



# MINUTES

**Monday, June 3, 2013**

**FORT MYERS BEACH TOWN COUNCIL  
TOWN HALL – COUNCIL CHAMBERS  
2523 ESTERO BOULEVARD  
FORT MYERS BEACH, FLORIDA 33931**

## **I. CALL TO ORDER**

Mayor Mandel called to order the June 3, 2013 Regular Meeting of the Town Council at 9:00 a.m. Present along with Mayor Mandel: Vice Mayor Kosinski and Council Members Andre, List, and Raymond. Also Present: Town Manager Stewart, Town Attorney Miller, Finance Director Wicks, Public Works Director Lewis, Community Development Director Fluegel, and Town Clerk Mayher.

## **II. INVOCATION – Rev. Lorrie Davison, St. Raphael’s**

## **III. PLEDGE OF ALLEGIANCE**

## **IV. APPROVAL OF FINAL AGENDA**

Consensus approved the Agenda as presented.

## **V. PUBLIC COMMENT**

Mayor Mandel noted Public Comment was a time for the public to discuss Consent Agenda Items and issues currently not on the agenda.

Public Comment opened.

Georgia Reinmuth, Treasurer of the Fort Myers Beach Friends of the Arts, noted that the organization applied for a public relations grant from the Town approximately seven months ago, and she offered an update on the grant received from the Town. She explained how the FMB Friends of the Arts contacted various art and cultural organizations in the Town as it pertained to the public relations contract the Friends of the Arts entered into for items such as media relations, newsletters, video production, news

monitoring, advertisement placement, and press releases. She stated she would have a final report for Council in January.

Joann Shamp, resident, commented on recent remarks in the local newspapers that described the Town as being 'dirty'; and expressed her view that the lack of maintenance along Estero Boulevard was what gave the appearance of being dirty (i.e. lack of continual sidewalks). She challenged the Council to get Lee County to help the Town with a bicycle lane and walkways/sidewalks on Estero Boulevard to help make the Town clean and safe. She asked Council, when making decisions, that they do not allow encroachments that would impact a 'good right-of-way' which was needed on the Boulevard.

Tom Merrill, resident, stated that he sent a letter to the airport and copied the Council. He offered an update on the Town's effort with the FAA and airport noise/traffic; and suggested how the Town and Council should better organize themselves with respect to liaisons between the Council, BOCC, and airport staff. He noted the airport had raised the flight elevations over the Town; however, it appeared there was an increase in the number of flights over Fort Myers Beach [80-90% of the flights from the west come over Fort Myers Beach]. He suggested that this was the time for the Town to have more discussions with the airport about the number of flights over the Town and to see what could be done to change it.

Tracey Gore, resident, discussed her opinion that there should be more 'transparency' with the Town Council and staff.

Garr Reynolds, resident, expressed his support for efforts to mitigate airport noise and traffic.

Public Comment closed.

Mayor Mandel suggested that the Council discuss the comments by Mr. Merrill during Agenda Management. He noted that he and Council Member List attended the formal meeting several months ago regarding the airport noise mitigation; and that the Town had sent letters to Senator Nelson's office who volunteered to follow-up with the FAA. He added that the airport had delayed slightly forwarding the report to the FAA, and that the FAA had six months to review and respond [six month period would end July-August].

Town Manager Stewart addressed 'government transparency' and explained when staff performed an 'administrative approval' process it was authorized by the Town Council.

## **VI. IMAGE OF FORT MYERS BEACH**

Vice Mayor Kosinski recounted how he had been approached by two neighbors who had been visited by Code Enforcement as it pertained to yard clippings placed out for pick-up before Tuesday; and reported that he also received a warning from Code Enforcement about the same matter.

Council Member Andre indicated he also supported bicycle lanes and sidewalks on Estero Boulevard as noted by Ms. Shamp.

Mayor Mandel reported he received a letter from the National League of Cities indicating the Town was a member of the NLC and that he received a certificate for the Town's recognition and participation in the Viva Florida 500 celebration; and gave the certificates to the Town Clerk. He announced the County Commission would be considering bicycle paths and sidewalks at a meeting they were holding today regarding funding solutions for Estero Boulevard.

## **VII. LOCAL ACHIEVEMENTS AND RECOGNITIONS**

None.

## **VIII. ADVISORY COMMITTEES ITEMS AND REPORTS**

No speakers.

## **IX. APPROVAL OF MINUTES**

- A. May 6, 2013 Town Council Meeting
- B. May 6, 2013 Work Session

**MOTION:** Vice Mayor Kosinski moved to approve the minutes as presented; second by Council Member List.

**VOTE:** Motion approved, 5-0.

## **X. CONSENT AGENDA**

- C. Disposal of Surplus Assets

A request to declare items indicated by Finance Department as 'surplus' to be deemed as such, thus allowing for their sale.

Town Manager Stewart explained that the request was for Council to approve that the surplus items may be sold.

**MOTION:** Council Member List moved to declare the items on "Exhibit A" surplus and authorize Staff to dispose of these items; second by Council Member Andre.

