

1. **Requested Motion:** Motion to approve/deny the Administrative Appeal #APL2013-0001. **Meeting Date:** May 6, 2013

Why the action is necessary: LDC Section 34-86 provides that the Town Council will hear and decide appeals from determinations or actions of any administrative official with the Town.

What the action accomplishes: Introduces the Ordinance and sets a public hearing date.

2. **Agenda:**

Consent
 Administrative

3. **Requirement/Purpose:**

Resolution
 Ordinance
 Other

4. **Submitter of Information:**

Council
 Town Staff
 Town Attorney

5. **Background:** See attached Administrative Appeal application and Memorandum from the Town Attorney.

6. **Alternative Action:**

7. **Management Recommendations:** Deny the appeal.

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



Town of Fort Myers Beach

COMMUNITY DEVELOPMENT DEPARTMENT

APPLICATION for PUBLIC HEARING

This is a two part application. Please be sure to fill out this form, which requires general information, as well as the Supplemental Form application specific to action requested for the subject property. Please submit *one ORIGINAL paper copy, eleven (11) copies* and *one digital/electronic copy* of all required applications, supplemental information, exhibits and documents. Please do not print and copy the instructions at the end of the application.

PROJECT NUMBER: CE13-0059 / APL2013-0001 DATE: 03/14/2013

Site Address: 1028 FIFTH STREET, FORT MYERS BEACH, FL 33931

STRAP Number: 24-46-23-W3-00208.0080

Applicant: KROHN INVESTMENTS, LLC Phone: 239-265-3881

Contact Name: MITCHELL KROHN Phone: 239-265-3881

Email: MWKROHN@YAHOO.COM Fax: _____

Current Zoning District: DOWNTOWN

Future Land Use Map (FLUM) Category: PEDESTRIAN COMMERCIAL

FLUM Density Range: _____ Platted Overlay: YES NO

ACTION REQUESTED

SUPPLEMENTAL FORM REQUIRED

- | | |
|---|--------------------------|
| <input type="checkbox"/> Special Exception | PH-A |
| <input type="checkbox"/> Variance | PH-B |
| <input type="checkbox"/> Conventional Rezoning | PH-C |
| <input type="checkbox"/> Planned Development <input type="checkbox"/> Commercial <input type="checkbox"/> Residential | PH-D |
| <input type="checkbox"/> Master Concept Plan Extension | PH-E |
| <input checked="" type="checkbox"/> Appeal of Administrative Action | PH-F |
| <input type="checkbox"/> Vacation of Platted Right-of-way and Easement | PH-G |
| <input type="checkbox"/> Other – cite LDC Section: _____ | attach on separate sheet |

PART I - General Information

A. Applicant*: KROHN INVESTMENTS, LLC Phone: 239-265-3881

**Applicant must submit a statement under oath that he/she is the authorized representative of the property owner. Please see PART III to complete the appropriate Affidavit form for the type of applicant.*

Applicant Mailing Address: P. O. BOX 2518, FORT MYERS BEACH, FL 33932

Email: MWKROHN@YAHOO.COM Fax: _____

Contact Name: MITCHELL KROHN Phone: 239-265-3881

B. Relationship of Applicant to subject property:

- | | | |
|---|---|--|
| <input checked="" type="checkbox"/> Owner* | <input type="checkbox"/> Land Trust* | <input type="checkbox"/> Partnership* |
| <input type="checkbox"/> Corporation* | <input type="checkbox"/> Association* | <input type="checkbox"/> Condominium* |
| <input type="checkbox"/> Subdivision* | <input type="checkbox"/> Timeshare Condo* | <input type="checkbox"/> Contract Purchaser* |
| <input type="checkbox"/> Authorized Representative* | <input type="checkbox"/> Other* (please indicate) _____ | |

**Applicant must submit a statement under oath that he/she is the authorized representative of the property owner. Please see PART III to complete the appropriate Affidavit form for the type of applicant.*

C. Authorized Agent(s). Please list the name of Agent authorized to receive correspondence Agents

Name: BEVERLY GRADY - ROETZEL & ADDRESS Phone: 239-338-4207

Address: 2320 FIRST STREET, FORT MYERS, FL 33901

Email: BGRADY@RALAW.COM Fax: 239-337-0970

D. Other Agent(s). Please list the names of all Authorized Agents (attach extra sheets if necessary)

Name: MITCHELL KROHN Phone: 239-265-3881

Address: P. O. BOX 2518, FORT MYERS BEACH, FL 33932

Email: MWKROHN@YAHOO.COM Fax: _____

Name: _____ Phone: _____

Address: _____

Email: _____ Fax: _____

Name: _____ Phone: _____

Address: _____

Email: _____ Fax: _____

PART II - Nature of Request

Requested Action (each request requires a separate application)

- Special Exception
 - Variance from LDC Section _____ - _____
 - Conventional Rezoning from _____ to _____
 - Planned Development
 - Rezoning from _____ to Commercial PD Residential PD
 - Amendment. List the project number: _____
 - Extension/reinstatement of Master Concept Plan. List project number: _____
 - Appeal of Administrative Action
 - Vacation Right-of-Way Easement
 - Other. Please Explain: _____
-
-

PART III - Waivers

Please indicate any specific submittal items that have been waived by the Director for the request. Attach a copy of the signed approval as Exhibit 3-1. (Use additional sheets if necessary)

- Code Section: _____ Description: _____
-
- Code Section: _____ Description: _____
-
- Code Section: _____ Description: _____
-

PART IV - Property Ownership

- Single Owner (individual or husband and wife)
 - Name: _____ Phone: _____
 - Mailing Address: _____
 - Email: _____ Fax: _____

Multiple Owners (including corporation, partnership, trust, association, condominium, timeshare, or subdivision)

- Complete Disclosure of Interest Form (see below)
- Attach list of property owners as Exhibit 4-1
- Attach map showing property owners interests as Exhibit 4-2 (for multiple parcels)
- For condominiums and timeshares see Explanatory Notes Part IV (Page 11)

DISCLOSURE OF OWNERSHIP INTEREST

STRAP: 24-46-23-W3-00208.0080

If the property is owned in fee simple by an INDIVIDUAL, tenancy by the entirety, tenancy in common, or joint tenancy, list all parties with an ownership interest as well as the percentage of such interest.

Name and Address	Percentage Ownership
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

If the property is owned by a CORPORATION, list the officers and stockholders and the percentage of stock owned by each.

Name, Address and Office	Percentage of Stock
<u>MITCHELL KROHN, PO BOX 2518, FT MYERS BEACH FL 3393</u>	<u>50%</u>
<u>CONSTANCE L. KROHN, PO BOX 2518, FT MYERS BEACH FL</u>	<u>50%</u>
_____	_____
_____	_____
_____	_____

If the property is in the name of a TRUSTEE, list the beneficiaries of the trust with percentage of interest.

Name and Address	Percentage of Interest
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

If the property is in the name of a GENERAL PARTNERSHIP OR LIMITED PARTNERSHIP, list the names of the general and limited partners.

Name and Address	Percentage of Ownership
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

If there is a CONTRACT FOR PURCHASE, whether contingent on this application or not, and whether a Corporation, Trustee, or Partnership, list the names of the contract purchasers below, including the officers, stockholders, beneficiaries, or partners.

Name, Address and Office	Percentage of Stock
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

Date of Contract: _____

If any contingency clause or contract terms involve additional parties, list all individuals or officers, if a corporation, partnership, or trust.

Name	Address
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

For any changes of ownership or changes in contracts for purchase subsequent to the date of the application, but prior to the date of final certificate of compliance, a supplemental disclosure of interest must be filed.

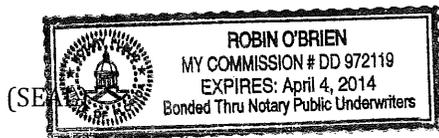
The above is a full disclosure of all parties of interest in this application, to the best of my knowledge and belief.

Mitchell Krohn
Signature

MITCHELL KROHN
Printed Name

STATE OF FLORIDA)
COUNTY OF LEE)

The foregoing instrument was sworn to (or affirmed) and subscribed before me on 3/15/2013 (date) by MITCHELL KROHN (name of person providing oath or affirmation), who is personally known to me or who has produced _____ (type of identification) as identification.



Robin O'Brien
Signature

ROBIN O'BRIEN
Printed Name

PART V – Property Information

A. Legal Description:

STRAP: 24-46-23-W3-00208.0080

Property Address: 1028 FIFTH STREET, FORT MYERS BEACH, FL 33931

Is the subject property within a platted subdivision recorded in the official Plat Books of Lee County? No. Attach a legible copy of the legal description as Exhibit 5-1.

Yes. Property identified in subdivision: _____

Book: 9 Page: 9 Unit: _____ Block: 8 Lot(s): 8 AND 9

B. Boundary Survey:

Attach a Boundary Survey of the property meeting the minimum standards of Chapter 61G17-6 of the Florida Administrative Code. A Boundary Survey must bear the raised seal and original signature of a Professional Surveyor and Mapper licensed to practice Surveying and Mapping by the State of Florida. Attach and label as Exhibit 5-2.

C. Property Dimensions:

Width (please provide an average width if irregular in shape) _____ feet

Depth (please provide an average width if irregular in shape) _____ feet

Frontage on street: _____ feet. Frontage on waterbody: _____ feet

Total land area: _____ acres square feet

D. General Location of Subject Property (from Sky Bridge or Big Carlos Pass Bridge):

FIRST STREET ON THE RIGHT OFF THE BRIDGE, BUILDING ON THE LEFT

Attach Area Location Map as Exhibit 5-3

E. Property Restrictions (check applicable):

There are no deed restrictions and/or covenants on the subject property.

A list of deed restrictions and/or covenants affecting the subject property is attached as Exhibit 5-4.

A narrative statement detailing how the restrictions/covenants may or may not affect the request is attached as Exhibit 5-5.

F. Surrounding Property Owners (these items can be obtained from the Lee County Property Appraiser):

- Attach a list of surrounding property owners within 500 feet as Exhibit 5-6.
- Attach a map showing the surrounding property owners as Exhibit 5-7.
- Provide Staff with two (2) sets of surrounding property owner mailing labels.

G. Future Land Use Category (see Future Land Use Map):

- | | |
|---|--|
| <input type="checkbox"/> Low Density | <input type="checkbox"/> Marina |
| <input type="checkbox"/> Mixed Residential | <input type="checkbox"/> Recreation |
| <input type="checkbox"/> Boulevard | <input type="checkbox"/> Wetlands |
| <input checked="" type="checkbox"/> Pedestrian Commercial | <input type="checkbox"/> Platted Overlay |

H. Zoning (see official Zoning Map):

- | | |
|--|--|
| <input type="checkbox"/> RS (Residential Single-family) | <input type="checkbox"/> CF (Community Facilities) |
| <input type="checkbox"/> RC (Residential Conservation) | <input type="checkbox"/> IN (Institutional) |
| <input type="checkbox"/> RM (Residential Multifamily) | <input type="checkbox"/> BB (Bay Beach) |
| <input type="checkbox"/> RPD (Residential Planned Development) | <input type="checkbox"/> EC (Environmentally Critical) |
| <input type="checkbox"/> CM (Commercial Marine) | <input checked="" type="checkbox"/> DOWNTOWN |
| <input type="checkbox"/> CO (Commercial Office) | <input type="checkbox"/> SANTOS |
| <input type="checkbox"/> CB (Commercial Boulevard) | <input type="checkbox"/> VILLAGE |
| <input type="checkbox"/> CR (Commercial Resort) | <input type="checkbox"/> SANTINI |
| <input type="checkbox"/> CPD (Commercial Planned Development) | |

PART VI
AFFIDAVIT
APPLICATION IS SIGNED BY AN INDIVIDUAL OWNER OR APPLICANT

I, _____ swear or affirm under oath, that I am the owner or the authorized representative of the owner(s) of the property and that:

I have full authority to secure the approval(s) requested and to impose covenants and restrictions on the referenced property as a result of any action approved by the Town of Fort Myers Beach in accordance with this application and the Land Development Code;

All answers to the questions in this application and any sketches, data or other supplementary matter attached hereto and made a part of this application are honest and true;

I have authorized the staff of the Town of Fort Myers Beach Community Development to enter upon the property during normal working hours for the purpose of investigating and evaluating the request made thru this application; and that

The property will not be transferred, conveyed, sold or subdivided unencumbered by the conditions and restrictions imposed by the approved action.

Signature of owner or authorized agent

Date

STATE OF FLORIDA)
COUNTY OF LEE)

The foregoing instrument was sworn to (or affirmed) and subscribed before me on _____ (date) by _____ (name of person providing oath or affirmation), who is personally known to me or who has produced _____ (type of identification) as identification.

(SEAL)

Signature

Printed Name

PART VII

AFFIDAVIT

APPLICATION IS SIGNED BY A CORPORATION, LIMITED LIABILITY COMPANY (L.L.C.), LIMITED COMPANY (L.C.), PARTNERSHIP, LIMITED PARTNERSHIP, OR TRUSTEE

I, MITCHELL KROHN (name), as AUTHORIZED REPRESENTATIVE (title) of KROHN INVESTMENTS, LLC (company), swear or affirm under oath, that I am the owner or the authorized representative of the owner(s) of the property and that:

- 1. I have full authority to secure the approval(s) requested and to impose covenants and restrictions on the referenced property as a result of any action approved by the County in accordance with this application and the Land Development Code;
2. All answers to the questions in this application and any sketches, data or other supplementary matter attached hereto and made a part of this application are honest and true;
3. I have authorized the staff of Lee County Community Development to enter upon the property during normal working hours for the purpose of investigating and evaluating the request made thru this application; and that
4. The property will not be transferred, conveyed, sold or subdivided unencumbered by the conditions and restrictions imposed by the approved action.

