

RESOLUTION NUMBER FMB-96-001

RESOLUTION OF THE FORT MYERS BEACH TOWN COUNCIL
OF LEE COUNTY, FLORIDA

WHEREAS, Donald A. & Anne S. Nyman filed an application for a rezoning from TFC-2 (Two-Family Conservation) to Commercial Planned Development; and

WHEREAS, the subject property is located at 2661-2681 Estero Boulevard and 145 School Street, Ft. Myers Beach, and is described more particularly as:

LEGAL DESCRIPTION: In Section 19, Township 46 South, Range 24 East, Lee County, Florida:

Lots 23-28, Block C, WINKLERS SUBDIVISION as recorded in Plat Book 8, Page 45, of the Public Records of Lee County, Florida, lying in Section 18, Township 46 South, Range 24 East, Lee County, Florida.

WHEREAS, the applicant has indicated the property's current STRAP numbers are: 19-46-24-02-0000C.0230 and 19-46-24-02-0000C.0270; and

WHEREAS, Donald A. & Anne S. Nyman, the owners of the subject parcel, authorized Humphrey & Knott, P.A., to act as agent to pursue this zoning application; and

WHEREAS, a public hearing was advertised and held on November 28, 1995 before the Lee County Hearing Examiner who gave full consideration of the evidence available; and

WHEREAS, a public hearing was advertised and held on February 9, 1996 before the Fort Myers Beach Town Council who gave full and complete consideration to the recommendations of the staff, the Hearing Examiner, the documents on file with the county, and the testimony of all interested persons.

NOW, THEREFORE, BE IT RESOLVED BY THE FORT MYERS BEACH TOWN COUNCIL, that the Council **DENIES** the requested rezoning from TFC-2 to CPD.

FINDINGS AND CONCLUSIONS:

The following findings and conclusions were made in conjunction with the denial of the requested rezoning:

The findings of fact of the Hearing Examiner as identified in the recommendation prepared after the November 28, 1995, hearing are adopted by the Town Council.

The Hearing Examiner was reversed because of the misapplication of POLICY 18.2.1 of the LEE PLAN, now the town transitional comprehensive plan, in that the facts support the conclusion that the proposed rezoning would intrude into a residential neighborhood and therefore must be denied.

The foregoing resolution was adopted by the Fort Myers Beach Town Council upon a motion by Ted FitzSimons, and seconded by Rusty Isler and, upon being put to a vote, the result was as follows:

Anita Cereceda	Aye
Ted FitzSimons	Aye
Rusty Isler	Aye
Garr Reynolds	Aye
Ray Murphy	Nay

DULY PASSED AND ADOPTED this 9th day of February, A.D., 1996.

FORT MYERS BEACH TOWN COUNCIL

BY: 
Mayor

Approved as to form by:


Town Attorney

70.51 Land use and environmental dispute resolution.—

(1) This section may be cited as the "Florida Land Use and Environmental Dispute Resolution Act."

(2) As used in this section, the term:

(a) "Development order" means any order, or notice of proposed state or regional governmental agency action, which is or will have the effect of granting, denying, or granting with conditions an application for a development permit, and includes the rezoning of a specific parcel. Actions by the state or a local government on comprehensive plan amendments are not development orders.

(b) "Development permit" means any building permit, zoning permit, subdivision approval, certification, special exception, variance, or any other similar action of local government, as well as any permit authorized to be issued under state law by state, regional, or local government which has the effect of authorizing the development of real property including, but not limited to, programs implementing chapters 125, 161, 163, 166, 187, 258, 372, 373, 378, 380, and 403.

(c) "Special master" means a person selected by the parties to perform the duties prescribed in this section. The special master must be a resident of the state and possess experience and expertise in mediation and at least one of the following disciplines and a working familiarity with the others: land use and environmental permitting, land planning, land economics, local and state government organization and powers, and the law governing the same.

(d) "Owner" means a person with a legal or equitable interest in real property who filed an application for a development permit for the property at the state, regional, or local level and who received a development order, or who holds legal title to real property that is subject to an enforcement action of a governmental entity.

(e) "Proposed use of the property" means the proposal filed by the owner to develop his real property.

(f) "Governmental entity" includes an agency of the state, a regional or a local government created by the State Constitution or by general or special act, any county or municipality, or any other entity that independently exercises governmental authority. The term does not include the United States or any of its agencies.

(g) "Land" or "real property" means land and includes any appurtenances and improvements to the land, including any other relevant real property in which the owner had a relevant interest.

(3) Any owner who believes that a development order, either separately or in conjunction with other development orders, or an enforcement action of a governmental entity, is unreasonable or unfairly burdens the use of his real property, may apply within 30 days after receipt of the order or notice of the governmental action for relief under this section.

