

MINUTES
FORT MYERS BEACH
Local Planning Agency

Town Hall – Council Chambers
2523 Estero Boulevard
Fort Myers Beach, FL 33931

Tuesday, June 14, 2011

I. CALL TO ORDER

Meeting was called to order at 9:02 AM by Chairperson Joanne Shamp. Other members present:

Bill Van Duzer-excused
John Kakatsch
Hank Zuba-excused
Rochelle Kay
Carleton Ryffel
Tom Cameron

LPA Attorney Marilyn Miller

Staff present: Community Development Director Walter Fluegel, Tina Ekblad, Planning Coordinator.

II. PLEDGE OF ALLEGIANCE and INVOCATION

Ms. Kay

III. MINUTES

A. Minutes of May 10, 2011

Motion: Mr. Kakatsch moved to accept the minutes, as corrected with minor edits.

Seconded by Mr. Cameron;

Mr. Ryffel pointed out a few minor errors for correction; Mr. Kakatsch commended the transcriber for the quality of the minutes.

Vote: Motion passed 5-0.

Motion: Mr. Cameron moved to switch items A and B in the agenda order.

Seconded by Ms. Kay;

Vote: Motion passed 5-0.

IV. ADMINISTRATIVE AGENDA

A. Consumption on Premises Workshop Discussion

Mr. Fluegel passed out copies of the minutes from Dec. 6, 2010, which included discussion regarding this topic, along with reference documents. He reviewed some of the possible options regarding overall permissibility of COP and EC, saying that

they could consider an outright prohibition of all COP and EC or develop regulatory options for permitting these either by special exception, outright permitted use, etc.

Ms. Shamp began the discussion starting with the option of outright prohibition of all COP and EC. Ms. Kay supported this option and asked how the Bert Harris Act would affect the Lani Kai and Top o' The Mast. Ms. Miller answered that it would only affect them if the LPA passed the total prohibition, including the "grandfathered" or "non-conforming" use properties. Mr. Fluegel interjected that Beach Pub had a special exception but he has no documents to say that the Lani Kai and Top o' The Mast have any.

Mr. Ryffel asked the attorney how prescriptive rights weigh into the legal argument regarding the aforementioned properties. There was brief discussion here regarding any documentation of special exceptions or "grandfathering."

Mr. Cameron asked who granted the special exception to the Beach Pub, and why. Mr. Fluegel replied that his research revealed that it was done by the county just at the time of the incorporation of the Town. Mr. Ryffel added that he was involved in the process at the time and explained why it was granted. Part of the reason was that the EC zoning had not yet existed; more discussion took place with Mr. Ryffel providing more history to the topic. Mr. Cameron still was not clear as to why the business was granted the exception and Mr. Fluegel stressed that the bifurcation of property is what creates the conflict. He said that the Coastal Construction Control Line only controls construction and does not determine zoning rights seaward. Then the Town created this zoning district that splits properties in two and further restricts property rights without clearly acknowledging what rights existed there. Mr. Fluegel admitted that this is a very "unique" situation, confused by zoning issues and unclear property rights.

Ms. Kay asked for clarification about bifurcation in the Town as compared to other areas. Mr. Fluegel said that in most towns the zoning is the same all the way from the upland parcel to the water line and he pointed out the EC area on a map, adding that the rights of use change as one walks toward the gulf.