KROHN INVESTMENTS, LLC

Name of Entity (corporation, partnership, LLP, LLC, etc)

Mitchell Krohn
Signature

AUTHORIZED REP
Title

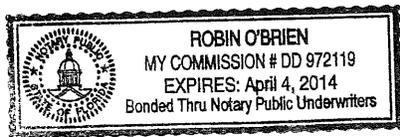
MITCHELL KROHN
Typed or Printed Name

MARCH 15, 2013
Date

STATE OF FLORIDA)
COUNTY OF LEE)

The foregoing instrument was sworn to (or affirmed) and subscribed before me on 3/15/2013 (date) by MITCHELL KROHN (name of person providing oath or affirmation), who is personally known to me or who has produced (type of identification) as identification.

(SEAL)



Robin O'Brien
Signature

ROBIN O'BRIEN
Printed Name

EXPLANATORY NOTES

Please do not print, copy and submit these instructions

Please submit *one ORIGINAL paper copy, eleven (11) copies and one (1) digital/electronic copy* of all required applications, supplemental information, exhibits and documents.

Application fees are set by resolution of the Town Council of the Town of Fort Myers Beach and must be paid before any materials submitted will be considered an application.

The applicant is responsible for the accuracy and completeness of this application. Time delays or additional expenses necessitated by submitting inaccurate or incomplete information will be the responsibility of the applicant. Decisions regarding requests to waive submittal requirements are at the discretion of the Community Development Director and may not be appealed.

All information submitted with the application becomes a part of the public record and will be a permanent part of the file.

All attachments and exhibits must be legible, suitable for recording, and of a size that will fit or conveniently fold into a letter size (8 ½ by 11) folder.

Any oversized site plans, drawings, pictures, and similar materials should be submitted in a legible reduced format (no more than 11"x17", broken up onto multiple sheets if necessary).

Explanatory Notes – Part I

- A. Applicant's name: The applicant may be the landowner or an authorized agent.
- B. Relationship of applicant to property: Indicate if the applicant is the property owner, and if so, the type of ownership. If the applicant is not the owner of the property, indicate the relationship of the applicant to the owner and submit a notarized authorization from the owner(s) to the applicant.
- C. Agent's name: If the applicant will have others representing him/her in processing the application, indicate name, address, and phone number.
- D. Other agents: Provide contact information for any other agents that may be involved in the request.

Explanatory Notes – Part II

Indicate the requested action.

Explanatory Notes – Part III

If waiver of any application requirement has been approved by the Community Development Director, attach a copy of the approval. Please request waivers prior to applying.

Explanatory Notes – Part IV

- If the property owner is an individual or husband and wife, check the box and provide the information.
- If there are multiple property owners, complete the disclosure form and include the names and mailing addresses of all persons or entities having an ownership interest in the property, including the names of all stockholders and trust beneficiaries. Disclosure is not

required of any entity whose interests are solely equity interests that are regularly traded on an established securities market in the United States or another country.

- If more than one parcel is involved, submit a list of all property owners and their mailing addresses. Provide a map keyed to the list of property owners showing their interests. The applicant is responsible for the accuracy of the list and map.
- Where the property is a condominium or timeshare condominium, the application must be initiated by both the condominium association and no less than 75% of the total number of unit owners. To verify ownership, the list of property owners must be identified by unit number and/or timeshare period as applicable, along with proof that the owners who did not join in the application were given actual written notice of the application by the applicants, who must verify the list and the notice by sworn affidavit. Attach this affidavit as Exhibit 4-3. In addition, a letter of opinion from an attorney licensed to practice law in the State of Florida addressing the considerations in LDC Section 34-201(a)(1)b.3. must be attached as Exhibit 4-4.

Explanatory Notes – Part V

- A. Include the street address of the subject property. List STRAP number. If more than one parcel is involved, list all STRAP numbers. If you don't know the STRAP number, you can look up the property in the records of the Lee County Property Appraiser at <http://www.leepa.org>. If the application includes only one or more undivided platted lots within a subdivision officially recorded in the Plat Books of Lee County, Florida, identify the property by lot number(s), block if applicable, subdivision unit if applicable, subdivision name, and plat book number and page number. If the property is not one or more undivided platted lots or is in an "unrecorded" subdivision, attach a metes and bounds legal description giving accurate bearings and distances for each course. If multiple parcels are involved, the metes and bounds legal description must describe the perimeter of the entire property subject to the request. The initial point in the description must be related to at least one established identifiable real property corner, such as a government corner or a recorded corner. The bearings used in the description must be clearly referenced to a well-established and monumented line.
- B. Submit a Boundary Survey meeting the minimum technical standards for surveying set out in Chapter 61G17-6 of the Florida Administrative Code. Make sure that the surveyor is aware of any specific needs of the survey (location of Coastal Construction Lines, locations of existing structures, locations of easements, etc) that are relevant to your request. The perimeter boundary of the entire subject property should be indicated clearly with a heavy line.
- C. Provide the property dimensions or the approximate dimensions if the property is not a regular quadrilateral.
- D. Describe how to get to the property starting from either the Sky Bridge or the Big Carlos Pass Bridge (specify which).
- E. If there are any deed restrictions or covenants that might affect the requested action, provide the information.
- F. Attach a list of the surrounding property owners within 500 feet of the perimeter of the area of the request. Also include two sets of mailing labels providing the names and

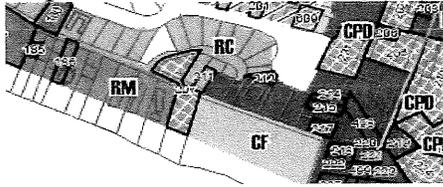
addresses of the owners on this list, and a map showing the parcel boundaries within the 500-foot radius. This information can be acquired for a small fee by requesting a "variance report" from the Map Sales Office at the Lee County Property Appraiser's Office. Contact information for the Property Appraiser can be found at <http://www.leepa.org>.

- G. Indicate the Future Land Use Map category or categories of the property as shown on the Fort Myers Beach Comprehensive Plan's Future Land Use Map, and whether the property is located in the "platted overlay" on the map.
- H. Indicate the current zoning of the property. In most cases the current zoning is shown on the official zoning map of the Town of Fort Myers Beach, as adopted by ordinance. If zoning actions affecting the subject property have been taken since March 2004, call Town Hall to verify the current zoning.

Explanatory Notes - Part VI & VII

The applicant must sign and submit either of the affidavits in Part IV & VII, as applicable.

Town of Fort Myers Beach
 Department of Community Development



Zoning Division

Supplement PH-F

Additional Required Information for an Appeal of an Administrative Action

This is the second part of a two-part application. This part requests specific information for an appeal of an administrative action. Include this form with the Request for Public Hearing form.

Project Name: TEE KI HUT OUTDOOR SEAING
Authorized Applicant: KROHN INVESTMENTS, LLC
LeePA STRAP Number(s): 24-46-23-W3-00208.0080

Current Property Status:
Current Zoning: DOWNTOWN
Future Land Use Map (FLUM) Category: PEDESTRIAN COMMERCIAL
Platted Overlay? <u>yes</u> <input checked="" type="checkbox"/> <u>no</u> <input type="checkbox"/> FLUM Density Range:

Requested Action:

<input type="checkbox"/> Appeal interpretation of LDC Section(s) _____
<input checked="" type="checkbox"/> Appeal other administrative action (Explain: <u>See Exhibit 1</u>)
<input type="checkbox"/> Appeal development permit (must be authorized by property owner)
<input type="checkbox"/> Appeal decision of LPA (Explain: _____)

Date of decision: <u>Received 2/19/2013</u>
--

Submittal Requirements

Narratives

On separate sheets, address the following questions as applicable to the specific type of action you are appealing:

LDC Interpretation

1. What is the interpretation that you are appealing?
Also attach copies of the request for an interpretation, and the written response by the Town, as "Exhibit 1."
2. Describe what interpretation, in your opinion, should have been given. Explain the basis for your opinion. *See Exhibit 1*

Other administrative action

1. What administrative action are you appealing? (summarize)
Also attached copies of your application for administrative action and the written response by the Town, as "Exhibit 1."
2. Describe what action, in your opinion, should have been taken. Explain the basis for your opinion. *See Exhibit 1*

Appeal of development permit

1. What specific development permit application are you appealing?
Include as much information as is necessary to make clear the nature of the proposed development, including site plans, elevations, construction plans, or any other relevant plans or designs. Attach these items and a copy of the written response by the Town or designee as "Exhibit 1"
2. Describe what action should have been taken, in your opinion, on the development permit being appealed. Explain the basis for your opinion.

Appeal of LPA decision

1. What specific LPA decision are you appealing? Indicate the context of the LPA decision (Historic Preservation Board decision, landmark sign request, MUD hearing, Comprehensive Plan interpretation) and attach a copy of the LPA resolution constituting the decision you are appealing.

2. Describe what decision the LPA (or LPA acting as Historic Preservation Board) should have made, in your opinion. Explain the basis for your opinion.

LDC Section 34-86 governs appeals of administrative actions unless other procedures are specifically provided in the LDC in a particular context. Note that an appeal is appropriate where it is alleged that there is an *error* in the administration and enforcement of the provisions of the LDC or any other ordinance.

LETTER OF AUTHORIZATION

TO FORT MYERS BEACH COMMUNITY DEVELOPMENT

The undersigned does hereby swear or affirm that it is the authorized applicant of the properties known as STRAP NO. 24-46-23-W3-00208.0080, Fort Myers Beach, Florida.

The undersigned hereby designates Beverly Grady on behalf of Roetzel and Andress, a Legal Professional Association, to be its agent to file an Application for Public Hearing regarding the above-referenced properties.

KROHN INVESTMENTS, LLC

By: Mitchell Krohn
Mitchell Krohn, authorized representative

STATE OF FLORIDA)
COUNTY OF LEE)

Sworn to (or affirmed) and subscribed before me this 15th day of MARCH, 2013, by Mitchell Krohn, who is personally known to me and who did (did not) take an oath.

Robin O'Brien
Notary Public
Printed Name: Robin O'Brien

[NOTARY STAMP / SEAL]

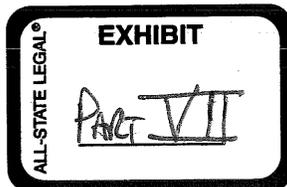
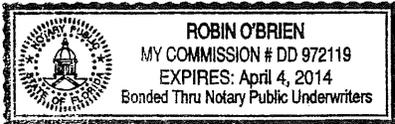
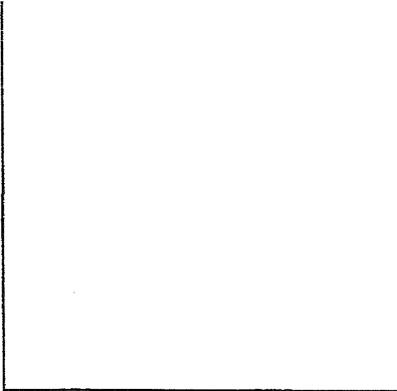


EXHIBIT 4-1

Prepared by and Return Recorded Original to:

Charles R. Meador, Jr., Attorney at Law
1661 Estero Boulevard, Suite 16
Post Office Box 2520
Fort Myers Beach, FL 33932-2520
Telephone: (239) 463-6619
Facsimile: (239) 463-6454

Property Appraiser Parcel I.D. No. 24-46-23-W3-00208.0080
Grantee Taxpayer I.D. No. _____
Documentary Stamp Tax on Transfer: \$4375



Reserved For Recorder

(STATUTORY FORM - Section 689.02, F.S.)

WARRANTY DEED

THIS WARRANTY DEED, made this 12 day of NOVEMBER, A.D. 2009, between BRIDGENORTH PROPERTIES, LLC, a Florida limited liability company, whose post office address is P.O. Box 1, Station 1, Fort Myers Beach, FL 33932, hereinafter called Grantor, and KROHN INVESTMENTS, LLC, a Florida limited liability company, whose post office address is P.O. Box 2518, Fort Myers Beach, FL 33932, hereinafter called Grantee.

WITNESSETH, That said Grantor, for and in consideration of the sum of TEN AND NO/100'S DOLLARS (\$10.00), and other good and valuable considerations to said Grantor in hand paid by said Grantee, the receipt whereof is hereby acknowledged, has granted, bargained, and sold to the said Grantee, and Grantee's heirs and assigns forever, the following described land, situate, lying and being in Lee County, Florida, to-wit:

Lots 8 and 9, Block 8, BUSINESS CENTER, as per plat thereof recorded in Plat Book 9, Pages 9 and 10, of the Public Records of Lee County, Florida.

SUBJECT TO easements, restrictions and reservations of record and taxes for the current and subsequent years.

and said Grantor does hereby fully warrant the title to said land, and will defend the same against lawful claims of all persons whomsoever.

*"Grantor" and "Grantee" are used for singular and plural, as context requires.

IN WITNESS WHEREOF, Grantor has hereunto set Grantor's hand and seal the day and year first above written.

