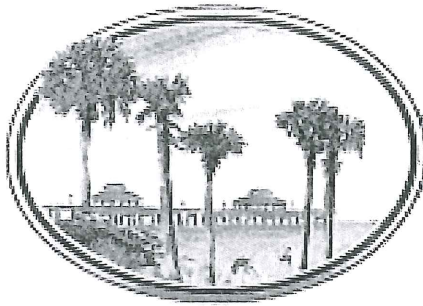




Town of Fort Myers Beach
Community Development Department

COP in EC Report
to LPA

October 6, 2011

Prepared by:

Walter Fluegel, MBA, AICP

Community Development Director

Marilyn Miller

Town Attorney

Table of Contents

1. Executive Summary
2. Comp Plan
3. Regulatory History
4. Historic Approvals & Legal Determinations
5. Considerations in crafting an ordinance

EXHIBITS:

1. COP Timeline
2. COP Inventory
3. Town Council Minutes
4. LPA Minutes
5. Staff Memos to Town Council on COP
6. Staff Memos to LPA on COP
7. Ordinances
8. Murphy Report
9. LPA Chair Memo on COP from May, 2011 LPA Meeting
10. Map of Establishments with COP Adjacent to EC
11. Pink Shell
12. Best Western
13. Edison Beach House
14. Pierside Grill
15. Top O' Mast
16. Nemos
17. The Cottage
18. Lani Kai
19. Wicked Wings
20. Beach Pub
21. DiamondHead
22. Estero Island Beach Club
23. Junkanoo
24. Outrigger
25. Gullwing Resort
26. Holiday Inn
27. Sandbar Resort
28. Breakers Econo Lux Inn
29. Exhibit depicting impact of EC Zoning District

Executive Summary

This report is intended to provide a comprehensive examination of the Consumption on Premises (COP) issue, specifically as it relates to extending service from a licensed premise into the Environmentally Critical (EC) zoning district. The report provides a summary overview of the current COP debate, which has been ongoing with the Local Planning Agency (LPA) since October, 2008. The fact that the current debate has spanned over 3 years, with no clear resolution, warrants a more comprehensive examination of the issues, misconceptions and ramifications.

This report examines the issues that are pertinent to developing a stronger basis for the critical decision making necessary to formulating an ordinance that effectively regulates COP. For example, the current debate at the LPA has centered upon a belief that COP should not be allowed in the EC Zoning District (which is also the Recreation Future Land Use), which would be worthy of consideration, but for Town Council's rejection of the LPA's interpretation, the precedents set by previously approved COPs and the lack of clear policy prohibition in the Comprehensive Plan. Accordingly, the more objective and defensible approach to developing a regulatory framework would be to focus on identifying methods of mitigating impacts of COP in EC (i.e. specific conditions of approval that mitigate potentially negative impacts) and identifying specific geographic areas wherein the potential impacts of COP may be greater.

For example, our analysis of the previously approved COP's in EC indicates that careful scrutiny was given to potentially negative impacts and specific conditions were established to mitigate the potential impacts. Further, those prior approvals contained unambiguous findings of fact that any potential negative impacts on the Environmentally Critical zoning district had been mitigated by the conditions of approval. Accordingly, these prior approvals should be viewed as precedents, but more importantly they provide guidance on the specific conditions developed as a means of mitigating potentially negative impacts of COP in EC.

Of the 18 properties identified as having COP licenses adjacent to the EC Zoning District, 12 of them were approved for COP in the EC Zoning District. Of those approved for COP in EC, 7 are located in the Downtown District and 5 are located outside the Downtown District. Of the 5 approved outside the Downtown District, 4 are resorts. Of the 12 approved for COP in EC, 5 or 6 are resorts, 4 are restaurants/bars, 1 is a restaurant and 1 is a bar/cocktail lounge. Of the 12 approved for COP in EC, 7 are approved directly on the sandy beach and 6 have no restrictions on outdoor music. The most common method of approval has been Special Permit/Exception, with 7 having been granted by SP/SE. Of the 4 resorts outside the Downtown District, 2 were granted by CPD rezoning. 5 of the COP approved for COP in EC, were approved by the Town, the rest were approved by the County prior to incorporation. One of the more significant findings

of our analysis was that no COP requested in EC has apparently ever been denied. Given the number of COP approvals in EC, it is difficult to conclude that the Comprehensive Plan intended to restrict further expansion of COP in the Recreation Future Land Use. Of equal concern in this regard, is the lack of discussion during the public hearings for these approvals regarding the issue of COP in EC and Recreation Future Land Use. In reviewing the transcripts for all of these approvals, it is clear that the larger concern expressed during public hearings related to concerns about the noise associated with outdoor entertainment.

Our analysis concludes that COP has already been established as a permissible use in the EC Zoning District, with varying methods of approval. While the methods of approval are valid means of controlling COP in EC, the lack of consistency of methods or established guidelines is an area of concern. Further, we have concluded that there has been an overall lack of consistency in conditions of approval, including dominion and control, hours of operation and entertainment restrictions. The lack of consistency in terms of conditions of approval confirms our concern about the lack of an appropriate regulatory framework.

Having said that, it should be noted that there has been some historic consistency in limited form, as it relates to the approval of COP in EC. For instance, the majority of COP approvals in EC were granted for establishments within the Downtown District and those granted outside the Downtown District were primarily granted to the larger resorts in Town, two of which were granted by CPD rezoning. Special Permits/Exceptions granted 7 of the 11/12 COP approvals. We believe there is some precedent for requiring future approvals within the Downtown District to require a Special Exception and those outside the Downtown District to be limited to resorts by CPD rezoning. Further, some of the approvals contained conditions that provide a strong basis for formulating a meaningful ordinance. More importantly, based upon Staff observations during the last tourist season, there are some conditions that provide a stronger basis for mitigating potentially negative impacts. For example, well-defined methods of dominion and control have more success in preventing the migration of alcohol from one property to another.

Comprehensive Plan Implications

LPA Comprehensive Plan Interpretation (LPA Resolution 2009-24):

The current discussion about COP was initiated at the October, 2008 LPA Meeting (Exhibit 4), with a broad dialogue on COP in general, including hours of service and licensing requirement. At that meeting, Interim Community Development Director, Frank Shockey, indicated in his staff memo (Exhibit 4) that the Town Manager had contracted with a consultant to prepare a study regarding the COP issue. However, the memo and dialogue at the October LPA meeting dealt with the COP issue in a fairly broad brush and did not include any specific conversation regarding COP in EC. A review of Town records indicates that on September 29, 2008, Town Manager, Scott Janke, entered into an ongoing planning services contract with Murphy Consulting Group. Based upon this contract, the Town Manager engaged Murphy Consulting Group to prepare a report on COP.

At the December 9, 2008 LPA meeting (Exhibit 4), the "Policy Considerations and Options-Consumption of Alcoholic Beverages" report (Exhibit 8), prepared by Murphy Consulting Group, was presented to the LPA. While the report was more comprehensive in nature, dealing with the expanse of COP related issues, including COP in the Recreation Future Land Use category, the discussion by the LPA focused in on COP in Recreation Future Land Use. Several LPA members indicated their belief that further expansion of COP in Recreation Land Use should be prohibited, which included some of the following comments.

Ms. Kay stated that she is confused about the whole issue and is not sure the LPA should be ready to take this on without further research as to what exactly is being proposed. Ms. Shamp stated that the Comp Plan, policy 4B8, is clear in that those parts of the Gulf beaches that lie seaward of the 1978 Coastal Construction Line *are* for recreation, and recreation uses are parks, schools, libraries, bathing beaches, beach access points and related public facilities. She added that there may be a situation in this review where it says that the FLUM Category doesn't provide for this expansion, but it also doesn't prohibit it, then the LPA needs to close the loopholes to protecting the public interests. Ms. Kay pointed out that the report summary states that *"the Plan does not clearly provide for an expansion of COP onto the Gulf beaches, nor does it clearly prohibit it..."* and stated that the LPA needs to work on clarifying that. Ms. Shamp asked how many establishments currently serve alcohol seaward of the 1978 CCL because they own that property privately and Mr. Murphy opined that there are three. Mr. Van Duzer agreed, adding that this is a family island and it ought to remain that way. He suggested sending forward the LPA's feeling that there should not be any additional COP on the beach side, other than the three grandfathered items, without going through the lengthy process of the "special exception." Ms. Kay agreed as well. Ms. Shamp also agreed and said that the LPA needs to close loopholes

to control the process. She added that the LPA is consistently fair in its decisions and the issue of non-conformity needs to be addressed, keeping the whole process fair and concise. Ms. Kay referred to the report under "On-Premises Consumption" on pg. 39, wherein the report sounds pro-expansion, and suggested that the LPA just add *"in order to best make the findings and conclusion necessary to support the NON-permanent expansion of COP uses only onto the gulf beaches of the Town may wish to amend the LDC to indicate that this expansion is NOT consistent with the Plan."* She suggested just making that statement negative rather than positive. Mr. Van Duzer moved to accept the report and request the Town manager to go forward to have a redraft of the LDC that combines the issues, with a consultant to give recommendations as to the changes needed to be made to the LDC to make it more concise. The motion was seconded by Mr. Weimer. Discussion ensued about what the process would be as far as an ordinance or recommendation, etc. Motion was carried 6-0, with Mr. Yerkes on an excused absence.

At the April 28, 2009 LPA Meeting (Exhibit 4) Town Staff and Murphy Consulting Group presented draft code amendments to Chapter 34 regarding Open Container and Liquor License requirements. The draft language was rather extensive in nature. Again, some of the LPA conversation focused on the issue of COP in EC. Ms. Shamp was concerned about the expansion of alcohol service onto the beach and the LPA was still not clear about who can have alcoholic beverages on the beach. Mr. Murphy explained that the places that currently have alcoholic service down to the beach would become non-conforming.

At the August 11, 2009 LPA Meeting (Exhibit 4), the LPA moved to table the conversation regarding the draft COP ordinances until after a Workshop could be held with Town Council. At that meeting, Ms. Shamp agreed that this is getting out of hand and cautioned that before moving forward and incurring huge legal fees, the LPA should be clear as to what the Council wants them to address; she suggested postponing this until they've had an opportunity to meet with the Council and clarify the issues.