Mr. Kakatsch was recognized in the audience and asked if there was a list of items.

Mayor Mandel responded in the affirmative.

**VOTE:** Motion approved, 5-0.

## **XI. PUBLIC HEARING**

- A. Quasi-Judicial Hearing: Case SEZ2013-0001, The Beached Whale Special Exception

A request for a special exception to serve alcoholic beverages outdoors at the restaurant known as the Beached Whale located at 1249 Estero Boulevard.

Public Hearing opened at 9:25 a.m.

Mayor Mandel asked if any Council Member had ex-parte communication regarding this item. Council Member Andre - site visit; Council Member List – site visit and spoke with owners about two months ago on a separate topic; Vice Mayor Kosinski – stated he would abstain [Form 8B Voting Conflict Form filed] and he “*hereby disclosed that on June 3, 2013 a measure came or will come before the Council that inured to the special gain of my business, JC Kosinski Engineering, Inc., as engineer of record on the project*”; Council Member Raymond – three site visits; Mayor Mandel – site visit.

LPA Attorney Miller swore in the witnesses.

Town Manager Stewart briefly reviewed the special exception request in a ‘*general sense*’ and the responsibility of staff as it pertained to review of the request. He pointed out that staff did not advocate one way or the other, rather they state whether the request meets the technical requirements for a special exception request.

Zoning Coordinator Dulmer presented comments for SEZ2013-0001, Special Exception for the Beached Whale, on behalf of the Town of Fort Myers Beach. She displayed an aerial photograph of the site and noted the location of the subject property was at 1249 Estero Boulevard. She reviewed the initial variance request for a special exception in the Downtown Zoning District to expand the area where outdoor consumption on premises was permitted to include 636± square feet of a proposed new deck at the front of the existing building on the subject property (Future Land Use – Pedestrian Commercial). She displayed renderings of the initial proposed site plan (noting there had been some modifications and they would discuss those later in the presentation). She noted on the site plan that three streets intersected at a point (Primo Drive, Palermo Circle, and Estero Boulevard). She continued the presentation with a review of the Applicant’s request to remove six back-out parking spaces, relocate ADA parking spaces, include a new outdoor deck with permanent roof cover, adjust the operating hours for the deck area from 7:00 a.m. to 2:00 a.m., and to offer acoustic music on the deck area from 11:00 a.m. to 10:00 p.m. (Monday through Friday). She displayed a site plan of the existing back-out parking and indicated the spaces the Applicant wanted to remove; and a rendering of the proposed plan and elevation. She briefly reviewed staff’s analysis of the Application according to the supporting regulations:

- Section 34-88 Special Exceptions – *Function*: The Town Council shall hear and decide all applications for special exceptions permitted by the district use. *Considerations* - In reaching its decision, the Town Council shall consider the following whenever applicable:
  - Section 34-88(2)(a):  
*Whether there exist changed or changing conditions [that] make approval of the request appropriate.*  
As contemplated in the Comprehensive Plan, the Times Square/Downtown area has continued to emerge as a vibrant urban core for the Town, and as such, that area can support a more intense variety of uses that are appealing and attractive to residents and visitors alike. *The Applicant’s request was consistent with this policy.*

With increasing congestion and traffic delays on Estero Boulevard, and the delay in Lee county making improvements to that right-of-way, the Comprehensive Plan encouraged any opportunity to remove traffic obstacles and improve traffic flow, and should be encouraged and supported. *The Applicant's request to remove six back-out parking spaces was consistent with this policy.*

○ Section 34-88(2)(e):

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

The subject property was located in what the Comprehensive Plan termed the Downtown Core. The Comprehensive Plan describes a vision for this area that “boasts a revitalized entertainment area with tree-shaded outdoor cafes, pedestrian streets, and an ‘Old Estero Island’ character to the buildings”.

In both the Community Design Element and the Future Land Use Element, the Comp Plan described a vision for the Downtown Core/Times Square area as a ‘nucleus of commercial and tourist activities’ with pedestrian-oriented commercial uses that enhance the experience of both the resident and visitor. *The Applicant's request was consistent with this vision.*

○ Section 34-88(2)(f):

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

The very nature of this application indicated that the requested use of consumption on premises was not a use allowable by right on the subject property. It was however, a use permitted by special exception (Section 34-126(a)(2)).

