

**FORT MYERS BEACH, FLORIDA
DEPARTMENT OF COMMUNITY DEVELOPMENT
ZONING STAFF REPORT**

TYPE OF CASE: Special Exception

CASE NUMBER: FMBSEZ2009-0001 (Wicked Wings)

LPA HEARING DATE: December 15, 2009

I. APPLICATION SUMMARY:

Applicant: Atwatter LLC (Walter Simmons, President)

Request: Special Exception in the DOWNTOWN zoning district to allow consumption-on-premises of alcoholic beverages in a restaurant providing an outdoor seating area that is within 500 feet of a dwelling unit under separate ownership. Applicant indicates the intent to apply for a 2COP State license for the sale of beer and wine for on-premises consumption.

Subject property:

LOT 11, BLOCK "D", CRESCENT BEACH SUBDIVISION,
AS RECORDED IN PLAT BOOK 4, PAGE 45, PUBLIC
RECORDS OF LEE COUNTY, FLORIDA.

Physical Address: 61 Avenue C., Fort Myers Beach, FL 33931

STRAP #: 19-46-24-W4-0070D-0110

Future Land Use designation: Pedestrian Commercial and Recreation

Zoning: DOWNTOWN and EC (Environmentally Critical)

Current use(s): Restaurant with outdoor seating on raised porch; a licensed personal watercraft and parasailing vendor operates on the littoral beach property seaward of the upland building, within the EC zoning district.

Adjacent zoning and land uses:

Adjacent properties are designated as Pedestrian Commercial Future Land Use Map (FLUM) category, except beach, which is Recreation FLUM.

North: 15-foot alley, then a single-family dwelling, then a vacant lot used as a seasonal parking lot, all zoned DOWNTOWN.

South: Undeveloped beach, zoned EC (Environmentally Critical).

East: Avenue C, then a mix of single-family, two-family and small multifamily residential buildings and a Retail store, small, with automobile fuel pumps, all zoned DOWNTOWN.

West: One single-family dwelling, then Lani Kai Island Resort, both zoned DOWNTOWN.

II. BACKGROUND AND ANALYSIS

Introduction and Background:

Walter Simmons (“Applicant”), President of Atwatter LLC (owner of the subject property), has requested a special exception to allow consumption-on-premises of alcoholic beverages in a restaurant providing an outdoor seating area that is within 500 feet of a dwelling unit under separate ownership. The applicant has indicated the intent to apply for a 2COP beverage license, which would allow the sale of beer and wine for consumption on the premises. The existing building on the subject property has been remodeled to serve as a kitchen and restroom area with a small lunch counter, and a raised outdoor porch has been built adjacent to the building for some additional seating. Pursuant to an approved development order and building permits, the use has lawfully been changed to a restaurant. The applicant has also provided other upgrades to the property and to nearby facilities, including construction of an accessible parking space and installation of a new fire hydrant near the intersection of Avenue C and Estero Boulevard. To allow consumption on premises of alcoholic beverages, however, a special exception is required under Land Development Code (LDC) Section 34-1264(a)(2)a.2. because the proposed outdoor seating area is less than 500 feet from a dwelling unit under separate ownership.

Analysis:

The subject property is zoned DOWNTOWN and is in the Pedestrian Commercial Future Land Use Map (FLUM) category, except that a portion of the existing deck seaward of the building extends into the EC (Environmentally Critical) zoning district. Underlying and coterminous with the EC zoning district is the Recreation FLUM category. The applicant uses the property for a restaurant with a small

outdoor seating area on a raised porch, consisting of the existing deck in the EC zoning district and a newly constructed deck in the DOWNTOWN zoning district. A development order, LDO2007-00401, and building permit, COM09-0019, were issued for construction and site improvements. Construction is complete, the building permit has received a certificate of compliance, and the restaurant use has received a use permit, but use of the outdoor seating area for consumption of alcoholic beverages on the premises requires special exception approval.