On September 17, 2009, a joint workshop of the Town Council and the LPA was held. One of the topics of the joint workshop was COP. The topic of COP in EC came up and there was specific conversation from Town Council about developing a more equitable regulatory scheme for dealing with COP in EC. For instance, the problem of one establishment being allowed to serve in EC and the establishment next door is not allowed to serve in EC. There was a general consensus that there was a lack of clear policy direction in the code about how to regulate COP in EC and that requests were being handled on an individual basis without any clear policy direction from the land development code. Also, there was a conversation about the fact that approved Special Exceptions for COP in EC have varying conditions of approval. Mr. Van Duzer spoke about the fact that the historical role of the LPA had been to act upon specific direction from Town Council and not to drive policy. Also, there was a consensus that the LPA needed to be more productive and focused and that direction from Council should be the driving force in policy direction and not an independent initiative of the LPA.

At the October 27, 2009, LPA Meeting, during the Future Work Activities agenda item, the LPA directed Staff to draft a statement to Council saying that "the LPA, in its consideration of the consultant's report, did not deem that the expansion of open container onto additional properties would not be appropriate.....or something to that effect."

At the November 10, 2009 LPA Meeting, Staff presented a draft resolution (LPA Resolution 2009-24) on COP as directed by the LPA at the October 27, 2009 LPA Meeting. The LPA voted 5 to 1 to approve the resolution. Some of the discussion at this meeting included the following comments. Ms. Shamp asked for a general consensus for support of the resolution as a whole. There was a majority consensus and Ms. Shamp then asked for individual comments. **Ms. Kay moved to accept the resolution, changing the words on the second page wherein it states "whereas the LPA finds that the expansion of the on premises consumption of alcoholic beverages onto the gulf beaches does not protect remaining natural resources and does not preserve the small town character of the Town, and does not protect residential neighborhoods against commercial intrusions, and therefore would not accord the comprehensive plan objectives, etc." "Now therefore be it resolved that the LPA recommends that the Town Council for the Town of Fort Myers Beach does restrict further expansion of on premises consumption of alcoholic beverages on the gulf beaches in the Town of Fort Myers Beach."**

Seconded by Mr. Weimer;

Vote: Motion passed 5-1 with Mr. Mandel opposing.

As an observation, it should be noted that it is difficult to understand the LPA's basis for this recommendation, inasmuch as, no specific rationale for the findings of fact were made in the deliberation or resolution and no specific policy language was referenced during the deliberation. Further, the deliberation did not address the precedents created by previously approved COPs in EC, nor did it address some of the more permissible language in the consultant's report. Accordingly, the LPA's interpretation is not supported by any of the documentation that was submitted to the LPA.

At the November 15, 2010 Town Council Workshop, Staff presented a Memo, dated, November 8, 2010 (Exhibit 5) that reviewed LPA 2009-24 and provided options for Council's consideration. At the December 6, 2010 Town Council Meeting, Council voted 4 to 1 to reject the LPA's Resolution and by rejecting the LPA's Resolution, Council has made the determination that COP is a permissible use in EC. Since this was a Legislative Interpretation by Council, as provided for in Chapter 15 of the Comprehensive Plan, a text amendment would be required to reverse that determination. Further, in a subsequent discussion and motion, Council decided that the Land Development Code was the appropriate place to regulate permissible uses such as COP and directed Staff to prepare an ordinance that treats COP in EC as a permitted ancillary use. The

motion and vote were based upon the Blue Sheet and Memo prepared for Council's consideration (Exhibit 5).

At the January 11, 2011 LPA Meeting, during the Community Development Director's Report, Staff provided the LPA with an update on the status of Town Council's December 6, 2010 Action on LPA Resolution 2009-0024 whereby Council rejected the LPA's recommendation. Further, the LPA was advised that Staff would be preparing an ordinance to regulate COP in EC, but there was no formal timeline at this point. The LPA Chair advised, "when it does come before the LPA, they will need a very thorough presentation with all the needed information."

At the April, 2011 LPA Meeting, Staff presented LPA with a preliminary working draft of one conceptual approach for regulating COP on the beach for existing establishments and another conceptual approach for regulating new establishments through the Special Exception Process. The purpose of this workshop, from Staff's perspective, was to focus on regulatory requirements (i.e. standard conditions of approval that would be applied to all existing or future establishments with COP in EC), such as hours of service, signage, restricting the movement of alcohol from one property to another, environmental standards (such as bio-degradable plastic cups with the establishments name on the cup), maintenance requirements (including maintaining the beach free of litter and debris) and grounds for revocation of the extension of premises. The transmittal memo was very clear that this was intended to be a working draft and that the discussion was meant to be a workshop discussion. Further, the transmittal memo was clear that Staff was looking for input on procedural approaches and regulatory standards. A copy of Staff's memo to LPA and working draft ordinance is provided in Exhibit 6.

At this meeting, several LPA members opined that they were opposed to COP in EC and expressed their intent to recommend denial of any ordinance that proposes allowing COP in EC. Further, the LPA's discussion focused heavily on the Comprehensive Plan interpretation. Staff reminded the LPA that Council had rejected the LPA interpretation and that the discussion needed to focus on the Land Development Code. Further, the LPA opined that they would need much more information than was provided, without specifying any details or a consensus on the information they felt was necessary.

Based upon LPA input at the April LPA meeting, Staff prepared a more comprehensive summary of the overall COP issue, with specific focus on the LPA's prior Comprehensive Plan interpretation and Town Council's rejection of that interpretation and provided it to the LPA at the May, 2011 LPA meeting. A copy of Staff's memo to the LPA is provided as Exhibit 6. The memo included a summary of Council's rejection of the LPA's Comprehensive Plan interpretation on COP, a summary of potential regulatory approaches, an overview of Staff's concerns about the need to establish a regulatory framework for COP, a summary of potential conditions of approval/regulatory requirements, a copy of Jerry Murphy's report, "Policy

Considerations and Options: Consumption of Alcoholic Beverages,” a copy of LPA Resolution 2009-24, a copy of Staff’s November 8, 2010 memo on COP in REC Future Land Use and an inventory of existing licensed COP establishments adjacent to the EC Zoning District.

At this meeting the LPA Chair presented her May 10, 2011 memo (Exhibit 9), “COP Expansion In The Environmentally Critical Zone/Recreation FLUM.” The memo outlined the Chair’s analysis that the Code prohibits expansion of COP in EC. Also, LPA member Ryffel presented a memo outlining alternative approaches to regulating COP in EC by allowing consumption, but not service.

That meeting began with the Town Manager addressing the LPA on the importance of crafting a well thought out and comprehensive COP ordinance to address the current lack of any regulatory requirements on the existing establishments with COP in EC.

Staff then presented a summary of their memo. During public input, the owner of Nemo’s expressed a need for a level playing field that provide a fair standard. Three members of the public expressed their opposition to expansion of alcohol on the beach.

The LPA Chair presented her memo on COP in EC and iterated her belief that the Land Development Code prohibits it. Commissioner Ryffel presented his alternative approach to allowing consumption in EC, accessory to permitted establishments. In the discussion of this alternative approach, it appeared that there were opposing view among member of the LPA, with some in favor of recommending denial of any ordinance to deal with COP in EC and the other favoring Commissioner Ryffel’s alternative approach.

Based upon LPA input at the May, 2011 LPA meeting, at the June, 2011 LPA Meeting, Staff prepared a workshop discussion (Exhibit 6), which included reviewing the LPA Chair’s Memo regarding her interpretation of COP in EC/REC. Further, the conversation focused on the alternative regulatory approach proposed by Commissioner Ryffel. The memo outlined the potential regulatory approaches and conditions of approval/regulatory requirements. At this meeting, the LPA expressed an interest in dual LPA Resolutions, including one that expressed their opposition to COP in EC. Also, it should be noted, that other than LPA member Ryffel’s attempt to introduce a new regulatory approach, the LPA provided no direction on regulatory approaches or any conditions of approval/regulatory requirements. Staff’s preliminary review of LPA member Ryffel’s approach indicates that further consideration of that approach is warranted. The LPA expressed concerns about the potential for Burt Harris claims arising from Lani Kai and Top O Mast. Staff discussed the issues created by the initial creation of the EC Zoning District, in that it bifurcated properties into two separate zoning districts. In addition, the LPA Chair raised the issue of vested rights of existing establishments.

Again, some LPA members expressed a preference towards an outright prohibition on COP in EC. Staff reminded the LPA that they can forward two separate resolutions, with one expressing their desire for prohibition and another providing their input on potential regulatory approaches. Staff again emphasized a need to receive input from LPA on potential regulatory approaches.

Based upon the lack of clear consensus and the Chair's belief that the Land Development Code prohibits COP in EC, Staff embarked upon a comprehensive review and legal assessment of all approved COP's adjacent to EC, in order to determine if there is any consistency in regulatory requirements. Further, Staff believed that, given the LPA Chair's memo, it would be beneficial to review previously approved COPs for policy interpretations and precedents in those approvals to verify whether the assertions in that memorandum were supported by the history of existing businesses with COP in EC.

At the July, 2011 Meeting, Staff presented a timeline of COP regulations, dating back to Lee County requirements, beginning in the 1970's to current Town requirements. Further, the inventory of all beachfronts COP's revealed 9 establishments where COP was granted by either the Town or County in the EC Zoning District. Exhibit E provides a timeline of all applicable County and Town ordinances dealing with COP and an exhibit depicting the impact of the EC Zoning District on bifurcating properties between two zoning districts. It should be noted that the initial assessment of these 9 previously approved COPs, indicates that, for some of the approvals, there was substantial policy considerations given to approving COP in EC. For example, some of these COP's were approved by Special Exception, subsequent to the incorporation of the Town and the approving resolutions gave specific contemplation to the fact that the COP use was being approved over the EC zoning line. These approvals are important to a determination of what precedent currently exists.

Based upon the fact that more comprehensive efforts to identify, assemble and conduct thorough assessments of the legal standing previously granted COP approvals (State Licenses, Town approvals and County approvals prior to incorporation) where necessary, Staff proposed a major revision to the project schedule, in order to allow Staff adequate time to research and prepare a comprehensive study of previously granted approvals.

