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# Memorandum

**To:** Chair, Vice Chair, LPA Members, Town of Fort Myers Beach  
**CC:** Town Manager, Community Development Director, Town Clerk  
**Date:** July 3, 2009  
**Subject:** Draft Liquor License Ordinance/Legal Comments

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Pursuant to LPA direction, below are legal comments on the referenced draft ordinance which is attached and which carries a watermark of "070309".

1. **Definitions of "place of worship" and "religious facilities"** (Section 4 Definitions, page 3):
  - These definitions are currently located in LDC Chapter 34- 2 . The LDC will need to be concurrently modified if these definitions are changed in this ordinance.
  - It is recommended that staff or the consultant review the impact that consolidating these two definitions would have on the remainder of the LDC, in the hope that they can be consolidated into one definition for ease of use.
  - It is recommended that these definitions be broadened out to include other forms of worship in addition to church or synagogue, such as mosques, for example.
  - The current definition makes a distinction between "place of worship" having instruction for classes of 100 or less children during the week, and "religious facilities" having instruction for classes for more than 100 children during the week.
  - The definition for "place of worship" carries over the LDC distinction of classes for 100 or less children, while the definition of "religious facilities" includes classes for over 100 children during the week. If the LPA recommends, and Town Council adopts, a new ordinance which incorporates this older language, the legislative history in this adoption process must set forth the basis for a distinction between over 100 and under 100 children.
  - The definition of "religious facility" needs to be clarified in that only religious assisted living facilities are encompassed by this definition.
  
2. **Hours of business** (Section 5. Hours of Business during which sales or service, consumption and occupancy are prohibited):
  - The LPA has not yet officially taken a position regarding altering the hours of sales or service (subsection a) or the hours of consumption and occupation (subsection b). Accordingly, I have not yet done any research on the legal implications of altering previously-granted COP

approvals which are shortened by the legislative process. In general, the Town has the ability to pass ordinances changing the rules under which businesses can operate, but if the LPA decides to move forward with a recommendation of shortened hours, I will provide a legal opinion on this subject upon request.

3. **Prohibited locations** (Section 6. Alcoholic beverage establishments; prohibited locations; measuring distances; exceptions)
  - This language tracks current LDC Section 34-1264 (b), except that it is more limiting as to dwelling units (the LDC restriction is as to “a dwelling unit under separate ownership, except when approved as part of a planned development; the proposed ordinance does not contain the “planned development” language)
  - The LPA and Town Council may wish to develop legislative history as to why the 500 foot prohibitions apply to a dwelling unit under separate ownership and another alcoholic beverage establishment. It would also be a good idea to have on the record why this prohibition applies to a child day care center, park, place of worship or religious facility, although presumably the same rationale which caused the state to prohibit alcoholic beverage establishments within 500 feet of a school (FS 562.45) would apply to the day care centers, etc.
4. **Hotel/Motel Bars** (Section 6 (c) (2)(c) Alcoholic beverage establishments, Exceptions, hotel/motels)
  - The language regarding sales or service only to patrons of the hotel/motel or resort, plus associated signage, should be reviewed to ensure it is consistent with current Town practices.
5. **Whereas Clauses.** I’ve added various “Whereas” clauses for LPA review.
6. **LDC Modifications**
  - It is imperative that the LDC provisions which are inconsistent with this ordinance be concurrently revised, to avoid confusion.

**TOWN OF FORT MYERS BEACH  
ORDINANCE NO. 09-\_\_\_**

**AN ORDINANCE OF THE TOWN OF FORT MYERS BEACH, FLORIDA, TO BE KNOWN AS THE TOWN OF FORT MYERS BEACH LIQUOR LICENSE RESTRICTION ORDINANCE; PROVIDING AUTHORITY; TITLE AND CITATION; FINDING OF NECESSITY; DEFINITIONS; HOURS OF BUSINESS DURING WHICH SALES OR SERVICE, CONSUMPTION, AND OCCUPANCY ARE PROHIBITED; ALCOHOLIC BEVERAGE ESTABLISHMENTS; PROHIBITED LOCATIONS; MEASURING DISTANCES; EXCEPTIONS; PENALTIES; SEVERABILITY; REPEALING CLAUSE AND **REPEALING ORDINANCE NO. 96-06**; AND PROVIDING EFFECTIVE DATE.**

WHEREAS, Article VIII, Section 2 of the Constitution of the State of Florida and Chapter 166 of the Florida Statutes provide that municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and exercise any power for municipal purposes except when expressly prohibited by law; and

WHEREAS, Article X of the Town Charter empowers the Town to adopt, amend, or repeal such ordinances and resolutions as may be required for the proper governing of the Town; and

WHEREAS, the Town Council finds that there is a public need affecting life, health, public peace, safety, security, welfare and property of persons inside the municipal limits of the Town so as to require the Town to pass regulations and restrictions regarding liquor licenses within the Town and further that such passage is needed for the effective administration and operation of the Town.