(4) To initiate a proceeding under this section, an owner must file a request for relief with the elected or appointed head of the governmental entity that issued the development order or orders, or that initiated the enforcement action. The head of the governmental entity may not charge the owner for the request for

relief and must forward the request for relief to the special master who is mutually agreed upon by the owner and the governmental entity within 10 days after receipt of the request.

(5) The governmental entity with whom a request has been filed shall also serve a copy of the request for relief by United States mail or by hand delivery to:

(a) Owners of real property contiguous to the owner's property at the address on the latest county tax roll.

(b) Any substantially affected party who submitted oral or written testimony, sworn or unsworn, of a substantive nature which stated with particularity objections to or support for any development order at issue or enforcement action at issue. Notice under this paragraph is required only if that party indicated a desire to receive notice of any subsequent special master proceedings occurring on the development order or enforcement action. Each governmental entity must maintain in its files relating to particular development orders a mailing list of persons who have presented oral or written testimony and who have requested notice.

(6) The request for relief must contain:

(a) A brief statement of the owner's proposed use of the property.

(b) A summary of the development order or description of the enforcement action. A copy of the development order or the documentation of an enforcement action at issue must be attached to the request.

(c) A brief statement of the impact of the development order or enforcement action on the ability of the owner to achieve the proposed use of the property.

(d) A certificate of service showing the parties, including the governmental entity, served.

(7) The special master may require other information in the interest of gaining a complete understanding of the request for relief.

(8) The special master may conduct a hearing on whether the request for relief should be dismissed for failing to include the information required in subsection (6). If the special master dismisses the case, the special master shall allow the owner to amend the request and refile. Failure to file an adequate amended request within the time specified shall result in a dismissal with prejudice as to this proceeding.

(9) By requesting relief under this section, the owner consents to grant the special master and the parties reasonable access to the real property with advance notice at a time and in a manner acceptable to the owner of the real property.

(10)

(a) Before initiating a special master proceeding to review a local development order or local enforcement action, the owner must exhaust all nonjudicial local government administrative appeals if the appeals take no longer than 4 months. Once nonjudicial local administrative appeals are exhausted and the development order or enforcement action is final, or within 4 months after issuance of the development order or notice of the enforcement action if the owner has pursued local administrative appeals even if the appeals

have not been concluded, the owner may initiate a proceeding under this section. Initiation of a proceeding tolls the time for seeking judicial review of a local government development order or enforcement action until the special master's recommendation is acted upon by the local government. Election by the owner to file for judicial review of a local government development order or enforcement action prior to initiating a proceeding under this section waives any right to a special master proceeding.

(b) If an owner requests special master relief from a development order or enforcement action issued by a state or regional agency, the time for challenging agency action under s. 120.57 is tolled. If an owner chooses to bring a proceeding under s. 120.57 before initiating a special master proceeding, then the owner waives any right to a special master proceeding unless all parties consent to proceeding to mediation.

(11) The initial party to the proceeding is the governmental entity that issues the development order to the owner or that is taking the enforcement action. In those instances when the development order or enforcement action is the culmination of a process involving more than one governmental entity or when a complete resolution of all relevant issues would require the active participation of more than one governmental entity, the special master may, upon application of a party, join those governmental entities as parties to the proceeding if it will assist in effecting the purposes of this section, and those governmental entities so joined shall actively participate in the procedure.

(12) Within 21 days after receipt of the request for relief, any owner of land contiguous to the owner's property and any substantially affected person who submitted oral or written testimony, sworn or unsworn, of a substantive nature which stated with particularity objections to or support for the development order or enforcement action at issue may request to participate in the proceeding. Those persons may be permitted to participate in the hearing but shall not be granted party or intervenor status. The participation of such persons is limited to addressing issues raised regarding alternatives, variances, and other types of adjustment to the development order or enforcement action which may impact their substantial interests, including denial of the development order or application of an enforcement action.

(13) Each party must make efforts to assure that those persons qualified by training or experience necessary to address issues raised by the request or by the special master and further qualified to address alternatives, variances, and other types of modifications to the development order or enforcement action are present at the hearing.

(14) The special master may subpoena any nonparty witnesses in the state whom the special master believes will aid in the disposition of the matter.

(15)

(a) The special master shall hold a hearing within 45 days after his receipt of the request for relief unless a different date is agreed to by all the parties. The hearing must be held in the county in which the property is located.

(b) The special master must provide notice of the place, date,

and time of the hearing to all parties and any other persons who have requested such notice at least 40 days prior to the hearing.