Staff's current work effort is focused on acquiring all documentation of previously approved COPs, including a review of all meeting minutes, and reviewing County and Town ordinances/resolutions regulating alcohol. This effort will include a review of any changes in state alcohol regulations. Further, the effort will include additional public records requests from the State Division of Alcohol, Beverage and Tobacco and a review of Lee County records as well.

Comprehensive Plan History:

On November 10, 2009, a report, titled "Policy Considerations and Options: Consumption of Alcoholic Beverages" (Exhibit 8) was presented to the LPA for their consideration. The report was commissioned by a former Town Manager and prepared by a former Community Development Director. With respect to the issue of COP on the Gulf Beaches, the report concluded, "The Plan does not clearly provide for the expansion of permitted COP onto the Gulf beaches, neither does it clearly prohibit it." At that LPA Meeting, as memorialized in LPA Resolution 2009-24 (Exhibit 5), the LPA voted 5 to 1 to recommend that the Comprehensive Plan: *"does restrict further expansion of on-premises consumption of alcoholic beverages on the Gulf beaches within the Town of Fort Myers Beach."* The effect of this action by the LPA was to recommend to Town Council, in the form of a Legislative Interpretation as provided for in Chapter 15 of the Plan, that Council determine that it was the intent of the Plan to further restrict the expansion of COP in the Recreation Future Land Use category.

At the November 15, 2010 Town Council Workshop, Staff presented a Memo, dated, November 8, 2010 (Exhibit 5) that reviewed the issue of COP in EC and provided potential options for Council's consideration. At Council's direction, Staff crafted several regulatory options for Council's consideration. At the December 6, 2010 Town Council Meeting, Council voted 4 to 1 to reject the LPA's Resolution and by rejecting the LPA's resolution, Council's vote, in essence, deemed COP to be a permissible use on the beaches. Since this was a Legislative Interpretation, as provided for in Chapter 15 of the Comprehensive Plan, it would now require a text amendment to reverse this determination. Further, in a subsequent motion and discussion, Council determined that the Land Development Code was the appropriate place to regulate permissible uses and directed Staff to prepare an ordinance dealing with COP in EC as a permitted ancillary use. The motion and vote were based upon the Blue Sheet and Memo prepared for Council's consideration (Exhibit 5).

In addition to the Comprehensive Plan Policy analysis that underscored the Murphy Report and Staff's memos to Council (Exhibit 5), consideration must be given to prior policy interpretations. We will delve deeper into the ramifications of these prior policy interpretations in Section 4 of this report. However, for the purposes of Comprehensive Plan considerations, it is important to note that there have been numerous requests for COP approved in the Recreation (REC) Future Land Use, and this provides sufficient precedent that COP in REC has been historically treated as a permissible use. Further, we take guidance from the fact that through all the research conducted, there appears to be no instance where a request for COP in REC has been denied.

In reviewing the records of COPs approved in REC, the COP timeline provided in Exhibit 1 depicts the timeframes for approvals prior to and subsequent to incorporation of the Town. An

important consideration is the fact that the 1978 CCCL line apparently served as the basis for the creation of the REC Future Land Use category and the EC Zoning District. This is an important consideration because the significance of that line pre-existed Town land use and zoning. This significance shows up in the public hearing records for those COPs approved by the County prior to the incorporation of the Town. In those approvals, the Hearing Examiner and County Staff acknowledged that the 1978 CCCL line delineates where construction was no longer permissible from that line. However, their decisions establish that while a structure (other than a deck) may not be allowed to be built seaward of the line, the same rationale does not follow with uses. In other words, the line was time and again memorialized as a construction line, but not as a line that prohibited continuity of uses. In fact, many of those early decisions gave great consideration to environmental impacts of the COP use crossing the 1978 CCCL line and in all instances such use was deemed to be compatible with the environmental considerations.

Regulatory History/Land Development Code

COP Ordinance Historical Overview:

Exhibit 1 depicts the timeline for the development of ordinances regulating alcohol, including both County Ordinances (prior to incorporation of the Town) or Town Ordinances (subsequent to incorporation of the Town). The more relevant ordinances are County Ordinances 76-9 and 81-41 and Town Ordinances 96-6, 98-14, 03-03 and 04-17. County Ordinance 76-9 established a Special Permit requirement for COP's within 500 feet of a school or church. County Ordinance 81-41 established a Special Permit requirement for COP in certain zoning districts. Town Ordinance 96-6 established the Town's Special Permit requirement for COP. Ordinance 98-14 adopted the Town's Comprehensive Plan, thus establishing the Recreation (REC) Future Land Use category. Town Ordinance 03-03 adopted the Town's current Land Development Code (Chapter 34), the Environmentally Critical (EC) Zoning District and created the current COP regulatory framework.

One of the more critical elements that should be understood is the impact that the creation of the REC (Recreation) Land Use category and EC Zoning District had on properties fronting on the beach. Exhibit 29 depicts the pre- and post- EC impact that EC had on properties located adjacent to the beach. Prior to Town Ordinances 98-14 and 03-03, properties adjacent to the beach, enjoyed one continuous land use and zoning for the limits of their entire property. Subsequent to the creation of REC and EC, the zoning and land use on any given property adjacent to the beach became bifurcated between the two land uses and two zoning districts. In order to understand the intent of this bifurcation, Staff reviewed all of the Town Council meeting minutes (and all available LPA minutes) during the development of the Comprehensive Plan. In

reviewing those minutes, it appears that the main objective was to create a line conterminous with the 1978 CCCL line, which would limit “construction rights” seaward of the line, but more importantly, provide a means of limiting allowable density for all properties adjacent to the beach by one-half.

LPA Chairs Memo on LDC Considerations:

The following review of LDC implications of COP in EC was provided by the LPA Chair, Joanne Shamp at the May 10, 2011 LPA Meeting. Following each paragraph, Staff has provided our review and observations in italics.

COP EXPANSION IN THE ENVIRONMENTALLY CRITICAL ZONE/RECREATION FLUM AND LDC REVIEW PREPARED BY JOANNE SHAMP, CHAIR, LPA - May 10, 2011

The Town Council rejected LPA Resolution 2009-24, deciding that the Land Development Code is the more appropriate place to identify more specific permissible uses relating to the expansion of COP onto the beaches in the EC Zone/Recreation FLUM. The LPA provides its role as described in the LDC as follows: **Sec.34-120(4)** “The function of the Land Planning Agency in accordance with LDC is to review proposed land development changes and amendments thereto, and make recommendation to the Town Council as to their consistency with the Comprehensive Plan”; and **Sec.34-120(2)** “The function and duty of the LPA is to prepare policies for guiding land uses in the Town in order to preserve the unique and natural characteristics of the island.”

Staff Response: *As indicated by the Chair, any amendment to the land development code requires LPA review and a recommendation to Town Council. Further, as the Chair indicates, the LPA’s role is to prepare “principles and policies for guiding land uses..”As contemplated in Chapter 15 of the Comprehensive Plan,, the LPA made a formal recommendation with respect to its interpretation to Town Council in the form of LPA Resolution 2009-24, which Town Council rejected. However, it should be noted that the LPA’s role, as it relates to the particular interpretation embodied in LPA Resolution 2009-24, is more specifically described in LDC Section 34-120(8), which states, “**Make recommendations to town council on legislative interpretations that have been requested in accordance with ch. 15 of the comprehensive plan.**” As clearly indicated in this code section, the LPA’s role is to make a recommendation to Town Council.*

In reviewing the LDC, references are found to indicate that the proposed COP expansion is prohibited, LDC **Sec.14-3(a)(15)** states that it is “unlawful or prohibited for any person to do, conduct or permit any commercial activities on the beach or dunes not explicitly authorized by the code or other Town ordinances.” There exists no explicit authorization of this COP expansion in the Comp Plan (see report “Policy Considerations and Options: Consumption of Alcoholic Beverages”), the LDC or in Town ordinances

Staff Response: *The code language referenced by the Chair is a valid consideration, and clearly by interpretation, COP has been allowed in EC, as demonstrated in Section 4 of this report. However, the language referenced in this code section should be viewed in the context of the language in the immediately following code section (14-3(b)), which states, “Permits may be issued by the Town Manager for activities otherwise prohibited by this section, which are found to be necessary for reasonable accommodation of persons with disabilities; adjunct to a lawfully existing activity; for the conduct of a civic or educational activity; for the conduct of scientific research; or for any purpose otherwise necessary to protect or to promote the public welfare, for such periods of time as appropriate for the circumstances. To the extent that a permit is allowed under this code for any of the above activities, the standards and procedures for issuance shall be governed by this code.” In response to the Chair’s observations, the aforementioned language is more troubling, in as much as, this language leaves the Town susceptible to challenge, as the language suggests that a lawfully existing use landward of the beach, should be allowed to extend on to the beach and be treated as a permitted adjunct use. For the purposes of the conversation, as it relates to COP, the language referenced by the Chair (14-3(a)(15)) is less troublesome than the language in Section 14-3(b). Given the number of lawfully permitted establishments with COP adjacent to EC, this code section provides a strong rationale for developing a regulatory framework for COP in EC.*

The Land Development Code’s strongest prohibition to the proposed COP expansion is **LDC Sec.34-1574(b)** “Except in instances of overriding public interest, new roads, private land development, or the expansion of existing facilities within Wetlands or on the sandy beaches that are designated in the Recreation category in the Fort Myers Beach Comprehensive Plan shall be prohibited.” No evidence of overriding public interest has been presented to the LPA.

Staff Response: *From Staff’s perspective, this section is clearly meant to be applicable to “construction” and “development activities” and not “uses” in EC. Also, this language is superseded by Code Sections 34-652(e) and 6-366, which establish specific provisions for the kinds of structures that can be built in EC and the approval process for same. It is important for the LPA to understand the fundamental difference between uses and structures and how they are dealt with from a zoning perspective. For example, it is common for a use to be allowed where a building may not be allowed or for a building to be allowed where a use is not allowed.*

LDC regulations support the legal relationship between the Comprehensive Plan and the LDC regarding COP expansion on the beaches. LDC **Sec.34-652(a)** designates the purpose of the EC zoning is to designate that the preservation of beaches is critical to the Town of Fort Myers Beach and restricts the uses. In **Sec.34-652(b)** the application of the EC district is intended to prevent a public harm by precluding the use of land for purposes that adversely affect a defined public interest. **Sec.34-609** states that where there are conflicts between the LDC and the Comp Plan regarding development in zoning districts, the Comp Plan will prevail.

