

RESOLUTION NO. 99-27

A RESOLUTION OF THE TOWN COUNCIL OF THE TOWN OF FORT MYERS BEACH; INTERPRETING THE TOWN'S ZONING REGULATIONS AS APPLIED TO THE BAY BEACH DEVELOPMENT, PURSUANT TO SECTION 34-208 OF THE TOWN'S LAND DEVELOPMENT CODE; MAKING FINDINGS OF FACT AND CONCLUSIONS OF LAW; AND PROVIDING AN EFFECTIVE DATE.

WHEREAS, Stardial Investments Company has filed an action in the Twentieth Judicial Circuit, Case Number 99-1042 CAJBR, which requires the Town Council to address the application of the Town's zoning regulations to the development known as Bay Beach; and,

WHEREAS, the Town manager has filed a request for an interpretation of the Town's zoning regulations as they pertain to Bay Beach, pursuant to Section 34-208 of the Town's Land Development Code; and,

WHEREAS, a public hearing was held on such request at 9:00 a.m. on June 14, 1999; and,

WHEREAS, at that public hearing the Town staff and the property owner, Stardial, submitted evidence in the record; and,

WHEREAS, the Town Council desires to render the interpretation requested by the Town Manager in such form as will assist the owner/developer of Bay Beach in planning for future phases of said development and assist the Town Manager in reviewing future applications for development permits therein;

NOW, THEREFORE, be it RESOLVED by the Town Council of the Town of Fort Myers Beach, Florida, that:

1. In Case No. 99-05-085.07S, the Applicant is the Town of

Fort Myers Beach, through its Town Manager, and the application was made pursuant to Section 34-208 of the Town's Land Development Code.

2. A public hearing on Case No. 99-05-085.07S was held at 9:00 a.m. on June 14, 1999, at the Town Council Chambers in the Nations Bank Building, 2523 Estero Blvd., Fort Myers Beach, Florida.

3. Such public hearing was duly and properly noticed.

4. Based on the evidence presented at such public hearing, the Town Council hereby makes the following findings of fact:

A. The Bay Beach development was initially rezoned by Lee County in 1972, when the Lee County Commission adopted its Resolution Z-72-243, approving "a zoning change from BU-1, RU-3, RU-3A, RU-1 to BU-4 and RU-4 with a request to operate under a community unit plan, for site location only." As indicated by the attachments to the resolution, which contain legal descriptions of each parcel and identify the zoning change made for each, various parts of the property involved in the request were rezoned to either BU-4 or RU-4.

B. A letter of intent from Robert Troutman, Jr., as the applicant, was submitted with the 1972 zoning application asserting that, overall, "less than 15% of the area will be covered by structures and parking combined."

C. The term "for site location only" was not defined in Lee

County's zoning regulations, but in 1972 Lee County used this designation as standard practice for larger developments. The County interpreted this practice as prohibiting development of the land rezoned until final development plans were approved by the County Commission. According to the County's Director of Zoning at that time:

When the Commission receives, reviews, and approves the final development plan submitted by the land owner/developer, the project receives final zoning status and work on all phases of the approved plan may begin. It is at this point that final density is established, road and utility criteria set and building guidelines finalized. Any alteration in the site location only plan must be considered and approved by the Commission.

D. In accordance with these procedures, in 1974 the Bay Beach developer presented a detailed site plan to the County Commission to finalize the zoning approval. This site plan was approved by the County Commission on May 22, 1974; it showed a golf course and 1,731 dwelling units in buildings of 2, 5, and 7 stories. Depending on how the property boundaries are determined, the 1974 plan, by actual calculations, shows approximately 78% green open space (counting the lakes and canals as green open space), with the remaining 22% of the land covered by buildings, parking lots and roads. This approval superseded the developer's commitment to 15% coverage by structures and parking, but it seems to be essentially the same in this regard (assuming 7% coverage by roads). Although called a "preliminary master plan," this approved site plan was treated as a "final development plan" as described by the Director

of Zoning, and development of the project was begun in accordance with this plan.