Reserved For Recorder

Signed in the presence of:

BRIDGENORTH PROPERTIES, LLC, a Florida limited liability company

By: CHEMONG ENTERPRISES, LLC, a Nevis limited liability company, as Manager

x Nancy Day
/ NANCY DAY
Witness Name - print or type

By: x Alida Carlake
/ Alida Carlake, as Manager

x M. Reg
/ M. Reg
Witness Name - print or type

PROVINCE /
~~STATE~~ OF ONTARIO
COUNTY OF RETEMBOROUGH, CANADA

EXECUTION OF the foregoing instrument was acknowledged before me this 12 day of NOVEMBER, 2009, by Alida Carlake, as Manager of CHEMONG ENTERPRISES, LLC, a Nevis limited liability company, as Manager of BRIDGENORTH PROPERTIES, LLC, a Florida limited liability company, who is (CHECK ONE OF THE FOLLOWING AS APPLICABLE) [] personally known to me, or [] who has produced () as identification.

x [Signature]
NOTARY PUBLIC - SIGNATURE ABOVE
NOTARY NAME JOHN JOSEPH CROOK (Notary Seal)
COMMISSION NO. - N/A
COMMISSION EXP. DATE LIFE
(Notary Name/Commission No./Exp. Date - typed or printed)



KROHN INVESTMENTS, LLC
EXHIBIT 1 TO THE APPEAL

This appeal is filed on behalf of Krohn Investments, LLC, and Mitch Krohn, individually and as managing member of the limited liability company (hereinafter collectively known as "Business Owner"). This is an appeal of a Town of Fort Myers Beach revocation of permitted uses without due process and in violation of the Town's Land Development Code. Business Owner owns the property at 1028 Fifth Street, Fort Myers Beach, Florida 33931 and is doing business as "Tee Ki Hut" (hereinafter "Subject Property"). A copy of the revocation letter and written permit stamped "revoked" that was provided to Business Owner (Mitch Krohn) at a meeting in Town Hall on or about February 19, 2013 is attached as Composite Exhibit "A" (note: that the revocation letter references Exhibits "A" and "B" which were never provided to Business Owner).

The error is compounded that the Town is estopped from revoking its written approval for permitted uses in the Downtown District and taking those uses from Business Owner. The Town took actions upon which Business Owner in good faith detrimentally relied and expended substantial sums for approvals from the Town and actual construction of additions to the Subject Property to include, but not limited to:

1. The Town issued by former Community Development Director, Dr. Frank Shockey, and Jim Carrasco verbal approval of all uses which are the subject of this appeal to Business Owner prior to Business Owner acquiring the Subject Property; and
2. The Town issued written approvals of all uses in 2010, 2011, and 2012 (Exhibit "B") by the Community Development Director or his designee have now been revoked; and
3. The Town issued building permits and certificates of completion and occupancy and a limited development order 2010-0014 (Exhibit "C") and incorporated by reference for structure additions to the Subject Property; and
4. Numerous inspections of the Subject Property by the Town have taken place since 2010 through 2013 with no objection.

(Above Items 1, 2, 3 and 4 hereinafter are referred to as "Town Approvals")

Specifically the Town cites an October 31, 2012 inspection as the only basis for its revocation delivered February 14, 2013 which is a 3-1/2 month delay.

Based on good faith reliance on Town Approvals, Business Owner constructed the first roofed addition in 2010 and commenced construction of the second addition in the fall of 2012 which was completed in January 2013. Business Owner spent substantial sums on acquisition of the Subject Property based upon the Town's assurance; on design; engineering fees; application fees to the Town for development order and for building permits and of course actual construction of each of the two (2) additions, all in reliance on the Town Approvals.

Personal Services are a permitted use in the Downtown zoning. The Subject Property is zoned Downtown. Land Development codes specifically regulates how one is to determine which zoning district will permit a specific land use:

1. First, consult the definitions in 34-2 to determine the appropriate terminology to describe the specific land use;
2. Consult Table 34-1 to determine which use (sub-groups include the desired land use)
3. Consult Table 34-2 to determine which zoning districts allow that use (sub-group)
4. Consult the zoning map to determine which land has been assigned to those zoning districts (See Section 34-62[f]).

In addition to the above, Business Owner met with the Director of Community Development and his assistant to confirm the retail use and personal service uses (hair braid, henna, and airbrush). Section 34-620(b) authorizes the Director to determine any use not specifically listed in the code as to whether it is permitted or not. In addition to the verbal approval, the Town issued written approval of personal services uses and retail use on the addition. The Town made such decisions which were issued to Business Owner verbally and in writing in 2010, 2011, and 2012 and the Town is bound by those factual determinations.

Business Owner's rights have been stripped away by the Town and Business Owner has been denied due process by the deprivation of its property rights. The Town has been an active participant in Business Owner's reliance by issuing building permits and the development order for the two (2) additions, inspecting the use of the first addition for use, issuing written approvals for use, and watching and inspecting the construction of the second addition but delaying the announcement of any issue until Business Owner had completed the second addition and then without notice and warning revoked the prior approvals.

The effect of the revocation is to put Business Owner out of business.

The definition of building in LDC Section 34-2 provides it is "any structure, whether temporary or permanent, having a roof intended to be impervious to weather and used or built for the shelter or enclosure of persons, animals, chattel, or property of any kind." (emphasis supplied). For the purposes of uses in the Downtown District of Chapter 34, the two (2) additions qualify as a building and therefore the uses of Retail and Personal Services pursuant to the Town Approval are permitted.

In addition, Section 34-678, Outdoor Display of Merchandise and Food, is specifically limited to regulation of food and beverage and merchandise and does not include personal services.

Chapter 34 provides for enforcement by the Town Manager through the following:

1. Chapter 2, Article V, which is code enforcement through the special magistrate or through the citation process to County court, each of which sets forth a due process procedure; or

2. Section 1-5 which does not authorize revocation of the permit.
3. A review of the code reveals that the only revocation process authorized by the Town Council is a process under Section 34-1264(i)(1)(a-g.), the revocation of an alcoholic beverage permit or approval and the basis for that revocation includes:
 - An application contains knowing false and misleading information; or
 - The applicant has violated state statute resulting in the loss of the state liquor license or the applicant has repeated violations for the twelve (12) months preceding and this Section provides for a hearing providing due process to the owner of the business.

In addition, this alcohol revocation procedure provides for notice, a hearing, and opportunity to be heard.

Here Business Owner specifically listed the uses for the addition(s) and was approved by the Town Approvals for those uses.

The test for application of estoppel is stated in *Town of Largo vs. Imperial Homes Corporation*, 309 So.2nd 571 (Fla. 2d. DCA 1975):

“The doctrine of equitable estoppel is applicable to local government exercising its zoning power when a property owner

- 1) relying in good faith
- 2) upon some action or omission of the government
- 3) has made such a substantial change in position or incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the rights he has acquired”

The Town of Fort Myers Beach laid a welcome mat and invitation to Business Owner to invest into the Town of Fort Myers Beach and Business Owner has relied on the approvals of the Town of Fort Myers Beach. Business Owner has substantially improved Times Square with its improvements.

We respectfully submit that the Town is bound by its past approvals and indeed those past approvals are a correct interpretation of the Land Development Code. We respectfully request that the Town Council of Fort Myers Beach overturn Exhibit “A” (an incorrect administrative order) and continue to permit personal services uses and retail on addition 1 and addition 2.



200
Town of Fort Myers Beach

Community Development
2523 Estero Blvd Fort Myers Beach, Florida 33931
Phone: 239-765-0202 Fax: 239-765-0591

February 13, 2012

Mitch Krohn
Krohn Investments LLC
PO Box 2518
Fort Myers Beach, FL 33932

Re: TMP12-0009

Dear: Mr. Krohn,

Upon further review of permit number TMP12-0009, Community Development Department advises you that some of the uses listed under 'approved uses and conditions' were approved in error and such approval is therefore hereby revoked.

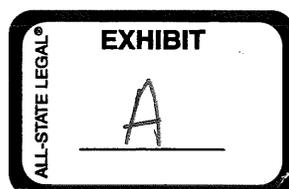
Specifically, 'retail, airbrush, henna and hair braiding on the deck' are not allowable uses on the open air deck and are no longer approved.

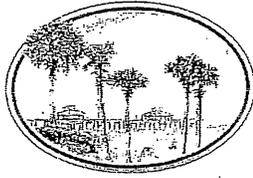
You continued to be approved for two (2) vending carts matching the description on Exhibit B and located on the subject property as depicted on Exhibit A.

Please feel free to contact me if you have any questions or require further clarification.

Sincerely,

Leslee Chapman
Zoning Coordinator
Town of Fort Myers Beach
Community Development





Town of Fort Myers Beach

Community Development Department
2523 Estero Boulevard Fort Myers Beach, Florida 33931
(239) 765-0202

OUTDOOR DISPLAY & SALES PERMIT

Outdoor Display Permit Number: TMP12-0009 Issued: 05/26/12

Business Name: TEEKI Hut

Type of Business: Retail Sales

Location Address: 1028 Fifth Street Fort Myers Beach, FL 33931

Property Owner Contact: Mitch Krohn

STRAP Number: 24-46-23-W3-00208.0080

Zoning District: DOWNTOWN

REVOKED

Approved Use and Conditions: ~~Retail, Henna, airbrush and hair braiding on the deck;~~

MUST remove all carts within 48 hours of hurricane warning; Vending carts restricted to those depicted on Exhibit A(site plan) and B; Permit must be renewed by 9/30/13

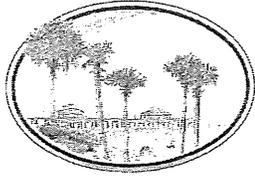
Expires: 9/30/13

Approved By: *Jessie Chapman* Date: 05/26/12

Title: Zoning Coordinator

NOTE: The Town of Fort Myers Beach reserves the right to inspect the location listed above whenever the establishment is open to the general public.





Town of Fort Myers Beach

Community Development Department

2523 Estero Boulevard Fort Myers Beach, Florida 33931

(239) 765-0202

OUTDOOR DISPLAY & SALES PERMIT

Outdoor Display Permit Number: TMP12-0009 Issued: 05/26/12

Business Name: TEEKI Hut

Type of Business: Retail Sales

Location Address: 1028 Fifth Street Fort Myers Beach, FL 33931

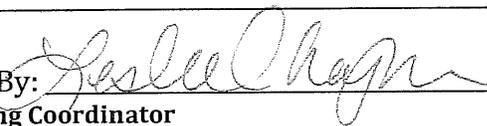
Property Owner Contact: Mitch Krohn

STRAP Number: 24-46-23-W3-00208.0080

Zoning District: DOWNTOWN

Approved Use and Conditions: Retail, Henna, airbrush and hair braiding on the deck;
MUST remove all carts within 48 hours of hurricane warning; Vending carts restricted to
those depicted on Exhibit A(site plan) and B; Permit must be renewed by 9/30/13

Expires: 9/30/13

Approved By:  Date: 05/26/12

Title: Zoning Coordinator

NOTE: The Town of Fort Myers Beach reserves the right to inspect the location listed above whenever the establishment is open to the general public.





Town of Fort Myers Beach

Community Development Department

2523 Estero Boulevard Fort Myers Beach, Florida 33931
(239) 765-0202

OUTDOOR DISPLAY & SALES PERMIT

Outdoor Display Permit Number: FMBBUS11-0002 Issued: 8/19/11

Business Name: TEEKI Hut

Type of Business: Retail Sales

Location Address: 1028 Fifth Street Fort Myers Beach, FL 33931

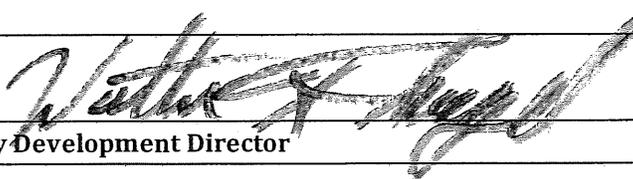
Property Owner Contact: Mitch Krohn

STRAP Number: 24-46-23-W3-00208.0080

Zoning District: DOWNTOWN

Approved Use and Conditions: Retail, Henna, airbrush and hair braiding on the deck;
MUST remove all carts within 48 hours of hurricane warning; Vending carts restricted to
those depicted on Exhibit A(site plan), B and C; Visual appearance restricted to proposed
elevation depicted on Exhibit D; Permit must be renewed by 9/30/12

Expires: 9/30/12

Approved By:  Date: 8/19/11

Title: Community Development Director

NOTE: The Town of Fort Myers Beach reserves the right to inspect the location listed above whenever the establishment is open to the general public.