Staff Response: *Section 34-652(d) identifies broad permitted uses and 34-652(e) and 6-366 identifies other permissible uses and structures through Special Exception. However, as previously mentioned, Section 14-3(b) suggests that some uses may be permitted by virtue of being permitted ancillary uses. The Chair references Sec.34-609. Since there is no such section, it appears that she meant to reference 34-619. We agree the Comprehensive Plan does prevail when conflicts arise. However, we believe that Council's rejection of the LPA's interpretation rendered the LDC the more appropriate place to deal with this issue. Further, had it been the intent for the code or the Comprehensive Plan to specifically prohibit COP in EC or REC, Code Section 34-620 (g) provides a list of specifically prohibited uses, which would have been the appropriate place to identify the prohibition.*

The LDC limits COP expansion "by right" in the EC Zone. **Sec. 34-652(d)** states that no land use in the EC Zone shall be permitted by right except those permitted by the Fort Myers Beach Comprehensive Plan and **Sec. 34-613(c)** states that development rights may be limited by other factors such as the Fort Myers Beach Comprehensive Plan and conditions on special exceptions and special permits.

Staff Response: *While the Chair may be correct in stating that COP is not clearly an outright permitted use in EC neither is it contemplated that COP should be treated as a permitted principal use. The current dialogue should remain focused on how to restrict COP as an ancillary use and under what circumstances it should be allowed. Again, consideration should be given to Section 14-3(b), which could be interpreted to suggest that COP may be a permissible ancillary use.*

COP expansion is also not permitted as an accessory or ancillary use in the Land Development Code. LDC **Sec.34-1262** states that premises used for the purpose of the retail sale, service or consumption of alcoholic beverages must conform with all applicable Town regulations. Those beachfront COP premises that are parcels split by zoning boundaries are regulated by **Sec.34-617(b)**: "when a parcel is split between two or more zoning districts each parcel is limited only to the permitted uses allowed in that portion, plus allowable accessory uses", while "accessory

uses may not be placed on portions of the parcels that do not contain the principal use to which they are incidental and subordinate.”

Staff Response: *This interpretation is inconsistent with the precedents mentioned in Section 4 of this report. Based upon the prior approved COP's in EC, the determinations have been made that COP is a permissible use in EC. For instance, the LPA recently recommended approval of two COP's by Special Exception in EC and made a specific determination of consistency between the use of COP and EC zoning.*

LDC Sec.34-677(b) (3) refers to the regulation of the sale of alcoholic beverages outdoors in Sec.34-1264, which states that “the area designated for an alcoholic beverage permit cannot be expanded without filing a new application for an alcoholic beverage permit covering the existing and proposed expanded area” (Sec.34-1264(g)).

Staff Response: *Code Section 677 is misquoted in the Chair's comments and it appears she is referencing Section 34-678(b)(3). This code section applies specifically to the Downtown zoning district and is more narrowly applicable to that outdoor area between the front of the restaurant and the right-of-way (i.e. street). However, we agree with the Chair that a new or amended application is required and we are still looking to the LPA for guidance on what the process should be. This request for guidance goes back to the May, 2011 LPA meeting.*

With regard to a proposed administrative approval of such COP expansion, Sec.34-1264(a)(2)(a).2 states that administrative approval may not be granted for outdoor seating within 500 feet of a park or dwelling unit under separate ownership. In addition, Sec.34-1264(a)(1) states that administrative approval of the expansion of on-premises consumption of alcoholic beverages may not be the appropriate action when there is a record of public opposition to a similar use at that location. The **Comp Plan** provides further safeguards, for example requiring the Town to provide procedural protection comparable to the public hearing process in the Mixed Residential FLUM category

Staff Response: *This is an area that a comprehensive COP ordinance should address. For instance, should beach furniture be treated the same as outdoor seating? Further, it does not appear that an administrative approval could be utilized to expand the service area delineated by a prior approved Special Exception; in fact it may require an amendment to the Special Exception, which can only be achieved by another Special Exception. Accordingly, these sections may need to be modified with a more comprehensive COP ordinance.*

A restriction or prohibition to this commercial expansion is addressed by Comp Plan **POLICY 4-C-2** directing that intensity in any FLUM category is limited by provisions of the Comp Plan and LDC. **Comp Plan POLICY 4-C-2** requires the LDC to specify maximum commercial intensities using the floor-area-ratio (FAR). The maximum intensity may not include land in the Recreation FLUM according to LDC **Sec.34-633(2)**: “a site’s lot area includes the gross square footage within the site’s private property line, minus wetlands, canals or other water bodies, and minus any land designated “Recreation” on the Comprehensive Plan’s future land use map.” Land in the Recreation FLUM category is not available for commercial expansion.

Staff Response: *From staff’s perspective, this section applies to structures and buildings. Intensity measures are not intended for sand, and this is reinforced by precedent established in prior COP approvals whereby the LPA did not give consideration to this issue and approved COP’s regardless of whether such approval was for decks and patios in EC or directly on the sand.*

Expansion of area for this COP service would require additional parking, per **Sec.34-20209(b)(1)** which states that “existing uses enlarged in terms of floor area shall provide additional parking spaces in accordance with **Sec.34-2020(d)(2)h.2**” and **Sec.34-2020(d)(2)h.2**, which states additional parking is required for outdoor seating for restaurants, bars and cocktail lounges.

Staff Response: *Staff has reviewed these sections and agrees that an amendment will be necessary because a precedent has been established by the bulk of the previously approved COP’s in EC that didn’t assign a parking requirement to service and/or consumption areas on the sand. Consideration should be given to the miles of beach that have no inherent parking requirement and the potential ramifications of assigning a parking requirement to sunbathing on the beach.*

COP expansion and beach definitions are limited by the new mean high water line (ECL) and state owned beachfront in the current navigation/re-nourishment project per **(F.S.161.191 (1))**: “the ECL recorded in accordance with a beach re-nourishment project shall be the new high water line and all land seaward of that line are the sovereign property of the State of Florida.”

Staff Response: *This is another area wherein the collective wisdom of the LPA will be of assistance in crafting an ordinance. For example, for those areas where beach renourishment has been completed, the ECL may be the seaward line for control or for measurement from that line. However, in areas where there is not an ECL, should MHW prevail?*

Limiting the expansion of COP to specific zoning districts would fall under several regulations of the Comp Plan and LDC. The **FLUM ELEMENT** of the **COMP PLAN** states that the Town can insist on protection of its private realm and the enhancement of its public realm when evaluating for new commercial development, providing for protection of residential interests. Even in the Downtown area, the map in **Sec.34-672, Figure 34-6** of the Downtown Zoning district shows the beaches and land seaward of the Coastal Construction Line (CL) to be outside the zoning district, as if intentionally protected from land use development.

Staff Response: *Once again, there is a difference between construction (i.e. development) and the use of land. But for the bifurcation of property created by EC, we may not be having this conversation and the entire process would continue to be regulated solely by the Special Exception process. The Town has made this distinction for previously approved COP's in EC, as well as for the well thought out code requirements for PAL and PWVL in EC. Further, it should be kept in mind that beach furniture is an outright permitted commercial use in EC. Accordingly, there is ample precedent of commercial uses being allowed in EC. More important, those precedents, i.e. PAL and PWVL, were established based upon a sound regulatory framework, with reasonable conditions of approvals and regulatory requirements to mitigate the potential impacts of the commercial uses.*

Historic Approvals & Legal Determinations

Previously approved COPs adjacent to EC:

This section will provide details about the 18 COP's that have been approved adjacent to the EC Zoning District, including how they were approved, when they were approved, whether they extended into EC, how they extend into EC, geographic location (i.e. Downtown or outside Downtown), current legal status, method of dominion and control of COP area, hours of service and restrictions on entertainment. Exhibit 2 provides an inventory of all COP's adjacent to EC, the previously mentioned parameters and the numbering identification corresponds to the numbers below, as well as to Exhibit 10, which provides a map of the locations. This narrative section will conclude with analysis of the precedents these prior approvals establish and what guidance they provide in the formation of a more comprehensive regulatory approach to regulating COP in EC.

1. Pink Shell (Exhibit 11)

Geographic Location: Pink Shell is located at the northern end of the island, near Bowditch Park, outside of the Downtown District and not within any other identified Comprehensive Plan/Land Development Code special district.

Approval Type: Pink Shell was rezoned to PUD by Lee County in 1982, pursuant to Z-82-170. COP was first



approved on the subject property in 1987, pursuant to Z-87-076, which restricted service to a 350 square foot recreation room together with a contingency for future expansion of that area. In 1989, Lee County granted an Administrative Approval for COP at the Chiki Huts. A 1990 State of Florida Alcohol License, approved for Zoning by Lee County, indicates approval of COP at the Chiki Huts. In 1991, Administrative Approval Amendment Number PUD-91-010 granted an extension of the COP approval until May 11, 1995. In 1998, Lee County granted an Administrative Amendment PUD-98-029 that memorialized COP at the Chiki Huts.

In 2001, the Town rezoned the subject property to MPD (Mixed-Planned Development) through Resolution 01-26, which approved COP at the Chiki Huts seaward of the 1978 CCCL Line. The motion for approval passed 5 to 1 (Ayes-Hughes, Reynolds, Murphy and Cain; Nay-Rynearson). In 2003, Lee County approved ADD2003-0086, which again depicted the Chiki Huts being approved for COP.

Legal Status: The 2001 rezoning (Town Resolution 01-26) of the subject property to MPD, with the Chiki Huts clearly being depicted on the Master Concept Plan (MCP) in the Recreation Future Land Use, and having historically been approved for COP indicates that COP in EC has been established as a lawful use on the Pink Shell property. Further, Resolution 01-26 set forth specific conditions on hours of service and entertainment.

