

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

TYPE OF CASE: Special Exception

CASE NUMBER: FMBSEZ2010-0005 (Surf Club)

LPA HEARING DATE: July 12, 2011

LPA HEARING TIME: 9:00 AM

I. APPLICATION SUMMARY:

Applicant: Cermak's Surf Club, LLC.

Request: Special Exception in the DOWNTOWN zoning district to allow consumption on premises of alcoholic beverages in a restaurant providing an outdoor seating area within 500 feet of dwelling unit under separate ownership.

Subject property: Crescent Park Addition
Lot 1 Block E Plat Book 4 Page 46

Physical Address: 1167 Estero Boulevard, Fort Myers Beach, FL 33931

STRAP #: 19-46-24-W4-0150E.001A

FLU: Pedestrian Commercial

Zoning: DOWNTOWN

Current use(s): Restaurant with 4COP beverage license

Adjacent zoning and land uses:

Adjacent properties are designated as Pedestrian Commercial on the Future Land Use Map (FLUM)

North: Canal

South: Mixed Use; Downtown

East: Hotel/Motel Use; Downtown

West: Mixed Use, Downtown

II. BACKGROUND AND ANALYSIS

History of Public Hearings:

The applicant's original application was heard and approved by the LPA at a public hearing January 11, 2011. Since that time, the applicant has amended the following items in the application:

1. Location of outdoor consumption – the applicant is requesting an to increase the area for outdoor consumption. The request includes a 375 square foot paver patio adjacent to the previously proposed 645 square foot wood patio in the original application. This increases the area for outdoor consumption to 1,020 square feet.
2. Hours of Operation – the applicant is requesting to operate between the hours of 9:00am to 2:00am. This extends the hours of operation from the previous request by 4 hours (the former hours were from 11:00am to 12:00am (Midnight)).

The requested increase in square footage for the area of Outdoor Consumption requires another public hearing with the Local Planning Agency.

Background

The subject property is located at 1167 Estero Boulevard, within the Times Square area (i.e. the Downtown Core area) as described in the Comprehensive Plan. The building is the former Waffle House, which was approved by Lee County Community Development on June 22, 1998.

The applicant purchased the property in April 2009.

In May 2009 the applicant, having possession of a 4COP liquor license, applied for and was granted through the administrative approval process, consumption on premises (FMBCOP2009-0001) with food. The COP was granted subject to the following conditions:

1. *All requirements of LDC Section 34-1264(k) are incorporated herein by reference and the subject establishment must comply with these requirements at all times.*
2. *Consumption on premises on the subject property is limited to a restaurant within the exterior walls of the existing building (shown by the attached **Exhibit B**). Any expansion of the area designated for consumption on premises will require a new approval in compliance with all applicable requirements of the LDC at that time.*

3. *Sales, service, and consumption of alcoholic beverages on the subject property are prohibited between the hours of 2:00 AM and 9:00 AM of each day.*
4. *No outdoor areas and no areas that are less than fully enclosed on the subject property are approved for consumption on premises.*
5. *Alcoholic beverage consumption on premises on the subject property is approved in conjunction with a restaurant use as defined in the LDC only. Alcoholic beverage consumption on premises in conjunction with any other use, specifically including but not limited to a bar or cocktail lounge, will require a new approval in compliance with all applicable requirements of the LDC at that time.*

The applicant is proposing to construct a 645 square foot wood patio with a service bar and a 375 square foot paver patio on the subject property and is requesting a special exception for outdoor consumption on premises for the proposed wood and paver patio area. In the site plan, provided by the applicant and labeled **Exhibit B**, the proposed wood patio would be located over an existing dry retention area and the proposed paver patio would be located adjacent to the existing entrance and pathways leading to the entrance. The applicant is proposing to enclose the area with a 3 to 6 foot high hedge or railing.

Analysis:

The regulations of the DOWNTOWN zoning district (Chapter 34 Section 678) encourage restaurants to provide outdoor seating areas located on porches or patios, largely between enclosed buildings and the street.