E. The 1972 and 1974 Lee County zoning regulations also did not describe a "community unit plan," but the concept was a forerunner to Planned Unit Development zoning (which wasn't formally adopted into the zoning regulations until 1978). Under the CUP or PUD concept, larger properties could be master planned to protect natural features or provide extensive recreational facilities such as a golf course. In exchange for a binding site plan committing to these special features and to a specific plan of development, the developer would be given credit for the open space and would be allowed to provide less open space on each individual building parcel, provided the overall plan was followed.

F. The approved 1974 site plan did not include all the land in the 1972 zoning resolution. It included all of the land zoned RU-4, plus a corner of the tennis courts on the north side of Lenell, which had been zoned BU-4. It also included two parcels that were not a part of the 1972 zoning resolution at all. The rest of the lands zoned to BU-4 in 1972 were later rezoned for various planned developments, as requested by subsequent owners (except for a portion that was used for a water tank and the Santa Maria resort, which were developed under the BU-4 zoning). Most of the lands zoned BU-4 in the 1972 rezoning were not shown on or developed under the approved 1974 site plan; they were developed under other "final development plans," including three rezonings to

Planned Development zoning districts (two approved by Lee County in 1988 and 1992 and one approved by the Town of Fort Myers Beach in 1997.)

G. BU-4 zoning districts were later converted to a category called CT, and RU-4 districts were converted to RM-2. Today, the lands shown on the 1974 site plan are zoned RM-2, except for the corner of the tennis courts on the north side of Lenell, as indicated above, which is zoned CT.

H. On June 10, 1981, the County Commission agreed to modify the 1974 site plan to allow two 10-story buildings (in place of two 7-story buildings) in what became known as Harbour Pointe.

I. In 1984, the County Commission adopted a new Comprehensive Plan with a "future land use map." At Fort Myers Beach, new development was generally limited by this Plan to 6 dwelling units per acre. Since Bay Beach had originally been approved for 1,731 units on about 180 acres for an overall density of 9.6 units per acre, the developer asserted a claim of vested rights to continue development according to the 1974 site plan. That vested rights claim was administratively denied, but the denial was appealed by the owner/developer to the Board of County Commissioners, pursuant to provisions set out in the Lee County Comprehensive Plan. Those procedures required an application for a vested rights determination to be made within 6 months after adoption of the Plan and required a public hearing for appeal decisions of the County Commission.

J. In 1985, the County Commission decided in that appeal (case no. VR-85-06-89) that Bay Beach was vested "to continue the project at RM-2 and CT zoning and 9.6 units per acre with 22% building coverage with 78% green open space to the extent originally agreed to in 1972 and 1974 by the Board of County Commissioners." This is the same percentage for green open space as was shown on the approved 1974 site plan. The 22% reference in the vesting decision doesn't explicitly include buildings and parking lots and roads; but the direct reference to the 1974 approval seems to confirm that these numbers were an awkward recitation of the previous approval and not a new standard. Furthermore, there was before the County Commission only a request to recognize the owner/developer's vested rights, not any application for an amendment to the site plan.

K. In 1987, the County Commission "clarified" its 1985 vesting decision to "recognize the site plan for Bay Beach dated August 21, 1986 and revised April 27, 1987 and June 15, 1987 as a clarification of the VR-85-06-89 vesting determination and . . . approve the use of the site plan for the permitting of future development of Bay Beach." The site plan or drawing that was thus "recognized" and "approved for . . . permitting" was labeled a "master concept plan" and will be described hereinafter.

L. In 1995, the Bay Beach owner/developer requested and Lee County's community development director administratively granted a

Planned Development modification for Waterside I and II, to allow both buildings to be 10 stories tall despite height and setback restrictions that would not have allowed 10-story buildings at that location. Although these two buildings were not shown as ten-story buildings on the 1974 approved site plan, the County zoning regulations in effect in 1995 allowed building heights to be increased if greater setbacks were provided. The owner/developer was not able to provide greater setbacks to the extent required to have ten-story buildings, but the land development regulations also allowed "deviations" from development regulations otherwise applicable for approved Planned Developments. These deviations were applied for and granted as if Bay Beach were an approved Planned Development.

M. In 1997, the Town of Fort Myers Beach, having recently been incorporated and having become the applicable local government authority for the area in which the Bay Beach development is located, recognized the validity of the 1974 site plan and directed that a development order be granted for the Palm Harbor Club condominium complex on the south side of Lenell Road on the basis that buildings of the same height (7 stories) were shown at that location on the 1974 site plan.