(16)

(a) Fifteen days following the filing of a request for relief, the governmental entity that issued the development order or that is taking the enforcement action shall file a response to the request for relief with the special master together with a copy to the owner. The response must set forth in reasonable detail the position of the governmental entity regarding the matters alleged by the owner. The response must include a brief statement explaining the public purpose of the regulations on which the development order or enforcement action is based.

(b) Any governmental entity that is added by the special master as a party must file a response to the request for relief prior to the hearing but not later than 15 days following its admission.

(c) Any party may incorporate in the response to the request for relief a request to be dropped from the proceeding. The request to be dropped must set forth facts and circumstances relevant to aid the special master in ruling on the request. All requests to be dropped must be disposed of prior to conducting any hearings on the merits of the request for relief.

(17) In all respects, the hearing must be informal and open to the public and does not require the use of an attorney. The hearing must operate at the direction and under the supervision of the special master. The object of the hearing is to focus attention on the impact of the governmental action giving rise to the request for relief and to explore alternatives to the development order or enforcement action and other regulatory efforts by the governmental entities in order to recommend relief, when appropriate, to the owner.

(a) The first responsibility of the special master is to facilitate a resolution of the conflict between the owner and governmental entities to the end that some modification of the owner's proposed use of the property or adjustment in the development order or enforcement action or regulatory efforts by one or more of the governmental parties may be reached. Accordingly, the special master shall act as a facilitator or mediator between the parties in an effort to effect a mutually acceptable solution. The parties shall be represented at the mediation by persons with authority to bind their respective parties to a solution, or by persons with authority to recommend a solution directly to the persons with authority to bind their respective parties to a solution.

(b) If an acceptable solution is not reached by the parties after the special master's attempt at mediation, the special master shall consider the facts and circumstances set forth in the request for relief and any responses and any other information produced at the hearing in order to determine whether the action by the governmental entity or entities is unreasonable or unfairly burdens the real property.

(c) In conducting the hearing, the special master may hear from all parties and witnesses that are necessary to an understanding of the matter. The special master shall weigh all information offered at the hearing.

(18) The circumstances to be examined in determining whether the development order or enforcement action, or the development order or enforcement action in conjunction with regulatory efforts of other governmental parties, is unreasonable or unfairly burdens use of the property may include, but are not limited to:

(a) The history of the real property, including when it was purchased, how much was purchased, where it is located, the nature of the title, the composition of the property, and how it was initially used.

(b) The history or development and use of the real property, including what was developed on the property and by whom, if it was subdivided and how and to whom it was sold, whether plats were filed or recorded, and whether infrastructure and other public services or improvements may have been dedicated to the public.

(c) The history of environmental protection and land use controls and other regulations, including how and when the land was classified, how use was proscribed, and what changes in classifications occurred.

(d) The present nature and extent of the real property, including its natural and altered characteristics.

(e) The reasonable expectations of the owner at the time of acquisition, or immediately prior to the implementation of the regulation at issue, whichever is later, under the regulations then in effect and under common law.

(f) The public purpose sought to be achieved by the development order or enforcement action, including the nature and magnitude of the problem addressed by the underlying regulations on which the development order or enforcement action is based; whether the development order or enforcement action is necessary to the achievement of the public purpose; and whether there are alternative development orders or enforcement action conditions that would achieve the public purpose and allow for reduced restrictions on the use of the property.

(g) Uses authorized for and restrictions placed on similar property.

(h) Any other information determined relevant by the special master.

(19) Within 14 days after the conclusion of the hearing, the special master shall prepare and file with all parties a written recommendation.

(a) If the special master finds that the development order at issue, or the development order or enforcement action in combination with the actions or regulations of other governmental entities, is not unreasonable or does not unfairly burden the use of the owner's property, the special master must recommend that the development order or enforcement action remain undisturbed and the proceeding shall end, subject to the owner's retention of all other available remedies.

(b) If the special master finds that the development order or enforcement action, or the development order or enforcement action in combination with the actions or regulations of other governmental entities, is unreasonable or unfairly burdens use of the owner's property, the special master, with the owner's consent to proceed, may recommend one or more alternatives that protect the

public interest served by the development order or enforcement action and regulations at issue but allow for reduced restraints on the use of the owner's real property, including, but not limited to:

1. An adjustment of land development or permit standards or other provisions controlling the development or use of land.
2. Increases or modifications in the density, intensity, or use of areas of development.
3. The transfer of development rights.
4. Land swaps or exchanges.
5. Mitigation, including payments in lieu of onsite mitigation.
6. Location on the least sensitive portion of the property.
7. Conditioning the amount of development or use permitted.
8. A requirement that issues be addressed on a more comprehensive basis than a single proposed use or development.
9. Issuance of the development order, a variance, special exception, or other extraordinary relief, including withdrawal of the enforcement action.
10. Purchase of the real property, or an interest therein, by an appropriate governmental entity.

