

**RESOLUTION NO.16-41**

**A RESOLUTION OF THE FORT MYERS BEACH TOWN COUNCIL RELATING TO AMENDMENT OF THE TOWN OF FORT MYERS BEACH ADMINISTRATIVE CODE 1-1; PROVIDING FOR SEVERABILITY AND AN EFFECTIVE DATE.**

**WHEREAS**, the Fort Myers Beach Town Council is the governing body in an for the Town of Fort Myers Beach, a municipality of the State of Florida, County of Lee; and

**WHEREAS**, the Town of Fort Myers Beach is a charter municipality incorporated on December 31, 1995 pursuant to Laws of Florida chapter 95-494, adopted in July 1995; and

**WHEREAS**, Town Charter sections 10.01 and 10.03 provide for the adoption of administrative provisions by Resolution of the Town Council; and

**WHEREAS**, certain amendments to the Town of Fort Myers Beach Administrative Code are now being proposed and the Town Council finds that the proposed amendments are acceptable, serve a public purpose, and are consistent with the terms and conditions of the Town Charter.

**NOW THEREFORE, BE IT RESOLOVED BY THE FORT MYERS BEACH TOWN COUNCIL AS FOLLOWS:**

1. The above recitals are true and correct and incorporated herein as though fully set forth below.

2. The proposed amendment to Town of Fort Myers Beach Administrative Code 1-1 (attached as Exhibit A) are approved and are hereby directed to be incorporated into the Town of Fort Myers Beach Administrative Code as indicated in the amendments.

3. The provisions of this Resolution are severable, and it is the intention to confer to the whole or any part of the Resolution, the powers herein provided. If any provisions of this Resolution are held unconstitutional by any court of competent jurisdiction, the decision of the court will not affect or impair any of the remaining provisions of this Resolution. It is hereby declared to be the Town Council's legislative intent that this Resolution would have been adopted had such unconstitutional provision not been included.

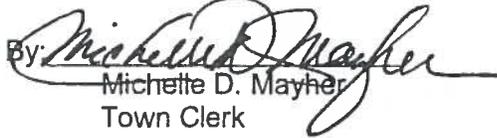
4. This Resolution becomes effective immediately upon its adoption by the Town Council.

Council Member Cereceda made a motion to adopt the foregoing Resolution, seconded by Council Member Hosafros. The vote was as follows:

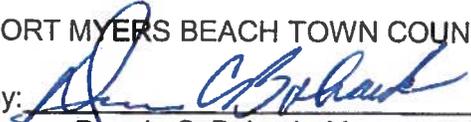
Dennis Boback	aye
Summer Stockton	nay
Tracey Gore	nay
Rexann Hosafros	aye
Anita Cereceda	aye

DULY PASSED AND ADOPTED THIS 21<sup>st</sup> day of November , 2016.

ATTEST:

By:   
Michelle D. Mayher  
Town Clerk

FORT MYERS BEACH TOWN COUNCIL

By:   
Dennis C. Boback, Mayor

Approved as to Form:

By:   
Town Attorney



## **Town of Fort Myers Beach Administrative Code 1-1 Transportation-Right-of-Way**

### **PURPOSE**

This Administrative Code includes a process for protecting Town of Fort Myers Beach rights of way (ROW) from unauthorized use. It is necessary to avoid potential loss of title or control to previously acquired rights of way and to avoid delays to transportation or Public Works projects caused by the necessity to recover possession of right of way, prior to project lettings. This Code is not intended to suggest the Town must allow existing encroachments; it is a tool providing options for how to handle encroachments whether the decision is made to remove or authorize their existence. This Code standardizes the process of issuing licenses to park in the Town's rights of way and sets forth the means by which these licenses are enforced by Beach and Street Enforcement (B.A.S.E.).

### **DEFINITIONS**

**Authorized Use:** The occupation of the Town's rights of way by virtue of an executed permit, license or recorded easement document.

**Encroachment:** An occupation or use of the Town's rights of way that has not been authorized by the execution of a permit, license, or other appropriate document.

**Rights of Way:** For purpose of this Code means land, property, or interest therein, usually in a strip, acquired for or devoted to a highway, road, street, bridge, alley, or public utility easement, for which the Town is the authority with jurisdiction and control and may lawfully grant access to pursuant to applicable law. It includes the surface, the air space over the surface and the area below the surface.

