

**FORT MYERS BEACH
TOWN COUNCIL
Town Hall – Council Chambers
2523 Estero Boulevard
Ft. Myers Beach, FL 33931
May 8, 2006**

I. CALL TO ORDER

A Land Use Meeting of the Fort Myers Beach Town Council was called to order by Mayor Dennis Boback on Monday, May 8, 2006 at 3:00 PM.

Members Present: Mayor Dennis Boback, Vice Mayor Don Massucco, Councilman Garr Reynolds, Councilman Bill Shenko, Jr., Councilman Charles Meador, Jr.

Excused Absence: none

Town Staff Present: Town Manager Rachel Lambert, Public Works Director Jack Green, Community Development Director Jerry Murphy, Town Attorney Anne Dalton

II. PLEDGE OF ALLEGIANCE

All present stood for the recitation of the Pledge of Allegiance.

III. INVOCATION: Town Manager Rachel Lambert gave the invocation.

IV. PUBLIC COMMENT: To be heard at the time the agenda item is discussed.

Mayor Boback asked Public Works Director Jack Green to provide an update on the seawall at the foot of Old San Carlos near Snug Harbor. Mr. Green said that in response to the council's request for him to look at alternative solutions to that provided in his original memo, he obtained a new estimate from the contractor that is on-site working for Lee County. The plan proposes I-beam bracing in order to provide adequate support for the existing wall. The estimate is for \$65,700, rather than the \$210,000 original estimate. Mr. Green reported that he consulted local marine contractor Darrel Banks regarding the new proposal, and Mr. Banks concurred that the bracing should hold the seawall for about ten more years. Mr. Green also spoke with the Florida Department of Environmental Protection regarding the permitting of the project. The DEP indicated that they did not believe that the project will need a permit, since the situation is an emergency. They are still reviewing the plans.

Mayor Boback asked Mr. Green if he had spoken with the owners of Snug Harbor to see if they would be interested in doing some sort of joint project. Mr. Green said that he had not yet spoken with them. Councilman Meador stated that he would prefer that the contract be reviewed by Town Attorney

Anne Dalton before it is signed. Councilman Shenko expressed his appreciation for Mr. Green's hard work on this issue.

MOTION: Councilman Shenko moved that the council authorize spending on the seawall project not to exceed \$70,000 from contingent fund subject to the review of the contract by Mr. Green and Ms. Dalton. Councilman Reynolds seconded the motion.

Vice Mayor Massucco was curious about the difference between the original proposal and the new one regarding the amount and quality of the work to be done, and the length of time that the work would hold the seawall. Mr. Green explained that there is less work involved, and that the beams are of high quality. He stated that Mr. Banks advised him that the work would hold ten to fifteen years, and that he wanted to use that time to make a thorough assessment of the seawall's overall condition. Vice Mayor Massucco asked if Mr. Green had any information on the Snug Harbor section of the wall. Mr. Green reported that Mr. Banks looked at that section as well, and concurred that that section was also in need of repair.

Councilman Reynolds expressed his appreciation to Mr. Green for staying on top of the situation. He also clarified a misinterpretation that ran in the *Sandpaper*, saying that he suggested to Mr. Green that he work with Snug Harbor on the seawall repair. Councilman Reynolds said that instead he suggested that Mr. Green and Snug Harbor use the same contractor. Councilman Reynolds then disclosed his concerns that if the contractors are blowing air through the seawall's 36" casing to clear debris, the extra pressure and intrusion could undermine the entire street. Mr. Green said that he believes that particular aspect of the project is completed. Mr. Green also reported that there is evidence that the seawall may have been repaired at some point previously, and he wants to look into that further.

VOTE: Motion was carried unanimously.