N. In December of 1997, the Town Council adopted new height regulations through Ordinance 97-9. The new height limit for all buildings is two stories over parking, with wall heights limited to 25 feet above the mandatory flood elevation. However, Section 5 of

the ordinance states, in part: "This ordinance shall not apply to previous land use approvals of the County Commission prior to incorporation or by the Town Council prior to the effective date."

O. In 1998, the Town Council approved Waterside III as part of the Bay Beach development at 10 stories tall, based on the developer's assertion that it had pre-sold the condominium units in that building in anticipation of receiving the same Planned Development modification it obtained for Waterside I and II. The Town Council's action was limited to the matter at hand (the Waterside III building only), and was based on the principle of equitable estoppel.

P. On January 1, 1999, the new Fort Myers Beach Comprehensive Plan took effect. The new Comprehensive Plan does not override any valid development rights that have vested due to previous land use approvals; the Plan allows for recognition of such vested rights by Resolution of the Town Council.

Q. In February of 1999, Stardial Investments Company, as successor owner/developer of the Bay Beach development, filed a declaratory judgment action in the Lee County Circuit Court, claiming that the Town was attempting to deny its vested rights in this development, even though the Town Council has never taken any official position on any of the aspects of Bay Beach's vested rights identified in the Complaint for Declaratory Judgment.

R. On May 4, 1999, the Town's legal counsel for that circuit court action wrote to the Town Manager and suggested that the Town

Manager initiate a proceeding under Section 34-208 of the Town's Land Development Code in order to obtain direction from the Town Council as to its position regarding various issues raised in the Complaint. That proceeding was initiated, and the ensuing application, posing four specific questions for the Council's consideration, is the subject of this Resolution.

S. The vested rights decision of the County Commission in 1985 was clear and specific. It vested Bay Beach for up to 1731 dwelling units in 2-, 5- and 7-story buildings as shown on the 1974 site plan, a golf course, and other recreational and accessory amenities to the residential development; it also specified the minimum amount of open space required (the 78% shown on the 1974 site plan) and limited the maximum coverage by buildings, roads and parking areas to the 22% shown on the 1974 site plan.

T. The "clarification" of that vested rights decision in 1987 by the County Commission actually did the opposite: it caused a great deal of confusion as to what was vested, particularly since, as described by the County's Director of Zoning, building types and height limits shown on the 1974 site plan were binding on the developer unless explicitly modified by the County Commission. The 1987 "clarification" was not made at a public hearing, as required by the County's Comprehensive Plan for a vested rights decision of the County Commission.

U. The map or drawing considered by the County Commission in conjunction with this 1987 "clarification," which was "recognized"

and "approved for . . . permitting" by the County Commission was prepared by Stardial (then the owner/developer) and included the following:

(1) The drawing attempted to accomplish the following administrative and procedural matters:

- The drawing recited the history of past approvals on this property (notes in section A);
- The drawing divided the residential portion of Bay Beach into 17 sub-parcels that could be developed independently but still take advantage of the common open space and recreational amenities within Bay Beach, and it permitted some modification of the sub-parcel boundaries;
- The drawing provided an inventory of development existing on the site in 1987 (section B.1.);
- The drawing allocated the maximum future development among 10 undeveloped parcels (section B.2.);
- The drawing specified how density allocations might be adjusted between sub-parcels;
- The drawing addressed procedural questions on how to process and track development approvals; and
- The drawing contained an ambiguous list of "development conditions" (section C) and apparently tried to address which regulations would prevail in

certain cases.

(2) Table B on the drawing included a list of permitted uses for parcels 10 and 17 which did not appear on the 1974 site plan used as the basis for the vesting decision. Some of these uses were not allowed at the time in RM-2 zoning districts. In addition, although the list included motels or multi-family dwellings on these parcels, no residential density (of the 1731 approved units) was assigned to one of the parcels and building parameters for the two parcels were not included in either the 1974 site plan or the 1987 drawing, as required by Lee County for a "site location only" zoning final development plan.