**Standard Parking Space:** For purposes of this Code, a standard 90 degree angle parking space is 162 square feet measured 9 feet by 18 feet. A standard parallel parking space is 140 square feet measured 7 feet by 20 feet. If a different size space is licensed, it will be charged based upon the number of square feet.

## **GENERAL**

The basic principle underlying this Code is that no person or entity may lawfully occupy or use the Town's rights of way without Town authorization to do so. Discovery of persons "in possession" or things built in or occupying the Town's rights of way are a red flag that action is needed. Once identified, such encroachments must either be removed or authorized.

## **IDENTIFYING ROW ENCROACHMENTS**

When identified, an encroachment should be reported to the Town Manager. The Town Manager has the authority to call attention of the encroachment to the Town Council. Town Council has the sole discretion and authority to direct the Town Manager to have the encroachment removed or to execute a permit, license, or easement to legitimize the encroachment.

The Town recognizes there are various historic uses of rights of way by commercial businesses, religious organizations and residents. This code provides a process for commercial businesses and others to obtain a permit or license to continue using rights of way by submitting an application and undergoing review and possible approval. The code is not intended to address such short term uses of rights of way such as parking of landscaping vehicles to support yard maintenance of residences, garage sales or one-time parties.

## **MAKING THE DECISION TO ALLOW THE USE TO CONTINUE**

An encroachment that has existed for an extended period of time, which poses no safety hazard or operational impediment, and which does not interfere with a transportation or Public Works project may be a candidate for consideration leading to issuance of a permit, license or easement authorizing the use. By specifically authorizing previously existing encroachments, the Town exercises control of its rights of way in a manner consistent with the Town's legal right to possession. The authorizing document specifies the terms and conditions under which the use will be allowed and provides a method for the termination of the use should it become necessary.

In determining whether to authorize an encroachment or require its removal, the following factors should be considered:

- Whether the encroachment has been in place for a long period of time or was recently added. NOTE: This may be a consideration, but is not a controlling factor;
- Whether the encroachment presents a safety hazard such as obstructing sight views or generally blocking the rights of way. In general, a safety hazard will be presumed to exist if an above ground improvement is located within the clear recovery zone established for the Town's facility. The Public Works Director and Town Manager will make the final determination as to whether a safety hazard exists;

- Whether the property on which the encroachment exists will be needed for transportation or Public Works purposes in the future;
- Whether the encroachment presents an operational impediment;
- Whether the encroachment benefits the Town or advances transportation or Public Works objectives; and
- Whether the license or permit is consistent with the Land Development Code.

### **REMOVING THE ENCROACHMENT**

If the Town determines the encroachment should be removed, the Town will deliver a written request to remove the encroachment. The request will allow a reasonable time for compliance. This request should emphasize that the unauthorized use of the Town's rights of way is defined as a second degree misdemeanor under the law.

If the request does not result in removal of the encroachment, the matter should be referred to B.A.S.E. or law enforcement. Sheriff and Town Staff have the authority to issue citations for unauthorized use of the rights of way.

Repeated instances of encroachment at the same location may be referred to the Town Attorney for initiation of legal proceedings.

### **AUTHORIZING THE ENCROACHMENT**

If the Town determines an encroachment may remain, an appropriate document must be executed to facilitate the continued encroachment. Each decision should be coordinated with the Town Attorney. Appropriate documents are permits or license agreements. An application must be submitted to the Town by permittee to obtain a permit or a license agreement to utilize the Town's rights of way. The rights granted under the permit or license agreement may not be sublet or assigned.

### **DETERMINING THE APPROPRIATE DOCUMENT**

Selecting the appropriate document for authorizing uses of Town's rights of way depends on the purpose, type and duration of the use. The following may be used as a guide:

- Commercial uses of rights of way that do not benefit the Town or advance transportation or Public Works objectives should be licensed for a fair market rental;

- Only licenses to a governmental entity for a “public purpose” are allowed without payment of the fair market value rental compensation. This does not include non-profit or charitable uses or entities;
- Uses that primarily benefit the Town or advance transportation or Public Works objectives, even if they also secondarily advance a commercial purpose may be authorized by permanent or temporary easements or by general use permits;
- Easements constitute an interest in real property and should be used for major improvements built in the rights of way that are permanent or intended to continue for a long period of time. Easements should contain appropriate language establishing conditions limiting uses, liability, etc. An example might be a pedestrian overpass constructed between a commercial operation and a parking facility;
- Permits should be used for shorter term or temporary non-commercial uses. Permits may also be issued by the Town under appropriate circumstances, for temporary uses of the Town’s rights of way.
- The Town will maintain an application required to obtain a permit or license agreement to utilize Town rights of way.