B 2



**TOWN OF
FORT MYERS BEACH
APPLICATION FOR OUTDOOR DISPLAY AND SALES
PERMIT**

ORD. 04-08. A permit is required for each business wishing to display merchandise outdoors or to place outdoor seating in conformance with this LDC Section 34-678

SUBJECT PROPERTY ADDRESS 1028 Fifth Street, FT Myers Beach
 PROPERTY DESCRIPTION 24-46-23-w3 - 00208.0080
 APPLICANT'S NAME Krohn Investment LLC. Mitchell Krohn
 APPLICANT'S MAILING ADDRESS PO Box 2518
STREET NUMBER APT. NUMBER
FT Myers Beach FL 33932
CITY STATE ZIP CODE
 APPLICANT'S PHONE NUMBER 239 265-3881
 OWNER OF PROPERTY (IF OTHER THAN APPLICANT) Same
 OWNER'S MAILING ADDRESS Same
STREET NUMBER APT. NUMBER
CITY STATE ZIP CODE
 OWNER'S PHONE NUMBER 239-265-3881

ADDITIONAL INFORMATION

- A. PHOTOGRAPHS OR DRAWINGS CLEARLY INDICATING THE TYPE, CHARACTER, NUMBER, SIZE, AND LOCATION OF PROPOSED OUTDOOR DISPLAY(S) OR DINING TABLE(S)
- B. LETTER OF AUTHORIZATION FROM PROPERTY OWNER (IF APPLICANT IS NOT THE PROPERTY OWNER)
- C. APPROVAL FROM THE FORT MYERS BEACH FIRE DISTRICT INSPECTOR (TAKE APPLICATION TO THE FIRE STATION ON ESTERO BLVD. AND HAVE THE INSPECTOR INITIAL HERE _____)
- D. \$200.00 APPLICATION FEE (THIS IS AN ANNUAL PERMIT THAT EXPIRES ON SEPT. 30)

Mitchell W Krohn
SIGNATURE OF APPLICANT DATE

Jim Cause per Walter Fluegel
(Staff Use Only)

SPECIAL PERMIT IS: APPROVED DENIED PERMIT EXPIRES _____

CONDITIONS: _____

COMMUNITY DEVELOPMENT DIRECTOR DATE

B-3

ODS10-9903807



TOWN OF FORT MYERS BEACH APPLICATION FOR OUTDOOR DISPLAY AND SALES PERMIT

ORD. 04-08. A permit is required for each business wishing to display merchandise outdoors or to place outdoor seating in conformance with this LDC Section 34-678

SUBJECT PROPERTY ADDRESS 1028 FIFTH ST

PROPERTY DESCRIPTION RETAIL STORE

APPLICANT'S NAME MITCH KROHN

APPLICANT'S MAILING ADDRESS PO BOX 2518 STREET NUMBER APT. NUMBER

FORT MYERS BEACH FL 33932 CITY STATE ZIP CODE

APPLICANT'S PHONE NUMBER 239 265 3881

OWNER OF PROPERTY (IF OTHER THAN APPLICANT) SAME AS ABOVE

OWNER'S MAILING ADDRESS STREET NUMBER APT. NUMBER

CITY STATE ZIP CODE

OWNER'S PHONE NUMBER

ADDITIONAL INFORMATION

A. PHOTOGRAPHS OR DRAWINGS CLEARLY INDICATING THE TYPE, CHARACTER, NUMBER, SIZE, AND LOCATION OF PROPOSED OUTDOOR DISPLAY(S) OR DINING TABLE(S)

B. LETTER OF AUTHORIZATION FROM PROPERTY OWNER (IF APPLICANT IS NOT THE PROPERTY OWNER)

C. APPROVAL FROM THE FORT MYERS BEACH FIRE DISTRICT INSPECTOR (TAKE APPLICATION TO THE FIRE STATION ON ESTERO BLVD. AND HAVE THE INSPECTOR INITIAL HERE)

D. \$200.00 APPLICATION FEE (THIS IS AN ANNUAL PERMIT THAT EXPIRES ON SEPT. 30)

Mitch Krohn SIGNATURE OF APPLICANT

2/10/10 DATE

(Staff Use Only)

SPECIAL PERMIT IS: APPROVED DENIED PERMIT EXPIRES

CONDITIONS:

COMMUNITY DEVELOPMENT DIRECTOR

DATE

X NOTE DECK IS TO BE USED FOR RETAIL, HENNA, AIRBRUSH, HAIR BRA

34



COPY

Town of Fort Myers Beach

Larry Kiker
Mayor

Bob Raymond
Vice-Mayor

Tom Babcock
Councilmember

Jo List
Councilmember

Alan Mandel
Councilmember

April 14, 2010

Writer's Direct Dial Number: 239-533-8585

MR. AHMAD KAREH
13041 MCCGREGOR BLVD
FORT MYERS, FL 33919

RE: ISLAND BREEZE
LDO2010-00014 - FMB TYPE 08 Limited Review (Insignificant Improve)
LP1 Appl (paperwrk LDO resub)A

Dear AHMAD KAREH :

Your application for a Land Development Code FMB TYPE 08 Limited Review (Insignificant Improve) Resubmittal has been approved for a Development Order with stipulation(s) for for the following:

Approval for the addition of 1,303 square feet of covered wood deck and ramp, addition of roof to cover both the existing structure wood deck and ramp, addition of 1,040 SF of covered brick paver pavilion, relocation of existing fence, and minor site related improvements.
LDO2009-00197 is now revoked and this LDO is approved.

Approval is subject to the following stipulation(s) and/or comment(s):

Fort Myers Beach Limited Review DO Type 1,2 & 4-8 Checklist (Ord. 04-01)

8) *Type 8 LDO Requirements. A Type 8 LDO is limited to any other improvement to land determined by the director to have insignificant impacts on public facilities according to standard measures (vehicular trips, amount of impervious area, gallons per day, etc.). [10-174(8)]*

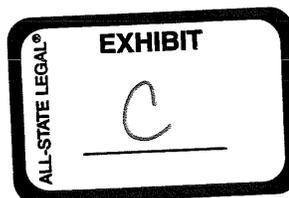
Once the project is completed a Certificate of Compliance must be applied for and an inspection from Development Services will be done.

11) *Contact. The reviewer may be contacted for additional information regarding this checklist.*

Please contact Becky Penfield if you have any questions regarding these comments.

rpenfield@leegov.com or 239-533-8587 extension 48802

This approval does not relieve the development from the responsibility to obtain all necessary Federal, State and local permits.



B.W.L.K.

APR 19 2010

DATE RECEIVED

ISLAND BREEZE

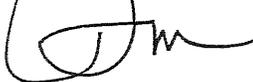
LDO2010-00014

April 14, 2010

If you have any questions concerning this matter, please contact this office.

Sincerely,

LEE COUNTY
DEPARTMENT OF COMMUNITY DEVELOPMENT
Development Services Division
For the Town of Fort Myers Beach

A handwritten signature in black ink, appearing to read "PJE", is written over the text of the department name.

Peter J. Eckenrode
Development Services Director

PJE / RLW

attachments: plans

ROETZEL & ANDRESS
A LEGAL PROFESSIONAL ASSOCIATION

2320 FIRST STREET
SUITE 1000
FORT MYERS, FL 33901-2904
239.338.4207 DIRECT
239.337.3850 MAIN
239.337.0970 FAX
bgrady@ralaw.com
www.ralaw.com

March 29, 2013

VIA REGULAR U. S. MAIL

COPY

Mr. Walter Fluegel
Town of Fort Myers Beach
2523 Estero Boulevard
Fort Myers Beach, Florida 33932

RE: Supplement to Appeal APL2013-0001

Dear Mr. Fluegel:

Please find enclosed a Supplement to add to APL2013-0001 regarding an additional Town decision dated March 7, 2013.

Very truly yours,

ROETZEL & ANDRESS


Beverly Grady

BG/ro
Enclosure
cc: Marilyn Miller (via regular mail w/enc.)

SUPPLEMENT TO APPEAL FILED MARCH 15, 2013
(MARCH 27, 2013)
CASE NO. APL2013-0001

This Addendum is to be incorporated to the Appeal of Administrative Determination filed on March 15, 2013 regarding 1028 Fifth Street, Fort Myers Beach ("Subject Property"), Case No. APL2013-0001.

After delivery on February 19, 2013 of the Town's revocation which is attached to the Appeal as Exhibit "A", representatives of the Town of Fort Myers Beach met with the owner of Tee Ki Hut at 1028 Fifth Street and inspected the site. As part of that inspection, Town of Fort Myers Beach Community Development representatives advised Mr. Krohn that the representative of the air-brushing personal service should file for his own business license which would also have the effect of permitting the Subject Property to additional sign square footage. During that inspection, representatives of the Town of Fort Myers Beach observed the location of the air-brushing business and stated that the Town would sign off on the approvals required on the Town of Fort Myers Beach Business Inspection signature form. \

On February 26, 2013, a Town of Fort Myers Beach Business Inspection signature form was filed with the Town of Fort Myers Beach with a copy is attached as Exhibit "1". The response of the Town was a denial and dated March 7, 2013 and labeled Exhibit "2" to this correspondence. The March 7, 2013 Administrative Decision is hereby incorporated into the existing Appeal as it denied the request based on the same issues disputed by the owner of the Subject Property. Air-brushing is a personal service that is a permitted use in the Downtown District and is not being conducted on an open deck. The Administrative Determination is wrong, incorrect and is hereby incorporated into the existing Appeal.

In addition, a review of the ordinance adopted regulating outdoor display and sales of merchandise and food, Ordinance 04-08 attached as Exhibit "3" provided no notice to the public of any regulation regarding personal services. The title is completely devoid of any notice regarding limitations or restrictions on personal service uses in the Downtown District. The minutes of the Council's first and second meeting, June 21, 2004 and June 30, 2004 are attached as composite Exhibit "4 A and B" and are also devoid of any mention of regulation of personal services. We respectfully request the Town accept this Supplement as part of APL2013-0001.

FEB 26 2013



Town of Fort Myers Beach

RECEIVED BY

BUSINESS INSPECTION SIGNATURE FORM

Owner's Name: <u>RICHARD MILES</u>	Phone: _____
Contact Name: _____	Cell Phone: <u>23-1-434-1402</u>
Strap Number: _____	Fax: _____
Business Name: <u>SHIRT SQUARTERS</u>	Email: _____
Business Location: <u>1028 5TH ST.</u>	
Business Description: <u>CUSTOM AIR BRUSHING</u>	

Fort Myers Beach Use Permit Number: _____
 Certificate of Use Issued: _____

APPROVALS REQUIRED

Zoning Review Approved by: _____ Date: _____

Building Inspection Approved by: _____ Date: _____
 Fax site plan, floor plan & form to Fort Myers Beach Building Department: 765-0591

Fire Inspector Approved by: _____ Date: _____
 Fort Myers Beach Fire Control District: 590-4242 Fax: 463-6761

Code Enforcement Approved by: _____ Date: _____
 Fort Myers Beach Code Enforcement: 765-0202 ext 108 Fax: 765-0909

Garbage Verification Name of Landlord: _____
 Veolia Waste Services: 334-1224 Fax 433-2550

Landlord provides service:	Approval stamp below:
Name of account: _____	
Phone Number: _____	
<input type="checkbox"/> Shared account	
<input type="checkbox"/> Established new service	
Veolia Waste services to fax back to 765-0909 Town of Fort Myers Beach	

**Provide HRS and/or Lee County Health Department approvals if applicable.
 Refer to Certificate of Use for scope of approved use(s) and conditions.**



Town of Fort Myers Beach

Community Development
2523 Estero Blvd Fort Myers Beach, Florida 33931
Phone: 239-765-0202 Fax: 239-765-0591

EXHIBIT 2

March 7, 2013

Richard Miles
Shirt Squirters
777 San Carlos Drive
Fort Myers Beach, FL 33931

Re: Certificate of Use, USE13-0010

Dear Mr. Miles,

A review of the Certificate of Use application for Airbrushing that is proposed to be conducted on the open deck of the property located at 1028 5th Street, that was received at Town Hall on February 26, 2013, cannot be approved for the reasons below.

The Town's Land Development Code (LDC) does not currently permit businesses that are located entirely outdoors. In addition, "airbrushing" is an activity and does not qualify as an outdoor display per the following code sections:

34-678(b)(2) - Purpose & Intent

Outdoor display of merchandise is not intended to expand retail space or to assist in liquidating clearance or discarded items. The principal purpose of outdoor display in the DOWNTOWN district is to enliven sidewalks and pedestrian plazas by promoting pedestrian-oriented businesses, not to expand businesses *or provide locations for freestanding businesses* or for mobile vendors. [emphasis added]

34-678(d) - Types of Outdoor Displays

Types of allowable outdoor displays are limited to the following: vending carts (carts cannot have more than 2 wheels and can only be left outside when the business is closed if it can be secured at night), clothing racks (limited to one support rod up to 6 feet long), specialized display racks (uniquely designed for a specific type of product), freestanding mannequins, tables or freestanding shelves (limited to 2 X 8 foot area or 4 X 4 foot area and not more than 3 feet in height), freestanding product displays (limited to a 4 X 8 foot product area with no more than 7 individual products), or dining tables.

Town of Fort Myers Beach

Community Development

2523 Estero Blvd Fort Myers Beach, Florida 33931

Phone: 239-765-0202 Fax: 239-765-0591

The application submitted by you contemplates a freestanding business that is proposed to be located entirely outdoors and, as such, cannot be permitted as "outdoor display."

Enclosed with this letter is your application and check #1008.

Sincerely,

A handwritten signature in cursive script, appearing to read "Leslee Chapman", written in black ink.

Leslee Chapman

Zoning Coordinator

Town of Fort Myers Beach

Community Development

ORDINANCE No. 04-08

AN ORDINANCE AMENDING CHAPTER 34, ARTICLE III, DIVISION 5. REDEVELOPMENT ZONING DISTRICTS. SUBDIVISION II. DOWNTOWN ZONING DISTRICT; AMENDING SECTION 34-677 (C) OUTDOOR SALES AND RETITLING IT SECTION 34-678 OUTDOOR DISPLAY AND SALES OF MERCHANDISE AND FOOD; REPEALING SECTION 34-677 (D) SANDWICH SIGNS; PROVIDING SEVERABILITY; AND ESTABLISHING AN EFFECTIVE DATE.

IT IS HEREBY ORDAINED BY THE TOWN OF FORT MYERS BEACH AS FOLLOWS:

SECTION 1. AUTHORITY. This Ordinance is enacted pursuant to the provisions of Chapter 95-494, Laws of Florida, Chapters 163 and 166, Florida Statutes, and other applicable provisions of law.

SECTION 2. AMENDING CHAPTER 34, ARTICLE III, DIVISION 5, SUBDIVISION II, DOWNTOWN ZONING DISTRICT. The amendments to Chapter 34 are contained in the attached **Exhibit A**. Entirely new language is indicated with underlining and language being repealed from the regulations is indicated with strike-throughs. The previous language for Outdoor Sales that was found in Section 34-677 (c) is now being amended and moved to Section 34-678 and titled Outdoor Display and Sales of Merchandise and Food. The previous language for Sandwich Signs that was found in Section 34-677(d) is now being repealed.