The subject property is generally located between Avenue C and the Lani Kai resort, directly along the beach in the vicinity of several small residential buildings. The restaurant, with its outdoor seating area proposed to be used for consumption of alcoholic beverages, is adjacent to the beach. Access to the property from Estero Boulevard is available by platted rights-of-way, known as "Avenue C" and "I Street", that were dedicated to the public by the plat of Crescent Beach Subdivision, as recorded in Plat Book 4, Page 45, Public Records of Lee County, Florida.

The Comprehensive Plan encourages pedestrian-oriented development in the downtown area, generally conceived as the area within the Pedestrian Commercial FLUM category. However, many of the pedestrians along the beachfront are families with children and the service of alcoholic beverages in an unenclosed area a few feet from the beach, in and near the EC zoning district, may not be conducive to a family outdoor recreational atmosphere. Considering the proper balance between encouraging pedestrian orientation of the downtown area and limiting the intrusiveness of commercial activities into existing neighborhoods is squarely within the purview of the LPA and Town Council in the special exception process.

The restaurant's outdoor seating area is located on a porch, in accordance with LDC Section 34-678(e)(4):

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 is regulated by state liquor laws and by § 34-1246 of this code.

The term "porch" is defined in LDC Section 34-678(e)(1)a. as

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 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.

The request for outdoor seating for patrons consuming alcoholic beverages on the premises implicates two general issues: (1) the use of the existing deck in the EC zoning district; and (2) the appropriateness of the outdoor seating area for alcoholic beverage consumption in this location generally.

Existing deck in the EC zoning district

The existing structure on the subject property includes a wooden deck (defined as a “porch” under LDC Section 34-678(e)(1)a., as discussed above) that is seaward of the building. This existing deck extends seaward of the Coastal Construction Setback Line (“1978 Line”), into the EC (Environmentally Critical) zoning district and the underlying Recreation FLUM category. The existing building was originally built in 1937 according to the records of the Lee County Property Appraiser. The deck appears on the archived Property Appraiser’s field card dating to the late 1970s and on the FDOT aerial photograph dating to 1975, and therefore was built at least prior to the establishment of the 1978 Line.

The applicant has not requested a special exception to expand or replace the deck structure in the EC zoning district. The deck structure remains nonconforming with regard to its location.

As LDC Section 34-678(e)(1)a. states, “businesses with existing porches are encouraged to utilize them for outdoor display.” This business has an existing porch, which existed prior to the establishment of the 1978 Line, and that extends into the Town’s EC zoning district and is therefore nonconforming because LDC Section 6-366 requires a special exception to allow minor structures (including decks) in the EC zoning district. New or expanded structures and uses in the EC zoning district, aside from a very limited group of uses provided in LDC Section 34-652(d), can only be allowed by special exception.

The special exception process is a process by which Town Council can determine if the use of the existing porch can be expanded to include alcoholic beverage service in the EC zoning district. Since this is an unusual situation, staff has recommended some additional factual findings to acknowledge and clarify that new development for commercial uses is not generally allowed in the EC zoning district.

If removed, the existing porch in the EC district could not be replaced without a special exception. Staff has recommended a condition to make this requirement clear in the event Town Council chooses to approve the current request to allow use of the existing porch as a part of the restaurant’s outdoor consumption of alcoholic beverages.

Alternatively, LPA could choose to recommend and Town Council could find that the commencement of alcoholic beverage consumption outdoors on the existing

deck in the EC district is contrary to the standards of LDC Section 34-88, because it would not protect, conserve, or preserve environmentally critical areas or because it would be incompatible with existing or planned uses in the EC zoning district and the Recreation FLUM. One basis for such a finding might be that the porch, being in the EC district, is so close to the public beach that its use for outdoor consumption of alcoholic beverages would be inappropriate given the recreational nature of the beach. In this case the Council could still choose to approve the requested special exception with the modification that the use is only permitted within the enclosed building and on the new porch, landward of the 1978 Line.

Outdoor seating for on-premises consumption of alcoholic beverages

The regulations of the DOWNTOWN zoning district encourage restaurants to provide outdoor seating areas located on porches or patios, largely between enclosed buildings and the street, to advance the goal of encouraging pedestrian activity. Although the porches on the subject property are between the building and Avenue C, they are also located near the beach, and part of one porch is in the EC zoning district.

