



# Memorandum

To: Mayor and Town Council

**Through:** Terry Stewart, Town Manager

From: Walter Fluegel, Community Development Director *WAF*

Date: November 8, 2010

Re: Consumption On-Premises (COP) in Recreation Future Land Use

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## **Executive Summary:**

DCD Staff has analyzed this issue in depth and would offer the following potential options for Council's consideration:

1. Accept LPA's interpretation that COP is not a permitted use in the Recreation Future Land Use category. Or;
2. Reject LPA's interpretation and interpret that COP is a permitted use in the Recreation Future Land Use category. Or;
3. Determine that the Land Development Code is the more appropriate place to identify more specific permissible uses (or in this instance more specific accessory/ancillary uses and/or Special Exception uses) and that COP in Recreation should be treated as a Special Exception under specific conditions in the LDC. Then direct Staff to work with the LPA to craft a regulatory framework for permitting COP. Further, this condition could include a provision directing Staff to develop a more comprehensive COP regulatory framework, establishing more consistent provisions, such as hours of operation, noise (music/entertainment), location of service, etc.

## **Analysis:**

DCD Staff has reviewed the LPA Resolution (attached) and the Consultant's study on COP (dated: November 2008, attached) and would offer the following general observations:

1. Prohibiting COP in the Recreation Future Land Use category could have some potentially unintended consequences, such as prohibiting COP for special events at City or County Parks, including Bowditch Park, Newton Park, Mound House, Lynn

Hall Park and Bay Oaks Park. Also, in the instance of the Mound House, there was a CPD (05-13) allowing COP, with conditions, as a permitted use in the Recreation Future Land Use category.

2. An interpretation that specific uses are precluded in any particular land use category could present challenges for similar ancillary related uses in a broader overall use category. For example, in Recreation we presently allow a broad spectrum of quasi-retail/recreational ancillary uses, such as parasailing and jet skis. It is possible that these legitimate uses could be challenged if Council's interpretation is that COP, which is also a quasi-retail/recreational ancillary use, is precluded in the Recreation Future Land Use category.
3. While the Consultant's study on COP (dated: November 2008) provided the policy analysis for concluding that COP is not a permitted use in the Recreation Future Land Use category, our analysis of broader policies concluded that there is sufficient policy latitude to declare it as either a permitted use or not a permitted use or a permitted use (accessory/ancillary or Special Exception use) that should be limited to specific areas, such as Times Square and/or other areas.
4. The Recreation Future Land Use category only really speaks with definitive limitation to one use and that is "new" residential development, which the policy (4-B-8) specifically states, "No new residential development is permitted." In this regard, we would urge caution about reading more into the policy language than is really there and that the Land Development Code may be the more appropriate place for regulating or making such determinations on specific uses. Land use categories, in general terms, are intended for establishing broader ranges of uses and when they seek to prohibit a specific use (such as "new" residential), it is typically found in specific language in the policy, as is the case for the residential prohibition in this very policy. Also, while COP as a use, may, in some instances be considered a primary use, often it is more typically classified as an accessory/ancillary or Special Exception use. In general terms, Comprehensive Plan policy language is not intended to drill down to this level of specificity, but deals with uses in broader contextual terms, as was the instance in the prohibition of "new residential" in the Recreation Future Land Use category.

### **Comprehensive Plan/Policy Analysis:**

In order to provide you with some basis for making your decision, we have analyzed some specific policies (in addition to those policies analyzed in the Consultant's Study on COP) and broader language from the Comprehensive Plan, for your consideration:

1. Here is some select narrative language from the Future Land Use Element which may provide some insight into intent, as it speaks of Times Square in terms of being an "Urban Beach environment." Also, it speaks of it in terms of "intense commercial activities." "Lynn Hall Park has more recreational facilities and remains the most lively and popular beach in Lee County."

*Analysis: The narrative contemplates a more vibrant downtown, which could be construed to suggest a more intensive mix of uses and a more permissive view of the overall range of uses.*

2. Goal 4: To keep Fort Myers Beach a healthy and vibrant “small town” **while capitalizing on the vitality and amenities available in a beach-resort environment** and minimizing the damage that a hurricane could inflict.