SECTION 3. SEVERABILITY. If any one of the provisions of this ordinance should be held contrary to any express provision of law or contrary to the policy of express law, although not expressly prohibited, or against public policy, or shall for any reason whatsoever be held invalid, then such provision shall be null and void and shall be deemed separate from the remaining provisions of this ordinance, and in no way affect the validity of all other provisions of this ordinance.

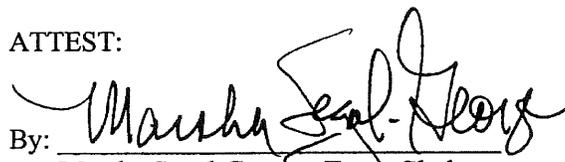
SECTION 4. EFFECTIVE DATE. This ordinance shall take effect immediately upon its adoption.

The foregoing ordinance was enacted by the Town Council upon a motion by Council Member Rynearson and seconded by Council Member Reynolds; upon being put to a vote, the result was as follows:

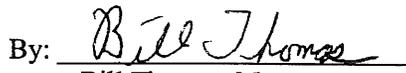
Bill Thomas	AYE
Garr Reynolds	AYE
Howard Rynearson	AYE
W. H. "Bill" Van Duzer	NAY
Don Massucco	NAY

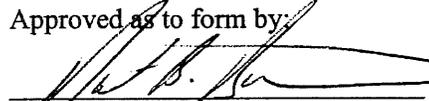
DULY PASSED AND ENACTED this 30th day of June, 2004.

ATTEST:

By: 
Marsha Segal-George, Town Clerk

TOWN OF FORT MYERS BEACH

By: 
Bill Thomas, Mayor

Approved as to form by:

Richard V.S. Roosa, Town Attorney

By: Robert B. Burandt
Florida Bar #434477

EXHIBIT A
FORT MYERS BEACH LAND DEVELOPMENT CODE

CHAPTER 34
ZONING DISTRICTS,
DESIGN STANDARDS,
AND NONCONFORMITIES

ARTICLE III.
ZONING DISTRICT REGULATIONS

DIVISION 5. REDEVELOPMENT
ZONING DISTRICTS

Subdivision II. DOWNTOWN Zoning District

Sec. 34-677. Additional requirements.

(a) *Commercial design standards.* The commercial design standards (§§ 34-991-1010) shall apply to all commercial and mixed-use buildings, or portions thereof, that are being newly built, and to "substantial improvements" to such buildings as defined in § 6-405.

(b) *Open space and buffers.* There are no minimum open space and buffer requirements in the DOWNTOWN district comparable to the standards found in ch. 10, except in three instances:

- (1) Portions of properties that lie east of Palermo Circle and more than 300 feet beyond the north edge of the Estero Boulevard right-of-way shall retain 50% of that portion as open space. This open space may be a stabilized sodded area useable for overflow parking.
- (2) Residential buffers are required between commercial or mixed-use buildings and single-family residential lots for properties on the north side of Estero Boulevard east of Palermo Circle. These buffers shall be constructed in accordance with the buffer requirements of ch. 10 of this code.
- (3) Buffers are required between any off-street parking lot and a public street in accordance

with the buffer requirements of ch. 10 of this code.

Sec. 34-678. (c) Outdoor display and sales of merchandise and food.

(a) *Generally.* Merchandise, food, and beverages may be displayed or sold outdoors in the DOWNTOWN zoning district only in accordance with this subsection.

(b) *Purpose.* The purpose of these regulations is to enhance the pedestrian environment of the town's business district through the creative use of outdoor spaces by providing businesses the opportunity to display a sample of their products and to sell food and beverages in a manner that enhances the public realm, creates an interesting and comfortable shopping and dining district, and maintains and improves the town's sense of place and property values.

- (1) Outdoor display of merchandise allows retailers an opportunity to inform and interest the public by offering a small sample of the products that are available inside. Outdoor display can also be appropriate for small retail products that are meant to be used outside, such as garden ornaments, windsocks, and beach toys.
- (2) Outdoor display of merchandise is not intended to expand retail space or to assist in liquidating clearance or discarded items. The principal purpose of outdoor display in the DOWNTOWN district is to enliven sidewalks and pedestrian plazas by promoting pedestrian-oriented businesses, not to expand businesses or provide locations for freestanding businesses or for mobile vendors (which are regulated in § 34-3002).
- (3) Restaurants are encouraged by this code to provide outdoor dining. Outdoor dining between a restaurant and a street is regulated by this section. The sale of alcoholic beverages outdoors is also regulated by state liquor laws and by § 34-1264 of this code.
- (4) See separate regulations for temporary outdoor displays during special events at § 34-2441 et seq.

(c) Allowable locations for outdoor activities. Table 34-4 summarizes the allowable locations for outdoor display of merchandise and outdoor dining in the DOWNTOWN zoning district.

Table 34-4 — Outdoor Activities in the DOWNTOWN Zoning District				
<u>Display Type</u>	<u>Location</u>	PRIVATE PROPERTY <i>(between store & street)</i>		PUBLIC PROPERTY <i>(Times Square pedestrian plaza)</i>
		<i>On porch</i>	<i>On patio</i>	<i>see (f)</i>
MERCHANDISE , as further limited by other provisions of § 34-678:				
<i>Vending carts – see (d)(1)</i>		no	YES	no
<i>Clothing racks – see (d)(2)</i>		YES	no	no
<i>Specialized displays – see (d)(3)</i>		YES	YES	no
<i>Mannequins – see (d)(4)</i>		YES	YES	no
<i>Tables/shelves – see (d)(5)</i>		YES	no	no
<i>Freestanding displays – see (d)(6)</i>		YES	YES	no
DINING:				
<i>Vending carts – see (d)(1)</i>		no	YES	no
<i>Dining tables – see (d)(7)</i>		YES	YES	YES

(d) Types of outdoor displays.

(1) Vending carts are limited to 2 wheels, must have integral roofs or umbrellas, and may use traditional or creative designs. Vending carts that have been manufactured to be secured at night, with fitted side panels, may be left outside when a business is closed. All other vending carts must be moved indoors when the business is not open. Within 48 hours of the issuance of a hurricane watch for the town by the National Hurricane Center, all vending carts must be moved indoors, removed from the county, or placed within an approved off-island storage area. Figure 34-9.1 shows two suggested vending cart designs.

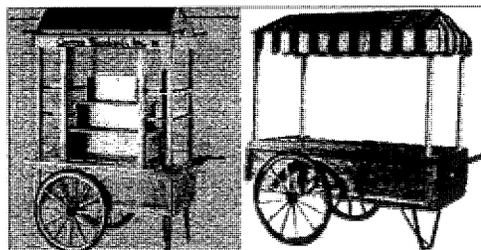


Figure 34-9.1

(2) Clothing racks are limited to one support rod up to 6 feet long on which clothing is hung. Similar displays whose principle function is for the display of clothing, swimwear, and other garments shall be considered a clothing rack. Clothing racks are often mounted on wheels. Figure 34-9.2 shows a typical clothing rack.



Figure 34-9.2

- (3) Specialized display racks are unique displays for a specific type of product. An example is a rack to hold beach toys or accessory items. Specialized display racks are limited to a 2-foot by 8-foot area or a 4-foot by 4-foot area. Figure 34-9.3 shows a specialized display rack.

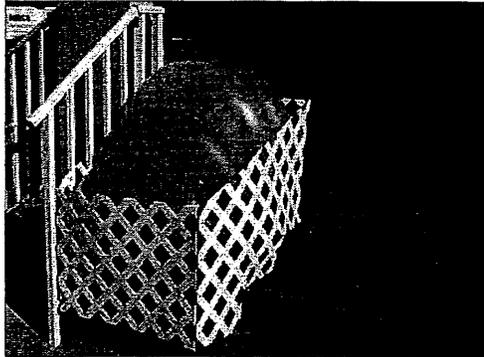


Figure 34-9.3

- (4) Freestanding mannequins are used to display clothing or swimwear. Figure 34-9.4 shows a typical freestanding mannequin.

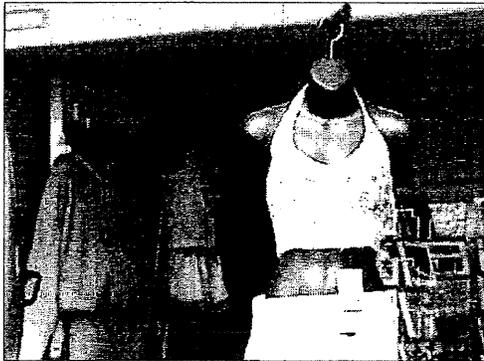


Figure 34-9.4

- (5) Tables or freestanding shelves are limited to a 2-foot by 8-foot area or a 4-foot by 4-foot area, and may not be more than 3 feet in height. Figure 34-9.5 shows a typical freestanding table with merchandise.

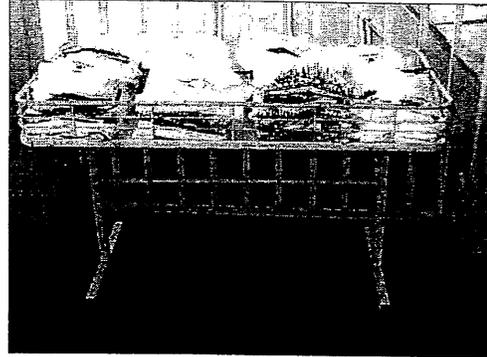


Figure 34-9.5

- (6) Freestanding product displays can be used for products such as lawn and garden accessories or windsocks that are appropriately displayed on their own. These types of products may be displayed within a 4-foot by 8-foot area or with a maximum of 7 individual products. Figure 34-9.6 shows typical freestanding product displays.

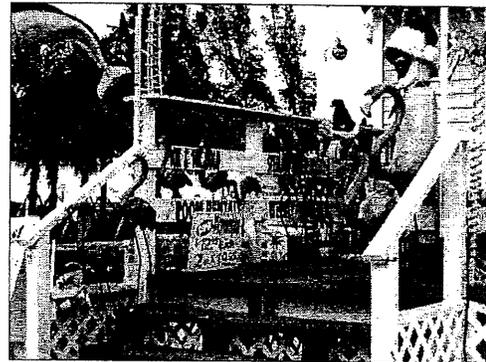


Figure 34-9.6

- (7) Dining tables are used to serve food and beverages to the public. Figure 34-9.7 shows typical dining tables on the Times Square pedestrian plaza.



Figure 34-9.7

(e) (+) On PRIVATE PROPERTY; number, location, and types of outdoor displays and dining tables. Retail businesses may sell their regular merchandise outdoors on private property between their stores and a street right-of-way only if the merchandise is placed on a raised porches or a patio, as defined in this subsection. No business may have more than two outdoor displays of merchandise, as defined in subsection (d). For example, a business may qualify for two vending carts, or one vending cart and one clothing rack, or one mannequin and one table, etc. Multiple occupancy structures with two or more businesses are limited to one outdoor display for each business up to a maximum of four outdoor displays per multiple occupancy structure, on up to two wheeled vending carts that meet the following criteria:

- a. Carts may contain no signage whatever;
- b. Carts must be non-motorized, moveable by hand, and no taller than 10 feet;
- c. Carts must be moved indoors during any hours that the business is not open; and
- d. Carts shall have integral roofs or umbrellas and use traditional or creative designs. Figure 34-9 shows two suggested cart designs:

(1) Porches and patios. Subsection (c) also indicates whether the outdoor display is permitted on a porch, patio, or either. For purposes of this section, porches and patios are defined as follows:

- a. Porch is a wooden or concrete structure that is elevated off of the ground and has

a railing at least 42 inches tall. A porch must be covered or covered with an awning, roof, or umbrellas. Wood must be painted or stained. Businesses with existing porches are encouraged to utilize them for outdoor display. New or expanded porches must comply with all chapters of this code.

- b. Patio is an area covered with paver bricks, concrete, wood, or similar material and located at ground level immediately adjacent to the front of the building. Asphalt or earthen spaces are not considered a patio. Patios are encouraged to be shaded with an awning or umbrella or with a roof that is an integral part of the outdoor display. Businesses without porches are encouraged to use patios. New or expanded patios must comply with all chapters of this code.

(2) Permitted merchandise and types of outdoor display. The following types of merchandise may be displayed outdoors using the display type described in subsection (d):

- a. Art (prints, sculpture, etc.): 1, 3, 5, 6
- b. Bathing suits and swimwear: 1, 2, 4
- c. Beach accessories (umbrellas, chairs, etc.): 1, 6; rental of beach equipment on the beach is regulated in § 14-5 of this code.
- d. Beach towels: 1, 2, 3, 5
- e. Beach toys, rafts, and floats: 1, 3, 5
- f. Clothing: 1, 2, 4, 5
- g. Clothing accessories (jewelry, purses, etc.): 1, 3, 4, 5
- h. Kites and windsocks: 1, 6
- i. Lawn and garden accessories: 1, 6
- j. Small retail items (souvenirs, suntan lotion, flowers, books, etc.): 1, 5
- k. Merchandise not specifically listed: 1, or on permitted display type for the most similar item.
- l. Personal services including tattoos, temporary tattoos, hair braiding, and hair wrapping are not permitted outdoors.

(3) Additional rules for outdoor displays of merchandise.