This vicinity is one of the most intensive commercial areas of the Town, and aside from a minimal number of residential units, is located generally away from the intensely residential areas of the island. Other restaurants and bars serving alcohol on the premises, many of which include outdoor seating areas, are located in Times Square and on Old San Carlos Boulevard to the north, and on both sides of Estero Boulevard to the south. Therefore, the request for outdoor consumption on premises is appropriate at this location.

The sidewalks on both sides of Estero Boulevard, the availability of seasonal commercial parking lots, and the popular use of the beach near the County fishing pier and Lynn Hall Park, help to attract beach-going pedestrians to the area. The applicants' restaurant is one among a large number of commercial uses in this part of the Town, several of which have outdoor seating near the beach. The presence of visiting pedestrians transitioning between parking areas, retail stores, restaurants, the beach, and nearby motels, is a long-established custom that will not be altered by approval or denial of the current request. The immediate vicinity is within the Pedestrian Commercial future land use category and the Comprehensive Plan's vision of this area encourages commercial uses. Furthermore, the Comprehensive Plan specifically contemplates that the Times Square

area (Downtown Core) include a more intensive mix of commercial uses including outdoor cafes.

The applicant indicates their intent is to operate between the hours of 9:00 am and 2:00 am. These hours are within the external limit set via Ordinance 96-06 prohibiting service between 2:00 am and 7:00 am daily throughout the Town. Although the applicant has provided these operating hours and therefore is willing to abide by them, these hours (or any other hours outside of 7am to 2am daily) cannot be limited without the Town Council finding such a condition necessary to protect the public health, safety, and welfare. Further, while the applicant has not requested music or any other audible outdoor entertainment uses, Staff suggests that due to the subject property's location at the terminus of a canal and with regard to the existing residential uses further to the east, Town Council should condition outdoor music and audible entertainment hours as well as standard operating hours.

The proposed wood and paver patio area indicated on the attached site plan as **Exhibit B**, is the only area proposed to be used for outdoor consumption and is the sole area being considered by this application. The proposed patio will add an additional 1020 square feet to the existing restaurant use. Currently, the subject property provides 15 parking spaces onsite. When subject to the applicable parking requirements found in Section 34-2020 and 34-676 of the Land Development Code, the proposed additional use area does not require additional parking spaces. As with the existing approval, the outdoor consumption is required to occur in conjunction with a restaurant as defined in the LDC 34-1264.

In the past, Lee County and the Town have issued location-specific approvals for alcoholic beverage uses which have sometimes contained limitations on the number of seats and the type and/or series of license. It is possible these conditions were an effort to limit potentially adverse effects on neighboring properties and possibly to aid with enforcement issues involving unauthorized expansions. Staff does not recommend including conditions to limit the number of seats or the type and/or series of state beverage license. The seating area can be limited by reference to the applicant's site plan, which clearly delineates the seating area. In the future, it is possible that changes to the type of seats used in the seating area or amendments to the building code could allow a somewhat different seating capacity within the same floor area. In addition, a future restaurant operator may acquire a different type or series of state beverage license and use it in conjunction with a restaurant use, either to serve beer only, to serve beer and wine, or to serve beer, wine, and liquor. The LDC does not distinguish between restaurants that serve beer, restaurants that serve beer and wine, and restaurants that serve beer, wine, and liquor. As a result, Staff has no basis in policy to develop theories or evidence to support the notion that locations serving beer only, beer and wine only, or beer, wine, and liquor, should be regulated differently by the Town.

Findings and Conclusions:

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

The Comprehensive Plan notes in the Consensus on Commercial Uses: “The present concentration of commercial uses in the Times Square area is good for Fort Myers Beach. Despite severe congestion during peak season and a general seediness that had been developing, Times Square has always provided an urban beach environment that does not exist anywhere else in Lee County, and which cannot be easily duplicated because of today’s floodplain regulations. The recent CRA improvements have sparked a renewed interest in Times Square among most islanders and has spurred a healthy movement to upgrade existing buildings.”

