiker, Mayor

By: _____
Michelle D. Mayher, Town Clerk

Approved as to form and legal sufficiency:

By: _____
FOWLER WHITE BOGGS, Town Attorney

DRAFT

FORT MYERS BEACH, FLORIDA
DEPARTMENT OF COMMUNITY DEVELOPMENT
ORDINANCE STAFF REPORT

LAND DEVELOPMENT CODE SECTION: Chapter 27, Article IV- Personal Watercraft and Parasailing

LPA HEARING DATE: October 11, 2011

LPA HEARING TIME: 9:00am

I. SUMMARY:

The proposed changes to the Parasail Activity License (PAL) and Personal Watercraft Vendor License (PWVL) sections of the Land Development Code are to clarify language in Chapter 27 Personal Watercraft and Parasailing, Article IV, regarding non-conforming uses, caps on numbers of license, and an enforcement provision. These language changes have no effect on any existing vendors.

II. BACKGROUND AND ANALYSIS

History of Public Hearings:

Town Council requested that the Marine Resources Task Force review proposed changes to Chapter 27. The Marine Resource Task Force reviewed and approved these proposed changes on January 12, 2011 during their regular meeting.

Background:

Town Council reviewed a request from a parasail license holder (PAL) to move their license to a new location on October 4, 2010. This request to move was due to a change in ownership of the property where the license was located. During analysis of this request, Town staff, and attorneys for the PAL vendor discovered conflicting language in Chapter 27 regarding the cap on licenses (currently six) and the conditions under which a vendor could move their business to a new location. The ambiguities in Chapter 27 were substantial enough to require Town Council to interpret the Land Development Code to approve or deny the request. After interpreting the code and approving the license transfer, Town Council directed the Town Attorney and staff to review Chapter 27, propose amendments to clarify existing language, and remove any conflicts or

ambiguities. The Town attorney and staff are proposing these changes to ameliorate these issues.

Analysis:

The first proposed change is to Sec. 27-51 (a) (1) to remove a reference in to Section 27-54 (e).

“(a) Businesses holding a valid PWVL or PAL shall be situated together with their vessels where appropriate upon a site authorized by the remainder of this code plus the provisions of this chapter to have such business and shall not:

(1) be located within 500 feet of any other business offering personal watercraft for rent or lease or parasailing activities, except for businesses that are co-located in accordance with § 27-54(e); or”

Section 27-54 (e) of the LDC does not exist. Section 27-54 simply describes that PWVL and PAL license must be displayed to the public and Section 27-54 is unchanged with these amendments.

The second change replaces the word “grandfather” for “legal non-conforming” in multiple locations in Section 27-55.

Sec. 27-55. Transferability of PWVL and PAL licenses; ~~grandfather clause.~~ Nonconforming locations

(a) Transferability. Provided that this chapter has been complied with, the PWVL or PAL is transferable if:

(1) The location of the business complies with the minimum separation requirements of this chapter, or is ~~grandfathered~~ nonconforming under subsection (b) or (c) below; and

(b) Nonconforming PWVLs. Personal watercraft vendors that have established or commenced with a business at their existing locations that was in existence on or before December 2, 1996, and which are in conformity with that conformed to the location requirements of this code that existed before that date, but which may or may does not comply with the location requirements set forth in this chapter and the remainder of this code may continue to operate as a nonconforming use after December 2, 1996, unless terminated for failure to obtain the PWVL as required by this chapter, voluntary discontinuation of business for a period of 30 days or more, or revocation of the PWVL permit.

(c) Nonconforming PALs. Parasail operators that have established or commenced with a business at their existing locations that was in existence on or before

January 21, 1997, and which are in conformity with ~~that conformed to~~ the location requirements of this code ~~that existed before that date~~, but which may or may ~~does~~ not comply with the location requirements of this code, but which may or may not comply with the location requirements set forth in this chapter, may continue to operate as a nonconforming use after January 21, 1997, unless terminated for failure to obtain the PAL as required by this chapter, voluntary discontinuation of business for a period of 30 days or more, or revocation of the PAL permit."

This is to avoid future ambiguities with the term "grandfathered" in reference to whether or not a business can change location. Please see exhibit "B". This in no way impairs the ability of a business to move locations beyond the restrictions already in Chapter 27. This change simply replaces the word "grandfathered" for "conforming".