Method of Dominion and Control: The CPD did not effectively establish dominion and control of the licensed premise. It appears that the objective in the CPD was to establish the point of service and made no specific reference to limiting the area of consumption.

Hours of Service: COP in conjunction with outdoor seating is allowed between the hours of 11:00AM and 10:00 PM.

Entertainment: Live outdoor music is prohibited. Recorded music is allowed between the hours of 11:00 AM and 10:00 PM.

2. Best Western (Exhibit 12)

Geographic Location: Best Western is located near the northern end of the island and outside of the Downtown District and not within any other identified Comprehensive Plan/Land Development Code special district.

Approval Type: COP with outdoor seating was approved by the Lee County Hearing Examiner in 1995 as a Special Permit (Case 95-08-061.02S), on a roof deck area 29' by 52'.

Legal Status: The deck area approved for COP does not extend into the EC Zoning District.

Method of Dominion and Control:

COP is limited to a 29' by 52' roof deck area, with 8' masonry or block wall on the north and west sides.

Hours of Service: 10:00 AM till 10:00 PM.

Entertainment: No live music and restrictions on the type of recorded music.

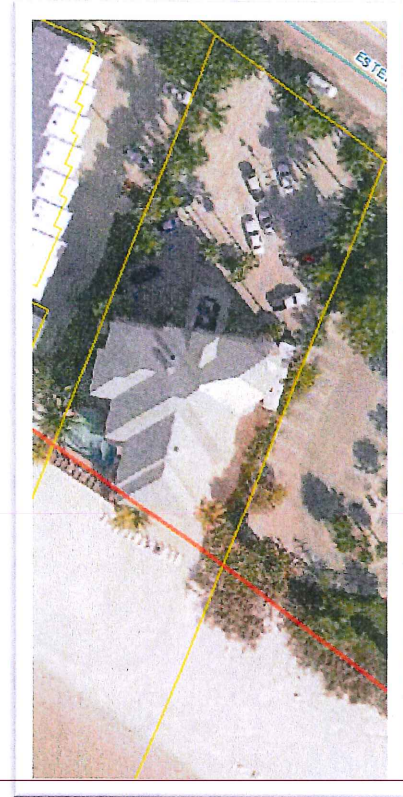


3. Edison Beach House (Exhibit 13)

Geographic Location: Edison Beach House is located adjacent to the northern end of the Downtown Zoning District.

Approval Type: Town Council approved a Special Permit to allow COP with outdoor seating in Resolution 00-12, by a vote of 3 to 2 (Aye- Cereceda, Hughes and Murphy; Nay-Reynolds and Mulholland). The outdoor seating area is located around the pool, which extends into the Recreation Future Land Use. At the time of the approval, Town Council made a finding that this was consistent with the Comprehensive Plan and that there would be no adverse environmental impacts.

The following minutes from the Town Council meeting provide more detail on the discussion. It is worthy to note that the discussion focuses on the Point of Sale and not the area of consumption:



March 13, 2000 Town Council Meeting Minutes for:

IV. PUBLIC HEARING: FIRST CENTRAL INV., CORP., IN REFERENCE TO EDISON BEACH HOUSE. CASE #SEZ1999-00028.

A special permit in the Commercial Planned Development (CPD) district to permit Consumption on Premises with outdoor seating per LDC 34-1265(a)(2). This property is located at 830 Estero Boulevard.

The Applicant's beginning comments were inaudible.

Applicants would like to sell liquor from the office for guests. It was established that non-guests could not purchase liquor there, as all liquor will be charged to guests' rooms.

Councilwoman Cereceda ascertained that the alcohol stocked would be beer, wine, and cocktails for two. Mr. Yax said as far as the extra items, he has talked to the 7-11 across the street about stocking some extra things they would like to see the guests have, and they expressed an interest in doing so.

Councilman Reynolds stated he didn't know if we could act on something like this unless it was written up, and he'd like to see this run by the planners and also by the LPA. In other words, he thinks we need more detail before we can act on something like that. He doesn't know how this would play, especially through Code Enforcement and Planning.

John Mulholland said that when a variance was granted by the LPA, it was quite clear to him that consumption was going to be in the guest rooms. The applicant explained that there might be a combination of liquor stocked in the office and in the guest rooms.

Councilman Reynolds advised he had visited the site and he expressed his pleasure in the architecture of the building. He felt that Code Enforcement needed to be aware of the change in plans, however, before the Council acts.

Councilwoman Cereceda felt that this was a convenience for the guests and nothing more.

County Input:

Dan Faulk of the Lee County Department of Community Development advised that the staff recommendation for this request was for denial of the consumption on premises with outdoor seating, as was the decision of the LPA. At the LPA meeting it was decided that whether alcohol is purchased from a bar by a pool or from the office it would still be considered consumption on premises. Mr. Faulk outlined the reasoning that led to the denial.

Vice Mayor Hughes stated that a major difference in the request is that liquor will not be sold to non-guests.

Anita Cereceda said that this property is going to be one of the premier properties on the Beach. She is a little concerned that currently under the permit the applicant has right now, a guest cannot take his drink out to the pool. She asked what Mr. Faulk's recommendation would be to us at this point as to how we could accommodate the request and stay with the spirit of the original approval to Mr. Yax. Mr. Faulk said it wasn't realistic to think that people are just going to sit in their rooms with their drinks and that it would be possible to approve the request with some conditions.

Councilman Reynolds said that as far as carrying drinks to the pool or anyplace else, he doesn't think we would have that control on any establishment on the island. Selling it, however, is a whole different ball game, so it is a definite change from the original request. We need to refer this back to the planners and let them react to this.

MOTION: Moved by Garr Reynolds and seconded by

that we send this request back to the planners and the LPA for

a restudy and additional information for Council.

The motion dies for lack of a second.

Mayor Mulholland advised that he thinks we have sufficient information.

Mr. Faulk stated that staff's concern was keeping alcohol on premises.

Vice Mayor Hughes said that he hadn't conceived of guests bringing their drinks to the pool because of sales in the guest rooms. What they had wanted to prohibit was a bar that was available to the public and particularly the people adjacent to Lynn Hall Park. And, incidentally, there are a number of bars that are within 500 feet of Lynn Hall Park on the other side. He felt there was no way that we are going to prohibit people from sitting around the pool having drinks. The main thing to him is that the public is not invited there.

Councilwoman Cereceda asked Attorney Roosa if the guest who brought a drink from his room and goes down to the pool with it was legally doing so. Attorney Roosa said, yes, he believes he is. So what is the difference between a person purchasing a Miller Light from room 603 and purchasing a Miller Light from the hotel office and going to the pool and drinking it? Attorney Roosa said that the original permit allowed for in-room bars, so he thinks it would require an amendment to that permit to allow the purchase of liquor in the office. As to the mechanics of what's different, he thinks testimony has been presented that there could be a larger inventory at the office than would be provided in a refrigerator, and that might have some impact. Asked if he believed that there would be

greater control as well, Mr. Roosa said yes, there would obviously be more control. There's no control to prevent teen-agers from drinking out of a refrigerator in a room with their parents, whereas if they tried to purchase it from an office, they would realize they were not eligible to do so. Ms. Cereceda asked how we would go about amending the original approval to allow for one additional location of sales. Mr. Roosa said that obviously the applicant has amended the application and so if we just approve the amended application that would accomplish that request. It is within our jurisdiction to approve it today without any further input.

Mayor Mulholland asked if the office would ask for proof before a guest could make purchases of alcohol. Mr. Roosa said the owner would violate his permit if he sold to anyone other than a guest. There would be better control if all sales were handled through the desk rather than in the room. Technically the sale is to the adult occupant of the hotel room and he is the one who would be responsible for not permitting access to a teen-ager.

Councilman Reynolds said he would just as soon have the liquor sold outside the office from a tiki hut as he would in the office. It would be more appropriate.

Public Comment:

A. Chris Lieb

Mr. Lieb said he is president of the Royal Beach Club, a family-oriented establishment, which is adjacent to the Edison Beach House. He sees no problem with selling alcohol in the office and charging it to the rooms so that the public cannot avail themselves of it.

MOTION: Moved by Ray Murphy and seconded by Dan Hughes

to approve the amended request by the property owner to include the

conditions that were stated prior by Attorney Roosa. Sales should be

during daylight hours only.

Dan Hughes moved to amend the motion by adopting a resolution that would be approved as stated by Councilman Murphy with the conditions stated, but changing the time to from 12:00 noon until 8:00 p.m. He would also add a fourth condition that would just be a clarification of the others: That there be no bar set up or tableside service. It would strictly have to fall within the conditions set forth by Councilman Murphy.

MOTION: Moved by Dan Hughes and seconded by Ray Murphy to approve

the amended request by the property owner, including the conditions stated

prior by Attorney Roosa, but changing the time stated by Councilman Murphy

from daylight hours to from 12:00 noon until 8:00 p.m. He would also add a

fourth condition that would just be a clarification of the others: That there be

no bar set up or tableside service. It would strictly have to fall within the

conditions set forth by Councilman Murphy.

Discussion:

Councilwoman Cereceda asked if the motion includes that sales be only to registered guests and only be transacted by a charge to the room. She was told yes.

Attorney Roosa offered to read what he understands the motion to be. "Alcohol is to be available at the office desk, limited to guests only and charged to an occupied room between the hours of 12:00 noon and 8:00 p.m. No bar or poolside service." The amended motion was further amended to show this wording.

MOTION: Moved by Dan Hughes and seconded by Ray Murphy to

amend the amended motion to read as follows: Alcohol is to be

available at the office desk, limited to guests only and charged to

an occupied room between the hours of 12:00 noon and 8:00 p.m.

No bar or poolside service.

Discussion:

Mayor Mulholland said he saw no advantage in moving the sales from the rooms to the office.

Motion carries 3-2 with John Mulholland and Garr Reynolds dissenting.

Legal Staus: The approval for COP with outdoor seating allowed COP in EC.

Method of Dominion and Control: No specific method was established other than allowing consumption outside, but not service. There was no specific prohibition on consumption extending onto the sandy beach. Point of sale was limited to the front desk or hotel room.

Hours of Service: Noon till 8:00 PM.

Entertainment: No conditions.