Other commercial uses in the vicinity include the Lani Kai hotel and its accessory restaurant and retail activities, a retail store with gasoline fuel pumps, and other restaurant and retail uses, some of which have outdoor seating areas with (or without) consumption of alcoholic beverages. Interspersed among these uses are a variety of older residential buildings, some containing more than one dwelling unit.

On the beachfront adjacent to the subject property and adjacent to the nearby Lani Kai property, personal watercraft vending and parasailing activity licensees operate. These uses attract pedestrians to the area and contribute to the relatively commercial atmosphere of this part of the beach. Although residential buildings are located in the immediate vicinity, the area of the subject property has been zoned to allow commercial uses for many years, and contains a mix of commercial, lodging, and residential uses.

The applicant indicates its intent to operate between the hours of 10:00 AM and 11:00 PM daily. This is within the external limit prohibiting service between 2:00 AM and 7:00 AM daily that applies throughout the Town. The outdoor deck area has a seating capacity of 30 people and the indoor lunch counter has a seating capacity of 15 people as configured on the applicant's site plan. The applicant has stated its intent to acquire a 2COP state license, which would allow the service of beer and wine. A restaurant's outdoor seating area approved for 2COP at 1661 Estero Boulevard in 2002 was limited to operation between 11 AM and 9:30 PM daily (Resolution 02-43). A restaurant's outdoor seating area approved for 2COP at 1600 Estero Boulevard in 2002 was limited to operation between 11 AM and midnight, Monday through Thursday, 11 AM and 1 AM,

Friday and Saturday, and Noon and 10 PM on Sunday (Resolution 02-44). Other locations in the vicinity, such as the Lani Kai, have licenses that predate the requirement to obtain local approval and therefore are limited by the general prohibition on service between 2:00 AM and 7:00 AM daily.

In the past, the LPA has recommended and Town Council has approved limitations on the number of seats and the type and/or series of license subject to the approval in an effort to limit potentially adverse effects on the neighboring properties and possibly to aid with enforcement issues involving unauthorized expansions of seating areas. Staff does not recommend conditions be included limiting the number of seats or the type and/or series of state beverage license. The seating area can be limited by reference to the applicant's site plan, which clearly delineates the seating area from other parts of the site. Changes to the types of seats used in the seating area or amendments to the building code could allow a different seating capacity within the same floor area in the future. A future restaurant operator may find it economically advantageous to acquire a different type or series of state beverage license and use it in conjunction with a restaurant use, either to serve beer only, or to serve beer, wine, and liquor. Under current state law, because of its small floor area the establishment would be unable to qualify for the special restaurant ("SRX") exception to the quota limitations on licenses that allow sales of beer, wine, and liquor, but could purchase an existing quota license (which would be much more costly than acquiring a 2COP license for beer and wine). The LDC does not distinguish between restaurants that serve beer, restaurants that serve beer and wine, and restaurants that serve beer, wine, and liquor, except in LDC Section 34-1264(h)(1), which limits expansion in circumstances in which "a legally existing establishment engaged in the sale or service of alcoholic beverages...is made nonconforming by reason of new regulations contained in this chapter."

Outdoor seating for consumption of alcoholic beverages at this location could encourage the pedestrian-friendliness of the beach in this area. On the other hand, it could increase the intensity of activity and become a source of irritation to the neighborhood. It is the LPA's role to recommend, and the Town Council's role to decide, whether the potential benefits outweigh the potential for detriments, or vice versa, in accordance with the associated considerations and findings.

III. RECOMMENDATION:

Staff recommends **APPROVAL** of the requested Special Exception to allow consumption on premises of alcoholic beverages in a restaurant providing outdoor seating areas that are within 500 feet of a dwelling unit under separate ownership.