Other changes are to clarify the language regarding the cap on licenses. This change simply clarifies what the total number is. This in no way affects or alters the cap on licensees, it simply clarifies the math.

(3) *Transferability of PALs to new conforming locations may only be allowed when licenses fall below 6. If there are ~~6~~ 5 or fewer PALs issued, then a license at a nonconforming location can move that license to a conforming location and surrender the nonconforming location which still results in 6 or fewer total licenses.*

(4) *Transferability of PWVLs to new conforming locations may only be allowed when licenses fall below 10. If there are ~~10~~ 9 or fewer PWVLs issued, then a license at a nonconforming location can move that license to a conforming location and surrender the nonconforming location which still results in 10 or fewer total licenses.*

Notably this change does not affect the ability of a vendor to transfer a license to a new location.

Finally, the enforcement language in Section 27-57 is changed to allow Town staff to clarify code enforcement mechanisms.

Sec. 27-57. Penalty.

~~*Violation of the provisions of this chapter, or failure to comply with any of the requirements, shall constitute a civil infraction. Any person who violates this chapter or fails to comply with any provision shall upon conviction thereof be fined \$150 for the first violation; \$300 for the second and third violation; and the town shall consider license revocation for more than three violations of this*~~

chapter, and in addition the violator shall pay all costs and expenses involved in the case.

The town manager or their designee is authorized to pursue any one or a combination of the enforcement mechanisms provided in this code (for example, § 1-5, or article V of ch. 2) for any violation of this article. Violation of the provisions of this chapter, or failure to comply with any of the requirements, shall constitute a civil infraction and the town shall consider license revocation for more than three violations of this chapter. Periodic compliance inspections will be conducted to insure compliance with the permit conditions and this ordinance.

The current language uses the term “conviction” and allows for an instant fine. “Conviction” is associated with criminal trials as opposed to “civil” which is a code enforcement matter. Civil infractions are violations of Town Land Development Code. A “conviction” is strictly a criminal matter over which Town Code Enforcement staff have no authority. Certified law enforcement officers are capable of citing someone under criminal codes. Civil infractions also allow for the code enforcement process which includes a process for notifying the owner of the property about the violation and allowing them and opportunity to abate the violation. The code enforcement process also allows for a public code enforcement hearing and a finding of fact that there has been a violation before a fine can be assessed.

III. RECOMMENDATION

Staff recommends **APPROVAL** of these proposed changes. These changes will clarify existing language and does not have any negative impact on current or future vendors.

Exhibits:

“A”- Proposed amendments to Chapter 27

“B” - Town Attorney memo from October 10, 2010 Town Council meeting

TO: Mayor and Town Council

FROM: Marilyn W. Miller, Town Attorney

DATE: September 23, 2010

RE: Interpretation of Section 27-55 of the Land Development Code (relating to transferability of PAL licenses)

The Town has received a request to transfer an existing parasail (PAL) license currently located at 1130 Estero Boulevard to a new location. In reviewing the relevant Land Development Code provisions, it is unclear whether such a transfer is permissible. The Town's Land Development Code contains a procedure for interpreting the Code in such situations. The relevant provisions state as follows:

Sec. 34-90. Land development code interpretations.

The town council may hear and decide applications for interpretations of this code as provided in § 34-265. Such applications shall not require a public hearing or recommendation from the local planning agency. Applications for such interpretations must be accompanied by the submittals described in § 34-202(a)(4)-(9); the director may waive any submittals that are not applicable to the type of interpretation being requested.

Sec. 34-265. Requests for interpretation of this code.

Where a question arises as to the meaning or intent of a section or subsection of this code, a written request stating the area of concern and the explicit interpretation requested shall be submitted on forms provided by the director.

(1) The director may render decisions of an administrative nature, such as but not limited to:

- a. Proper zoning classification for a use not specifically addressed; and
- b. Procedures to follow in unusual circumstances.

(2) Interpretations which, in the opinion of the director, involve policy or legislative intent issues shall be placed on the agenda of the town council for its consideration (see § 34-90)

The interpretation sought in this instance involves policy and/or legislative intent and must, according to the above-cited provisions, be decided by the Town Council.

ISSUE: What was the Town Council's legislative intent with respect to the limitations on transferability of an existing PAL license to another location pursuant to Sec. 27-55 of the Land Development Code?