**IT IS HEREBY ORDAINED BY THE TOWN OF FORT MYERS BEACH, FLORIDA as follows:**

**SECTION 1: Incorporation of “Whereas” Clauses.**

The above “Whereas” clauses are hereby incorporated by reference.

**SECTION 2: Authority, Title and Citation.**

This Ordinance is enacted pursuant to the provisions of Chapter 95-494, Laws of Florida, Chapters 163 and 166, Florida Statutes, and other applicable provisions of law. It will hereafter be known and cited as the “TOWN OF FORT MYERS BEACH LIQUOR LICENSE RESTRICTION ORDINANCE.”

### **SECTION 3. Finding of Necessity.**

The Town Council finds that there is a public need affecting life, health, public peace, safety, security, welfare and property of persons inside the municipal limits of the Town so as to require the Town to pass regulations and restrictions regarding liquor licenses within the Town and further that such passage is needed for the effective administration and operation of the Town.

### **SECTION 4. Definitions.**

For the purpose of this Ordinance the following terms, phrases, words, and their derivations have the meaning given herein. When not inconsistent with the context, words used in the present tense include the future, words used in the plural include the singular, and words used in the singular include the plural.

**Alcoholic beverage** means distilled spirits and all beverages containing one-half (1/2) of one percent (1%) or more alcohol by volume. This definition is intended to accord with the definition in the Beverage Law.

**Alcoholic beverage establishment** means any establishment within the municipal limits of the Town that meets all local zoning requirements, possesses all municipal and county permits required by law, and is currently licensed by the division of alcoholic beverages and tobacco for the sales or service of alcoholic beverages for consumption off the licensed premises, on the licensed premises, or both.

**Bar** means an operation the primary activity of which is the sales or service of alcoholic beverages for consumption on the premises.

**Beverage Law** means chapters 561 through 565, 567, and 568 of the Florida Statutes.

**Day care center, child** means a facility or establishment that provides care, protection, and supervision for six or more children unrelated to the operator and that receives consideration for any of the children receiving care, whether or not operated for profit. This definition does not include public or nonpublic schools that are in compliance with the Compulsory School Attendance Law, Ch. 322 Florida Statutes. The term "child day care center" is synonymous with the terms "preschool" and "nursery school."

**Dwelling unit** means a room or rooms connected together that could constitute a separate, independent housekeeping establishment for a family, for owner occupancy, or for rental or lease on a weekly, monthly, or longer basis as specified for various zoning districts in the Land Development Code, as amended from time to time, and is physically separated from any other rooms or dwelling units that may be in the same structure, and that contains sleeping and sanitary facilities and a kitchen.

**Full course meals** means food items available on a standard menu that include soups, salads, side orders, entrées, non-alcoholic beverages, and desserts.

**Hotel/motel** means a building, or group of buildings on the same premises and under single control, that are kept, used, maintained, or advertised as, or held out to the

public to be, a place where sleeping accommodations are supplied for consideration to transient guests for periods of one day or longer.

**Hotel bar** means a bar operated in connection with any hotel/motel or multiple-family building with more than 100 units, operated by the same owner or management, licensed by the state for, and engaged primarily in, sales or service of alcoholic beverages under the Beverage Law for consumption on the premises during the hours of operation of the hotel business not prohibited by this Ordinance.

**Hours of operation** means the posted hours that an establishment is open to the public for business within the limitations on hours of business established by this Ordinance.

**Licensed premises** means not only rooms where alcoholic beverages are stored or sold by the licensee, but also all other rooms in the building which are so closely connected therewith as to admit free passage from rooms where alcoholic beverages are stored or sold by the licensee to other rooms over which the licensee has some dominion or control and also includes all of the area embraced within the sketch appearing on or attached to the application for the license involved and designated as such on said sketch, in addition to that area included or designated by general law. This definition is intended to accord with the definition in the Beverage Law.