(3) One of the ambiguous "development conditions" is C.3, which states as follows:

*THE TOTAL AGGREGATE GROUND FLOOR COVERAGE OF BUILDINGS FOR ALL LAND USES, BOTH EXISTING AND FUTURE, SHALL NOT EXCEED TWENTY-TWO (22) PERCENT OF THE TOTAL PROPERTY AREA, WHICH TOTAL INCLUDES RETENTION LAKES, EASEMENTS, AND PRIVATELY OWNED SUBMERGED LANDS, PURSUANT TO THE COUNTY COMMISSION'S VESTED RIGHTS ORDER OF OCTOBER 2, 1985. (SEE REFERENCE A.6 ABOVE).*

The syntax is awkward, making it unclear whether the clause beginning "which total" modifies the first or second clause of this sentence. The wording of the 22% reference is similar but not identical to the County Commission's motion in

1985, without helping to clarify that motion. There is some ambiguity in the Commission's citation of 22% *building coverage*; it could be argued that the old 22% cap for buildings *and parking and roads* was being replaced by a cap of 22% for buildings only. However:

- The Commission's motion explicitly said "to the extent originally agreed to in 1972 and 1974," at which time the 22% referred to buildings *and parking and roads*.
- The 78% "green open space" standard was never abrogated and remained in effect, in addition to the 22% percent coverage cap.
- Lee County zoning regulations have always defined lot coverage limitations as including all structures, and "structures" have always been defined by those regulations to include paved parking areas.

(4) Another ambiguous "development condition" is C.7, which states as follows:

*PROPOSED LAND USES LISTED IN B.2 ARE CONSISTENT WITH USES ALLOWED WITH THE ORIGINAL BU-4 AND RU-4 ZONING CLASSIFICATIONS. HOWEVER, FUTURE PROJECT DEVELOPMENT APPROVALS WILL BE REQUIRED TO COMPLY WITH THE PROPERTY DEVELOPMENT REGULATIONS UNDER THE PRESENT CT AND RM-2 ZONING*

*REQUIREMENTS. IF A USE ALLOWED IN BOTH THE CT AND RM-2 DISTRICTS HAS DIFFERING PROPERTY DEVELOPMENT REGULATIONS, THE MORE RESTRICTIVE SHALL APPLY.*

The reference in this "condition" to CT and RM-2 regulations is puzzling, since the only CT land contained in the 1987 drawing was a small part of the tennis courts (as well as the small piece containing the water tank, which is no longer owned by Stardial and which was not included in the approved 1974 site plan). Also, there is a reference in this "condition" to "present" zoning requirements. An opportunity was available to define whether this wording meant present at the time (in other words, freezing the 1987 regulations as they apply to this development), or present at the time each development approval is sought. Most of the regulations have not changed since 1987, but some have, creating an unnecessary ambiguity for matters that are not addressed by specific terms of the 1974 site plan.

(5) Further muddling the meaning of the 1987 drawing is wording in marginal notes under the heading "plan approval references." Note A.5. states: "Height limitations amended to permit ten-story buildings, approved by county commission, June 10, 1981." This is not completely inaccurate, since the County Commission did approve two 10-story buildings for Harbour Pointe in 1981. But the wording of the note has been

suggested by Stardial to mean that 10-story buildings were approved throughout all of Bay Beach.

V. The memo containing the staff recommendation with regard to this matter repeated the "development conditions" printed on the drawing and added the following statement: "In addition to these conditions, Bay Beach must comply with all other county regulations." A letter of February 2, 1987, from Lee County's Michael Kloehn (who, along with Dan Shaw, negotiated this site plan with Stardial) acknowledged that a "vesting clarification" would be only the first step in replacing the 1974 site plan. Mr. Kloehn said in the letter that he would recommend that the County Commission review the new plan at a later hearing with appropriate legal advertising. No such advertised public hearing has ever been requested by Stardial or held by the County Commission to finalize or effectuate any rezoning of the property to allow additional permitted uses or to convert the development to a Planned Development under existing regulations with a controlling Master Concept Plan (even though that is how the 1987 drawing is titled).

W. Although there was a public hearing requirement for vested right determinations of the County Commission, there was not such public hearing requirement in County ordinances for County Commission approvals of final development plans for lands zoned "site location only."