#### **LICENSES FOR PARKING IN TOWN’S ROWs**

Licenses may be obtained to park in specific rights of way locations approved by the Town Manager and Town Council. The fair market value will be utilized to establish the license fee. The license period will run from October 1 through September 30. However, the license term may be for less than 12 months. Licenses by the month must cover consecutive monthly periods; and, licenses by the week must cover seven consecutive days. Only abutting property owners are eligible to obtain this license. The fair market value is determined by the average yearly parking meter revenue per metered space. This license fee will be set each July 15<sup>th</sup> using the previous July 1 to June 30 average and will be included in the Town fee schedule.

Any construction within the rights of way requires a Town right of way permit. The permit or license fee will be determined by the number of parking spaces by size and/or the actual number of square feet leased as set forth in the fee schedule.

Applications for licenses under this section must be submitted to the Department of Public Works at least 60 days before the lease term is to start. These applications will be reviewed by the Town Staff including the Department of Community Development and Public Works. The Town Manager will issue the licenses after approval by Council. The permit or license agreement may be terminated by either party upon 60 days prior written notice, without recourse.

### **OTHER LICENSES TO UTILIZE TOWN ROWs**

Licenses may be obtained to place tables and chairs in the Old San Carlos right of way consistent with the Comprehensive Plan and Chapter 34 Commercial Design Standards. The fee to utilize the right of way will be consistent with the Times Square Business Utilization of the Town's Rights of Way (Administrative Code 1-2).

Structures within the Town right of way (Ex. S.O.B.) require a permit and/or license agreement calculated utilizing fair market value. Applications for licenses will be due by August 1<sup>st</sup>.

### **ENFORCEMENT OF THE TOWN'S ROWs**

B.A.S.E. is responsible for the enforcement of the provisions of this Code and applicable ordinances.

### **APPEAL PROCESS**

An applicant that is denied a permit or license to use Town rights of way may appeal the Town Manager's decision to Town Council upon filing the request for appeal with the Town Manager. The appeal must be filed within 15 days of the written denial. The Town Council decision is final and not subject to appeal.

**Licensed space cost for Downtown and Commercial Plan Development zoning classification for FY 16/17**

<u>Months Licensed</u>	<u>Prorated Cost of Space</u>	<u>Cost Per Space @ 9x18</u>	<u>Cost Per Space @ 7x20</u>	<u>Cost Per Square Foot</u>
12	50.00%	1,153.80	997.11	7.12
11	51.82%	1,096.11	947.26	6.77
10	54.15%	1,041.30	899.89	6.43
9	57.16%	989.24	854.90	6.11
8	61.09%	939.78	812.15	5.80
7	66.32%	892.79	771.55	5.51
6	73.51%	848.15	732.97	5.24
5	83.80%	805.74	696.32	4.97
4	99.51%	765.45	661.50	4.73
3	100.00%	576.90	498.56	3.56
2	100.00%	384.60	332.37	2.37
1	100.00%	192.30	166.19	1.19
Weekly	100.00%	44.26	38.25	0.27

**Licensed space cost Village zoning classification for FY 16/17**

26% less parking space usage in this area and cost is discounted by 26%

<u>Months Licensed</u>	<u>Prorated Cost of Space</u>	<u>Cost Per Space @ 9x18</u>	<u>Cost Per Space @ 7x20</u>	<u>Cost Per Square Foot</u>
12	37.00%	853.81	737.86	5.27
11	38.35%	811.12	700.97	5.01
10	40.07%	770.57	665.92	4.76
9	42.30%	732.04	632.62	4.52
8	45.21%	695.44	600.99	4.29
7	49.08%	660.66	570.94	4.08
6	54.40%	627.63	542.40	3.87
5	62.01%	596.25	515.28	3.68
4	73.64%	566.44	489.51	3.50
3	74.00%	426.91	368.93	2.64
2	74.00%	284.60	245.95	1.76
1	74.00%	142.30	122.98	0.88
Weekly	74.00%	32.75	28.30	0.20

**The annual license agreement must specify the actual months and/or weeks to be rented. If the license fee is paid in full before the start of the license agreement, the above prices will be used. Otherwise, there will be a \$30.00 processing fee added to each payment.**

**Note: The above charges are based on the revenue from 10/1/14 to 9/30/15.**