*Analysis: The goal suggests that while maintaining the small town character, there is an acknowledgement of the tourist destination nature and hence the range of amenities that make the beach a desirable destination for tourists.*

3. **Policy 4-A-8: The town shall establish clear and consistent rules and processes that govern private and public development. They shall be incorporated into a graphic Land Development Code that: i. illustrates permitted uses and dimensions needed to implement this comprehensive plan; iii. Resolves inconsistencies between current zoning and land development regulations and this comprehensive plan...**

*Analysis: In Staff's view, this policy suggests that the LDC is the more appropriate venue to determine the appropriateness of specific uses. In the case of COP, Council may deem it more appropriate to consider it an accessory/ancillary or Special Exception use to another primary use.*

4. **Policy 4-B-8: “RECREATION”**: applied to **public parks, schools, undevelopable portions of Bay Beach, and those parts of Gulf Beaches that lie seaward of the 1978 coastal construction line.** Additional accretions of beach, whether by natural causes or through beach renourishment, will automatically be assigned to this category. **No new residential development is permitted** (although several existing buildings were legally constructed seaward of the 1978 control line). The maximum density of residential development here is one unit per 20 acres, with all units constructed outside this category. **Allowable uses are parks, schools, libraries, bathing beaches, beach access points, and related public facilities.**

*Analysis: The policy contemplates a specific prohibition of “new residential” as a broad range of potential primary uses and remains silent with respect to allowable accessory/ancillary uses. However, the policy does establish bathing beaches as a primary use, which then provides Council the latitude to interpret the accessory/ancillary uses, be it through the Comprehensive Plan or the Land Development Code.*

5. Objective 3-D: **TIMES SQUARE** — Stimulate the revitalization of the downtown core area (near Times Square) as the nucleus of commercial and tourist activities.

Policy 3-D-1: The town shall create a Downtown Redevelopment Agency to assist the Main Street program in revitalizing downtown as a lively, inviting, comfortable, and safe public environment.

*Analysis: The objective and policy contemplate Times Square as a nucleus of commercial and tourist activities, supporting the concept of a broader range of more intensive urban uses and uses supportive of tourism.*

6. Policy 4-B-6: "PEDESTRIAN COMMERCIAL": a primarily commercial district applied to the intense activity centers of Times Square (including Old San Carlos and nearby portions of Estero Boulevard) and the area around the Villa Santini Plaza. For new development, the maximum density is 6 dwelling units per acre (except where the Future Land Use Map's "platted overlay" indicates a maximum density of 10 units per acre for affordable units consistent with the adopted redevelopment plan). Commercial activities must contribute to the pedestrian-oriented public realm as described in this comprehensive plan and must meet the design concepts of this plan and the Land Development Code. Where commercial uses are permitted, residential uses are encouraged in upper floors. All "Marina" uses in Policy 4-B-7 are also allowed on parcels that were zoned for marinas prior to adoption of this plan. Non-residential uses (including motels and churches) now comprise 58.9% of the land in this category, and this percentage shall not exceed 90%.

*Analysis: The policy contemplates more vibrant activity centers, suggesting these nodes and the ranges of uses may be broader and more intensive than in other areas.*

7. Policy 5-D-1: The town's policies on shoreline protection measures shall be as follows (see also Objective 5 and related policies in the Conservation Element of this plan):
  - i. Beach renourishment will be necessary along much of the Gulf beach. The long-term recreational and economic benefits will offset the cost. The town shall work closely with Lee County, which has agreed to take the lead role in carrying out this important activity. All practical measures shall be taken to ensure that beach renourishment improves sea turtle nesting habitat rather than interfering with it. Public access to existing and renourished beaches is an important priority of the town of Fort Myers Beach.
  - ii. Sand dunes should be protected and re-created wherever they have been removed. Native dune plants should be protected and non-native exotics removed. Dune walkovers should be constructed where they do not exist and existing structures should be maintained.
  - iii. The use of vehicles on any part of the beach should be severely limited in accordance with Conservation Policy 6-E-4(iv).
  - iv. **Buildings and other structures should be located as far away from the shoreline and dune system as possible since the beach is a constantly changing environment.** Beachfront development shall be protected from coastal erosion, wave action, and storms by vegetation, setbacks, and/or beach renourishment rather than by seawalls or other hardened structures, which tend to hasten beach erosion, interfere with public access, and block sea turtle nesting.
  - v. Development (other than minor structures) shall not be allowed seaward of

the 1978 Coastal Construction Control Line. Development seaward of the 1991 Coastal Construction Control Line may be permitted provided it complies with this comprehensive plan and all state and local permitting requirements.