**V. PUBLIC HEARING LAND USE CASE:
Big John's Boardwalk Eatery – DCI2005-00112**

Mayor Boback asked if any council members had any ex-parte communication with the property owners or other persons regarding this case. Councilman Meador reported that he is personal friends with the property owner, Joan DeLucas, and its proposed principal operator, John Cooker, and that he provided legal representation for the Ms. DeLucas in the past. He said that he no longer represents Ms. DeLucas, nor has he any pecuniary interest in the property. Councilman Shenko saw the property five years ago, but has not spoken to anyone about it since. Vice Mayor Massucco, Councilman Reynolds, and Mayor Boback visited the site, but spoke to no one.

Mayor Boback opened the public hearing. Those testifying were sworn in by Ms. Dalton.

Jim Caywell, a retired lawyer and Ms. DeLucas' husband, spoke on behalf of the property owner's attorney Matt Uhle. Mr. Caywell gave a history of the property and its owner. He explained that the building has always been divided into two parts holding two separate businesses located at 2301 and 2307 Estero Blvd. 2301 Estero Blvd. has been vacant since 1999, and the entire building has been vacant since 2003. The building and its interior suffered damage from Hurricane Charley in 2004. Ms. DeLucas and Mr. Cooker began renovations on the building with the intent of turning it into a restaurant. They then discovered that the property would have to be rezoned from Commercial Boulevard to Commercial Planned Development to permit the restaurant to operate. Ms. DeLucas applied for rezoning on November 29, 2005. On April 11, 2006, she presented her case to the LPA, which approved the rezoning.

Mr. Caywell expressed his opinion that the location and size of the building, as well as the surrounding neighborhood makes it undesirable as offices, as it was originally zoned. He also stated the concerns of adjacent property owners as he understood them: odors from the restaurant, new and visible propane tanks outside the building, and the view of the property from the back. Mr. Caywell explained that the property owner addressed neighbors' concerns about odor by directing the kitchen vents away from adjacent properties, and installing charcoal filters to remove odors and smoke. He noted that the use of propane tanks is necessary and that there could be a barrier constructed to obstruct the view of said tanks from passersby. With regard to the view of the back of the building, the business owners offered to pay for neighbors to plant palm trees to hide their view. The other option, as proposed by Mr. Caywell, was for an 8-foot high wooden barrier to be constructed around the back of the property.

Mr. Caywell opined that any change in use at this location would cause an increase in intensity of use, and require more parking spaces. However, he feels that it is unreasonable for the town to expect that the building be partially 'demolished' in order to comply with present setbacks and other requirements of the land development code. Mr. Caywell also reported that the LPA had a concern about the garbage that would be generated by the restaurant. He said that Mr. Cooker spoke with Onyx, and the company recommended three closed-lid trash bins in the back of the building that would be rolled to the front of the building for collection three times per week.

Michael Roeder, Director of Planning at Knott Consoer, testified next. Mr. Roeder observed that the Comprehensive Plan Policy 4C-3, and Land Development Code Section 34-702-D(1) both state that in order for a property to have a new or more intense use in the commercial category, it must be rezoned as Commercial Planned Development. Mr. Roeder pointed out that the lot was platted in 1925, and the building constructed in 1961, making it historic. He noted the desire of the town to preserve the pedestrian friendliness of Estero Blvd., and indicated that rebuilding according to present codes would mean the structure would have to be elevated; he did not see this elevation as being friendly to pedestrian traffic. Regarding town staff's

recommendation that the council deny the rezoning based on the restaurant being in a residential neighborhood, Mr. Roeder used a map to note that other businesses already exist in close proximity to 2301 and 2307 Estero Blvd. He specifically mentioned a convenience store, the Neptune Inn, and a fruit stand. Mr. Roeder claimed that the proposed restaurant would be better for the community if operated in the existing building than a new building built to the specifications of the town's Comprehensive Plan and Land Development Code. He told the council that there will be ten deviations needed in order to use the existing building.