Also, as contemplated in the Comprehensive Plan, the Times Square area (Downtown Core) has continued to emerge as a vibrant urban core for the Town. Therefore, the area can support a more intensive mix of uses which is consistent with the applicant’s request.

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

The applicant’s request for outdoor consumption on premises is fitting with the vision for the area. The subject property is located in the Times Square area (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.”

Further, in both the Community Design Element and the Future Land Use Element, the Comprehensive Plan describes a vision for the Times Square area (Downtown Core) as a “nucleus of commercial and tourist activities” with pedestrian oriented commercial uses that enhance the experience of both the resident and visitor. Again, the applicant’s request is consistent with this vision, by providing additional venue for the enjoyment of the outdoor environment of Fort Myers Beach.

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

The very nature of this application indicates that the requested use of outdoor consumption on premises is not a use allowable by right on the subject property. It is however, a use permitted by special exception. The applicant’s request is appropriate at this location due to the subject

property's location in the Times Square area (Downtown Core) and is consistent with the goals, objectives, policies and intent of the Comprehensive Plan; which describes a vibrant tourist commercial district.

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

The proposed outdoor consumption application will not have negative effects on environmentally critical areas and natural resources. The subject property is within an existing commercial district and the proposed deck is to be located on an area of the site that was previously disturbed.

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

The subject property and the area immediately surrounding it are within the Pedestrian Commercial future land use category. The Comprehensive Plan's vision for the Times Square area (Downtown Core) encourages commercial uses be maintained and/or increased, including outdoor cafes. Staff feels the applicant's request is compatible with the area and its vision.

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

The outdoor consumption on premises of alcoholic beverages on the subject property will be required to comply with the applicable standards in the Fort Myers Beach LDC including but not limited to 34-678(7)(e)(1), 34-678(7)(e)(4), and 34-1264. Staff recommends finding that the requested use, as conditioned, is in compliance with applicable zoning provisions and supplemental regulations pertaining to the use set forth in LDC Chapter 34.

III. RECOMMENDATION

With consideration to the current and existing conditions, Staff recommends **APPROVAL** of the requested Special Exception to allow the consumption on premises of alcoholic beverages in a restaurant providing outdoor seating areas within 500 feet of dwelling unit under separate ownership. Limitations on the outdoor seating area for consumption on premises are for Town Council to determine at public hearing. If the Town Council chooses to approve the requested special exception, staff recommends the approval be subject to the following conditions:

1. The area of the subject property used for outdoor consumption on premises must be confined entirely to the proposed wooden and paver patio area shown

on the site plan attached hereto and incorporated herein by reference as **Exhibit B**. This area will be enclosed by a 3 foot hedge and railing, except for access points, further delineating the outdoor consumption area from other areas of the subject property. Planting of shrubs must meet the requirements of Land Development Code section 10-420(d).

2. Sales, service, and consumption of alcoholic beverages must not begin earlier than 11:00 AM and must end no later than 10:00 PM each day.
3. The use must comply at all times with the provisions of LDC Section 34-1264(k), as may be amended from time to time, and must at all times in operation be licensed as a permanent public food service establishment with seating, in accordance with Chapter 509, *Florida Statutes*, and applicable state agency rules.
4. Conditions in prior approvals including the applicant's May 29, 2009 COP (FMBCOP2009-0001) will remain in effect except where voided by this action.
5. Music and other audible entertainment are prohibited before 11:00 AM and after 9:00 PM of each day in outdoor seating areas, and must comply at all times with applicable noise ordinances.

IV. CONCLUSION:

Regulations for the DOWNTOWN zoning district encourage outdoor dining, and many restaurants have followed the vision of the Comprehensive Plan in accordance with these regulations and are providing outdoor seating areas where alcoholic beverages are served as a part of a menu of full-course meals as required by LDC Section 34-1264(b)(2).