Ms. Shamp passed out some documents for members to review while she spoke (attached) and read from it a quote by Mr. Stewart. She discussed certain pages, which she said summarized what she and Ms. Kay learned from a presentation last week regarding the Bert Harris Act, with regard to property rights. Specifically, she referred to pg. 6, item #5, which deals with litigation procedures and stipulates that "a property owner must file a claim within 1 year of the action which impacted the property." Ms. Shamp said that this is what guided her to form her opinion that the LDC is clear in regulating COP in the EC zone. She added that the 3 properties that are currently non-conforming have been so for so long, it would be difficult to say that they have no rights whatsoever to continue. She feels that the LDC currently provides sufficient regulations to restrict COP in EC zone and current regulations should be enforced accordingly. Ms. Shamp also commented that with all the

changes that are impacting safety and other issues on the island, it is not the time to change these regulations. She continued to point out the portions of her report where she did considerable research and listed relevant sections of the LDC and other legal references for discussion by the LPA. In her report, pg. 9 talks about “non-conforming” establishments with regard to alcohol and expansion and points out that those establishments cannot expand. In addition, she cited Alcohol 1264G “Expansion of the Area Designated for a Permit,” which she said is specific with regard to alcohol, and it says “expansion of the area designated for permit cannot be expanded without a new application for alcohol permit...” Ms. Shamp read additional restrictions from that section (see report) and opined that there is “plenty of constraint here” to support that existing ones cannot expand into the EC zone.

Ms. Shamp continued to read and explain more of her report for the members while citing all of the regulations she highlighted and gathered from various sections of the LDC and the LDC which are important to discussion of this topic by the LPA. Based on her research and findings, she opined that the LDC already regulates this topic without the need for any changes, especially when changes may result in legal ramifications, reminding the group that “once it is done, it’s done” and it cannot be “undone” so decisions must be seriously considered. She supports the outright prohibition of COP.

Mr. Ryffel commented that he thought he read something that said the county parks would be selling alcoholic beverages and Ms. Shamp agreed that she read that they have the right to do so but they are interested in having “alcohol events” at facilities in the parks. He commended Ms. Shamp for her obvious hard work in preparing the document and all of the work she has done.

Short recess at 10:12 AM. Reconvened at 10:20 AM.

Mr. Fluegel felt that the LPA was leaning towards forwarding a resolution to Council to memorialize their thoughts on prohibition and said there is also a need to bring forth staff’s recommendation as a regulatory approach. He asked if the LPA is willing to delve into the regulatory perspective or just focus on prohibition. Ms. Shamp said that she was under the impression that Council was looking for a recommendation as to whether the LPA wanted to do anything further or leave it as it stands. Mr. Ryffel said that if the LPA sends a recommendation forward without a clear understanding of what’s next, they may not have any other opportunity to review it again. Ms. Shamp said that the LPA must get it back for a second chance. Mr. Fluegel said his opinion is that this needs to be dealt with within the scope of the LDC and staff must bring forward their recommendations in all scenarios. He added that he sees the biggest problem now is the existing 2 establishments that the Town has no zoning control over since there are no rules in the LDC acknowledging their rights. The third establishment had a special exception that included terms and conditions that at least gave some control but the other 2 have no restrictions and this is very troublesome.