- i. The allowance of 'back-out' parking on Estero Blvd.
- ii. A reduction in the number of required parking spaces from 29 to 10
- iii. Allowing the property owner to plant palms on the rear neighbor's property (with permission from that property owner) in order to waive the requirement of a two-foot wide landscaped buffer between properties
- iv. Waiving the requirement of a debuffer between parking and the sidewalk, as it would not be conducive to 'back-out' parking
- v. Allow the setback for the building from Estero Blvd. to remain at 49 feet, rather than the required 10-foot maximum setback
- vi. Allow the side setback to remain at 4.9 feet, rather than the required minimum side setback of 5 feet
- vii. Allow the setback on the north side to remain at 1.13 feet, rather than the required minimum setback of 5 feet
- viii. Allow the rear setback to be 2 feet, rather than the required minimum setback of 20 feet
- ix. As this is a corner building, Mr. Roeder asked that the council allow the building to remain at its present setback of 48.5 feet from the intersecting lines of right-of-way at the corner, rather than the required maximum setback of 20 feet
- x. Allow the building to keep its existing 16-foot blank wall, rather than comply with the design guidelines that set the maximum length of a blank wall on a façade facing the street to be 10 feet

Mr. Roeder noted that it would be a family restaurant and the hours of operation for the restaurant would not exceed 10:00 PM, and invited the council to attach restriction to the rezoning to address any of their concerns regarding hours of operation. He also noted that the restaurant would not be serving hard liquor, but would be serving beer and wine. There would also be no outside dining or entertainment. Lighting would be diverted from the residential neighborhood, and the sidewalk in front of the building would be marked to point out the pedestrian right-of-way. Mr. Roeder also discussed the landscaping of the property. He stated that Mr. Cooker would not allow employees to park in guest spaces, and he would hire only island residents to reduce the need for them to drive to work.

Mr. Cooker reiterated the discussion that he had with the property's neighbor about planting palm trees, and the meeting he had with Onyx regarding the trash.

Vice Mayor Massucco asked for clarification on the number and location of the parking spaces. Particularly, how the two end spaces could be safely utilized. Mr. Roeder explained that the LPA had the same concern, and that the property owner would be happy to use those areas for landscaping at the wish of the town. Mr. Cooker agreed that the two parking spaces in question are unconventional, and he felt that they might create confusion for motorists. Vice Mayor Massucco asked for clarification about the blank wall. Mr. Cooker confirmed that there would be a mural painted on that wall.

Councilman Shenko questioned whether or not the loading dock in the back could be removed in order to allow space for a buffer between the building and its rear neighbor. Mr. Roeder insisted that the loading dock is necessary for the operation of the restaurant.

Councilman Meador asked for clarification on the deviation needed for the parking spaces. He pointed out that the LPA recommendation allowed for 12 spaces, whereas the property owner is asking for the deviation to be 10 spaces.

Mr. Roeder noted that the applicant is not asking for any deviation from the town's sign regulations.

Mayor Boback noted that the property behind the building in question is currently for sale, and that the new property owner might not agree to the palms planted as a buffer on their property. He also asked how the applicant plans to keep the noise level down, and if there is a break room for employees planned. He expressed his concern about the back door being open, and employees breaking outside with the back door open. Mr. Cooker informed the council that the residence behind 2301 and 2307 Estero Blvd. is not for sale. He confirmed that he has a break room/office planned for inside the restaurant, and that he would work with the property owners behind him to keep the noise down. He intends to keep the back door closed during business hours, other than when deliveries arrive and trash is taken out. Mayor Boback asked for clarification on the number of front entrances for the building. Mr. Cooker confirmed that there are 2. Mr. Caywell offered to have the deliveries come in through the front door to reduce the traffic in the back of the building.

Councilman Shenko asked where the delivery and municipal waste trucks are going to park if they are working through the back door. Mr. Cooker said that the trucks would most likely park in either the front or on the side nearest Fairweather Lane. Mr. Shenko pointed out that there is only 1 foot of land owned by the applicant between the building and the property line.

Councilman Reynolds asked for clarification on the square footage of the building, specifically how many square feet would be used for the restaurant and how many for the pizzeria. Mr. Cooker said that the restaurant would be 'almost exactly 2,000 square feet' and the pizzeria would be 1,960 square feet. Councilman Reynolds then asked for clarification on the rear setback of the building. Mr. Roeder informed him that the building is set back 5 feet from the property line, and the loading dock is set back 2 feet.