X. The Lee County Comprehensive Plan provides that any substantial deviation to a vested development caused the

development to lose its vested status.

Y. The Lee County Land Development Code, after 1978, included provisions for rezoning lands to a Planned Unit Development district. This was the forerunner for later County and Town Planned Development regulations. Planned Development rezonings include adoption of a Master Concept Plan, as described in Sections 34-373(a)(2)a. and 34-377(b)(3) of the Town's Land Development Code. Section 34-378 of the current Land Development Code, entitled "Effect of Planned Development Zoning," states the role of Master Concept Plans that have been properly adopted:

- (a) *Compliance with applicable regulations.* After the adoption of the master concept plan and the conditions and auxiliary documentation that govern it, any and all development and subsequent use of land, water and structures within the planned development must be in compliance with the following, in order of precedence:
  - (1) The Lee Plan. *[now the Fort Myers Beach Comprehensive Plan]*
  - (2) Divisions 1, 2 and 3 of this article. *[general standards that apply to all planned developments]*
  - (3) The master concept plan and attendant conditions and auxiliary documentation.
  - (4) Applicable county development regulations in force at the time of final plan submission.
  - (5) The general provisions of this chapter, unless otherwise excepted by an approved schedule of deviations.

The 1974 site plan was, in form and effect, a Master Concept Plan, as described by the County's Zoning Director.

Z. However, the later 1987 Bay Beach drawing is not a traditional site plan in that it shows no buildings at all and specifies no maximum heights. In order for the 1987 Bay Beach

drawing to have been a valid Master Concept Plan in accordance with the 1987 Lee County Land Development Code (even incorporating as it did the approved 1974 site plan), the following steps would have been required:

(1) There would have been a formal application for a zoning change pursuant to section 804.03.C of the Lee County Zoning Ordinance (now Section 34-373);

(2) Formal public hearings would have been held to change the zoning district on the land, in accordance with 804.03.F (now Section 34-377);

(3) The County Commission would have voted to assign a new zoning district to the property (probably "RPD" for a Residential Planned Development), replacing the RM-2 zoning; and

(4) A formal zoning resolution would have been adopted and recorded in the public records of Lee County pursuant to 804.03.G (now Section 34-378). That resolution would have specified the previous and new zoning district(s) on the property; identified height restrictions if they were to differ from general regulations; specified any other deviations from the County's development regulations; and included a copy of the approved Master Concept Plan.

Since none of these things were done in 1987, the recognition of the 1987 drawing could not be lawfully considered as having rezoned the property to some type of Planned Development district.

Rezoning also require notice to affected property owners and a public hearing, neither of which was done in 1987.

5. Based on said findings of fact, the Town Council hereby makes the following conclusions of law:

A. The Town of Fort Myers Beach, through its Town Manager, is an appropriate party to request an interpretation of zoning regulations under Section 34-208 of the Town's Land Development Code.

B. An interpretation of how current zoning regulations apply to claimed vested development rights is within the purview of an interpretation under Section 34-208.

C. The public hearing for Case No. 99-05-085.07S was duly noticed in accordance with the Town's Land Development Code.

D. Vested rights may not be obtained for all rights granted by a particular zoning district or set of district regulations, but only for a specific approved development.

E. The 1985 decision of the County Commission granted vested rights for such a specific approved development, as shown on the 1974 site plan for Bay Beach, for up to 1731 dwelling units in 2-, 5- and 7-story buildings, a golf course, and other recreational and accessory amenities to the residential development, with building, road and parking coverage limited to 22% of the site and a requirement for a minimum of 78% green open space. Subsequent approved amendments to this site plan, including five 10-story

buildings in place of those originally approved, slightly different building arrangements and footprints, and a rearrangement of golf course holes, did not amount, cumulatively, to a substantial deviation to the vested development.

F. Other changes could have been made to the approved site plan, and further changes could still be made by the Town Council to the approved site plan, without causing this development to lose its vested status, as long as all of the changes, cumulatively, do not amount to a substantial deviation.

G. The vested rights for Bay Beach could not have been lawfully expanded or enlarged by the County Commission in 1987 without the required public hearing; nor could the RM-2 lands included within the development have been rezoned to allow additional permitted uses, or the RM-2 regulations changed to allow additional permitted uses, without the public hearings required by Chapter 166, Florida Statutes.