(c) This subsection does not prohibit the owner and governmental entity from entering in to an agreement as to the permissible use of the property prior to the special master entering a recommendation. An agreement for a permissible use must be incorporated in the special master's recommendation.

(20) The special master's recommendation is a public record under chapter 119. However, actions or statements of all participants to the special master proceeding are evidence of an offer to compromise and inadmissible in any proceeding, judicial or administrative.

(21) Within 45 days after receipt of the special master's recommendation, the governmental entity responsible for the development order or enforcement action and other governmental entities participating in the proceeding must consult among themselves and each governmental entity must:

(a) Accept the recommendation of the special master as submitted and proceed to implement it by development agreement, when appropriate, or by other method, in the ordinary course and consistent with the rules and procedures of that governmental entity. However, the decision of the governmental entity to accept the recommendation of the special master with respect to granting a modification, variance, or special exception to the application of statutes, rules, regulations, or ordinances as they would otherwise apply to the subject property does not require an owner to duplicate previous processes in which the owner has participated in order to effectuate the granting of the modification, variance, or special exception;

(b) Modify the recommendation as submitted by the special master and proceed to implement it by development agreement, when appropriate, or by other method, in the ordinary course and consistent with the rules and procedures of that governmental entity; or

(c) Reject the recommendation as submitted by the special master. Failure to act within 45 days is a rejection unless the

period is extended by agreement of the owner and issuer of the development order or enforcement action.

(22) If a governmental entity accepts the special master's recommendation or modifies it and the owner rejects the acceptance or modification, or if a governmental entity rejects the special master's recommendation, the governmental entity must issue a written decision within 30 days that describes as specifically as possible the use or uses available to the subject real property.

(23) The procedure established by this section may not continue longer than 165 days, unless the period is extended by agreement of the parties. A decision describing available uses constitutes the last prerequisite to judicial action and the matter is ripe or final for subsequent judicial proceedings unless the owner initiates a proceeding under s. 120.57. If the owner brings a proceeding under s. 120.57, the matter is ripe when the proceeding culminates in a final order whether further appeal is available or not.

(24) The procedure created by this section is not itself, nor does it create, a judicial cause of action. Once the governmental entity acts on the special master's recommendation, the owner may elect to file suit in a court of competent jurisdiction. Invoking the procedures of this section is not a condition precedent to filing a civil action.

(25) Regardless of the action the governmental entity takes on the special master's recommendation, a recommendation that the development order or enforcement action, or the development order or enforcement action in combination with other governmental regulatory actions, is unreasonable or unfairly burdens use of the owner's real property may serve as an indication of sufficient hardship to support modification, variances, or special exceptions to the application of statutes, rules, regulations, or ordinances to the subject property.

(26) A special master's recommendation under this section constitutes data in support of, and a support document for, a comprehensive plan or comprehensive plan amendment, but is not, in and of itself, dispositive of a determination of compliance with chapter 163. Any comprehensive plan amendment necessary to carry out the approved recommendation of a special master under this section is exempt from the twice-a-year limit on plan amendments and may be adopted by the local government amendments in s. 163.3184(16)(d).

(27) The special master shall send a copy of the recommendation in each case to the Department of Legal Affairs. Each governmental entity, within 15 days after its action on the special master's recommendation, shall notify the Department of Legal Affairs in writing as to what action the governmental entity took on the special master's recommendation.

(28) Each governmental entity may establish procedural guidelines to govern the conduct of proceedings authorized by this section, which must include, but are not limited to, payment of special master fees and expenses, including the costs of providing notice and effecting service of the request for relief under this section, which shall be borne equally by the governmental entities and the owner.

(29) This section shall be liberally construed to effect fully its obvious purposes and intent, and governmental entities shall direct all available resources and authorities to effect fully the obvious purposes and intent of this section in resolving disputes. Governmental entities are encouraged to expedite notice and time-related provisions to implement resolution of disputes under this section. The procedure established by this section may be used to resolve disputes in pending judicial proceedings, with the agreement of the parties to the judicial proceedings, and subject to the approval of the court in which the judicial proceedings are pending. The provisions of this section are cumulative, and do not supplant other methods agreed to by the parties and lawfully available for arbitration, mediation, or other forms of alternative dispute resolution.

(30) This section applies only to development orders issued, modified, or amended, or to enforcement actions issued, on or after October 1, 1995.

History.—

s. 2, ch. 95-181.