Mayor Boback asked for testimony from Lee County staff. Nettie Richardson, Principal Planner with Lee County Division of Zoning representing Fort Myers Beach, pointed out that the Comprehensive Plan calls for the rear setback of the building to be 15 feet, and that the applicant has 2 feet. She also stated that the adjacent property owner cannot be forced to have the buffer on their property, and that it is the responsibility of the applicant to provide the buffer on their property. Ms. Richardson said that by having no buffer and increasing the intensity of use at this location, the applicant is not being sensitive to the nearby residential uses. Additionally, she expressed concern over the noise that would be generated from the operation of the restaurant, specifically from customers on the benches in the front, and kitchen noise emanating from the building's 2 back doors. Ms. Richardson was also concerned with the increased traffic to the business and lack of parking for it.

Ms. Richardson went on to point out that the applicant has not made any structural improvements to the building, meaning that they have made no effort to improve that area of the island. She was also concerned that there is no sidewalk in front of the business, and that is not conducive to any pedestrian clientele. Ms. Richardson reported that Lee County staff finds the application for rezoning inconsistent with the Comprehensive Plan. She expressed that a restaurant is an inappropriate use for the property in that neighborhood, and that staff recommends denial of the application.

Councilman Meador asked Ms. Richardson if she was at the LPA meeting when the case was discussed, and she responded that she was. Mr. Meador then asked her why the LPA wanted to approve the application. She reported that they said they were in favor of using the existing building, and that they wanted a pizzeria in their neighborhood.

Councilmen Shenko and Reynolds and Vice Mayor Massucco had no questions for Ms. Richardson.

Mayor Boback then asked for testimony from town staff. Jerry Murphy testified first after being sworn in by Ms. Dalton.

Mr. Murphy then asked if council had any questions for him.

Councilman Reynolds had no questions for Mr. Murphy.

Vice Mayor Massucco asked if the location were to be zoned properly, could they then issue a beer and wine license for the restaurant. Mr. Murphy said that the LPA recommended that no approval be given to consumption on premises without a separate hearing. Vice Mayor Massucco then asked for clarification from the applicant as to their intentions regarding alcohol. Mr. Roeder confirmed that the applicant seeks a beer and wine only license with no bar and no outside service, and they understand that they would have to come back before council in order to get approval.

Councilman Shenko asked about the possibility of delivery trucks, particularly beer trucks, using Fairweather Lane, and Mr. Murphy confirmed that it is a concern of staff.

Councilman Meador and Mayor Boback had no questions.

Mr. Murphy pointed out that there are only 8 viable spaces at 2301 and 2307 Estero Blvd. He also noted that the Commercial Boulevard Future Land Use seeks to preserve existing commercial uses, but require any intensification of use to be brought forward through the Commercial Planned Development Process. That process encourages a redevelopment of property, not a list of deviations and conditions to make an existing property compliant to current regulations.

Ms. Dalton clarified some of the conditions of the LPA.

Mayor Boback opened public comment:

- Tracy Moon, of 290 Pearl Street, offered his support for Mr. Cooker, and disclosed his concern about the safety of the sidewalks.
- Chris Loffreno, of 2100 Estero Blvd., expressed his support for the council's approval for the operation of a restaurant at 2301 and 2307 Estero Blvd. He also said that he has noticed exterior improvements to the building.
- Kevin Mulhearn, of 11230 Marblehead Manor Ct., Fort Myers, who owns several properties close to the applicant's, shared his support for the proposed restaurant. He felt that the restaurant would be family-oriented and a benefit for the community.
- Richard Reider, of 6041 Gulf Drive, was sworn in by Ms. Dalton. He stated that he is totally against the proposed location selling beer and wine.

Mayor Boback closed the public comment.

MOTION: Vice Mayor Massucco motioned that council approve the applicant's request given the deviations and conditions spelled out in the resolution. Councilman Meador seconded the motion.