FACTUAL BACKGROUND

In late August of this year, the Town Manager received the attached correspondence from attorney Beverly Grady on behalf of her client, Paradise Parasail, Inc. (hereinafter "Paradise"). Paradise currently has two parasail licenses for two separate locations: 1130 and 1028 Estero Boulevard. Those two licenses have been in existence since before the time the parasailing regulations were adopted in January 21, 1997. The license for 1130 Estero Boulevard has been owned by Paradise since before 1997; the license for 1028 Estero Boulevard was originally owned by another entity and was transferred to Paradise in 1999.

As you may know, the 1130 Estero Boulevard location is the Seafarer's property that was recently purchased by Lee County. Paradise has a valid and binding lease for its parasail business at that location, but Lee County has made it clear that they do not want to continue with the lease at that location. There are approximately three (3) years remaining on the current lease and there is also an option to renew for an additional five (5) years. Lee County has taken title to the property and there is an issue about the validity of the lease because the lease was not recorded and the property was subsequently foreclosed by Fifth Third Bank. It is unclear from the Court records whether the existing lease was extinguished by the foreclosure action. Paradise is willing to transfer the license for 1130 Estero Boulevard to another location, but it is unclear whether such a transfer is permissible under the current wording of the parasail regulations.

When the parasail regulations were first adopted in 1997, the following PAL operators were legally in existence:

- Rebel Watersports
- Aquasports Unlimited
- Wind and Water sport (two locations)
- Paradise Parasail (1130 Estero Boulevard location)
- Sun and Fun Air & Water Sports
- Patrick Renalli

During the public hearing held on January 21, 1997, the minutes reflect that the foregoing seven (7) licenses were acknowledged by the then Town Manager Marsha Segal-George. The minutes quote Ms. Segal-George as stating that "There are 6 PAL licenses and one "grandfathered" license (Pat Ranalli) and they are the only ones who could pick up at any location." In Ordinance 97-2, however, it states, in Section 28-50.B.7.:

The Town Manager may issue no more than (6) PAL licenses outstanding at any point of time. PAL's shall be issued on an annual basis coinciding with the Town's fiscal year, October 1 through September.

At the time that ordinance was passed, there were a total of seven (7) parasail business locations operating and those same businesses have continued to operate and have been renewed from year to year despite the foregoing provision which seems to indicate that only six (6) licenses can be outstanding at any one time. One interpretation, therefore, is that the “grandfathered” license referred to in the minutes from the adoption hearing was considered to be separate and apart from the other six (6) licenses and is not to be considered as one of the six (6) licenses referred to in Section 28-50.B.7. of the ordinance. The 1996 draft ordinance lends support to that interpretation as it specifically lists Mr Ranelli in the grandfather provision due to written agreements.

The original ordinance provision concerning transferability of PAL licenses read as follows:

28-54 TRANSFERABILITY OF PAL: GRANDFATHER CLAUSE

A. The PAL is transferable provided that the number of outstanding PAL’s issued by the Town is less than six (6) and:

1. The location of the business complies with the minimum separation requirements of this Ordinance, or is a “grandfathered in” accordance under (sic) subsection B below; and
2. The new business owner files an amended application with the Town providing the information required in this Ordinance.

B. Parasail operators that have established or commenced business at their existing locations on or before the effective date of this Ordinance, and which are in conformity with the location requirements of the Fort Myers Beach Land Use Code, but may or may not comply with the location requirements set forth in this Ordinance, may continue to operate as a nonconforming use after the effective date of this Ordinance, unless terminated for failure to obtain the PAL as required by this Ordinance, voluntary discontinuation of business for a period of 30 days or more, or revocation of the PAL permit.

The foregoing section was repealed by Ordinance 01-05 and regulations concerning transferability were added to existing Section 27-55 as follows:

Sec. 27-55. Transferability of PWVL and PAL licenses; grandfather clause [incorporates § 28-54]

(a) Transferability. Provided that this chapter Ordinance has been complied with, the PWVL or PAL is transferable if:

- (1) The location of the business complies with the minimum separation requirements of this chapter ordinance, or is a “grandfathered in” accordance under subsection (b) below; and
- (2) The new business owner files an amended application with the town providing the information required in this chapter Ordinance; and
- (3) Transferability of PALs to new conforming locations may only be allowed when licenses fall below 6. If there are 6 or fewer PALs issued, then a license at a nonconforming location can move that license to a conforming location and

~~surrender the nonconforming location which still results in 6 or fewer total licenses. For PAL transfers only, the number of outstanding PALs issues by the town must be less than six.~~ [moved from § 28-54]

. . .