The Applicant's request was appropriate at this site due to the subject property's location in the Downtown Core Area Outdoor Dining, both on private and on public property was encouraged by the Comp Plan and the Land Development Code. *Approval of the Applicant's request, along with conditions requiring appropriate building permits, would ensure that all performance standards were met.*

○ Section 34-88(2)(g):

*Whether the request would protect, conserve, or presser environmentally critical areas and natural resources.*

The Applicant's request would have no negative effects on the environmentally critical areas and natural resources of Fort Myers Beach because the subject property was located in an established commercial district, landward of the Coastal Construction Line(s) and far from environmentally critical areas and sensitive natural resources. *Approval of the Applicant's request should be conditioned to require that any outdoor lights met with the Sea Turtle lighting requirements.*

○ Section 34-88(2)(h):

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

The subject property and the area immediately surrounding the site were within the Pedestrian Commercial Future Land Use category. The Comprehensive Plan's vision for this area does not require that it be transformed from an intensively commercial area into a primarily residential district or any other use. *It possessed a vibrant mix of uses, and as*

*such, staff felt the Applicant's request was compatible and appropriate within its neighborhood.*

o Section 34-88(2)(i):

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

*The consumption on premises of alcoholic beverages on the subject property would be required to comply with the applicable standards in the Fort Myers Beach LDC including, but not limited to Section 34-1264. Staff recommended finding that he requested use, as conditioned, is in compliance with applicable general zoning provisions and supplemental regulations pertaining to the use set forth in LDC Chapter 34.*

She reported that staff recommended **approval with conditions** of the requested special exception in the Downtown Zoning District to expand the area where outdoor consumption on premises was permitted to include 636± square feet of proposed new deck at the front of the existing building on the subject property with the following conditions:

1. Consumption on premises is limited to the building located on the subject property at 1249 Estero Boulevard and both the existing upper, and proposed new lower outdoor decks depicted on the attached 'Exhibit C'.
2. Hours of operation for consumption on premises shall be limited to the hours of 7:00 a.m. to 2:00 a.m., daily for both inside the building and the outdoor deck area.
3. Acoustic music shall be limited to 11:00 a.m. to 10:00 p.m., Monday through Friday.
4. Any proposed roof overhangs and/or projections must meet the Commercial Design Standards set forth in LDC Section 34-991 and specifically Section 34-995(3).
5. All work proposed to be done will require a Limited Review Development Order and any other permits determined to be necessary at the time of permitting.

She reported there was a Public Hearing held by the LPA on April 9, 2013; Public Comment was heard concerning noise and pedestrian safety; and that the LPA voted 6-0 for recommendation of approval [LPA Member Steele excused absence] with modification to staff recommended conditions:

- #2 – Hours of operation for consumption on premises shall be limited to the hours of 7:00 a.m. to 2:00 a.m., daily for inside the building and 7:00 a.m. to 11:00 p.m. daily for the outdoor deck areas.
- #3 – Non-amplified acoustic music and outdoor televisions shall be limited to 'from 11:00 a.m. to 11:00 p.m.' daily.

and added conditions #6 through #10:

- #6 – No required parking spaces, including required ADA spaces, may extend into the Town or Lee County right-of-way.
- #7 – The applicant shall provide an impervious retention area under the proposed outdoor deck to assist with stormwater retention.
- #8 – The outdoor seating on the proposed outdoor deck will at all times comply with current Building, Fire, and life safety codes for tables and chairs.
- #9 – The applicant will apply for a permit with Lee County to paint or otherwise delineate the sidewalk area running along the Estero Boulevard frontage of the subject property.
- #10 – The sliding doors providing access from the existing restaurant to the proposed outdoor deck must remain closed, aside from regular ingress and egress functions when indoor music is being played.

She reported that after the LPA Meeting staff took note of their discussions on:

- Sidewalks in the subject area [LPA Condition #9] - she indicated on the displayed photograph where there was an existing sidewalk delineated by painted lines.
- Visibility – She displayed an amended site plan submitted by the applicant and indicated the deck had been ‘pulled back’.

Town Attorney Miller asked if the revised site plan indicated the new square footage.

Zoning Coordinator Dulmer responded in the affirmative; and added that the applicant would probably be able to answer the question. She continued to report that after the LPA Meeting staff noted their discussion on:

- Noise – She displayed a graphic of the subject property and the purchased sale of properties surrounding the subject property [1993 & before and 1994 & after] as it pertained to the opening date of the Beached Whale.

She reported that staff recommended the removal of LPA’s recommended Condition #9 since it had already been met.

Council Member Andre asked, with respect to the sidewalk, how was this different from ‘Jay’s Hardware’.

Zoning Coordinator Dulmer stated she was uncertain if it was different.

Public Works Director Lewis explained that at Jay’s Hardware the owner had painted the lines; however, they had ‘cross-hatched’ the space so it appeared that no one should utilize the space which created a hazard. She added that bollards were also installed that caused two-way pedestrian traffic in front of the store that had to go out into the roadway. She reported the County came out and corrected the situation and left the white stripes. She noted the County, through the Town, did do the existing demarcation in front of the Beached Whale and the hot dog stand.

David Easterbrook, Easterbrook Consulting & Design and representing the applicant, discussed his views of the Town’s Comprehensive Plan. He requested, on behalf of his client the applicant, for a positive vote from the Council. He noted how he worked with staff on the project and his belief that the project would be positive for the Town.

Vice Mayor Kosinski asked how far back the edge of the deck was from the painted sidewalk.

David Easterbrook stated it was six feet.

Council Member List asked for the dimensions of the deck since the size had been modified.