Councilman Reynolds had no comment.

Councilman Shenko did not support the motion based on lack of parking and the deviation from the required rear setback.

Councilman Meador reiterated that the property had been granted deviations in the past. He suggested that Vice Mayor Massucco amend his motion regarding the buffer and the parking spaces.

AMENDED MOTION: Vice Mayor Massucco amended the motion to insist on an 8-foot wood fence as a buffer, not the existing chain-link fence. The property would also have 8 parking spaces, not 10 as noted on the resolution, and that trash pick-up would occur in the front of the building. Councilman Meador amended his second.

VOTE: Motioned failed 3-2, with Mayor Boback and Councilmen Shenko and Reynolds dissenting, and Vice Mayor Massucco and Councilmen Meador voting in favor.

MOTION: Councilman Shenko motioned to deny the application and that the Town Council of Fort Myers Beach incorporate the findings and conclusions of the Lee County Zoning Division Staff Report in its final order. Councilman Reynolds seconded the motion.

There was no discussion.

VOTE: Motion carried 3-2 with Mayor Boback and Councilmen Shenko and Reynolds voting in favor, and Vice Mayor Massucco and Councilmen Meador dissenting.

**VI. TOWN MANAGER'S ITEMS:
Report of Lee County Clerk of Courts' Internal Auditing Department of
Finance Procedures**

Town Manager Rachel Lambert said that the Clerk of Courts was not prepared to present their findings at this time, but that they had additional information for the town to review. She suggested that a special meeting be called for a later date in order to go over the report.

Mayor Boback suggested a council workshop. There was some discussion of council schedules, and the workshop was scheduled for May 31, 2006 at 5:00 PM.

**VII. PUBLIC HEARING LAND USE CASE:
110 Mango Street – FMBDCI2006-00001**

Mayor Boback opened the public hearing. He asked if any members of council had any ex-parte communications with the property owner.

Councilman Meador lives at 112 Mango Street, and is opposed to the application, although he had no pecuniary interest in the case. He asked legal advice of Ms. Dalton.

Ms. Dalton pointed out that Councilman Meador might have a personal interest in the outcome of this matter, and advised him not to vote. Councilman Meador then 'disqualified' himself from the vote, noting that he still had the right to participate in the discussion. Councilman Reynolds shared his belief that he was not allowed to abstain from voting if he did not have a pecuniary interest in the case.

Councilman Shenko, Mayor Boback, Vice Mayor Massucco, nor Councilman Reynolds had no ex-parte communication regarding this case.

Ms. Dalton swore in the witnesses.

Frank Shockey, Planning Technician with the Town of Fort Myers Beach, testified on behalf of the applicant, the Town of Fort Myers Beach. Mr. Shockey explained that when the town adopted its Land Use maps, this property was zoned as Residential Multi-Family, as its commercial use was not apparent. As the property was and continues to be used for commercial activities, the applicant requests that it be rezoned as Commercial Boulevard.

Councilman Reynolds said that the business that currently operates at that location was never approved by council, and that the property does not fall within the town's zoning for Commercial Boulevard as it is the second lot from Estero Blvd.

Vice Mayor Massucco expressed that was his intention to go along with staff and LPA recommendations and approve the resolution.

Mr. Shockey responded to Councilman Reynolds' remarks by pointing out that Lee County permitted The Heavenly Biscuit at that location in 2001, and The Monkey Tree Restaurant in 2004. He explained that 2001 was prior to the adoption of the official zoning map.

Councilman Meador testified that he purchased the property adjacent to 110 Mango Street in 1982. He said that at that time there was no business at the property in question. When a new owner purchased the building, they obtained permission from Lee County to operate a beauty parlor there. It was later used as a residential rental, then as The Heavenly Biscuit restaurant in 2001, and now as The Monkey Tree Restaurant. Councilman Meador expressed his disagreement with the proposed rezoning.

Mayor Boback opened public comment.