**Membership organization** means an organization operating with formal membership requirements with the intent to pursue common goals or activities.

**Package goods** means any container of alcoholic beverages.

**Package store** means an alcoholic beverage establishment licensed by the state where alcoholic beverages and package goods are sold only in sealed containers for consumption off the premises.

**Parcel of land** means real property capable of being described with such definiteness that its location and boundaries may be established, that is designated by its owner or developer as land to be used or developed as a unified whole, or that has been used as a unified whole.

**Park** means a recreational area open to the public that serves the immediately surrounding neighborhood, entire community, or larger area, including all preserves, open spaces, playgrounds, recreation facilities and fields, museums, auditoriums, ranges and buildings, lakes, streams, canals, lagoons, waterways, pools, causeway bridges, roadways, marinas, piers, and abutting lands and adjacent littoral waters, that are used for recreational purposes, or as parks, and the pertinent rights-of-way presently under or hereafter acquired and placed under the jurisdiction, control, and administration of the Town, and all public service facilities located on grounds, buildings, and structures in the Town that are under the control of or assigned for upkeep, maintenance, or operation by the Town.

**Person** means any individual, association, corporation, estate, firm, limited partnership, partnership, trust, or other legal entity.

**Place of worship** means a structure or structures designed primarily for accommodating an assembly of people for the purpose of religious worship, including but not limited to related religious instruction, church, or synagogue ministries involving classes for 100 or less children during the week, and other church or synagogue sponsored functions that do not exceed the occupancy limits of the building.

**Premises** means any lot, area, tract, or parcel of land.

**Religious facilities** means religious-related facilities and activities that may include, but are not limited to, bus storage facilities or areas, convents, rectories, monasteries, retreats, church or synagogue ministries involving classes for more than 100 children during the week, and assisted living facilities.

**Restaurant** means an establishment engaged primarily in the sales or service of food and beverages in a ready-to-consume state.

**Restaurant, bona fide** means a restaurant that is also an alcoholic beverage establishment that:

(a) is engaged primarily in the service of food and non-alcoholic beverages, where the sales or service of alcoholic beverages is incidental to the sale and service of food and non-alcoholic beverages; and

(b) meets all local zoning requirements, and possesses all municipal and county permits required by law; and

(c) is currently and lawfully licensed by the division of hotels and restaurants of the department of business and professional regulation; and

(d) offers and serves full course meals with full kitchen facilities and food preparation staff capable of preparing and serving full course meals continuously during all hours of operation; and

(e) has a customer service area consisting of tables and chairs, or customer counters, and kitchen facilities, restroom facilities, pantries, and storage room(s) that, aggregated together, comprise no less than 75 percent of the gross floor area, and that are adequate to accommodate the service of full course meals; and

(f) has a sufficient total number of seats or chairs at tables, counters, and bars within the customer service area to accommodate the full occupant load as determined by the town in accordance with the provisions of the Florida Building Code and the Florida Fire Code or successor codes.

This definition is intended to accord with the definition in the Beverage Law.

**Restaurant bar** means a bar operated in direct connection with a bona fide restaurant and by the same owner or management, licensed by the state for sales or service of alcoholic beverages under the Beverage Law for consumption on the premises during the hours of operation not prohibited by this Ordinance.

**School** means an educational institution run by a public agency, a church or synagogue, or a not-for-profit organization.

**SECTION 5. Hours of business during which sales or service, consumption, and occupancy are prohibited.**

(a) **Sales or service.** The sales or service of alcoholic beverages on any licensed premises of an alcoholic beverage establishment is prohibited between the following hours:

- (1) 12 midnight on Monday and 7:00 a.m. on Monday.
- (2) 12 midnight on Tuesday and 7:00 a.m. on Tuesday.
- (3) 12 midnight on Wednesday and 7:00 a.m. on Wednesday.
- (4) 12 midnight on Thursday and 7:00 a.m. on Thursday.
- (5) 12 midnight on Friday and 7:00 a.m. on Friday.
- (6) 1:30 a.m. on Saturday and 7:00 a.m. on Saturday.
- (7) 1:30 a.m. on Sunday and 7:00 a.m. on Sunday.
- (8) On legal holidays established by state law, the hours of prohibition are the same for the days on which such holidays fall as for subsection (6), above. [on April 28, 2009, the LPA suggested that this subsection be removed and the provisions of subsection (b) below be the only limitations on hours of business.]