David Easterbrook stated it was approximately 626 square feet.

Discussion was held regarding the visibility triangle and line-of-sight as it related to the deck and vehicular traffic; requirements for a special exception application regarding site plan drawing and

engineered drawings with surveyed lines; new deck dimensions and allowable seating according to the Fire Code; and the first floor deck elevation of 42 inches.

Vice Mayor Kosinski asked for the applicant's view on the LPA recommendation to restrict the COP to 11:00 p.m.

David Easterbrook reported the applicant really wanted to operate between 7:00 a.m. and 2:00 a.m.; and added that the Surf Club, Mermaid Club, and SOB operated during those hours.

Planning Coordinator Overmyer displayed and reviewed a graphic that depicted approved special exceptions for COP with outdoor seating and a limitation on the hours of operation.

David Easterbrook clarified that the applicant was not requesting outdoor entertainment for upstairs and had requested acoustical music on the downstairs deck only. He stated that if music was the issue, they did not need it on the proposed deck since they were mainly interested in serving beverages and food. He reported the upper deck closed at midnight.

Zoning Coordinator Dulmer explained that the original decision by the County Hearing Examiner approved hours of operation for the upper deck from 11:00 a.m. to 11:00 p.m. daily.

Council Member Raymond questioned hours of operation for inside and outside as described by staff.

Planning Coordinator Overmyer clarified that the hours of operation he noted were for the special exception outdoor lower deck entertainment portion only.

Mayor Mandel requested clarification that the hours noted by staff for the special exception outdoor entertainment all ended at 11:00 p.m. or earlier with the exception of one business in Times Square.

Planning Coordinator Overmyer responded in the affirmative.

Mayor Mandel indicated he had received concerns from constituents regarding the vehicular line-of-sight as it pertained to the proposed lower deck.

Community Development Director Fluegel explained that if the special exception was approved, the applicant would have to come in for a Limited Development Order and a building permit; and at the time of the LDO the Town would require the site geometry for the visibility triangle and that the Town's Development Code had requirements for vehicular line-of-sight to the right-of-way.

Town Manager Stewart noted that the applicant would be required to submit a survey to validate the project was meeting the criteria of the special exception as part of the Limited Development Order review.

Discussion ensued concerning the required documentation to be submitted after an approval of a special exception; and the dimension of the existing crosswalk from the Beached Whale property line.

Town Attorney Miller explained there were three types of zoning actions (rezoning, special exception, and a variance); and that Council's function was to determine whether the special exception needed to be conditioned to make it compatible. She added that the applicant would still have to comply with building codes and engineering standards for the vehicular line-of-sight.

Council Member Andre questioned if there was a need for buffers.

Zoning Coordinator Dulmer stated that no buffering was required in the Downtown Zoning District; and added the applicant was requesting the Consumption on Premises on the new deck and that the applicant currently a COP for both inside the building and for the upper deck.

Town Attorney Miller pointed out that if the applicant was only seeking the proposed deck, then the application would go through the administrative approval process and not require Council approval.

Mayor Mandel noted that if the special exception was approved, it was conditional upon all the conditions and safety/transportation issues being met. Mayor Mandel asked if a member from LPA was present for comment.

Joann Shamp, Vice Chair of the LPA, reported the LPA held their Public Hearing on the Beached Whale on April 9, 2013 where their discussion centered on pedestrian and bicyclist safety; preserving the public right-of-way on Estero Boulevard, Palermo Circle, and Primo Drive; obstruction to vehicular line-of-sight; mitigation of noise intrusion into the surrounding residential neighborhood; and identifying hours of operation. She reviewed the information that Council had received and the LPA had not received:

- Hours and conditions of the existing upper deck
- Hours and conditions for COP and music of surrounding properties
- Photo of the painted sidewalk
- Location of the stop sign at Primo Drive in relation to the deck location

She noted that the LPA found out there was the existence of a bus stop in the area. She explained LPA concerns regarding pedestrian and patron safety as it pertained to the raised deck and the busy traffic intersection. She added that the LPA was unaware at their meeting that a school bus stop existed; and that the LPA supported the elimination of back-out parking. She clarified the LPA's Condition #9 was for the property owner to obtain the permit from Lee County to paint the sidewalk the way they wanted and for the right-of-way to stay open. She reported that neighbors and a business owner voiced their concerns regarding the special exception during Public Comment at the April 9<sup>th</sup> LPA Meeting. She reviewed the basis for the conditions recommended by the LPA. She reported the special exception was approved by a vote of 6-0. She discussed her *personal* views on the proposed deck and how the height of the deck might be considered.

Public Comment opened.

Tracey Gore, resident, explained that she had many questions concerning the special exception request. She noted her belief that the special exception should be sent back to the LPA since it was indicated there was information that the LPA had not received at the time of their hearing; that the outdoor music would intrude into her neighborhood; and questioned if a menu had been submitted by the applicant to insure the appropriate food was served at the appropriate time. She discussed her opinion on staff's

review of the application; concerns about COP near a school bus stop; delivery trucks on Primo Drive; and questioned the number of tables/chairs for the proposed deck. She displayed a picture of the stop sign at Primo Drive that needed maintenance to remove stickers.