4. Pierside Grill (Exhibit 14)

Geographic Location: Pierside Grill is located in the Downtown District, in Times Square, adjacent to the County Pier.

Approval Type: In 1999, Town Council approved Resolution 99-39, to allow a trellis over the existing deck that extends 74+/- seaward of the 1978 CCCL line. The motion to approve the trellis was approved by a unanimous vote (Ayes-Cerceda, Hughes, Mulholland, Reynolds and Murphy).

Legal Status: While this approval was not specific to COP, it is informative, in that based upon the Council discussion, they clearly were aware that they were memorializing the outdoor dining (and hence COP) seaward of the 1978 CCCL line. Further, the discussion by Council indicates that they acknowledged that the use was being approved in the Recreation Future Land Use.



Method of Dominion and Control: No requirements were specifically established by any Town Zoning Action.

Hours of Service: None established.

Entertainment: None established.

5. Top O' Mast (Exhibit 15)

Geographic Location: Top O' Mast is located in the Downtown District, in Times Square, adjacent to Crescent Beach Family Park.

Approval Type: There is no formal zoning approval of COP for the subject property. The State of Florida Liquor License does have zoning staff approval from Lee County, dated 12-2-83. The site sketch that accompanied the 1983 license, appears to have only been approved for COP within the building. In 1988, the applicant amended the site sketch to include the deck area, but the amended sketch was not signed by Lee County staff for zoning approval. In 1988, the applicant amended the site sketch, to include what appears to be the sandy beach, but the amended sketch was not signed by Lee County staff for zoning approval. In 1988, the State of Florida Division of Alcohol, Beverages and Tobacco issued an Official Notice, which indicated "No sales from parking lot or beach."



Legal Status: Based upon the aerial and State Issued Alcohol Permit, it does not appear that COP is permitted seaward of the EC Zoning District line.

Method of Dominion and Control: Dominion and control appears to be established by the deck and railing.

Hours of Service: Not specified in the State Liquor License.

Entertainment: Not specified.

DBR - 801-E
(Rev. 3/85)

State of Florida
Department of Business Regulation
Division of Alcoholic Beverages & Tobacco

OFFICIAL NOTICE

City: FORT MYERS BEACH County: LEE Date: 06/16/88

To: Licensee: STEER MILL, INC

D/B/A: TOP OF THE MAST License: Type 4COP # 46-123

You are hereby notified YOU MAY SELL ALCOHOLIC BEVERAGES
ONLY ON THE PREMISES AS SHOWN ON THE APPLICATION
FOR YOUR LICENSE. THIS INCLUDES THE BUILDING AND
DECK ONLY. NO SALES FROM PARKING LOT OR BEACH

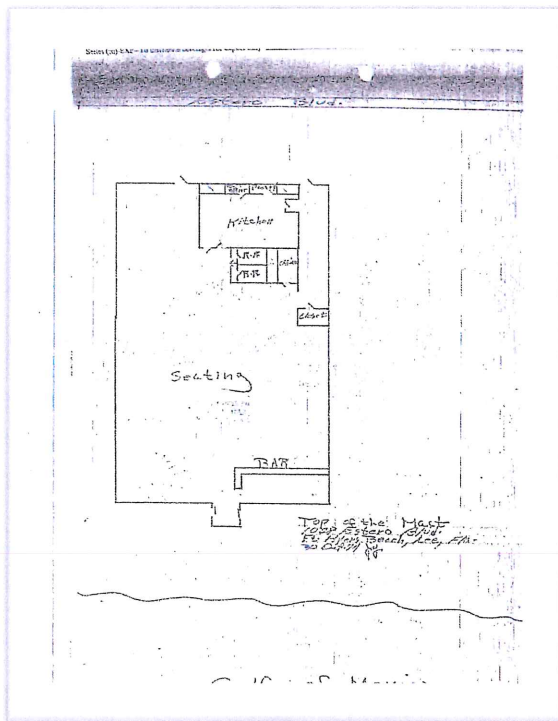
If these instructions are not complied with by noon on IMMEDIATELY/19
Charges will be filed against you.

Received this Notice

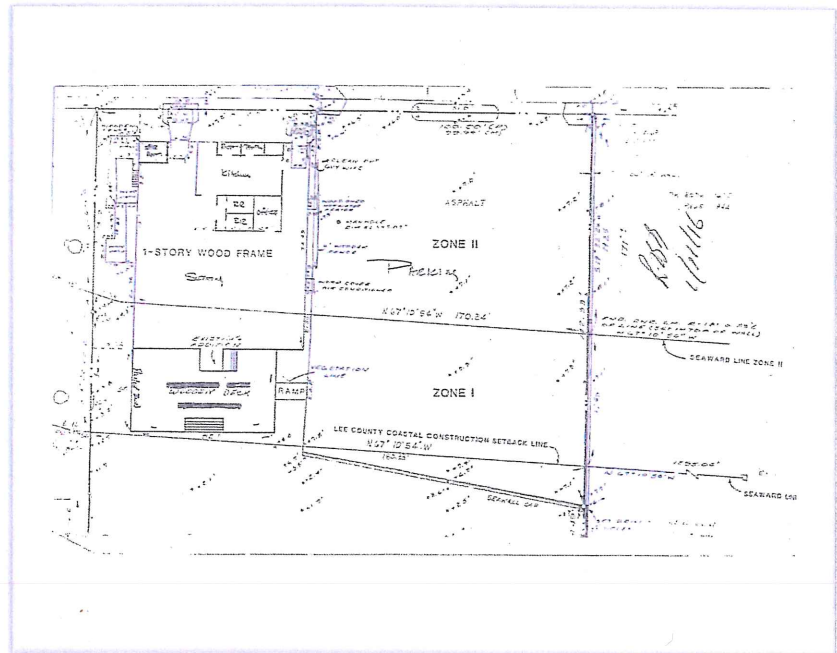
JUNE 16, 1988 C. L. TVEY Director

ETALOTLER Manager Issued By: W. J. [Signature]

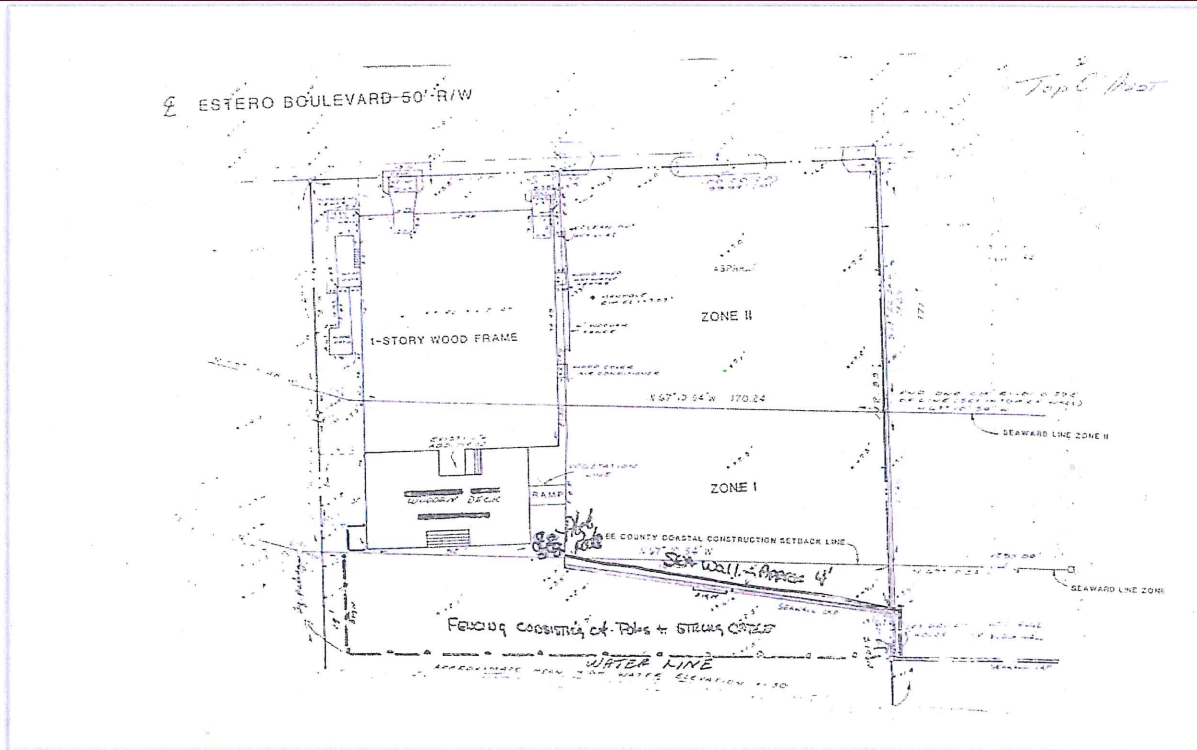
1988 ABT Official Notice



1983 ABT License Site Sketch



1986 ABT License Site Sketch

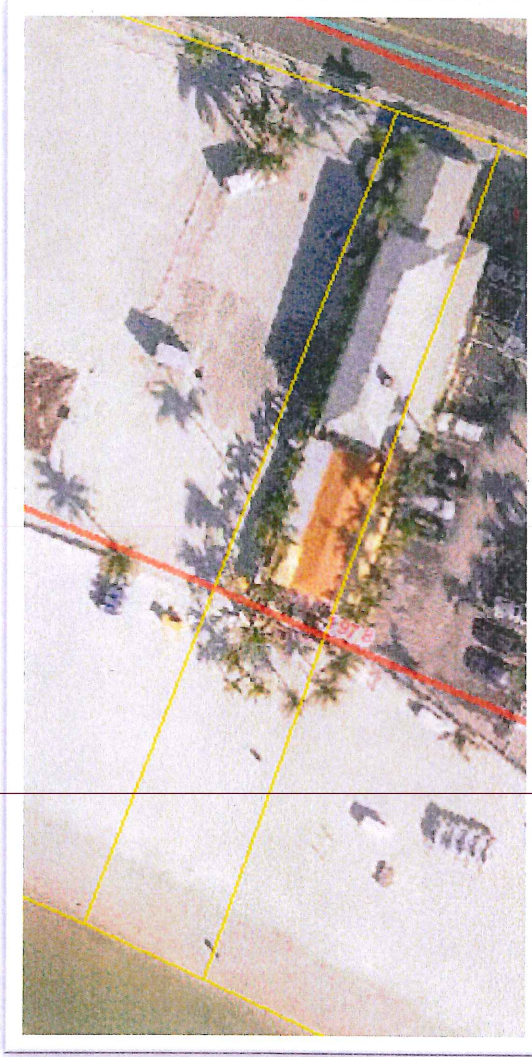


1987 ABT License Site Sketch

6. Nemos (Exhibit 16)

Geographic Location: Nemos is located in the Downtown District, adjacent to Crescent Beach Family Park.