Ms. Shamp asked if the Town has had any conversations with the establishments

regarding their responsibilities regarding safety, etc. Mr. Ryffel interjected that the Town needs to first define exactly what the situation is with the 2 businesses and what their restrictions are as recorded now. Ms. Shamp agreed that they are spending considerable time discussing this when they don't have all of the facts and information needed. Ms. Kay also agreed and feels that this decision should not be arrived at too quickly or haphazardly as once the change is made, it sticks. Mr. Fluegel brought up a certain video company coming onto the beach, at the invitation of a liquor-licensed business, as an example of lack of zoning and enforcement control. He said they can do this again, even after being warned and asked not to. Ms. Shamp pointed out that they could be charged and Mr. Fluegel was quick to point out that they would then just pay the \$250.00 fine, say "thanks" and do it again. Ms. Shamp added that there are other sections that could be applied; for instance Sec. 34-1264(i)1, states that "*revocation of their alcohol permit is allowed with 1c, "repeated violation of any Town ordinance at the location within 12 (inaudible) period preceding the revocation hearing..."*" She said there are sign and many other regulations that can be enforced to constantly address the problems and threaten their licenses. Mr. Fluegel commented that he is understanding the LPA to be saying "leave the 3 alone," but "if I have no Town zoning approval on it, I have no right of revocation" and no rules to go to the state to take the license. He said there is no rule to be broken but Mr. Kakatsch said "that they don't have authority to start it in the first place." Mr. Fluegel asked "how does that relate to the alcohol license...if they invite the video company out there, how does that relate?" There was a comment that "that activity is enhanced with alcohol" and Mr. Fluegel agreed although he still insisted that there is still no "regulatory framework" to establish the Town's rights. He said there is no tie between the Special Events permit and the alcohol license. Ms. Shamp opined that "maybe that's the spot you make the change" because it's a small change, not expanding the COP into the EC zone, it is making a regulation more enforceable. More discussion ensued here with arguments from both sides. Mr. Fluegel said that they still need to address the zoning of alcohol issue. Ms. Miller opined that the biggest question now is whether or not the 2 "grandfathered" were ever legal and admits that she never come across a situation like this wherein businesses were allowed to operate for years with no regulation and then suddenly expected to follow certain rules. Again, Ms. Kay asked if they should be finding that information first, to see if they've ever "been legal," but Mr. Fluegel replied that he had found no supporting information so far.

Mr. Kakatsch said he would like to see the total prohibition of alcohol on the beach and that the existing 3 be given "a way out." He said that last Friday he sat on the beach behind the Mermaid and counted 19 people from 4-6:00PM with either alcoholic beverages in their hands or "something in a brown bag, assumed to be alcohol." He feels that enforcement of this, especially in the Times Square area, is impossible, especially since learning from some of those people that they had not purchased their drinks on the beach. His point was that the problem goes beyond just the businesses selling the alcohol on the beach and the only way to control it at all is to totally restrict it altogether.

Mr. Cameron said that they are charged with and need to give Mr. Fluegel and staff “something to enforce” that makes sense. He is in agreement with total prohibition.

Ms. Shamp asked what the legal ramifications would be if they find no proof that the 2 businesses are “legal” and they now decide to force compliance, having allowed them to operate all this time without rules. Ms. Miller said it is a lengthy process but they look to the state to see what they have in their files for the properties.

Mr. Fluegel reminded the members that staff is still expected to bring forth regulatory recommendations even if the LPA supports total prohibition. He said that Mr. Ryffel’s idea is a good one and encouraged them to discuss that approach. He asked that they consider taking prohibition out of the picture and thinking about how they would deal with this from a regulatory perspective, since Council needs to see their opinions and the options. Ms. Kay argued that “this is back to square #1...this is where we were when you came up with that Administrative Approval” and said every time they meet about this, “we say prohibit and you say we want regulations.” Mr. Fluegel replied “you have your opinion and I have mine.” Ms. Kay respected that but said she feels he is telling the LPA that no matter what they decide, prohibition is not going to happen; therefore they must come up with regulations that will make the Council happy. Mr. Fluegel said “that’s your opinion; my opinion is my job is to give Town Council the best options available...”

Mr. Kakatsch asked for clarification of the options they were given; #1 is outright prohibition of all COP in EC. Mr. Fluegel asked how many other establishments would or could possibly want the same thing that the 3 existing have. Mr. Fluegel replied that this would depend on what is stated is eligible to get it. Mr. Kakatsch said his concern is not as much the 3 places that already have this privilege but more the dozen or so other businesses that have restrictions and want the same deal. More discussion ensued and Ms. Miller summarized that the LPA can still philosophically be opposed to the expansion but if they want to have any input before it’s drafted, they need to come up with something.

Mr. Ryffel said that one of the most important things to do is find out the status of the 2 or 3 existing properties. He said that he has about an hour’s worth of ideas to discuss as options but the attorney was not able to stay for the whole discussion. They wanted to have a short overview but Mr. Ryffel said he needs to present the entire package he put together. They decided to allow him to begin and get as far as they can before Ms. Miller had to leave.