- a. A retail store wishing to display merchandise outdoors in the DOWNTOWN zoning district must obtain a permit for this use (see

- subsection (e)(5)) in addition to meeting all other requirements of this code.
 - b. Merchandise that is displayed outdoors must be available for sale inside the store.
 - c. All outdoor displays must be brought indoors during any hours that the business is not open, except as provided for vending carts in subsection (d)(1).
 - d. Outdoor displays may contain no business or product identification signage whatever; each display may have one 4 inch by 6 inch sign to display prices.
 - e. All outdoor displays must be non-motorized and movable by hand and may be no taller than 10 feet.
 - f. Merchandise may not be attached to the building or to a railing unless incorporated into an approved type of outdoor display, such as a specialized display rack, mannequin, or freestanding product display (see subsection (d)).
- (4) **Outdoor dining.** A restaurant wishing to provide outdoor seating between the restaurant and a street must obtain a permit for this use (see subsection (e)(5)) in addition to meeting all other requirements of this code. The seating must be located on a porch or patio as defined in this subsection. The sale of alcoholic beverages outdoors is regulated by state liquor laws and by § 34-1264 of this code.
- (5) **Permit required.** A permit is required for each business wishing to display merchandise outdoors or to place outdoor seating in conformance with this section.
- a. Permits may be issued for up to one year and shall expire each year on September 30.
 - b. Permit applications may be filed at any time using forms available from town hall. Applications should be accompanied by photographs or drawings that clearly indicate the type, character, number, and size of outdoor displays or dining tables that are being proposed.
 - c. Permits may be issued by the town manager. The town manager may also choose to refer an application to the town council for its consideration in lieu of administrative issuance or rejection.
 - d. Permits may include modifications to the standards in this section to better accomplish the purposes set forth in

- subsection (b). Other reasonable conditions may also be imposed regarding the layout and physical design of porches, patios, vending carts, specialized display racks, shelves, tables, and umbrellas.
- e. Outdoor display and dining permits may be suspended by the town manager for noncompliance with the permit. Suspensions may be appealed to the town council in accordance with procedures set forth in § 34-86 for appeals of administrative decisions. Suspension of a permit does not preclude the town from pursuing any of the other enforcement mechanisms provided in this code (for example, § 1-5, or article V of ch. 2).

(f) ~~(2)~~ **On PUBLIC PROPERTY:** No merchandise may be displayed outdoors on public property. Retail businesses Restaurants may extend their operations onto public sidewalks and plazas only as follows:

- (1) **General location.** a: These provisions are limited to the Times Square pedestrian plaza (see Figure 34-6), along both sides of Old San Carlos Boulevard; and other locations if explicitly approved by the town council.
- (2) **Who may operate.** b: Vending rights are available only to the owner or primary lessee of the private property that immediately abuts the sidewalk or pedestrian plaza, or in the case of leased property, only to the primary lessee; vending rights may not be further sub-leased.
- (3) **Specific location.** c: Vending rights can be used only in the area directly in front of the private property and lying between 90-degree extensions of the side property lines.
- (4) **Outdoor dining.** d: No fixed or moveable equipment may be placed on a public sidewalk or plaza to sell or serve food except that as follows:
 - i: tables, umbrellas, and chairs may be placed by restaurants for the use of their customers; no signage is permitted except lettering on umbrellas up to 8 inches in height.
 - 2. Wheeled food carts are permitted if they meet the following criteria:
 - ~~a-~~ Carts must meet the criteria found in § 34-677(c)(1)b-d;

~~b-~~ Not more than one chair or stool may be provided for the employee; and

~~c-~~ One sign per side of cart may be displayed, with each sign limited to 3 square feet in area.

~~3-~~ Along Old San Carlos Boulevard, all tables and carts shall be placed only on the 5-foot bricked furnishing zone adjoining the curb and shall not otherwise block pedestrian movement along the sidewalk.

~~c-~~ No merchandise may be displayed on a public sidewalk or plaza except when placed on tables or shelves that are moved indoors during any hours the business is not open and that do not exceed the following dimensions:

- ~~1-~~ Maximum height: 3 feet
- ~~2-~~ Maximum width parallel to right-of-way line: 8 feet
- ~~3-~~ Maximum depth: may not extend more than 2 feet beyond the right-of-way line onto the sidewalk or plaza.

- (5) Permit required. ~~f-~~ Vending rights for dining on public property may be exercised only upon issuance of a permit by the town that sets forth the conditions of private use of a public sidewalk or plaza, including:
- ~~a-~~ 1- Additional restrictions on the degree which tables, umbrellas, chairs, and carts may interfere with pedestrian movement;
 - ~~b-~~ 2- Restrictions on the extent to which food or merchandise not available in the abutting business may be sold;
 - ~~c-~~ 3- Requirements for keeping the area surrounding the tables or carts from debris and refuse at all times;
 - ~~d-~~ 4- Insurance requirements;
 - ~~e-~~ 5- Payment of fees established by the town for vending rights;
 - ~~f-~~ 6- Limitations on leasing of vending rights, if any; and
 - ~~g-~~ 7- Other reasonable conditions as determined by the town, including full approval rights over the design of umbrellas, carts, tables, etc.

Permitting procedures and enforcement shall be the same as provided in subsection (e)(5).

(d) Sandwich signs. Sandwich signs may be placed in the DOWNTOWN zoning district despite the general prohibition in § 30-4 of sandwich signs;

"A" signs, or other types of portable signs which are portable and readily movable from place to place. A business may place a single- or double-faced sandwich sign on the same premises or on a sidewalk directly in front of the premises provided that the sign is placed indoors after business hours, is not illuminated, and does not exceed 24 inches in width and a total of 6 square feet per side.

[this subject is now addressed in § 30-5(a)(18)]

approved in order to protect the flood insurance program for the entire Town. In the event FEMA after their review wishes to include some of the non-required items it would be an issue for Council to address in the Fall. He explained that the form of the ordinance is dictated by the Federal Government, using definitions written 30 years ago, and it is unacceptable to customize these definitions to meet local conditions. He advised that the Final Public Hearing would be on June 30th at 9:00 A.M., stressing that if any Council members desire any alternative language he would need time to make revisions.

Mr. Van Duzer advised that after conversation with Mr. Spikowski he had several concerns, all but one of which were addressed. This has to do with the provision that any outside appraisal be within 20 per cent of the Property Appraiser's valuation, which Mr. Van Duzer considers to be very low, perhaps only 50 to 60 per cent of market value. Since a property owner is only allowed to go up to 50 per cent of fair market value, should an appraisal exceed 20 per cent more than the Property Appraiser's estimate, review of their request would be required. In view of this, Mr. Van Duzer recommends increasing the 20 per cent to approximately 35 per cent. Mr. Spikowski explained that the 20 per cent figure is not mandated by the Federal Government, and any change would be within the discretion of the Council. Mr. Reynolds had a concern about the amount of Government assistance with respect to buildback costs, which Mr. Van Duzer attempted to explain. Mr. Spikowski was also requested to explain, which he did.

Mayor Thomas opened the meeting for Public Hearing at this time.

Mr. Bill Whittaker, owner of the Dairy Queen on FMB, came forward and stated that this issue concerns him directly, referencing increased property values and taxes.

There being no further public comment, the Public Hearing was closed.

Mr. Van Duzer pointed out that there is only one more Public Hearing on this ordinance and asked for further discussion. He referenced examples used by Mr. Reynolds in previous discussion and explained that his intent in recommending a higher percentage was to protect private property rights, not to increase the amount received from the Government. He acknowledged that the current practice has been abused, resulting in Federal intervention. Mr. Ryneason agreed to support 35 per cent as a fair figure in view of rising construction costs. Mr. Massucco expressed concern that an outside appraisal would result in a higher assessed value by the Property Appraiser. Mr. Spikowski explained that while this could be possible, the Property Appraiser generally uses their own formula and adjusts all properties uniformly, rather than looking for instances in the public record such as the theoretical one being discussed. In order to arrive at a consensus, Mayor Thomas polled the Council: Mr. Van Duzer, 35%, Mr. Reynolds, 20%, Mayor Thomas, 20%, Mr. Ryneason, 35%, Mr. Massucco, 35%.

Ms. Segal-George advised that the final Public Hearing will be June 30th at 9:00 A.M.

Mr. Van Duzer discussed the mobile home section and the elevation requirements, which would now require a mobile home to be raised to eleven feet. Mr. Spikowski advised that this is a Federal requirement which has been addressed by a special allowance in the applicable zoning district providing the option for such sites to be used as transient RV sites instead. He said that this was the only way to stay within the FEMA rules. There was a discussion of definitions pertaining to RVs and mobile homes.

C. PUBLIC HEARING OF ORDINANCE 04-08 TO AMEND CHAPTER 34 OF THE LDC, OUTDOOR DISPLAY IN DOWNTOWN ZONING DISTRICT:

The title of this ordinance was read by Mr. Spikowski. He explained that this ordinance affects only specific parts of Times Square and Old San Carlos in the Downtown Zoning District. The basic regulations were adopted in March 2003, and shortly after there were unanticipated problems encountered. There have been a number of workshops, with LPA review on at least 3 occasions, most recently on June 8th with respect to the draft being presented at this meeting. The LPA found this ordinance consistent with the Comprehensive Plan and recommended adoption with the elimination of lettering on umbrellas which they also deleted. This is strictly a local matter with no State or Federal intervention. He explained the intent of the ordinance and described some of the conditions it is intended to alleviate.

Mr. Reynolds had a question with respect to a particular location which it was determined to be outside of the Downtown Zoning District. Mr. Spikowski added that the LPA has agreed to address other locations at a later date.

June 21, 2004

The meeting was opened for Public Hearing at this time.

Kerry Hendry came forward and said she has recently acquired a lease to a small store in Times Square and wanted to be sure of the rules. She had been given some papers by John Richard and wanted to question the raised porch area, which her store does not have. She asked whether she would still be able to have a rack outside. Mr. Spikowski advised that the answer depends on whether or not she is the primary lessee of the space and whether the space intended for her display is on private or public property, which she may not know. He explained that the ordinance is very specific on a number of issues. With respect to the porch issue, the original ordinance allows merchandise on raised porches, which was added at one of the Public Hearings when one merchant who attended raised an objection. As a result, people began building porches for the purpose of additional displays, which was not the intent.

Public Hearing was closed at this time.

Mr. Rynearson described a personal observation in Old San Carlos and expressed disappointment that outdoor displays were being allowed on public property in that area. He recommended that everyone personally inspect the area in question prior to the next Public Hearing. Mr. Spikowski directed attention to the applicable portion of the ordinance and pointed out that Council has the authority to determine whether or not to allow displays on public property. He added that most communities are very restrictive with respect to outdoor displays. He said the question to consider is whether outdoor displays make the area more interesting to pedestrian traffic and conducive to shopping, or does it create clutter and an undesirable atmosphere. Mr. Reynolds said he concurs with Councilman Rynearson and is not in favor of using public property in Old San Carlos. Councilman Van Duzer observed that this was intended to be a pedestrian friendly area when the Comprehensive Plan was adopted. He observed that the merchants have requested outdoor displays and that this ordinance would give a measure of control. Mr. Spikowski explained that the LPA was concerned that allowing this on a trial basis might result in creating a vested interest, which was the reason for the permit process. Mr. Van Duzer asked whether there had been a number of business owners at the LPA hearings, pointing out that there were none at this meeting. Mr. Spikowski explained that there was very little input at the LPA, but most came out of a series of meetings held by former Community Development Director Dan Folke with the merchants. He verified that the draft before Council came out of those meetings. Ms. Segal-George added that she had attended these meetings, which had been well attended with a great deal of discussion, and there had been merchants who wanted no displays on public property. The subject of enforcement came under discussion, and Ms. Segal-George expressed the opinion that this version could easily be enforced, although she acknowledged that unforeseen events can occur. Mr. Rynearson asked for a consensus that there be no outdoor displays on public property, which he said was his only concern. Mr. Massucco observed that the restaurants have been given wide latitude and asked whether vendors should not be given similar consideration. Mr. Van Duzer agreed that there should be a year's trial with respect to public property, observing that once the ordinance is passed the merchants will attempt to find ways to circumvent it. Mr. Reynolds agreed with Mr. Rynearson that the area should not encroach on public space. Mayor Thomas also agreed that public property should not be used, making the decision 3 to 2 against using public property for outdoor displays. Mr. Spikowski will prepare a memo for the next meeting accordingly. It was verified that this applies to Old San Carlos only. Mr. Spikowski added that the meeting on June 30th which was originally scheduled for 3:00 P.M. has been changed to 9:00 A.M. because of the lengthy agenda.

D. PUBLIC HEARING OF ORDINANCE 04-11 TO AMEND PARKING VIOLATIONS:

Mayor Thomas announced that this will be the only Public Hearing on this subject. Ms. Segal-George read the title of the ordinance and explained that Council had changed the fine from \$32.00 to \$25.00 and this memorializes that change.

The meeting was opened for Public Hearing. There being no public comment, Public Hearing was closed.

MOTION: Motion to adopt this ordinance was made by Mr. Van Duzer and seconded by Vice Mayor Reynolds.

Mr. Roosa read the title of the ordinance. Bill Spikowski, Planning Consultant to the Town, came forward and explained that this is the final Public Hearing on this ordinance; the first Public Hearing was on June 21st as a result of which he issued a memo dated June 23rd which includes 2 suggested changes: (1) Valuations of private appraisals, which by consensus was agreed should be 35 per cent rather than 20 per cent as per the draft ordinance; (2) on the second page a change in the definition should be "in any 1-year period" to be consistent with the rest of the flood plain ordinance. He recalled that there was additional public comment and discussion by Council at the first Public Hearing, but no additional suggested changes.

The meeting was opened for Public Hearing at this time. There being no public comment, Public Hearing was closed.