If the Town Council chooses to approve the requested special exception, staff recommends that approval be subject to the following conditions:

1. The licensed area of the subject establishment must be confined entirely to the building areas shown on the floor plan attached hereto and incorporated herein by reference as **Exhibit B**, including the interior of the building, and the two areas of the raised porch labeled “new deck” and “exist. deck.” The licensed area, and the area approved for consumption on premises, does not include any area beneath the raised porch or building, or any portion of the grounds, parking area, or beach and the use of these areas for consumption on premises and food service is prohibited.
2. Music and other audible entertainment must only take place during hours beginning at 10:00 AM and ending at 11:00 PM of each day and must comply at all times with applicable ordinances.
3. The hours of operation must not begin earlier than 10:00 AM and must end no later than 11:00 PM daily.
4. The use must comply at all times with the provisions of LDC Section 34-1264(k), as may be amended from time to time, and must at all times be licensed as a permanent public food service establishment with seating, in accordance with Chapter 509, *Florida Statutes*, and applicable state agency rules.
5. The use must comply at all times with lighting standards, including the regulations for the protection of Sea Turtles provided in LDC chapter 14, article II.
6. Approval of this special exception does not create a vested right to reconstruct the structure labeled “exist. deck” on **Exhibit B** that is located within the EC (Environmentally Critical) zoning district. The existing structure that is within the EC zoning district is limited by LDC Sections 34-3242 and 34-3245. New construction and/or replacement of existing structures in the EC zoning district must comply with all requirements of the LDC and Comprehensive Plan at the time of permitting.
7. At each egress point from the porch, instructional signs visible to restaurant patrons leaving the licensed area must be placed and maintained containing the legible statement “No Alcoholic Beverages Beyond This Point”.

Recommended Findings and Conclusions

1. *Whether there exist changed or changing conditions [that] make approval of the request appropriate.*

Comprehensive Plan (Comp Plan) **Policy 3-D-1** envisions “revitalizing downtown as a lively, inviting, comfortable, and safe public environment.” This

neighborhood between the Lani Kai resort (1400 Estero Boulevard) and the Estero Island Beach Club condominium (1836 Estero Boulevard) contains a mix of older cottages, mostly used for rentals, and commercial activities such as a retail store with fuel pumps, a seasonal parking lot, a restaurant, a coffee shop, and a few small retail stores. Applicant acquired a development order and building permits to remodel the existing building for reuse as a small restaurant with an outdoor seating area on a raised porch. Staff recommends the finding that the applicant's successful change of use of the property from a dwelling unit to a restaurant is a changed condition and approval of the request, as conditioned, is appropriate.

2. Whether the request is consistent with the goals, objectives, policies, and intent of the Fort Myers Beach Comprehensive Plan.

The subject property is in the Pedestrian Commercial FLUM category, near Estero Boulevard and the Lani Kai resort. Comp Plan **Policy 4-B-6**, regarding the Pedestrian Commercial FLUM, states that commercial activities must contribute to the pedestrian-oriented public realm. The beach areas northward from the Diamondhead and Lani Kai to Lynn Hall Park are heavily traveled by pedestrian beachgoers. The proposed restaurant will be oriented toward this foot traffic while providing a controlled area of alcoholic beverage consumption in conjunction with dining on a raised porch that is sequestered from the beach itself by railings and by its elevation above the adjacent grade. The elevation of the porch, the railings, and the recommended signage should help to remove the use of the restaurant from the activity of the public on the public beach. Staff recommends the finding that the request, as conditioned, **is consistent** with the goals, objectives, policies, and intent of the Comprehensive Plan with regard to this commercial area.

3. Whether the request meets or exceeds all performance and locational standards set forth for the proposed use.

A restaurant is a use permitted by right in the Downtown zoning district. Because dwelling units under separate ownership are located within 500 feet of the subject property, a special exception is necessary in order to allow an outdoor seating area. Performance and locational standards for the restaurant use, site development, and remodeling to the building, have already been addressed through the development order process and the requested use meets the applicable parking requirements under LDC Chapter 34, Article IV, Division 19. Whether or not the use of an existing nonconforming structure in the EC zoning district for on premises consumption is appropriate, is a question best answered on a case-by-case basis by Town Council through the special exception process. Adequate provision has been made for solid waste removal from the site using movable containers. Staff recommends the finding that the request, as conditioned, **meets or exceeds** all performance and locational standards set forth for the proposed use.