Town Manager Stewart addressed Ms. Gore's questions with respect to staff responses to her questions.

Ms. Gore reviewed her objection to the outdoor music, the dimensions of the proposed deck, and ingress/egress issues on Primo Drive.

Dick Swenson, resident, recapped past pedestrian/vehicle accidents on Estero Boulevard and noted his concerns about the line-of-sight for the vehicles at the subject location. He questioned the updated dimension of the proposed deck, and the dimension of the roof as depicted on the site plan.

Garr Reynolds, resident, discussed his opinion regarding staff responses to some of the Council's questions; complimented Ms. Gore on her work on the matter; and his belief that the request should be decided in December/January when more residents were here. He noted his concerns regarding three streets intersecting at the subject property; potential for increased noise; the school bus stop; and the hours of operation for COP. He explained he would like to see Times Square activity remain in Times Square; and questioned the location of the subject property as it related to zoning.

Jeannette Swenson, resident, stated she concurred with the previous speakers. She noted her past difficulties with driving down Primo Street as it related to the subject property and vehicular line-of-sight; noise intrusion into her neighborhood; and problems at night with customers from the Beached Whale. She explained her views on how her neighborhood was different from other areas in the downtown area because it involved residences along the street with a commercial business at the end.

Public Comment closed.

LPA Vice Chair Shamp requested Zoning Coordinator Dulmer to display the aerial view of the subject property used during the staff presentation. She expressed her view that the applicant had been very responsive during the special exception process. She questioned the yellow line as compared to the subject building that was depicted on the aerial view.

Zoning Coordinator Dulmer explained the yellow line was the Property Appraiser's line; and added that it was very rare that they line-up exactly and it was not a specific engineered drawing. She stated the Town did have a survey to confirm the property lines.

Planning Coordinator Overmyer explained the process conducted by the Property Appraiser when taking aerial photographs and why the lines would appear to be off.

David Easterbrook, Easterbrook Consulting & Design and representing the applicant, clarified that the proposed outdoor music was only going to be 'unplugged' acoustic guitar, and that the applicant was willing to remove that item from the request. He added that there was no music on the upstairs deck except for music '*piped in through small speakers*'. He explained that the deck was reduced by 10 square feet, and calculations would be required again when they submitted a full set of plans. He stated

that he had to comply with the rules set forth by the Council, plus the Comprehensive Plan and Lee County. He added that it was not the intention of the Beached Whale to get customers to start drinking at 7:00 a.m. and that the applicant was willing to have the morning hours commence at 9:00 or 10:00 a.m.

Community Development Director Fluegel noted that the LPA voted 6-0 to move the matter forward to Council, and that the LPA (as does Council) has the right to continue an item if they believe they do not have sufficient information to evaluate the application. He pointed out that the LPA approval included recommendations which addressed some of their concerns. He addressed some of the questions raised during Public Comment:

- School bus stop – noted the school bus stops can shift from time-to-time; the Council could evaluate that matter, and staff did not evaluate it at the time of review.
- Some questions asked of staff by Ms. Gore in emails - seemed to be statements and not questions which appeared to be better asked on the record.
- Prior special exceptions approved by Lee County [for the Beached Whale] – one was an administrative approval and one approval went through a Lee County Hearing Examiner.

Zoning Coordinator Dulmer explained that in the Staff Report given to the LPA the staff did not include the special permit for the upstairs deck because the request from the applicant was for a whole new deck on a different level dealing with a COP on that deck. The applicant did not request any changes, amendments, or anything different to the upstairs deck. She explained the information on the upstairs deck was included in the Council packet in response to the questions and concerns brought up subsequent to the LPA Meeting. She explained the purpose of the public hearing process performed today.

Community Development Director Fluegel explained that comments staff hears at LPA Meetings and subsequent to the LPA Meetings causes them to anticipate what additional information Council may want to receive; therefore, staff went back to the applicant to ask for a revised conceptual site plan to depict the site visibility triangle.

Zoning Coordinator Dulmer noted that staff also added information to Council on the hours of operation and conditions for the upper deck and the photo of the sidewalk.

Town Manager Stewart asked if there was any section of the Code that would require staff to include any information about other approvals already granted if it was not modifying that prior approval.

Zoning Coordinator Dulmer responded in the negative.

Town Attorney Miller noted that the information about the upper deck was not part of the subject application because they were not seeking a change to the upper deck.

Discussion ensued regarding the previous approvals by Lee County for the upper deck and the interior at the subject property.

Town Attorney Miller noted the applicant had the ability to apply for the COP for the proposed deck. She explained she did not believe the applicant's request was an expansion; that it was not presented as part of the factual background to the LPA, but she believed it was discussed at the LPA and that the LPA was fully aware that there was a special exception granted by Lee County for the upper deck. She explained that if the Council felt the LPA should reconsider that matter, it was their prerogative to continue the hearing and send it back to the LPA, but legally the Council was not required to do so. She stated the upper deck approval was the COP outside; and noted the applicant could build the deck, but it was the COP outside on the deck that required the special exception process by Council.