If Town Council finds that the requested use is contrary to the public interest or the health, safety, comfort, convenience, and/or welfare of the citizens of the Town, or that the request is in conflict with the criteria of LDC Section 34-88 regarding Special Exceptions, Town Council should deny the request as provided in LDC Section 34-88(4). If Town Council chooses to approve the request, special conditions necessary to protect the health, safety, comfort, convenience, or welfare of the public may be attached if Council finds that such conditions are reasonably related to the requested special exception. Staff has recommended conditions for the Town Council's convenience and consideration. Staff's recommended condition limiting the hours for sales, service, and outdoor consumption of alcoholic beverages on the premises is based upon the general policy established by the Town Council in Ordinance 96-06 Town of Fort Myers Beach Liquor License Restriction.

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

Exhibits:

Exhibit A – Legal Description

Exhibit B – Site Plan

1/4/09
2008

Prepared by and return to:
Title Professionals of Florida
13241 University Drive, Suite 103
Fort Myers, Florida 33907
incidental to the issuance of a title insurance policy.
Parcel Identification Number: 19-46-24-W4-0150E.001A
File Number: 09001942TPF

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Warranty Deed

This Warranty Deed made this 10th day of April, 2009, by

J.Harold Chastain, Individually and as Trustee of the JHC 2003 Trust dated April 9, 2003,

hereinafter called the GRANTOR, to

Cermak's Surf Club, LLC.,

whose post office address is 1167 Estero Blvd., Fort Myers Beach, FL 33931,
hereinafter called the GRANTEE:

(Whenever used herein the terms "Grantor" and "Grantee" include all the parties to this instrument and the heirs, legal representatives, and assigns of individuals, and the successors and assigns of corporations.)

Witnesseth, that the GRANTOR, for and in consideration of the sum of TEN AND NO/100 DOLLARS (\$10.00) and other valuable considerations receipt whereof is hereby acknowledged, hereby grants, bargains, sells, aliens, remises, releases, conveys and confirms unto the GRANTEE, all that certain land, situate in Lee County, Florida, viz:

A lot or parcel of land comprised of part of Lot 1, Block "E" of CRESCENT PARK ADDITION, according to a map or plat thereof recorded in Plat Book 4, page 46, of the Public Records of Lee County, Florida, and part of the reserved strip of area lying East of said Block "E" and West of Block "D" of said Crescent Park Addition and part of the vacated street or drive lying between said reserved strip and said Block "E" and part of the unused street or drive lying between said reserved strip and Block "D", and part of the canal right-of-way shown on said plat, which lot or parcel is described as follows: From the SW Corner of said Block "E" run Southeasterly along the North line of Estero Boulevard for 80 feet to the Point of Beginning of the lands herein described; From said Point of Beginning, run North parallel with the West line of said Block "E" for 76.34 feet to a point on a prolongation of the line dividing the North 1/2 and the South 1/2 of Lot 2 of said Block "E"; thence run East along said prolongation for 137.5 feet to a point 112.68 feet West of the East line of said Block "D" thence run South 112.68 feet from and parallel with said East line of Block "D" for 126.75 feet to a point on the North line of Estero Boulevard, which point is 120 feet Northwesterly along said boulevard from the Southeast corner of said Block "E", thence run Northwesterly along said boulevard for 146.45 feet to the Point of Beginning.

This property is not the homestead of the Grantor(s) nor is it contiguous to the homestead of the Grantor(s).

SUBJECT TO covenants, conditions, restrictions, reservations, limitations, easements and agreements of record, if any; taxes and assessments for the year 2008 and subsequent years; and to all applicable zoning ordinances and/or restrictions and prohibitions imposed by governmental authorities, if any.

TOGETHER with all the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining.

TO HAVE AND TO HOLD, the same in fee simple forever.

AND THE GRANTOR hereby covenants with said GRANTEE that except as above noted, the GRANTOR is lawfully seized of said land in fee simple; that the GRANTOR has good right and lawful authority to sell and convey said land; that the GRANTOR hereby fully warrants the title to said land and will defend the same against the lawful claims of all persons whomsoever.