H. Since no public hearing was held when the County Commission "clarified" the vested right situation for Bay Beach in 1987, that "clarification" must be interpreted, if at all possible, as not having expanded or extended the vested rights for Bay Beach.

I. Since no public hearing was held in conjunction with the County Commission "clarification" of the vested right situation for Bay Beach in 1987, that action cannot be interpreted as having rezoned the property so as to allow additional uses not permitted by the RM-2 zoning.

J. The 1987 County Commission "clarification" of the vested right situation for Bay Beach can be read as an amendment to the approved site plan, as long as the amendments, in conjunction with all other amendments, did not amount to a substantial deviation.

K. The 1987 County Commission "clarification" of the vested right situation for Bay Beach cannot be considered as having lawfully rezoned the property to some type of Planned Development district, and the drawing "recognized" at that time cannot be considered as having been lawfully adopted as a Planned Development Master Concept Plan, because the public hearing and other requirements for such a rezoning were not adhered to.

L. The 1995 changes to the site plan approved by Lee County were applied for by the owner/developer and processed by the County as if they were deviations to an approved Planned Development Master Concept Plan. Because of all the ambiguity surrounding the vested rights "clarification" of 1987 and the issue of exactly what prior lawful amendments have been made to the approved site plan, the most appropriate way to deal with this development would be for the Town to initiate a rezoning to a Planned Development zoning district and incorporate into that Planned Development a thorough and explicit Master Concept Plan and all conditions, limitations, and deviations from current development regulations applicable to the completion of this project.

M. In order to interpret the 1987 action of the County Commission with regard to Bay Beach as lawful, it cannot be

interpreted as allowing uses not otherwise permitted by the RM-2 zoning in 1987. To the extent that the drawing acknowledged by the County Commission lists permitted uses for sub-parcels 10 and 17, such list must be interpreted as allowing only those principal uses and accessory uses allowed by RM-2 zoning in 1987. Also, should the owner/developer elect to develop a motel, multi-family, or other residential use on a parcel having no assigned residential density (assuming such use was allowable in RM-2 in 1987), the density transfer provisions outlined on the drawing must be followed to keep the overall number of residential units no greater than 1731. Furthermore, since a final development plan for "site location only" rezonings was supposed to include the building heights and other building parameters, the site plan will also have to be amended to include such details for any use not shown on the approved 1974 site plan for sub-parcels 10 and 17; such details must conform to the Land Development Code and Comprehensive Plan in effect at the time the site plan is so amended.

N. If the 1987 action of the County Commission with regard to Bay Beach is interpreted literally--as applying the 22% coverage limitation to buildings only and as having abrogated the 78% green open space requirement, there would have been no limitation whatsoever on maximum impervious coverage or minimum required open space; and the property could have been developed with 100% coverage by buildings, roads, and parking areas, with the only limitation being 22% coverage by buildings. If that was what was

intended, it would have been unlawful as an attempted delegation of legislative authority to the developer; it would have certainly been a substantial deviation to the vested development; it would have been an unlawful expansion of the Bay Beach vested rights; and it would have been directly contrary to the way the County Land Development Code treated lot coverage limitations for all other lands.

O. If the conditions listed on the drawing recognized by the County Commission in 1987 are interpreted as allowing the owner/developer of Bay Beach to always have the benefit of and make changes to the development in accordance with the development regulations existing in 1987, regardless of what regulation changes are made in the future for public health, safety and welfare purposes, the County Commission's action would have been unlawful as an attempted abrogation by the County Commission of its legislative authority and as an attempt to give the owner/developer a vested right to all rights allowed by a particular set of zoning regulations, rather than a specific approved development.

P. The approved 1974 site plan remains the basis for the Bay Beach vested rights, along with all amendments to that site plan heretofore lawfully approved, as interpreted herein.

Q. The owner/developer of Bay Beach is entitled to a vested right to construct up to 1731 dwelling units as shown on the approved 1974 site plan, as well as any other development or use lawfully approved as an amendment to that site plan. (For purposes

of this interpretation, it is assumed that none of the 1731 dwelling units originally approved were lost by voluntary actions of the owner/developer. That issue is not before the Town Council in this application.) To the extent reasonably necessary to enable development of the owner/developer's vested rights, the Town Council is obligated, in rezoning the property to Planned Development and adopting a proper Master Concept Plan, to approve additional amendments to the approved 1974 site plan, as long as the cumulative amendments do not amount to a substantial deviation from the vested development.