Discussion was held concerning the previously approved upper deck COP and the proposed lower deck COP request.

Council Member Andre questioned the recommendations from the Lee County Hearing Examiner.

Town Attorney Miller stated those recommendations remained and the Council could not address them. She explained that staff was not approving the special exception for the COP and that was Council's decision to make at this time.

Discussion was held pertaining to Chapter 34 – COP and the special exception process; the visibility triangle concern; noise concern; and hours of operation concern.

Council Member Raymond mentioned his concern about Council's ability to assign hours to the lower deck but not the upper deck.

**Recessed at 10:45 a.m. – Reconvened at 11:06 a.m.**

Council Member Raymond indicated he was glad the deck dimensions had been reduced from the original plan. He questioned if there would be landscaping around the deck. He explained why the Surf Club hours ended at 9:00 p.m. due to the residences located behind the business. He reviewed his views on the hours of operation and questioned if the required number of parking spaces would be impacted.

Zoning Coordinator Dulmer reported the applicant still had sufficient parking even after the six back-out spaces would be removed.

Discussion was held concerning information that was and was not provided to the LPA regarding the special exception application.

Council Member Raymond noted his concern regarding a 'painted sidewalk' and asked if it could be a requirement to install a 'real sidewalk'.

Town Attorney Miller explained if the County would permit a 'real sidewalk' then it could be a condition for the applicant to submit an application to the County for installation of a sidewalk; however, it was the County's right-of-way.

Discussion was held regarding the sidewalk and future improvements to Estero Boulevard.

Town Attorney Miller reiterated why the hours of operation for the upper deck could not be changed by Council at this time; and explained Council's ability to address the hours of operation only on the lower deck.

Discussion was held concerning noise levels and decibel levels; the upcoming noise ordinance; and the subject request for non-amplified music and outdoor television.

Town Attorney Miller reported there was discussion concerning the indoor amplified music which was the basis for the condition that addressed the doors to be closed.

Vice Mayor Kosinski clarified it was staff's position not to have landscaping around the deck due to it being an obstruction to the vehicular line-of-sight.

Zoning Coordinator Dulmer added that buffers were not required in the Downtown Zoning District, and that there was a concern depending upon the height and/or location of any shrubs/trees there might be interference with visibility coming out of Primo Drive/Palermo Circle.

Vice Mayor Kosinski requested the stop sign at Primo Drive be cleaned.

Town Manager Stewart stated he had already listed the problem in his notes.

Discussion was held concerning the information that the LPA did not receive; and dimensions of the proposed deck and the triangle of sight.

Council Member List told of her experience with noise in the Downtown as it related to the location of her residence; changes in the Town during the past 18 years for both residential and commercial; the Beached Whale being a 'good neighbor'; and impacts to the residents on Primo Drive and Palermo Circle over the years. She noted the importance of the vehicular line-of-sight; the need to find a solution regarding the delivery trucks; and the hours of operation as it related to a vacation destination town.

Council Member Andre agreed with the necessity to address the dangerous situation with the delivery trucks. He reviewed the approval by the County as it pertained to the upper deck seating.

Town Attorney Miller noted that the number of seating was an issue that was addressed through the Fire Code.

Discussion ensued regarding the proposed deck seating permissible by the Fire Code; the proposed motion listed on Blue Sheet Number 2013-054; reduced dimensions of the proposed deck; possible buffering on the inside of the rail on the deck; visibility issues with vegetative buffering on the outside of the proposed deck; the site visibility triangle noted in the Code; potential for improving sight visibility at the subject property; sidewalks; hours of operation; tables and chairs on the deck controlled by the Fire Code; and noise issues.

Town Manager Stewart questioned if the hours of operation for COP were changed, would that restrict only the service of alcohol to those hours and not the service of food.

Mayor Mandel explained the service of alcohol would be limited to begin at 11:00 a.m. until 11:00 p.m., but the service of food may start at 7:00 a.m.; and that the applicant agreed there would be no music at all on the lower deck.

Mr. Easterbrook noted that there would be televisions on the lower deck (approximately six).

Council Member Raymond questioned the status of the sidewalk.

Town Attorney Miller explained the approval could not be contingent upon the applicant getting approval from the County for the sidewalk, but it could be conditioned that the applicant apply to the County.

Discussion ensued regarding the sidewalk at the subject site; the approval from the County for the upper deck as it pertained to music; and lighting on the deck to comply with sea turtle regulations.