(b) **Consumption and occupation of establishments licensed for consumption on the premises.** The consumption of alcoholic beverages on and occupation of any alcoholic beverage establishment licensed for on the premises consumption is prohibited between the following hours:

- (1) 12:30 a.m. on Monday and 7:00 a.m. on Monday.
- (2) 12:30 a.m. on Tuesday and 7:00 a.m. on Tuesday.
- (3) 12:30 a.m. on Wednesday and 7:00 a.m. on Wednesday.
- (4) 12:30 a.m. on Thursday and 7:00 a.m. on Thursday.
- (5) 12:30 a.m. on Friday and 7:00 a.m. on Friday.
- (6) 2:00 a.m. on Saturday and 7:00 a.m. on Saturday.
- (7) 2:00 a.m. on Sunday and 7:00 a.m. on Sunday.
- (8) On legal holidays established by state law, the hours of prohibition are the same for the days on which such holidays fall as for subsection (6), above.

Alcoholic beverage establishments are prohibited from opening or remaining open to the public for business or to allow patrons, customers, or persons other than employees and vendors to remain on such licensed premises during the hours specified above.

(c) **More limited hours of operation.** Owners or operators of alcoholic beverage establishments or other lawful businesses regulated by this Ordinance, for business or other reasons, may choose more restrictive hours of operation than provided by this Ordinance. Nothing in this Ordinance will be construed to prevent an alcoholic beverage establishment from posting hours of operation more restrictive than those provide herein.

## **SECTION 6. Alcoholic beverage establishments; prohibited locations; measuring distances; exceptions.**

(a) **Prohibited locations.** Alcoholic beverage establishments are prohibited within 500 feet of:

- (1) A school; [required by § 562.45 of the Beverage Law].
- (2) A child day care center, park, place of worship, or religious facility;
- (2) A dwelling unit under separate ownership; and
- (3) Another alcoholic beverage establishment.

(b) **Measuring distances.** Distances must be measured from the nearest point on the perimeter boundary line of the parcel of land on which the alcoholic beverage establishment is located, in a straight horizontal line, to the nearest point on the perimeter boundary line of the parcel of land on which the prohibiting use is located.

(c) **Exceptions.**

(1) *Bona fide restaurants*, provided:

- a. The bona fide restaurant is in full compliance with the requirements of the state division of hotels and restaurants of the department of business and professional regulation; and
- b. The bona fide restaurant serves full course meals at all times during its hours of operation; and
- c. If the licensed premises includes a bar, only a restaurant bar is used and the sales or service of alcoholic beverages is only to patrons ordering meals or waiting to be seated at tables, and the restaurant bar is located so that there is no indication from the outside of the building and any associated structures that alcoholic beverages are available on the premises. The restaurant bar must be directly connected with the dining room and must be only a service bar for patrons of such restaurant. Stools are permitted at the restaurant bar and alcoholic beverages must be sold by the drink only. A package store or the sale of package goods from a restaurant bar is prohibited on the licensed premises. The sale of alcoholic beverages is prohibited when the restaurant is

not actually engaged in and open to the public for the service of full course meals; and

- d. The bona fide restaurant continues to comply with all applicable laws, regulations, and other definitional and regulatory requirements of the Land Development Code.

(2) *Hotel/motels and resorts*, provided:

- a. The hotel/motel or resort is not located within 500 feet of a school.
- b. The hotel/motel or resort contains at least [Option 1]: 100[Additional Option 2]: 50 units and any alcoholic beverage establishment(s) are under the same roof or on the same premises under unified control; and
- c. If the licensed premises includes a bar, only a hotel bar is used and the sales or service of alcoholic beverages is only to patrons of the hotel/motel or resort, and the hotel bar is located so that there is no indication from the outside of the building and any associated structures that alcoholic beverages are available on the premises. The hotel bar must be directly connected with and ancillary to the hotel/motel or resort. Stools are permitted at the hotel bar and alcoholic beverages must be sold by the drink only. A package store or the sale of package goods from a hotel bar is prohibited on the licensed premises. The sale of alcoholic beverages is prohibited when the hotel/motel or resort is not actually operating and open to the public as a hotel/motel or resort; and
- d. The hotel/motel or resort and all alcoholic beverage establishment(s) continue to comply with all applicable laws, regulations, and other definitional and regulatory requirements of the Land Development Code.