6. Based on said findings of fact and conclusions of law, the Town Council answers the four questions posed in this Case No. 99-05-085.07S as follows:

A. *Have the Lee County Commission's 1972 and 1974 zoning actions on Bay Beach been properly and lawfully modified by later actions?*

The rezoning action in 1972 has never been properly and lawfully modified. The property in question--the land included within the approved 1974 Bay Beach site plan--is all zoned RM-2, except for that small portion on which the corner of the tennis courts is located, adjacent to the water tank on the north side of Lenell.

As to the 1974 site plan approval, this is part of the County Commission's "zoning" action only because, as described by the

County's Director of Zoning in 1975 for "site location only" rezonings:

*When the Commission receives, reviews, and approves the final development plan submitted by the land owner/developer, the project receives final zoning status and work on all phases of the approved plan may begin. It is at this point that final density is established, road and utility criteria set and building guidelines finalized. Any alteration in the site location only plan must be considered and approved by the Commission.*

The site plan was also part of the County Commission's "zoning" action because, as the Bay Beach owner/developer was informed by the Director of Zoning, building types and height limits shown on the 1974 site plan were binding on the developer unless explicitly modified by the County Commission.

There have been lawful and proper amendments made to the site plan since 1974. However, the extent of those amendments is unclear because of the ambiguities in the 1987 action of the County Commission in "clarifying" the vested rights situation for Bay Beach.

B. *Is the Bay Beach site plan that was approved on June 23, 1987, a valid Master Concept Plan, as described in Section 34-378 of the Fort Myers Beach Land Development Code? (And, if not, to what extent was the proposed development shown on the Master Concept Plan properly and lawfully determined to have been vested?)*

The site plan or drawing "recognized" by the County Commission in 1987, although labeled a "Master Concept Plan," was not a valid

Master Concept Plan, as described in Section 34-378 of the Town's Land Development Code (or any part of the County's Land Development Code relating to Planned Developments). However, that drawing, and the approved 1974 site plan which it amended and supplemented, have been treated by both the owner/developer and the County as having the same effect as a Planned Development Master Concept Plan.

The 1987 "Master Concept Plan" doesn't really show any of the proposed development. However, it incorporates by reference the approved 1974 site plan, which does show the proposed development. (If it did not incorporate the approved 1974 site plan, it would not do one of the things required by the County for a final development plan for "site location only" rezonings--finalize building guidelines.) That 1974 approved site plan, having been approved prior to adoption of the County's Comprehensive Plan, is the basis of the Bay Beach vested rights. What was vested was a development of up to 1731 dwelling units in 2-, 5- and 7-story buildings, with a maximum of 22% coverage by buildings, parking areas and roads (or, theoretically, 22% coverage by just buildings if no paved roads were necessary and all parking was under buildings), and with a minimum of 78% green open space, all as shown on the 1974 site plan. Other residential accessory uses shown on the 1974 site plan were also vested.

The approved site plan for Bay Beach has been amended since 1974 in the following respects, all of which are hereby cumulatively determined to not amount to a substantial deviation so

as to deprive Bay Beach of its vested status:

(1) Five buildings have been increased in height to 10 stories.

(2) The specific locations and building footprints for other buildings currently on the ground have been slightly altered, as have the specific locations and layouts of parking areas, parts of the golf course, and other amenities which are currently on the ground.

(3) The residential portion of Bay Beach has been divided into 17 sub-parcels which can be independently developed but still take advantage of the common open space and recreational amenities within Bay Beach, and some modification of sub-parcel boundaries has been approved.

(4) The maximum residential density has been allocated among the sub-parcels, and limited density transfers between sub-parcels by the owner/developer have been approved.

(5) Other possible uses have been approved for sub-parcels 10 and 17, but only those listed on the 1987 drawing and allowable in 1987 in RM-2 zoning as permitted uses.