4. *Whether the request will protect, conserve, or preserve environmentally critical areas and natural resources.*

The existing structure on the subject property was developed many decades ago. Through the development order and building permit processes existing nonconformities have been removed or mitigated except for the remaining deck that extends into the EC zoning district. Artificial lighting has been required to be brought into compliance with sea turtle protection requirements. Construction of additional structures in environmentally critical areas has not been permitted and appropriate vegetation has been added to the site through the development order process. As conditioned, the existing deck in the EC zoning district cannot be replaced without proper prior approval from the Town Council through the special exception process. In conjunction with the completed site improvements and as conditioned, staff recommends the finding that approval of the request, as conditioned, **will** protect, conserve, or preserve environmentally critical areas and natural resources.

5. *Whether the request will be compatible with existing or planned uses and not cause damage, hazard, nuisance, or other detriment to persons or property.*

The existing surrounding uses include dwelling units, the Lani Kai resort, a seasonal parking lot, a convenience food and beverage store with fuel pumps, a restaurant, and some small retail stores. Within the Pedestrian Commercial Future Land Use Map category, adjacent dwelling units and vacant lots could potentially be redeveloped with commercial or mixed use buildings in accord with the regulations of the DOWNTOWN zoning district or through planned development rezoning. The beach adjacent to the subject property supports personal watercraft and parasailing activities licensed under LDC Chapter 27, and is heavily traveled by the public. The recommended conditions clearly restrict the use to the existing deck and prohibit its expansion to the grounds of the site or the adjacent beach. Staff recommends the finding that the requested use, as conditioned, **will be** compatible with existing or planned uses and **will not** cause damage, hazard, nuisance, or other detriment to persons or property.

6. *Whether the requested use will be in compliance with applicable general zoning provisions and supplemental regulations pertaining to the use set forth in LDC Chapter 34.*

The restaurant use complies with parking, lighting, and other similar requirements set forth in LDC Chapter 34. The consumption on premises of alcoholic beverages use, as conditioned will be required to comply with the applicable standards in LDC Chapter 34, Article IV, Division 5, for consumption on premises in a restaurant regardless of the type or series of state license. The appropriate limitations on an outdoor seating area for consumption on premises

that is allowed by special exception are for Town Council to determine through the hearing process, during which process they should find that the conditions are reasonably related to the special exception requested. Staff recommends the finding that the requested use, as conditioned **will be** in compliance with applicable general zoning provisions and supplemental regulations pertaining to the use set forth in LDC Chapter 34.

IV. CONCLUSION:

Regulations for the DOWNTOWN zoning district encourage outdoor dining, and many restaurants have followed the vision of the Comprehensive Plan in accordance with these regulations and are providing outdoor seating areas where alcoholic beverages are served as a part of a menu of full-course meals as required by LDC Section 34-1264(b)(2). This use of outdoor areas for dining is envisioned as an improvement to the pedestrian-orientation of the area, which will invite visitors to leave automobiles behind and walk from place to place.

Few such restaurants are located directly along the beachfront, however, and none of those located directly adjacent to the beach received zoning approval for on-premises consumption of alcoholic beverages recently. Nearby outdoor seating areas are located at the Lani Kai and at the Hooters Restaurant. Whether new outdoor seating areas for consumption of alcoholic beverages are appropriate so near the beach, and whether this particular outdoor seating area is appropriate in this particular location are questions of fact to be determined by the Town Council. If Town Council finds that the requested use is contrary to the public interest or the health, safety, comfort, convenience, and/or welfare of the citizens of the Town, or that the request is in conflict with the criteria of LDC Section 34-88, Town Council should deny the request as provided in LDC Section 34-88(4); if Town Council chooses to approve the request, special conditions necessary to protect the health, safety, comfort, convenience, or welfare of the public may be attached if they find such conditions are reasonably related to the requested special exception. Staff has recommended such conditions for the Town Council's convenience.

Staff recommends **APPROVAL** of the requested special exception, as conditioned.

Exhibits:

Exhibit A – Legal Description of Subject Property

Exhibit B – Floor plan

Exhibit A
SEZ2009-0001

Lot 11, Block D, CRESCENT BEACH SUBDIVISION, as recorded in Plat Book 4,
Page 45, Public Records of Lee County, Florida.