The documents were included in the LPA member’s packets and they were referred to. Mr. Ryffel read from an email he had sent to Mr. Fluegel (attached) which relates to the rest of his documents. He continued and told the members to refer to their copies that has no strike-thrus and underlines. He said gave 2 options: 1a, 1b and 1c, which he said address COP in different areas of the Town and basically allow consumption without sales, service, tables, etc. anywhere, except 1 of the options.

Mr. Ryffel said that 1a applies to the Time Square area and allows COP *“on the beach... up to 10’ landward of the interface between the wet and dry sand,”* which takes the place of the *“within 50’ ft. of mean high tide.”* The next point states *“alcohol must be purchased at the existing bar(s) to be consumed on the beach; there will be no sales, wait staff, tables or carts...on the beach.”* The alternative would allow COP in the Times Square area, but it would allow the sales, wait staff, etc.

Mr. Ryffel said that 1b talks about businesses outside the TS area with existing COPs and not including any whose COPs were approved as part of a planned development. These places would need to seek a special exception; *“alcohol would be purchased at an existing bar to be consumed on the beach up to 10’ landward of the interface between the wet and dry sand; there will be no sales, wait staff, tables or carts...on the beach.”*

Mr. Ryffel’s option 1c does refer to those granted under planned development, directing those people to get an amendment to their previously approved plans. He option#2 covers all locations with existing COPs and states that *“any facility on the beachfront with an existing COP license...alcohol may be consumed on the beach owned by the business or property up to 10’ landward of the interface between the wet and dry sand; all purchases must be made from the existing bars on the property and may be consumed on the beach, there will be no sales, wait staff, tables or carts...on the beach.”* He added that now the “wet and dry sand interface” is about 300’ out due to renourishment so this may need to be changed.

Mr. Fluegel approves of the suggestions by Mr. Ryffel but Ms. Shamp asked how it would work with the ATF’s enforcement. Mr. Fluegel said they have addressed that already and ATF’s stand is that they will enforce by the premise’s license but the zoning area would be addressed by area and enforceable locally. Discussion ensued about this.

Mr. Cameron asked which applies, the property owner line or the EC line. Mr. Fluegel agreed that this is something that needs to be defined since renourishment is taking place.

Ms. Miller opined that the best way to address this is first forming a resolution after the public hearing for whatever regulations they compose; this would be a 2 part resolution with the first part to stipulate that expansion should not go into the EC and the second, the LPA’s recommendations with respect to the draft. Mr. Fluegel said he needs to stick to a timeframe but there were comments about not rushing and getting the work done, with time to have the public involved.

Ms. Shamp asked for public comment on COP. Mr. Lee Melsick said that this is a dramatic change to the beach and asked them not to be swayed by things like Mr. Fluegel’s staffing problems and timelines. He said the LPA tried to do all of this in 2009 but they were rejected by Council and told to leave it alone. He pleaded with them to take their time and continue to investigate the facts and make the same good-

sense decisions they've made in the past. He pointed out that this important issue is being rushed to get it all done in the summer when many of the island residents are not here to give their input, adding that this is "convenient for the politicians who want to push this thing through..."

Public comment closed.

B. EAR Discussion

Ms. Ekblad showed slides and gave her presentation about this item, giving details about how and why this is required by the Dept. of Economic Affairs.

There is a survey being distributed via the website, hand outs and hopefully some mailings. There is advertising being done and all of the information will be collected and evaluated. Ms. Ekblad gave a few statistics received as a result of the surveys collected so far: 86% of respondents own the unit they stay in at the beach; 94% of them have lived on the island longer than a year; the top 3 components for "livability" on the beach were small business incentives, bike paths and a vibrant/active downtown area; top 3 responses for the type of transportation people may use in the future were bike paths, sidewalks and the trolley; other responses were also discussed (see surveys).