MOTION: Motion was made by Councilman Ryneerson to move the item with the changes as proposed; seconded by Vice Mayor Reynolds.

VOTE: A roll call vote was taken. Councilman Ryneerson: Aye; Vice Mayor Reynolds: Aye; Councilman Van Duzer: Aye; Mayor Thomas: Aye; Councilman Massucco: Aye. Motion passed by unanimous vote.

E. FINAL PUBLIC HEARING OF ORDINANCE 04-08 TO AMEND CHAPTER 34 OF THE LDC, OUTDOOR DISPLAY IN DOWNTOWN ZONING DISTRICT:

Mr. Roosa read the title of this ordinance. Bill Spikowski explained that this is the Final Public Hearing on this ordinance which affects only the Downtown Zoning District. He recalled that at the First Public Hearing on June 21st there was considerable discussion and possible changes, and in preparation he submitted another memo dated June 23rd that includes language to carry out Council's suggestions from that meeting, which he enumerated. Mr. Ryneerson cautioned that this must be made very plain, and that no food be allowed on public property, with existing restaurants grandfathered in. Mr. Spikowski suggested some specific language for this purpose, except for grandfathering existing uses. He had some concerns about whether this would require re-advertising and suggested that this could either be continued in its entirety until Fall, or voted upon with the exception of the grandfather clause, which would then be addressed in the Fall.

Mr. Van Duzer suggested that there should be a consensus to move forward, and it was decided to do this following public comment.

The meeting was opened for Public Hearing at this time.

Herb Atkin came forward and recalled that at the time he purchased the toy store and turned it into a coffee shop he had the right to have 2 vending carts on private property. He is not contesting any of the Town's plans for public property, but with respect to private property he is very concerned with the permitting procedures under consideration. He said this would give the Town the opportunity to choose the merchandise he decides to sell. Mr. Atkin read from specific portions of the draft ordinance. He requested putting off a decision until Fall to give other business owners the opportunity for input. He referred to campaign literature which promised less government and listening to the community, with an overwhelming emphasis on less government involvement. He considers the proposed regulation an erosion of private property rights and said that if he has to fight for his rights on a daily basis he will go out of business.

There being no further public comment, the Public Hearing was closed.

Mr. Ryneerson agreed that there should be a consensus. Mr. Reynolds said he agrees with the comments made by Mr. Spikowski and referred to conditions in Times Square. Mayor Thomas observed that he was open for suggestions. Mr. Van Duzer said he has reversed his opinion and agrees with restriction of outdoor displays and tables in Old San Carlos, but Times Square is unique and he feels there should be fewer restrictions. Mr. Massucco agreed that more input from the merchants would be appropriate, and Ms. Segal-George pointed out that there had been a series of 3 or 4 workshops on the subject with all merchants invited and a number who attended. She also called attention to the fact that the Times Square Committee, where it would have been discussed, has not had a quorum for the last three months. She pointed out that there has always been an unofficial policy of restricting outdoor displays to the type of merchandise sold inside, so as not to allow one merchant an unfair disadvantage. She used the example of

June 30, 2009

food products versus clothing outside. She also emphasized that under previous Lee County regulations there were more stringent restrictions on any outdoor displays whatsoever. She advised that it would not require any revision of a menu in the case of food products. She said there has never been discussion of removing existing outdoor tables or prohibiting new ones, so if this is contemplated, it is the only issue that had not been discussed with the merchants. Mr. Ryneerson explained that he had no intention to remove existing tables. He also recalled sitting on the Council when Mr. Atkin's restaurant was approved and did not recall any discussion of outdoor carts. He observed that the intent is to prevent an undesirable atmosphere and clutter, and is ready to move forward on the ordinance today.

MOTION: Motion was made by Councilman Ryneerson to approve this ordinance with the conditions that there be no outdoor merchandise on public property on Old San Carlos, and there will be no more restaurants allowed to create outside dining that does not already exist. Motion was seconded by Vice Mayor Reynolds.

DISCUSSION: Councilman Van Duzer said he could not support the motion because while he agrees with the Old San Carlos provision, he does not agree with removing opportunities in Times Square, citing turnover of businesses in that area. Vice Mayor Reynolds stated that he had no intention to restrict any tables in Times Square, and Mr. Ryneerson pointed out that the issue could always be revisited, but at this point he wished to stay with his motion. Motion was clarified by Mr. Spikowski to include Change 1B, Change 2, and further changes with respect to his memo which he cited. He also referred to Table 34 in the ordinance which would require revision if the motion passes. Ms. Segal-George further clarified the motion with respect to prohibiting new outdoor tables. Mr. Ryneerson explained the reasoning behind his motion and pointed out that if it doesn't work the ordinance can be revisited. Mr. Reynolds said he could not support the motion in that event, because he had not understood this provision. Ms. Segal-George made a suggestion that new tables could be requested which Mr. Reynolds agreed with, and Mr. Spikowski also had some suggestions. Mr. Ryneerson agreed as motioner.

DISCUSSION: Mr. Massucco reiterated his earlier remark that this was a very complex subject and would be hesitant to vote on anything until he could see a final draft that could be examined in detail.

VOTE: A roll call vote was taken. Mr. Ryneerson: Aye; Mr. Reynolds: Aye; Mr. Thomas: Aye; Mr. Massucco: No; Mr. Van Duzer: No. Motion passed by a vote of 3-2.

F. MATANZAS HARBOR MOORING FIELD OPERATIONS AGREEMENT:

MOTION: Motion was made by Mr. Ryneerson and seconded by Mr. Reynolds to approve this agreement.

VOTE: Motion was passed by unanimous vote.

G. MATANZAS HARBOR MOORING FIELD PUMP OUT BOAT:

MOTION: Motion was made by Mr. Ryneerson to approve the item not to exceed \$47,250.00; seconded by Mr. Reynolds.

VOTE: Motion was passed by unanimous vote.

H. PERMANENT LIVE-ABOARD LOTTERY:

It was established that inasmuch as there were only 8 applicants, there was no lottery for the 10 slots.

I. AUTHORIZATION TO AWARD PROFESSIONAL SERVICES FOR MPO STUDY:

TO: Mayor and Town Council

FROM: Marilyn W. Miller

DATE: April 24, 2013

RE: Administrative Appeal APL2013-0001
Krohn Investments, LLC (Teeki Hut)

The purpose of this memorandum is to provide background and analysis of the above-referenced Administrative Appeal. Administrative Appeals are governed by the provisions of Section 34-86 of the LDC. Subsection (1) of that section states, in pertinent part:

(1) **Function.** The town council will hear and decide appeals where it is alleged there is an error in any order, requirement, decision, interpretation, determination or action of any administrative official charged with the administration and enforcement of the provisions of this code, or any other ordinance or portion of the code which provides for similar review. . .

In this instance, the appeal is from the action taken by the Zoning Coordinator on February 13, 2013¹ that revoked approval for certain uses that were included in an annual Outdoor Display & Sales Permit that was issued on May 26, 2012. The uses that were revoked are “Retail, Henna, airbrush and hair braiding on the deck.” The basis for that revocation is Section 34-678(e)(2)l. which states:

Personal services including tattoos, temporary tattoos, hair braiding, and hair wrapping are not permitted outdoors.

The February 13, 2013 letter did not revoke the entire permit; the approval for two (2) vending carts is still valid.

The owner, in “Exhibit 1 to the Appeal” states that the basis for the appeal is that the “revocation of permitted uses (is) without due process and (is) in violation of the Town’s Land Development Code.” That Exhibit further states that the Town is estopped from revoking its written approval for permitted uses in the Downtown District because the owner constructed the roofed wooden deck for the express purpose of locating the hair braiding, henna and airbrush uses thereon.

¹ The letter is actually dated February 13, 2012, but that is a typographical error.

A review of the permit history for this property indicates that an application to construct the roofed deck was approved on August 10, 2009 with stipulations. One of those stipulations was:

1. STIPULATION – Per LDC 34-678, additional town and/or state permits would be required to utilize the outdoor porch for the sale of merchandise, seating for dining and/or alcohol consumption.

In 2010, a new application for a Development Order to construct the deck was submitted and was approved on April 14, 2010. The 2010 application added an additional 1,040 square foot of covered brick paver pavilion. That approval included the caveat that all necessary Federal, State and local permits must be obtained. Copies of these two LDO approvals are attached for your convenient reference.

Nothing in the permit applications or approvals for the deck indicates that the owner was building the deck for the express purpose of conducting retail, henna, airbrush and hair braiding activities. To the contrary, the first LDO approval expressly advises the owner that additional approval would be required to utilize the deck for any sale of merchandise.

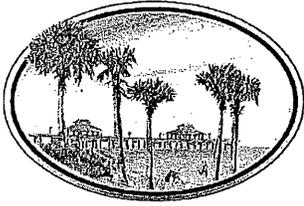
After the wooden deck was completed, the owner, in 2010, made application to the Town for an Outdoor Display & Sales Permit. That permit was issued and listed the Retail, Henna, airbrush and hair braiding uses. That permit was clearly issued in error because Section 34-678(e)(2)l. of the LDC unambiguously states that those uses are not allowed. When the error was discovered, the owner was advised that those uses are not permitted as Outdoor Display and that portion of the permit was revoked.

The owner's argument that the Town is estopped from revoking the approval of the uses is not supported by the law. The case of *Ammons v. Okeechobee County*, 710 So.2d 641 (Fla. 4th DCA 1998) is almost directly on point with the facts in this case. In the *Ammons* case, a zoning official mistakenly determined that a property was properly zoned for the activity requested when it was not. An occupational license was granted to the owner based on the zoning official's erroneous determination that the use was permitted. When the mistake was discovered (almost 15 months after the approval of the occupational license), the occupational license was revoked and the business owner was ordered to cease all commercial activity. The business owner sought an injunction against the County and the Code Enforcement board on the theory of equitable estoppel. The Court framed the issue as "whether the county may be equitably estopped from revoking the occupational license based upon the zoning official's mistake." The Court in that case held that the zoning official could properly withdraw the unauthorized occupational license and the County was not equitably estopped. Similarly, in this case the Town erroneously issued an Outdoor display & Sales Permit that included uses that clearly are not permitted under the current Land Development Code. The Town's action in revoking that approval is permissible and the Town is not equitably estopped from doing so. A copy of the *Ammons* case is attached for your convenient reference. To allow these uses to continue on the deck would, in essence, be the equivalent of approving a use variance, which is not permissible. In order to approve these type of uses, the Outdoor Display regulations in the LDC would have to be amended.

The stated purpose of the Town's Outdoor Display regulations is “. . .to enhance the pedestrian environment of the town's business district through the creative use of outdoor spaces by providing businesses the opportunity to *display a sample of their products. . .*” and “. . .to inform and interest the public by offering a small sample of the products that are available inside” [emphasis added] Not only are the uses that were revoked by the Town specifically prohibited, they also do not meet the intent of the Outdoor Display regulations.

Based on the foregoing, the Administrative Appeal should be denied.

cc: Terry Stewart, Town Manager
Walter Fluegel, Community Development Director
Leslee Chapman, Zoning Coordinator
Beverly Grady, Esq.



Town of Fort Myers Beach

Larry Kiker
Mayor

Herb Acken
Vice-Mayor

Tom Babcock
Councilmember

Jo List
Councilmember

Bob Raymond
Councilmember

August 10, 2009

Writer's Direct Dial Number: (239) 533-8730

AHMAD R. KAREH, P.E., M.S.C.E.
BEAN, WHITAKER, LUTZ & KAREH
13041 MCGREGOR BLVD.,
FORT MYERS, FL 33919

RE: ISLAND BREEZE
LDO2009-00197 - FMB TYPE 01 Limited Review (imperv added)
LR1 Application (LDO Resub) A

Dear AHMAD R. KAREH, P.E., M.S.C.E. :

Your application for a Land Development Code FMB TYPE 01 Limited Review (imperv added) Resubmittal has been approved for a Development Order with stipulation(s) for for the following:

APPROVED WITH STIPULATIONS FOR the addition of a 1,303 s.f. covered wood deck and ramp and the relocation of the main entrance to the existing building per approved drawings.

Approval is subject to the following stipulation(s) and/or comment(s):

Fort Myers Beach Limited Review DO Type 1,2 & 4-8 Checklist (Ord. 04-01)

10) Miscellaneous Items.

1. STIPULATION - Per LDC 34-678, additional town and/or state permits would be required to utilize the outdoor porch for the sale of merchandise, seating for dining and/or alcohol consumption.

2. STIPULATION - No electric, plumbing or other utilities beyond those required by code shall be located below base flood elevation (BFE).

11) Contact. The reviewer may be contacted for additional information regarding this checklist.

Contact the Town of Fort Myers Beach Development Services Department at 239-765-0202 regarding comments

This approval does not relieve the development from the responsibility to obtain all necessary Federal, State and local permits.

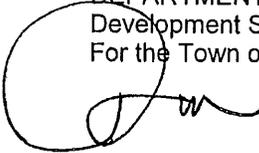
ISLAND BREEZE
LDO2009-00197

August 10, 2009

If you have any questions concerning this matter, please contact this office.

Sincerely,

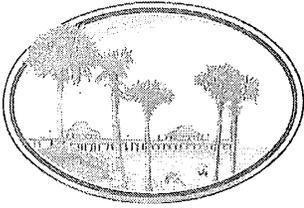
LEE COUNTY
DEPARTMENT OF COMMUNITY DEVELOPMENT
Development Services Division
For the Town of Fort Myers Beach

A handwritten signature in black ink, appearing to be "Peter J. Eckenrode", is written over the typed name and title.