~~(c) Nonconforming PALs. (b) Parasail operators that have established or commenced business at their existing locations on or before January 21, 1997, the effective date of this Ordinance, and which are in conformity with the location requirements of the Fort Myers Beach land use this code, but which may or may not comply with the location requirements set forth in this chapter Ordinance, may continue to operate as a nonconforming use after January 21, 1997, the effective date of this Ordinance, unless terminated for failure to obtain the PAL as required by this chapter, Ordinance, voluntary discontinuation of business for a period of 30 days or more, or revocation of the PAL permit. [moved here from § 28-54]~~

The first and second sentence in Section 27-55(3) appear to contradict one another. The first sentence indicates that PAL licenses are only transferable if there are *five* (5) or fewer licenses (i.e. less than six). The very next sentence, however, indicates that a license *can* be transferred if there are *six (6) or fewer* licenses. To further complicate matters, it appears that in practice, the Town has, over the past several years, allowed several of the existing businesses to transfer their PAL licenses to different locatons despite the fact that there have always been a total of seven (7) licenses in existence.

The wording in Section 27-55(c) concerning “nonconforming” PALs is likewise ambiguous. If the established businesses conformed to the location requirements on the date the ordinance was adopted in 1997, then arguably they are *conforming*, not *nonconforming*. Normally a “nonconforming” use or location is defined as a use or location that conformed to all legal requirements at the time the use or location originated, but no longer conforms to all requirements due to a change in regulations. It is unclear from the records I have reviewed, but perhaps the “grandfathered” business was the only truly “nonconforming” business at the time the regulations were adopted in 1997. That would make sense, since the terms “grandfather” and “nonconforming” are terms that typically have the same meaning.

Another section that is relevant to the issue is Section 27-53(d), which states:

27-52 (d) Cap on number of licenses. PWVLs and PALs shall be issued on an annual basis coinciding with the town’s fiscal year, October 1 through September 30.

- (1) The town manager may issue no more than 10 PWVL licenses outstanding at any point of time.
- (2) The town manager may issue no more than 6 PAL licenses outstanding at any point of time.
- (3) See § 27-55 for regulations on transfers of existing PWVLs and PALs.

Since the six (6) original PAL licenses; plus the Renalli "grandfathered" license have all apparently been in effect continuously for the past thirteen (13) years, an argument can be made that the six (6) licenses referred to in this section, and perhaps in the other LDC sections as well, do not include the Renalli "grandfathered" license. But, as stated above, the Town has for the past thirteen years, routinely renewed all seven of the existing licenses on an annual basis.

I have reviewed the minutes of both the 1997 and 2001 Town Council meetings when the ordinance was first adopted and then amended to try to discern the legislative intent, but have found nothing other than Marsha Segal-George's comments from the adoption of the original ordinance in 1997. As stated above, her only comment at that meeting was to state that there were six (6) PAL licenses and one (1) "grandfathered" license and that they are the only ones who could pick up at any location. It appears that the restrictions on location transfers may have been adopted to ensure that no more than seven (7) businesses would be permitted. Another possibility, however, is that the regulations were adopted to further limit the number of parasail business locations by only allowing a location transfer when the number of licenses falls below a certain number.

The Town Council must decide what it believes the previous Council's legislative intent was when Section 27-55 of the Land Development Code was adopted and subsequently amended. Council's options are: (1) determine that it was the prior Council's intent to allow any of the six (6) parasail business licenses that were in existence in 1997 (i.e. excluding the "grandfathered" location) to transfer to a new location; (2) determine that it was the prior Council's intent to only allow an existing business to transfer its license to a new location if there are less than six (6) licenses outstanding at the time the transfer is sought (i.e. five (5) or fewer outstanding licenses); or (3) determine that it was the prior Council's intent to allow any of the seven (7) parasail businesses that were in existence at the time the regulations were adopted to transfer their license to a new location. Once Council decides how this section should be interpreted, it is my recommendation that section 27-55 be amended to clarify the language so that it accurately reflects the legislative intent and hopefully removes the ambiguities.

If you have any questions concerning the foregoing, please do not hesitate to contact me.

Attachment