The owner/developer of Bay Beach may apply for further amendments to the site plan, including a reduction in the 78% green open space requirement, to the extent permitted at the time of such amendment by the Town's Comprehensive Plan and Land Development Code. Any such allowable reduction in required open space--and other allowable changes requested--may be approved by the Town

Council provided they do not, in conjunction with all other approved amendments, amount to a substantial deviation. Further amendments to the 1974 site plan should be processed as an amended Planned Development Master Concept Plan, in conjunction with a rezoning of the entire Bay Beach property to Planned Development.

C. *Are the building height restrictions in Fort Myers Beach Ordinance No. 97-9 applicable within Bay Beach?*

By its terms, Ordinance 97-9 is not applicable to previous land use approvals of the County Commission prior to the Town's incorporation. Therefore, buildings in the Bay Beach development may be constructed to the heights shown on the approved 1974 site plan. However, the owner/developer of Bay Beach may apply for further amendments to the site plan to increase building heights to the extent permitted, if at all, at the time of the amendment by the Town's Comprehensive Plan and Land Development Code. Any such allowable increases in building heights may be approved by the Town Council provided they do not, in conjunction with all other approved amendments, amount to a substantial deviation. Further amendments to the 1974 site plan should be processed as an amended Planned Development Master Concept Plan, in conjunction with a rezoning of the entire Bay Beach property to Planned Development.

D. *Are retail stores or restaurants allowed in Bay Beach at the intersection of Bay Beach Lane and Estero Boulevard?*

The only uses allowed at this location (sub-parcels 10 and 17)

are those shown on the approved 1974 site plan, plus any additional uses listed on the 1987 drawing for such parcels which were allowable in 1987 in RM-2 zoning as permitted uses. The uses allowed in RM-2 zoning in 1987 are not apparent from the record made in regard to this application; therefore, unless the matter is otherwise resolved in a future rezoning of the property to a Planned Development zoning district, any request for development of any additional use on these parcels should be treated as follows:

(1) No such requested use shall be permitted unless it is listed on the 1987 drawing for the sub-parcel in question.

(2) No such requested use shall be permitted unless it was allowed as a permitted use by the RM-2 zoning district under the 1987 Lee County Land Development Code.

(3) No such residential use shall be permitted unless there is sufficient residential density assigned to the sub-parcel in question on the 1987 drawing or transferred from other sub-parcels pursuant to the conditions listed on the 1987 drawing.

(4) No such use shall be permitted until the site plan is further amended to include building heights and other building parameters for such use; such building heights and other parameters must not exceed the limits set forth in the Land Development Code and Comprehensive Plan in effect at the time such site plan amendment is approved.

(5) The approval of such uses, any necessary density transfer in conjunction therewith, and the site plan amendments necessary to

develop such uses may be approved by the Town Council provided the site plan amendments do not, in conjunction with all other approved amendments, amount to a substantial deviation. Further amendments to the 1974 site plan should be processed as an amended Planned Development Master Concept Plan, in conjunction with a rezoning of the entire Bay Beach property to Planned Development.

7. This Resolution shall take effect immediately upon its adoption.

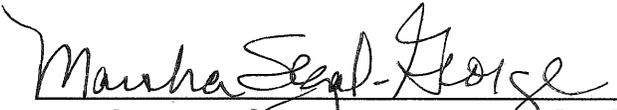
The foregoing resolution was adopted by the Fort Myers Beach Town Council upon being put to a vote; the result was as follows:

Anita T. Cereceda	<u>aye</u>
Daniel Hughes	<u>aye</u>
John Mulholland	<u>aye</u>
Garr Reynolds	<u>aye</u>
Ray Murphy	<u>aye</u>

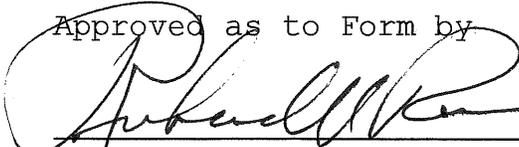
DULY ADOPTED this 1st day of July, 1999.

ATTEST:

TOWN OF FORT MYERS BEACH

  
Marsha Segal-George, Town Clerk

By:   
Raymond E. Murphy, Mayor

Approved as to Form by  
  
Richard V.S. Roosa, Town Attorney