**MOTION:** Council Member List moved to approve the request for a special exception (SEZ2013-0001) in the Downtown Zoning District to permit outdoor consumption on premises to include 626 square feet or less of a proposed new deck at the front of the existing building on the subject property with Conditions #1-9 as contained in the draft Resolution 13-09:

**RECOMMENDED CONDITIONS OF APPROVAL:**

1. Consumption on premises is limited to the building located on the subject property at 1249 Estero Boulevard and proposed new lower outdoor deck depicted on the attached Exhibit C.
2. Hours of operation for consumption on premises shall be limited to the hours of 7:00 AM to 2:00 AM, daily for inside the building and 11:00 AM to 11:00 PM daily for the lower outdoor deck area.
3. No live music is permitted. Outdoor televisions shall be limited to from 11:00 AM to 11:00 PM daily.
4. Any proposed roof overhangs and/or projections must meet the Commercial Design Standards set forth in LDC Section 34-991 and specifically Section 34-995(e).
5. All work proposed to be done will require Limited Review Development Order and any other permits determined to be necessary at the time of permitting.
6. No required parking spaces, including required ADA spaces, may extend into the Town or Lee County right-of-way.
7. The applicant shall provide an impervious retention area under the proposed outdoor deck to assist with stormwater retention.
8. The outdoor seating on the proposed outdoor deck will at all times comply with current building, fire and life safety codes for tables and chairs.
9. All doors providing access from the existing restaurant to the proposed outdoor deck must remain closed, aside from regular ingress and egress functions, when indoor music is being played.

**RECOMMENDED FINDINGS AND CONCLUSIONS:**

In accordance with the requirements of LDC Sections 34-84 and 34-88 regarding consideration of eligibility for a special exception, the LPA recommends that the Town Council make the following findings and reach the following conclusions:

1. Changed or changing conditions **do not** exist that make the requested approval, as conditioned, appropriate;
  2. The requested special exception, as conditioned, **is** consistent with the goals, objectives, policies, and intent of the Fort Myers Beach Comprehensive Plan;
  3. The requested special exception, as conditioned, **meets or exceeds** all performance and locational standards set forth for the proposed use;
  4. The requested special exception, as conditioned, **will** protect, conserve, or preserve environmentally critical areas and natural resources;
  5. The requested special exception, as conditioned, **will** be compatible with existing or planned uses and **will not** cause damage, hazard, nuisance or other detriment to persons or property;
- The requested special exception, as conditioned, **will** be in compliance with the applicable general zoning provisions and supplemental regulations pertaining to the use set forth in LDC Chapter 34.

**SECOND:** Council Member Raymond

**VOTE:** Motion approved, 4-0; Vice Mayor Kosinski abstained.

Town Attorney Miller addressed the issue of delivery trucks contained in Chapter 28-20 and stated staff would review to see if the applicant was in compliance or if the code needed to be modified.

Public Hearing closed at noon.

## **XII. ADMINISTRATIVE AGENDA**

### **A. Central Parking Systems of Florida, Inc./BASE Contract Extension**

A request to approve Amendment No. 6 to the Service Provider Agreement between the Town and Central Parking Systems of Florida, Inc. to extend the term of the Agreement to September 15, 2013.

Town Manager Stewart briefly reviewed the request was to approve an amendment to the Service Provider Agreement between the Town and Central Parking Systems of Florida, Inc. to extend the term of the Agreement to September 15, 2013.

Public Comment opened.

No speakers.

Public Comment closed.

**MOTION:** Vice Mayor Kosinski moved to approve Amendment No. 6 to the Service Provider Agreement between the Town and Central Parking Systems of Florida, Inc. to extend the term of the Agreement to September 15, 2013; second by Council Member List.

**VOTE:** Motion approved; 5-0.

**B. Bulk Water Rate Increase**

A request for Town staff to move forward with the public notification associated with the proposed potable water rate increase and set September 3, 2013 at 9:00 a.m. for a Public Hearing.

Town Manager Stewart briefly reviewed the request for the bulk water rate increase that came from the County who had conducted a rate analysis showing they needed to increase their rates. He noted Council's action was not to approve the increase but to have staff begin notifying the public and to set a Public Hearing date.

Public Comment opened.

No speakers.

Public Comment closed.

**MOTION:** Council Member List moved to authorize staff to move forward with the public notification associated with the proposed potable water rate increase and set September 3, 2013 at 9:00 a.m. for a Public Hearing; second by Council Member Andre.

**VOTE:** Motion approved; 5-0.

**XIII. PUBLIC COMMENT**

**XVII. TOWN MANAGER'S ITEMS**

**A. Mound House Update**

Town Manager Stewart reported he had no new issues; and added that he could review the Mound House Report now or at the Work Session later.

Consensus was to review the Mound House Update Report at the Work Session.

**XVIII. TOWN ATTORNEY'S ITEMS**

Town Attorney Miller – no items or report.

**XIX. COUNCILMEMBER ITEMS AND REPORTS**

Council Member Raymond – reported he had received three phone calls during the past week concerning Ocean Harbor as it pertained to a title and right-of-way. He asked if it would be a topic for Agenda Management.

Discussion ensued regarding the right-of-way and Newton Park.