Approval Type: In 1995, the Lee County Hearing Examiner approved a Special Permit (95-07-161.02S) to allow COP outdoors, restricted to 1,106 square feet with 12 indoor seats and 50 outdoor seats. In 2007, the Town Council affirmed the County's prior approval of COP with outdoor seating in Resolution 07-13, by a unanimous vote (Aye-Boback, Massucco, Reynolds, Meador and Shenko). While no site plan was included in the 1995 or 2007 approvals, the records of the Hearing Examiner in 1995, clearly indicate that the approval included "a outside area for about 50 seats on the beach." Further, the record indicates "that approximately 95% of their trade will come from the beach." A review of the 1998 aerial photo of the subject property indicates the chairs and tables being located directly on the beach and no pavers in the current location of pavers on the beach. In 2010, Town Council approved a Special Exception to allow COP with outdoor seating, with a site plan that clearly depicts outdoor seating in the EC Zoning District.



Legal Status: Based upon the aforementioned approvals, it appears that COP has been established seaward of the EC Zoning District line. Further, based upon the aerials and site plans, it appears that COP was approved directly upon the sand.

Method of Dominion and Control: None specifically required in the approving resolution.

Hours of Service: 7:00 AM till 2:00 AM.

Entertainment: Outdoor music is limited to between the hours of 10:00 AM and 10:00 PM.

7. The Cottage (including Beach Dog House and Gulf Shore Grill) (Exhibit 17)

Geographic Location: The subject property is located within the Downtown District.

Approval Type: The subject property received an Administrative Approval (COP2002-00013) from Lee County in 2002. This approval limited outdoor seating to the existing deck area. Field cards from the County Property Appraiser, dating back to 1976, indicate it has long been in use as a restaurant. There have been numerous code enforcement violations on the subject property, from unpermitted construction activity to alcohol service issues.

Legal Status: While the COP2002-00013 did not approve COP directly on the beach, it should be noted that almost the entire main structure is located within the EC Zoning District. Further, it should be noted that this approval was granted after the establishment of the REC Future Land Use and EC Zoning District.

Method of Dominion and Control: While dominion and control of the property are established within the confines of the buildings and deck area, it should be noted that the open nature of the ground floor and orientation to the beachfront are indicative of inadequate establishment of dominion and control.

Hours of Service:

Beach Dog House: 10:00 AM till 10:00 PM

The Cottage: 10:00 AM till 2:00 AM

Gulf Shore Grill: 7:00 AM till 10:00 PM

Entertainment: Outdoor music and entertainment are prohibited in the outdoor seating areas.



8. Lani Kai (Exhibit 18)

Geographic Location: The subject property is located within the Downtown District.

Approval Type: In 1977, prior to construction of the Lani Kai, a portion of the subject property (Lots 3 & 4 and a portion of 5, of Block E) were rezoned and granted a Special Permit for COP for beer and wine. The lots approved do not extend to the beach and only encompass a minor area of the current building footprint of Lani Kai, closer to Estero Boulevard. Further, in 1989, Lee County signed off on the Zoning Approval portion of the State Alcohol License and in 2001 the Town signed off on the Zoning Approval portion of the State Alcohol License.



Legal Status: The records for the property are unclear as to whether or not the sale and consumption of alcohol was approved directly on the beach. However, it is clear that portions of the licensed premises do fall within the EC Zoning District.

Method of Dominion and Control: None established.

Hours of Service: None established specific to the property.

Entertainment: None established.

9. Wicked Wings (Exhibit 19)

Geographic Location: The subject property is located within the Downtown District.

Approval Type: In 2010 the Town Council unanimously approved a Special Exception for Wicked Wings (Resolution 10-01) for COP in the Downtown and EC Zoning Districts. In December, 2009, the LPA recommended approval of this Special Exception by a unanimous vote and no objections were expressed over the COP extending into the EC Zoning District, even though Town Staff made it abundantly clear that the request for COP was extending into the EC Zoning District. This Special Exception is significant, inasmuch as, in the prior month (November 2009) the LPA had opined to Town Council, in the form of an LPA Resolution, that the Comprehensive Plan had intended to restrict further expansion of COP into the Recreation Future Land Use and hence the EC Zoning District.



Legal Status: Resolution 10-01 approved COP in EC.

Method of Dominion and Control: COP was approved on the deck area, where the outdoor seating is located.

Hours of Service: 10:00 AM till 11:00 PM.

Entertainment: 10:00 AM till 11:00 PM.

10. Beach Pub (Exhibit 20)

Geographic Location: The subject property is located within the Downtown District.

Approval Type: In 1995, just before incorporation of the Town, the Lee County Hearing Examiner approved a Special Permit to allow COP on the subject property (95-10-173.02S). This approval granted COP service and consumption directly on the sandy beach and seaward of the 1978 CCCL Line. Further, the Hearing Examiner found that the Special Permit, as conditioned, “will protect, conserve and preserve environmentally critical areas and natural resources.”

Legal Status: The Special Permit allows COP in the EC Zoning District.

Staff considers this approval to be significant in several aspects, which are worthy of consideration in the formulation of any ordinance dealing with COP in the EC Zoning District. First, this case introduced some fairly stringent conditions on the approval, which included limitations on hours of operation, limitations on live music, the concept of allowing consumption directly on the sandy beach and establishing dominion and control through rope and post of the area of consumption, while limiting service of beer and wine to patrons from the bar (i.e. no service directly on the sand). Further, this approval introduced a significant concept that has to be dealt with, which is that these establishments rely upon pedestrian traffic along the beach for patrons and as such do not require parking for the consumption areas on the beach.

Method of Dominion and Control: Rope and post.

Hours of Service: 10:00 AM till 10:00 PM.

Entertainment: Live entertainment from 10:00 AM till 8:00 PM.



11. DiamondHead (Exhibit 21)

Geographic Location: The subject property is located within the Downtown District.

Approval Type: In 2001, Town Council approved Resolution 01-15 to allow COP on the outdoor deck area.

Legal Status: The deck area approved for COP does not extend into the EC Zoning District.

Method of Dominion and Control: Limited to deck area.

Hours of Service: 9:00 AM till 10:00 PM.

Entertainment: Outdoor entertainment limited to between the hours of 9:00 AM till 10:00 PM, subject to restrictions on amplification, recorded music and live music, which states as follows:

1. *The following conditions will apply to any outdoor music and/or entertainment located around the pool area or the proposed elevated deck:*
 - a. *Recorded background music that is restricted to a mono background system, which is defined as a 60 amps system with speakers limited to 1 to 2 watts that provides for a volume that is kept at or below normal conversation level, is allowed.*
 - b. *Only non-amplified string instruments are allowed to be played "live" without plugging into the mono background system.*
 - c. *Entertainment and/or live music, (excluding non-amplified string instruments), which is defined as a keyboard that is limited to the function of a piano with or without a Disc Jockey, referred to as a "DJ" and/or a vocalist is allowed only when the keyboard and all microphones, for a "DJ" or vocalist are plugged into the mono background system and the volume is kept at or below normal conversation level.*
 - d. *Any music that is played in the Lounge Area located on the first elevated floor must comply with Conditions 4.a., 4.b., and 4.c., or else the outside door(s) from the Lounge to the proposed elevated deck must be closed.*



12. Estero Island Beach Club (Exhibit 22)

Geographic Location: The subject property is located within the Downtown District.

Approval Type: In 1995, the Lee County Hearing Examiner approved a Special Permit (95-10-232.04S) to allow COP, which restricted service to the Tiki Bar and limited consumption to the pool deck area.

Legal Status: The pool deck area extends into the EC Zoning District, thus allowing COP in EC at this location.

Method of Dominion and Control: Service is limited to the Tiki Bar and consumption is limited to the pool deck area and further restricted to guests or residents of the resort.

Hours of Service: 8:00 AM till 10:00 PM.

Entertainment: Live entertainment is prohibited, but recorded background music is allowed.



13. Junkanoo (Exhibit 23)

Geographic Location: The subject property is located immediately adjacent to the Village District.

Approval Type: In 1990, the Lee County Hearing Examiner approved a Special Permit (90-1-18-SP-1) to allow COP with outdoor seating.

Legal Status: Based upon the wording in the Hearing Examiner's Conditions, it appears that COP was approved for the entirety of Lots 21 through 25, with the exception of the parking lot, as referenced in the Staff Presentation to Hearing Examiner. Since there are portions of Lots 21 through 25 that extend into the EC Zoning District, it appears that COP has been approved in EC for the subject property.



Method of Dominion and Control: None established.

Hours of Service: None established in the approval.

Entertainment: None established in the approval.

14. Outrigger (Exhibit 24)

Geographic Location: This resort is located towards the southern end of the island.

Approval Type: The subject property was rezoned to CPD (Commercial Planned Development) in 1995 by the Lee County Commission, prior to incorporation of the Town. Among the permitted uses established in the CPD, are: Bar or Cocktail Lounge



(existing), Commercial Use of Beach Front Seaward of the Water Body Setback Line (Existing) and Consumption on Premises (existing).

Legal Status: The listing of permitted commercial uses on the beach and approval of COP without any specific location restrictions supports a finding that COP was approved in EC for the subject property.

Method of Dominion and Control: None established.

Hours of Service: None established.

Entertainment: None established.

15. Gullwing Resort (Exhibit 25)

Geographic Location: This resort is located towards the southern end of the island. (Zoning District?)