Mr. Ryffel referred back to the COP discussion and asked what if there was a referendum when many residents are not here now. This information will be included for the next meeting since the attorney has left.

V. ADJOURN AS LPA AND RECONVENE AS THE HPB

Motion: Mr. Ryffel moved to adjourn as LPA and Reconvene as HPB.

Seconded by Mr. Kakatsch;

Vote: Motion passed 5-0.

The last meeting for the HAC did not have a quorum so not much was done. She said that 47 homes were identified by the county in the Comp Plan as eligible for the designation.

A. Smith Cottage

June 23 will be the presentation for this property.

Motion: Mr. Ryffel moved to adjourn as HPB and Reconvene as the LPA.

Seconded by Mr. Kakatsch;

Vote: Motion passed 5-0

VI. ADJOURN AS HPB AND RECONVENE AS THE LPA

Meeting was reconvened at 12:14PM, with the same members still present.

VII. LPA MEMBER ITEMS AND REPORTS

Ms. Kay asked about having an LPA attorney who they are able to just call with questions when needed. She also said she is “very frustrated” about going before the Council with LPA decisions because they do get notes on all of the LPA discussions and decisions and she feels that they don’t regard the LPA’s input as important to their decisions.

Mr. Kakatsch agreed and said he has similar feelings, adding that the LPA needs to do what is right for the families on the beach and not just what is important to the businesses. He wanted the record to reflect that he “think(s) we’re in for trouble” if we open this thing up.

Ms. Shamp agreed with Ms. Kay in the need for constant communication and would like to have a separate attorney for certain items.

VIII. LPA ATTORNEY ITEMS

Ms. Miller left earlier.

IX. COMMUNITY DEVELOPMENT DIRECTOR ITEMS

Mr. Fluegel briefly discussed the progress on the Seafarer’s demolition but said there is no indication of what comes next, but there is a development agreement. He said the LPA will be in the loop on any changes since anything that will be done will require amendments.

Ms. Kay asked about the short-term rental issue. Mr. Fluegel said it will go back in June for a second reading of the ordinance; he gave brief explanation of the details.

Mr. Fluegel also agrees with the communication opinions of the members and said that it has been very challenging for staff to have to deal with so much that has gone unattended for too many years. He reminded them that their input is critical if this COP change is passed.

**X. LPA ACTION LIST REVIEW
Resolutions to Town Council**

- Ms. Shamp commented on the Merlo CPD and said that this was particularly upsetting to her. She said that the Council passed this and granted the applicant more things than they even asked for. She expressed her frustration in the Council’s decisions in situations like this and can’t understand why they do some of the things they do.
- **Connecticut St. –TBD**

Future Work Activities

- LDC 613-14 10-255 Storm Water-TBD
- Post-disaster reconstruction/recovery**-TBD; Ms. Miller
- IPMC (code enforcement clean-up) possibly July-all LPA
- COP ordinance
- Residential rent ordinance-June 20th
**Members expressed frustration that this item has been on the agenda for about 4 years and they still have no plans.
- Beach Raking Ordinance-Aug.

Mr. Ryffel again reminded Mr. Fluegel to communicate to the Council that the COP issue cannot be dealt with in a shortened timeframe and cannot be taken lightly. Mr. Fluegel remained adamant that he has staffing and time management issues and cannot wait much longer for some action from the LPA. They continued to argue about the topic.

Mr. Kakatsch asked if there was anyone on the staff to write grants and Mr. Fluegel said he and Ms. Ekblad have experience at this but it’s still a time management problem so they will try to get to this, too.

XI. ADJOURNMENT

Motion: Mr. Cameron moved to adjourn.

Seconded by Ms. Kay;

Vote: Motion passes 5-0.

Meeting adjourned at 12:56 PM. Next meeting July 12, 2011 at 9:00 AM.

Adopted _____ with/without changes. Motion by _____
(DATE)

Vote: _____ Signature: _____

- End of document