Town Manager Stewart reported Council had dealt with this matter on at least three different occasions; and pointed out that the Town Attorney has indicated the Town's ownership of the right-of-way was clear and unequivocal, and the Town had every right to do what was done. He stated Council could go back and address the matter and make a change; however, he recommended that Council did not do so.

Discussion ensued regarding the request from Ocean Harbor.

Town Attorney Miller stated two years ago she had prepared a written legal opinion on the matter and stated she would forward it to the Council Members.

Vice Mayor Kosinski – recognized the Mayor and Town Manager for the effort they made regarding the ability for the bridge to hold three lanes of traffic.

Council Member List – questioned property on Palermo Circle with construction issues.

Town Manager Stewart reported the property in question was built in violation of the code restrictions that currently exist.

Town Attorney Miller explained that if someone had an accessory structure that was not attached to the main structure it has a different set-back from a water body than something attached to the main structure. She reported that on the original plans for the property it showed the structure was not attached; however, when built it was attached to the main structure. She indicated it was her understanding that the engineer was redoing the plans to separate the two structures.

Discussion ensued regarding how the accessory structure was attached to the main structure; the current process in place for registering contractors doing work in Town; and how the Town worked with the building industry concerning unlicensed contractors.

Town Attorney Miller reviewed how contractors registered with the State and how people could research certified contractors through the DBPR website.

Council Member Andre – no items or reports.

Mayor Mandel – requested the Town Attorney send him an email when these two items were completed - garnishment phrasing for the Personnel Rules, and the request to reinstate the 501(3)(c) for the pool.

Town Attorney Miller explained that by statute the Town would receive attorney fees and cost as it pertained to garnishment; and she would check to see if she had the information on the 501(3)(c) for the pool or it might be in her office.

Mayor Mandel – asked if the Town should send back the ILA to the County asking them to not unreasonably withhold any suggestions the Town would make to the County as it pertained to County projects or work in the Town.

Town Attorney Miller stated she would be preparing language for the ILA and sending it back to Mr. Loveland at the County.

Mayor Mandel – asked when the ‘circle’ might occur around Seafarer’s.

Town Attorney Miller reported she met with Calvin Giordano [consultant] and that the consultant was making a lot of progress on that issue.

Town Manager Stewart reported staff was working on the matter of the ‘circle’ around Seafarer’s.

Town Attorney Miller gave the paperwork to the Mayor regarding the 501(3)(c) for the pool.

## **XX. AGENDA MANGEMENT**

No discussion.

## **XXI. RECAP OF ACTION ITEMS**

No discussion.

## **XXII. ADJOURNMENT**

Motion by Vice Mayor Kosinski; second by Council Member List to adjourn. Meeting adjourned at 12:21 p.m.

Adopted \_\_\_\_\_ With/Without changes. Motion by \_\_\_\_\_

Vote: \_\_\_\_\_

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Michelle D. Mayher, Town Clerk

- End of document.



**APPOINTED OFFICERS (continued)**

- A copy of the form must be provided immediately to the other members of the agency.
- The form must be read publicly at the next meeting after the form is filed.

IF YOU MAKE NO ATTEMPT TO INFLUENCE THE DECISION EXCEPT BY DISCUSSION AT THE MEETING:

- You must disclose orally the nature of your conflict in the measure before participating.
- You must complete the form and file it within 15 days after the vote occurs with the person responsible for recording the minutes of the meeting, who must incorporate the form in the minutes. A copy of the form must be provided immediately to the other members of the agency, and the form must be read publicly at the next meeting after the form is filed.

**DISCLOSURE OF LOCAL OFFICER'S INTEREST**

I, Joseph C. Kosinski, Vice Mayor, hereby disclose that on June 3, 2013:

(a) A measure came or will come before my agency which (check one)

- inured to my special private gain or loss;
- inured to the special gain or loss of my business associate, JC Kosinski Engineering, Inc;
- inured to the special gain or loss of my relative, \_\_\_\_\_;
- inured to the special gain or loss of \_\_\_\_\_, by whom I am retained; or
- inured to the special gain or loss of \_\_\_\_\_, which is the parent organization or subsidiary of a principal which has retained me.

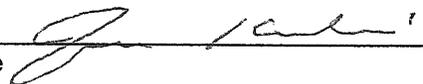
(b) The measure before my agency and the nature of my conflicting interest in the measure is as follows:

Case#SEZ2013-0001 The Beached Whale Special Exemption.  
I was the Engineer of Record for the project.

Date Filed

6-3-13

Signature



NOTICE: UNDER PROVISIONS OF FLORIDA STATUTES §112.317, A FAILURE TO MAKE ANY REQUIRED DISCLOSURE CONSTITUTES GROUNDS FOR AND MAY BE PUNISHED BY ONE OR MORE OF THE FOLLOWING: IMPEACHMENT, REMOVAL OR SUSPENSION FROM OFFICE OR EMPLOYMENT, DEMOTION, REDUCTION IN SALARY, REPRIMAND, OR A CIVIL PENALTY NOT TO EXCEED \$10,000.