Approval Type: In 1997 the Town Council approved a Special Permit (Resolution 97-10) to allow COP on the subject property. However, due to LPA about noise in relation to the outdoor seating, the request for approval of COP in conjunction with the outdoor seating was withdrawn prior to Town Council consideration.



Legal Status: COP is not approved in the EC Zoning District on the subject property.

Method of Dominion and Control: N/A

Hours of Service: N/A

Entertainment: N/A

16. Holiday Inn (Exhibit 26)

Geographic Location:

This resort is located towards the southern end of the island. (Zoning District?)

Approval Type: In 1988, the Lee County Commission granted a Special Permit (Resolution Z-88-291) to allow COP with outdoor seating.



Legal Status: Based upon our review of the aerial photo of the subject property, a portion of the outdoor seating area for COP is located within the EC Zoning District.

Method of Dominion and Control: Limited to the outdoor seating areas identified in the approval.

Hours of Service: None established.

Entertainment: None established.

17. Sandbar Resort (Exhibit 27)

Geographic Location: This motel/hotel is located towards the southern end of the island. (Zoning District?)

Approval Type: In 1993, the Lee County Hearing Examiner approved a Special Permit to allow COP with outdoor seating. The outdoor COP was limited to the pool and recreation area within the seawalled portion of the property.

Legal Status: COP is not allowed in the EC Zoning District on the subject property.



Method of Dominion and Control: Confined to pool deck area, with landscape requirements and limited to hotel guests only.

Hours of Service: 7:00 AM till 9:30 PM, Sunday through Thursday and 7:00 AM till 10:30 PM, Friday and Saturday.

Entertainment: No outdoor entertainment or loud music allowed.

18. Breakers Econo Lux Inn (Exhibit 28)

Geographic Location: The subject property is located within the Downtown District and is now Crescent Beach Family Park (formerly Breakers Econo Lux Inn).

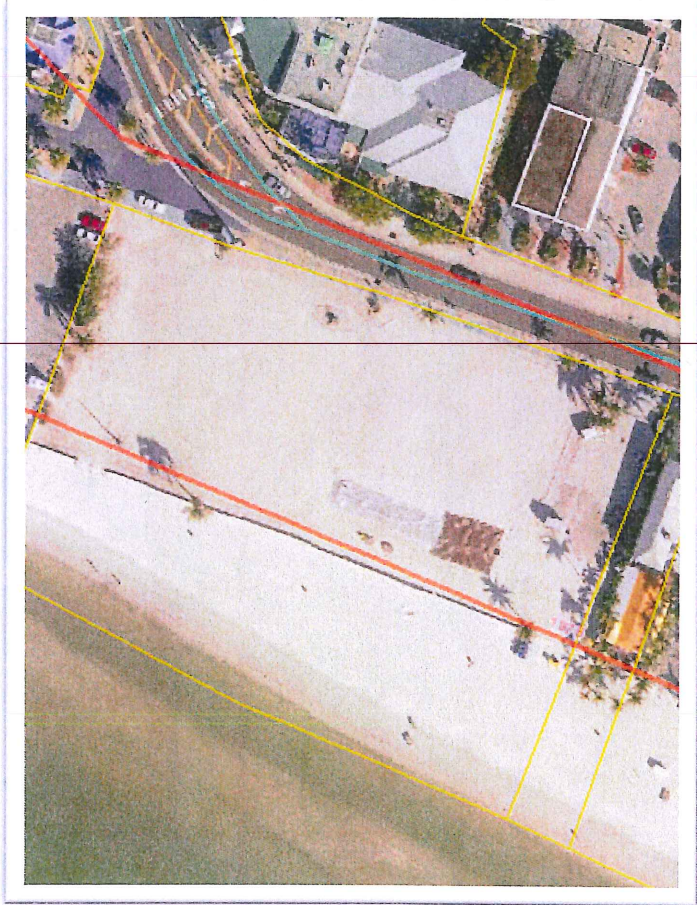
Approval Type: In 1991, the Lee County Hearing Examiner approved a Special Permit to allow a bar on the subject property, within the confines of the building that stood at the time of the approval.

Legal Status: It does not appear that the area approved for COP within the confines of the building would have fallen within the EC Zoning District.

Method of Dominion and Control: N/A.

Hours of Service: N/A.

Entertainment: N/A.



Analysis of Approved COPs:

Of the 18 properties identified with COP licenses adjacent to the EC Zoning District, 12 have been identified that were approved for COP in the EC Zoning District. Of those approved for COP, 7 are located in the Downtown District and 5 are located outside the Downtown District. Of the 5 approved outside the Downtown District, 4 are resorts. Of the 12 approved for COP in EC, 5 or 6 are resorts, 4 are restaurants/bars, 1 is a restaurant and 1 is a bar. Of the 12 approved for COP in EC, 7 are approved directly on the beach and 6 have no restrictions on outdoor music. The most common method of approval has been Special Permit/Exception, with 7 having been granted by SP/SE. Of the 4 resorts outside the Downtown District, 2 were granted by CPD rezoning. 5 of the COP approvals in EC were approved by the Town, the rest were approved by the County prior to the Town's incorporation. One of the more significant findings of our analysis was that no COP requested in EC has ever been denied. Given the number of COP approvals in EC, it is difficult to conclude that the Comprehensive Plan intended to restrict further expansion of COP in the Recreation Future Land Use. Of equal concern in this regard, is the lack of discussion during the public hearings for these approvals, regarding the issue of COP in EC and Recreation Future Land Use. In reviewing the transcripts for all of these approvals, it is abundantly clear that the larger concern expressed during public hearings related to concerns about outdoor entertainment.

Conclusions of Approved COPs:

Our analysis concludes that COP has been established as a permissible use in the EC Zoning District for as long as that district has existed, with varying methods of approval. While the methods of approval are valid means of controlling COP in EC, the lack of consistency of methods or established guidance is an area of concern. Further, we have concluded that there has been an overall lack of consistency in conditions of approval, including dominion and control, hours of operation and entertainment restrictions. The lack of consistency in terms of conditions of approval reinforces our perception of the lack of an appropriate regulatory framework.

Having said that, it should be noted that there has been some historic consistency in some limited regards, as it relates to the approval of COP in EC. For instance, the majority of COP approvals in EC were granted for establishments within the Downtown District and those granted outside the Downtown District were primarily granted to the larger resorts in Town, two of which were granted by CPD rezoning. Special Permits/Exceptions granted 7 of the 11/12 COP approvals. We believe there is a strong precedent for requiring future approvals within the Downtown District to require Special Exception approval and those outside the Downtown District to be limited to resorts by CPD zoning. Further, some of the approvals contained conditions of approval that provide a strong basis for formulating a meaningful ordinance. More importantly, based upon

Staff observations during the last tourist season, there are some restrictions that are more effective in mitigating potentially negative impacts. For example, well defined methods of dominion and control have more success in preventing the migration of alcohol from one property to another.

Considerations in crafting an ordinance

Assuming that it is the policy of Town Council to not prohibit COP in EC, then an appropriate regulatory approach should be developed in the form of an ordinance. In order to assist Staff in developing an ordinance to regulate COP in the EC Zoning District, it is constructive to facilitate a dialogue on the various methods of regulation, which includes process, location restrictions and conditions. We respectfully request your input on means of regulating COP in EC. Specifically, we need input on the three primary considerations; process, location restrictions and conditions of approval.

Process:

There are four primary zoning processes for regulating COP in EC, which we would offer for your consideration: Special Exception; Planned Development Zoning; Administrative Approval; or, Permitted Use.

Location Restrictions:

As our analysis in Section 4 of this report (Historic Approvals & Legal Determinations) concluded, 7 of the 12 approved COPs in EC are located within the Downtown District and of the 5 located outside the Downtown District, 4 are resorts. Given the fact that the 12 approved COPs evolved over the course of three decades, we believe that some guidance should be taken from the location precedence set over time. Accordingly, we believe there should be some regulatory framework based upon geographic considerations. The fact that 4 of the 5 COP's located outside the Downtown Zoning District are resorts, suggests that serious consideration should be given to limiting COP's outside the Downtown Zoning District. Further, the fact that 2 of the 4 Resorts were approved for COP by CPD rezoning, suggests that, should the regulatory bar be elevated outside the Downtown, a more rigorous review process should be required. Also, it suggests that consideration should be given to restricting COP outside the Downtown District to resorts only.

Conditions of Approval:

Based upon our analysis in Section 4 of this report, it is clear that some consideration has historically been given to developing conditions of approval to mitigate any potentially negative impacts. This is significant in a couple regards. First, it is a clear acknowledgement that COP in EC has been viewed as having the potential to have adverse impacts. Second, in some instances there is consistency in the conditions imposed on some of the existing COPs in EC. However, it also has to be noted that there are broad inconsistencies in the conditions imposed on the existing COPs in EC. Accordingly, we would strongly recommend that a uniform set of conditions be developed that are applied consistently.

Accordingly, following are some of the potential standard conditions that can and should be considered in developing an ordinance:

1. Principal Use Restrictions- Should COP in EC be limited as an ancillary use to specific principal uses, i.e. restaurants, bars, resorts, etc.; and
2. Specific Conditions of Approval- What specific conditions should be required, for example:
 - a. Plastic cups, aluminum cans or glass bottles.
 - b. Hours of service/consumption in EC.
 - c. Location restrictions of service/consumption in EC, i.e. within property lines under same ownership and no closer than 10 feet of the Mean High Water Line (MHW).
 - d. Method of Dominion Control- i.e. rope and post, deck, vegetation, signage and/or security detail.
 - e. Restrictions on tables.
 - f. Management/maintenance responsibilities of owners.
 - g. Security requirements.
 - h. Signage requirements, i.e. alcohol purchased on one property is prohibited from being taken onto another property.
 - i. Insurance requirements.
 - j. Seasonal restrictions, i.e. should hours of service/consumption be further restricted during times of the year, such a turtle nesting season.
 - k. Annual renewal requirements.
 - l. Terms of revocation and revocation process.

- m. Fees, i.e. initial fee and annual renewal fees.
- n. Other considerations that LPA deems appropriate.

Closing Thoughts:

Based upon LPA input and Town Council's previous direction, Staff will prepare a draft ordinance for discussion at the November 8 LPA Meeting.