Edward Shelovitz, the property owner, testified that the lot was purchased as commercial zoning. He only found out that the property was zoned residential when he went to sell it. He stated that he spoke with Bill Spikowski, and was told that "an error was made" in the zoning of 110 Mango Street.

Mr. Murphy stated that proper notification procedures were followed when the property was rezoned from commercial to residential use.

Mayor Boback closed the public comment.

MOTION: Councilman Reynolds motioned that the council "reject this application" as he did not believe that it meet the town's Comprehensive Plan.

AMENDED MOTION: Councilman Reynolds amended the motion to include that the application was rejected because it is not in compliance with the town's Comprehensive Plan, Chapter 34 of the Land Development Code, and "applicable town ordinances". Councilman Shenko seconded the motion.

Councilman Shenko asked Mr. Murphy how the rejection of the application would affect The Monkey Tree, which is the currently operating business at 110 Mango Street. Mr. Murphy said that it would continue to operate as "non-conforming" as long as the "operation was not discontinued", even if the property was sold to a new owner.

VOTE: Motion passed 4-0 with Councilman Meador abstaining.

VIII. COUNCIL MEMBER ITEMS AND REPORTS

Council Meador asked Ms. Lambert about the time and place of the town's first meeting with the Red Cross to discuss citizen volunteers for

disaster recovery. Ms. Lambert said that the workshop is scheduled for June 7th at 6:00 PM in Town Hall. Councilman Meador also expressed his intent to propose a meeting adjournment time for council meetings.

Councilman Shenko commented on the 'Guest Commentary' in *The News-Press* on May 4th, 2006, by Steve Boutell regarding beach re-nourishment. He pointed out that at the town's meeting with FEMA, council directly asked if the re-nourishment would lower flood insurance rates and was told "absolutely not". He said that this was contrary to what Mr. Boutell stated in the newspaper. Councilman Shenko then asked for a consensus of council that a letter be sent to the chairman of the county commission requesting that Mr. Boutell asked for clarification of his statements about flood insurance in writing from FEMA. Councilman Shenko then called for a report at the next council meeting from the town's community development staff regarding the state of Jimmy B's.

Vice Mayor Massucco reported that he attended the Visitor Convention Bureau breakfast and the TDC meeting.

Councilman Reynolds expressed his disappointment in one of the local newspapers for repeatedly making comments about council members. He suggested that if the situation is not resolved on its own, then council instruct Ms. Dalton to seek the opinion of the Attorney General. Councilman Reynolds asked that council reach an agreement with God's Table to allow them to operate their program. He called for island residents that are members of any of the churches involved with God's Table that have proposals to solve the conflict to contact the council.

Mayor Boback asked Mr. Murphy if there had been any code enforcement actions involving Jimmy B's. Mr. Murphy said that he would check with Julie Brown, Code Enforcement Officer, about the status of this issue.

Councilman Shenko reiterated his concern over the statements made by Mr. Boutell in *The News-Press*, as he felt there were misrepresentations in some of those statements. He asked that either the Mayor or Town Manager write a letter to the County Commissioner asking for clarification of those statements in writing from FEMA. Ms. Lambert offered to raise these questions to the County Commissioner, and council agreed.

IX. TOWN MANAGER'S ITEMS

Ms. Lambert had nothing to report.

X. TOWN ATTORNEY'S ITEMS

Ms. Dalton asked that the meeting with the attorneys for Chapel By the Sea, scheduled for Wednesday, May 10th, 2006, be put on the agenda for the next meeting for discussion purposes.

XI. PUBLIC COMMENT

Richard Ryder stated that there is an illegal triplex operating at 6021 Gulf Drive. He said that he reported the building repeatedly to the town and has not seen any action taken.

XII. ADJOURNMENT

MOTION: Councilman Meador made a motion to adjourn. Councilman Shenko seconded the motion.

VOTE: The motion passed unanimously.

Mayor Boback adjourned the meeting at 6:21 PM.

Respectfully submitted,

Nicole Olsen
Interim Transcribing Secretary