vi. Where buildings are threatened by erosion that cannot be reversed by major beach renourishment, the town's priorities are (1) to allow the structure to be moved away from the beach; (2) to allow emergency renourishment (including the use of trucked-in sand); and (3) to allow rip-rap only when the previous priorities are not possible. Existing seawalls on the beach may be maintained or removed but not rebuilt.

vii. The absolute last resort for shoreline protection is the use of hardened structures (except that terminal groins may be permitted at inlets if acceptable to state and federal permitting agencies). New beachfront buildings requiring seawalls for protection from coastal erosion shall not be permitted.

*Analysis: The policy establishes the importance of protecting beaches as a natural resource and contemplates the impact of development (i.e. buildings), but is silent on the impact of uses.*

## **8. LEGISLATIVE INTERPRETATIONS**

In order to apply the plan consistently and fairly, it will be necessary from time to time to interpret provisions in the plan in a manner which insures that the legislative intent of the Town Council which adopted the plan be understood and applied by subsequent councils, town employees, private property owners, and all other persons whose rights or work are affected by the plan. When the plan is interpreted, it should be done in accordance with generally accepted rules of statutory construction, based upon sound legal advice, and compiled in writing in a document, which can be a companion to the plan itself.

A. Requests. Requests for interpretations may be made by any Town Council member, the Town Manager, the Local Planning Agency, or any applicant for a type of development regulated by this plan.

B. Local Planning Agency. Upon receiving a request and written recommendations from the Town Manager, the Local Planning Agency shall review the same and forward them to the Town Council with its comments and recommendations.

C. Town Council. Upon receiving the recommendations of the Local Planning Agency, the Town Council shall render a final decision as to the correct interpretation to be applied. This interpretation shall be that which is adopted by absolute majority of the Town Council, and, upon being reduced to a board resolution drafted in response to the board majority, it shall be signed by the Mayor and recorded in the town's official records. The Town Clerk shall be responsible for maintaining copies of all such resolutions in a single document, which shall be appropriately indexed and provided to all persons upon request.

The document shall be updated regularly and the latest version thereof furnished to all persons requesting copies of the plan itself.

**D. Legal Effect of Legislative Interpretations.** Any provision of the plan specifically construed in accordance with the foregoing procedures may not be reinterpreted or modified except by a formal amendment of the plan itself. Once formally adopted in accordance with these procedures, the annotation shall have the force of local law and all persons shall be placed on constructive notice of it. Any development orders issued in reliance on legislative interpretations of this plan are subject to challenge under the provisions of Section 163.3215, Florida Statutes.

*Analysis: The interpretation provisions contemplate the full legal effect, which includes a requirement that any subsequent interpretation of a previous interpretation can only be accomplished through a Comprehensive Plan Amendment.*

**Conclusion/Recommendation:**

While Staff is inclined to support the more defensible policy interpretation of Option 3 identified in the Executive Summary, wherein the Land Development Code is the more appropriate place to interpret this specific use, we acknowledge that this important interpretation is ultimately a potentially important basic community character standard and the policy language provides a fair degree of latitude to accommodate the range of potential interpretations outlined in the Executive Summary.

Further, should Council decide on Option 3, Staff is confident that code language can be promulgated to provide a more definitive framework for dealing with future uses. For example, future COP in Recreation could be limited to specifically established and/or geographically defined areas, such as Times Square and/or established larger resort destinations, with appropriate conditioned restrictions. Also, Council would retain the option to further restrict the future expansion of COP uses on the beach or not allow it at all. Also, the policy framework could acknowledge previously conveyed and/or established rights, while setting more consistent standards on future uses. Last, dealing with COP in the Land Development Code would allow Staff to develop a more comprehensive regulatory framework encompassing a broader range of COP issues in a more consistent manner.