Peter J. Eckenrode
Development Services Director

PJE / RXW

6 Sets of drawings



Town of Fort Myers Beach

Larry Kiker
Mayor

Bob Raymond
Vice-Mayor

Tom Babcock
Councilmember

Jo List
Councilmember

Alan Mandel
Councilmember

April 14, 2010

Writer's Direct Dial Number: 239-533-8585

MR. AHMAD KAREH
13041 MCCGREGOR BLVD
FORT MYERS, FL 33919

RE: ISLAND BREEZE
LDO2010-00014 - FMB TYPE 08 Limited Review (Insignificant Improve)
LP1 Appl (paperwrk LDO resub)A

Dear AHMAD KAREH :

Your application for a Land Development Code FMB TYPE 08 Limited Review (Insignificant Improve) Resubmittal has been approved for a Development Order with stipulation(s) for the following:

Approval for the addition of 1,303 square feet of covered wood deck and ramp, addition of roof to cover both the existing structure wood deck and ramp, addition of 1,040 SF of covered brick paver pavilion, relocation of existing fence, and minor site related improvements.
LDO2009-00197 is now revoked and this LDO is approved.

Approval is subject to the following stipulation(s) and/or comment(s):

Fort Myers Beach Limited Review DO Type 1,2 & 4-8 Checklist (Ord. 04-01)

8) *Type 8 LDO Requirements. A Type 8 LDO is limited to any other improvement to land determined by the director to have insignificant impacts on public facilities according to standard measures (vehicular trips, amount of impervious area, gallons per day, etc.). [10-174(8)]*

Once the project is completed a Certificate of Compliance must be applied for and an inspection from Development Services will be done.

11) *Contact. The reviewer may be contacted for additional information regarding this checklist.*

Please contact Becky Penfield if you have any questions regarding these comments.

rpenfield@leegov.com or 239-533-8587 extension 48802

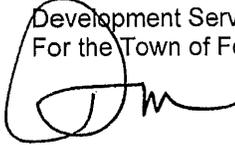
This approval does not relieve the development from the responsibility to obtain all necessary Federal, State and local permits.

ISLAND BREEZE
LDO2010-00014
April 14, 2010

If you have any questions concerning this matter, please contact this office.

Sincerely,

LEE COUNTY
DEPARTMENT OF COMMUNITY DEVELOPMENT
Development Services Division
For the Town of Fort Myers Beach

A handwritten signature in black ink, appearing to read "PJE", is written over the text of the department name.

Peter J. Eckenrode
Development Services Director

PJE / RLW

attachments: plans

710 So.2d 641

23 Fla. L. Weekly D1009

Lisa AMMONS, Rolland Ammons, Jr., Precision Aluminum of Okeechobee, Inc., and Eva Miskinis, Appellants,

v.

OKEECHOBEE COUNTY, Code Enforcement Board of Okeechobee County, Florida, Martin O'Shea and Matthew Lightsey, Appellees.

No. 97-0552.

District Court of Appeal of Florida, Fourth District.

April 15, 1998.

Robert J. Gorman of Robert J. Gorman, P.A., Fort Pierce, for appellants.

Frank G. Cibula, Jr. of Law Offices of Frank G. Cibula, Jr., West Palm Beach, and Johnson and Bussey, P.A., Rockledge, for appellees.

**ON MOTION FOR REHEARING
WARNER, Judge.**

We withdraw our previously issued opinion and substitute the following in its place. In all other respects, the motion for rehearing is denied.

This appeal arises from the trial court's entry of summary judgment in the appellants' suit against Okeechobee County and various individuals for their allegedly wrongful revocation of an occupational permit. We affirm in part and reverse in part.

In 1989, appellants planned to start an aluminum construction company in Okeechobee and needed a structure for storage of the aluminum construction materials. Appellant Lisa Ammons' mother owned property on 42nd Avenue in Okeechobee which the appellants bought to use as a site for their storage facility. They intended to build their home adjacent to the storage facility. They consulted an Okeechobee County zoning officer as to the suitability of the property for their planned purposes. According to the allegations of the complaint, the zoning officer advised them that they could accept deliveries of

aluminum construction supplies at the subject location, and the county issued a building permit for construction of the "utility room."

About a month later, the appellants applied for an occupational license for their aluminum construction business at that location. The application for the occupational license included a statement by a county

zoning administrator that the property on which the business would operate was properly zoned for that purpose. The application indicated an "office in home" at an address on 3rd Avenue and a delivery address at the 42nd Avenue location. The county subsequently issued the occupational permit. The appellants then commenced their business, operating out of an office on 3rd Avenue and accepting deliveries of material and storing them at the 42nd Avenue address. Sometime thereafter, the appellants also applied for and received a building permit for their home on the 42nd Avenue property where the "utility room" was being built and where the deliveries for their business were received.

Approximately fifteen months later, the county attorney sent the appellants a letter informing them that they must cease all commercial activity at the 42nd Avenue site, because the county had erroneously issued the occupational license under the guise of a license for a "home occupation" and not a commercial enterprise such as the appellants' business. Their occupational license was subsequently suspended.

The appellants applied to the county for a special exception or a rezoning of the property so that they could carry on their commercial activity at the 42nd Avenue address, but they were turned down. In addition, the county issued orders finding appellants in violation of county ordinances and requiring the appellants to relocate their business.

Appellants filed suit in several counts against the county and the individuals involved with the issuance of their occupational license and building permit. Counts I and II sought an injunction against the county and the Code Enforcement Board, on the theory of equitable estoppel, to prevent the revocation of their occupational license and the enforcement of the zoning ordinances against them. Counts III and IV demanded damages against the county under 42

U.S.C. section 1983 for violations of substantive and procedural due process rights. Counts V and VI sought damages from all appellees for a denial of equal protection of the laws, and count VII demanded damages for a taking of the appellants' property. The appellants then filed an amendment to the complaint alleging two causes of action against another Okeechobee resident, Ms. Sales, and a member of the Code Enforcement Board, Mr. Lightsey, who was also named as a defendant in the original complaint. The gist of the count against Ms. Sales was for intentional infliction of emotional distress, and appellants also sought an injunction against both Ms. Sales and Mr. Lightsey to prevent further harassment by them.

The appellees, except for Ms. Sales, all moved for summary judgment which the trial court granted as to counts I through VI. It concluded that all of the dismissed counts sought equitable remedies which were not available to the appellants because equitable estoppel could not be asserted against the county. Consequently, the trial court entered two final judgments, disposing of the first six counts. This left remaining count VIII against Ms. Sales, count IX against Mr. Lightsey and Ms. Sales, and count VII, which was against the county only. When the appellants subsequently voluntarily dismissed the remaining counts against the county and against Mr. Lightsey, the trial court entered another final judgment in favor of all appellees.

As a preliminary matter, we hold that the appeal was untimely as to the Code Enforcement Board and the individually named defendants, except for Mr. Lightsey. All issues with respect to them were disposed of in the final judgment on December 31, 1996. An appeal should have been taken within thirty days of rendition of this order to confer jurisdiction upon this court. Florida Rule of Appellate Procedure 9.110(k) provides: "[i]f a partial final judgment totally disposes of an entire case as to any party, it must be appealed within 30 days of rendition." Since the plaintiffs did not appeal the judgment disposing of all claims against the individual defendants, except for Mr. Lightsey and the Code Enforcement Board, this appeal is not timely as to them and is hereby dismissed. We do find that the appeal is timely as to the county and Mr. Lightsey under *Mendez v. West Flagler Family Ass'n, Inc.*, 303 So.2d 1, 5 (Fla.1974), as counts VII and IX, which were factually interrelated to

the other six counts of the complaint, were not disposed of until the voluntary dismissal.

Counts I and II of the appellants' complaint were based on the theory that the county was equitably estopped from revoking their occupational license because of the representations made to them during the application process, representations on which the appellants relied in expending substantial sums in the construction of both the utility room and their residence. In support of its motion for summary judgment, the county attached an affidavit of the zoning department official who had certified that the appellants' business was eligible for "home occupation" status, pursuant to the relevant ordinance. However, the official stated in his affidavit that the issuance of the license was in error because he had not complied with the requirements of the ordinance. An affidavit of the county attorney was also filed, attaching a letter to the appellants which had notified them that the occupational permit was issued in error. In ruling in favor of the county, the trial court determined that equitable estoppel could not be applied against the county.

First, it is clear that the use of the appellants' property on 42nd Avenue for business purposes violated the zoning ordinances. The property was zoned for residential uses, although the ordinance contained an exception for "home occupation" uses. However, to permit such use there could be no change to the outside appearance of the home, and no home occupation could be conducted in an accessory building. Clearly, where a separate building was constructed to store the business materials, this activity did not constitute a "home occupation." Appellant Lisa Ammons admitted in her deposition that after she received the occupational permit, she ran the business out of her 3rd Avenue office and not the 42nd Avenue property.

What occurred here, as appellant even admits, is that the zoning official made a mistake. The occupational license was issued because the zoning official certified that the property was properly zoned for the activity requested. This was not the case, as even a cursory reading of the zoning ordinances would reveal. The question is whether the county may be equitably estopped from revoking the occupational license based upon the zoning official's mistake.

In *Corona Properties of Florida, Inc. v. Monroe County*, 485 So.2d 1314 (Fla. 3d DCA 1986), a zoning official issued a building permit to a property

owner, based upon his determination that the property owner's right to a second building permit had vested, and despite the fact that an amended ordinance decreased the density of dwelling units on the property. The owner had originally applied under the old ordinance, secured a building permit, commenced some work on the development, and then abandoned the project. The court held that where a zoning official did not have the authority to determine whether the owner had vested rights in the prior building permit or the authority to issue the building permit pursuant to the letter determining the vested rights, the county could not be estopped to revoke the issuance of the permit. Quoting from *Dade County v. Gayer*, 388 So.2d 1292, 1294 (Fla. 3d DCA 1980), the court said:

[w]hile at first blush it seems that the application of the rule may be harsh, it would be inconceivable that public officials could issue a permit, either inadvertently, through error, or intentionally, by design, which would sanction a violation of an ordinance adopted by the legislative branch of the government. Only the duly constituted members of the Metropolitan Dade County Commission enjoy that prerogative and then only in accordance with established procedure.

Corona, 485 So.2d at 1317. We agree with this reasoning. Here there is nothing but a simple, rather glaring mistake by the zoning official, which was completely unauthorized and in violation of the legislative direction through the county's ordinances. Estoppel cannot be asserted against a government entity based on mistaken statements of the law. See *Branca v. City of Miramar*, 634 So.2d 604, 606 (Fla.1994). The appellants were on constructive notice of the contents of the ordinance and are presumed to have constructive knowledge of the nature and extent of the powers of governmental agents who issue permits. See *Godson v. Town of Surfside*, 150 Fla. 614, 8 So.2d 497, 498-99 (1942).

Page 645

The official did not have the authority to certify compliance with zoning regulations when the ordinance on its face precluded the activity which the appellants sought to conduct on the property. It would not serve public policy well to permit such mistakes to persist when they affect public welfare, like planning and zoning decisions do. Thus, the official could properly withdraw the unauthorized

occupational license. We affirm the trial court's rendition of summary judgment on counts I and II.

With respect to counts III and IV, the appellants alleged causes of action for violation of their civil rights under 42 U.S.C. section 1983, asserting deprivations of substantive due process and procedural due process rights. Unlike counts I and II, these counts are not equitable actions. The appellants claim that they had a vested property right in the issued occupational license, sufficient to be protected by substantive due process rights. We disagree. An occupational license is merely the privilege, accorded by the state or its subdivisions, to conduct business at a particular location. The denial of such a license does not prevent a business owner from pursuing a lawful occupation; it merely prevents the business from operating at a particular location. As stated in *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir.1994)(en banc), cert. denied by *McKinney v. Osceola County Bd. of County Comm'rs*, 513 U.S. 1110, 115 S.Ct. 898, 130 L.Ed.2d 783 (1995):

The substantive component of the Due Process Clause protects those rights that are "fundamental," that is, rights that are "implicit in the concept of ordered liberty".... [A]reas in which substantive rights are created only by state law ... are not subject to substantive due process protection under the Due Process Clause because "substantive due process rights are created only by the Constitution." As a result, these state law based rights constitutionally may be rescinded so long as the elements of procedural-not substantive due process are observed.

(quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937) and *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 229, 106 S.Ct. 507, 515, 88 L.Ed.2d 523 (1985)).

The decision to revoke an occupational permit which has been issued in violation of the law does not strike at fundamental rights under the constitution. It therefore does not constitute a violation of substantive due process rights. Where a state-based right is revoked, it may be constitutionally rescinded where procedural due process is observed. See *McKinney*, 20 F.3d at 1556. In this case, the appellants received a hearing on the revocation. As the occupational license was never lawfully issued to begin with, appellants have received such procedural due process as is due them. We affirm the summary judgment on counts III and IV.

Counts V and VI alleged denials of equal protection of the law and demanded damages. The complaint states a cause of action and no affidavits were filed opposing its allegations. Thus, the county failed to meet its burden in moving for summary judgment of proving the nonexistence of any material fact. See *Crandall v. Southwest Florida Blood Bank, Inc.*, 581 So.2d 593 (Fla. 2d DCA 1991); *Fine Arts Museums Found. v. First Nat'l in Palm Beach*, 633 So.2d 1179 (Fla. 4th DCA 1994).

For the foregoing reasons, we affirm the trial court's dismissal of counts I, II, III and IV of the complaint and reverse as to the dismissal of counts V and VI. We remand for further proceedings.

DELL, J., and PARIENTE, BARBARA J.,
Associate Judge, concur.