(3) *Membership organizations*, provided:

- a. The membership organization is not located within 500 feet of a school;
- b. The sales or service of alcoholic beverages is only to members and member-accompanied guests of the membership organization, and there is no indication from the outside of the building and any associated structures that alcoholic beverages are served on the premises; and
- c. The membership organization continues to comply with all applicable laws, regulations, and other definitional and regulatory requirements of the Land Development Code.

(4) *Nonconforming uses*. Any alcoholic beverage establishment lawfully operating on licensed premises prior to July 1, 1999 is exempt from the provisions of subsection (a) of this section, but is subject to the provisions for nonconforming uses in the Town Land Development Code, as amended, as long as it continues to comply with all applicable laws, regulations, and other definitional and regulatory requirements of the Land Development Code.

(5) *Other; town council approval required*.

- a. *Distance from schools.* Except for a bona fide restaurant, a resolution approving the location of an alcoholic beverage establishment within 500 feet of a parcel of land containing a school will be required prior to issuance of a use permit. In addition to the considerations and findings required for rezonings by Chapter 34 of the Land Development Code, prior to approval the local planning agency will review and make a recommendation and the town council must find that the location promotes the public health, safety, and general welfare of the community in accordance with § 562.45, of the Beverage Law.
- b. *Distance prohibition from all other uses.* Except for a bona fide restaurant, hotel/motel or resort, membership organization, or lawfully existing nonconforming use complying with the requirements of this Ordinance, a special exception in accordance with the requirements of the Land Development Code is required prior to issuance of a use permit for location of an alcoholic beverage establishment within 500 feet of a parcel of land containing a place of worship, religious facility, child day care center, park, dwelling unit under separate ownership, or another alcoholic beverage establishment.

The proceedings for such special exception must be in conformance with the provisions of Florida Statutes § 166.041(3)(c). These restrictions will not be construed to prohibit the issuance of special event permits as provided for in § 561.422 of the Beverage Law, the Land Development Code, and all other applicable regulations.

#### **SECTION 7. Penalties.**

Any person convicted of violation of Section 5 of this Ordinance may be punished by a fine not to exceed \$500.00 or by imprisonment in the County jail for a period not to exceed 60 days, or both. Such fine and imprisonment will apply to each such offense. If said violation involves the operation or occupation of a motor vehicle in violation of Section 316.1936 Florida Statutes, such person will also be guilty of a non-criminal moving traffic violation, punishable as provided in Ch. 318 Florida Statutes.

#### **SECTION 8. Severability.**

If any of the provisions of this Ordinance should be held contrary to any express provision of law or contrary to the policy of express law, although not expressly prohibited, or against public policy, or should for any reason whatsoever be held invalid, then such provision will be null and void and will be deemed separate from the remaining provisions of this ordinance, and in no way affect the validity of all other provisions of this Ordinance.

#### **SECTION 9. Repealing Clause.**

Ordinance 96-06 is specifically repealed by this Ordinance. All other ordinances or parts thereof in conflict with the provisions of this Ordinance are, to the extent of such conflict, hereby superseded and repealed.

#### **SECTION 10. Effective Date.**

This Ordinance will become effective immediately upon its adoption.

The foregoing was enacted by the Town Council upon a motion of Council Member \_\_\_\_\_ and seconded by Council Member \_\_\_\_\_ and, upon being put to a vote, the result was as follows:

Larry Kiker, Mayor \_\_\_\_\_  
Herb Acken, Vice Mayor \_\_\_\_\_  
Tom Babcock \_\_\_\_\_  
Jo List \_\_\_\_\_  
Bob Raymond \_\_\_\_\_

DULY PASSED AND ENACTED this \_\_\_\_\_ day of \_\_\_\_\_ 2009.

ATTEST: TOWN OF FORT MYERS BEACH,  
FLORIDA

By: \_\_\_\_\_ By: \_\_\_\_\_  
Michelle Mayher, Town Clerk Larry Kiker, Mayor

Approved as to form by:

\_\_\_\_\_  
Anne Dalton, Esquire  
Town Attorney