

**FORT MYERS BEACH
TOWN COUNCIL
Town Hall – Council Chambers
2523 Estero Boulevard
Ft. Myers Beach, FL 33931
October 17, 2005**

I. CALL TO ORDER

Mayor Bill Van Duzer called a Land Use Meeting of the FMB Town Council to order on Monday, October 17, 2005 at 10:00 AM.

Members Present: Mayor Bill Van Duzer, Vice Mayor Howard Rynearson, Councilman Don Massucco, Councilman Garr Reynolds, Councilman Ken Katcko

Staff Present: Town Manager Marsha Segal-George, Town Attorney Anne Dalton

II. PLEDGE OF ALLEGIANCE

All present stood and recited the Pledge of Allegiance.

III. INVOCATION

Mayor Van Duzer gave the invocation.

IV. PUBLIC COMMENT

No one came forward.

V. LAND USE CASE – VAR2004-00038: Ostdiek Swimming Pool Variance – Town Resolution 05-31

Mayor Van Duzer declared the hearing open, and asked everyone who would offer testimony in the case to be sworn in, which they were, by Town Attorney Dalton.

Ex parte communications: Councilman Massucco spoke off the microphone, but it sounded like he had met with the owner of the property and a neighbor. Councilman Reynolds spoke with the owner. Councilman Katcko had none, nor did Mayor Van Duzer.

Mayor Van Duzer told Mr. Ostdiek, as he came forward to make his presentation, that everyone on Council had already read the presentation he had made to the LPA, but that he should proceed however he wished.

Mr. Ostdiek said if everyone were familiar with the site and the request, he would skip the information he had given the zoning appeals board (LPA). He thanked the Council for doing their job, no matter how it turned out, because they all had their challenges and he appreciated the work they did, as it wasn't easy.

Mr. Ostdiek said he basically wanted to put a pool in the back of his house, overlooking the bay. He said they had started the project three years ago, and had asked for a variance. He said he had met all of the requests and criteria the County had asked for, and the reason he wanted the variance was because he wanted to elevate the pool to the level of the house. He said he had mangroves growing as high as twelve feet behind his property along the water, didn't want to cut them down, and elevating the pool would also get it out from under their shade. He said elevating the pool would give his family the opportunity to enjoy the sun, enjoy the view, enjoy his grandchildren when they used it, and enjoy his home. He said he had been a resident since 1991, and a taxpayer at Gull Wing and Widgeon Terrace. He said his house was on a dead-end street through a gated community and with neighbors on both sides. He said he could put a raised pool in the side yard with no variance, but the neighbor had written letters objecting to that site for the pool, as they feel it would negatively affect the resale value of their home. He said they had met all the requirements they had been asked to fulfill. He had seen raised pools on Sanibel, pictures of which he had shared with the LPA. He also had pictures from his dock to illustrate the view one would see from the bayside, which showed that the 12-foot high mangroves would hide the wall that would be necessary to raise the pool. He distributed those pictures to the Council members. He concluded that he hoped to be approved, so that he could begin construction of the pool next summer. Mr. Ostdiek mentioned that he had a heart condition, and looked forward to getting much needed exercise in his new pool.

Mayor Van Duzer remarked that Mr. Ostdiek looked healthy, which prompted a hearty "thank you" from Mr. Ostdiek.

Councilman Massucco asked if some kind of buffer or fence could be constructed for privacy if the pool were sited in Mr. Ostdiek's side yard. Mr. Ostdiek said the pool would be at the same level as the neighbor's living space windows, and a buffer or fence would block their view as well as the sun. Councilman Massucco asked if the raised pool in the picture from Sanibel closely approximated how his pool would look. Mr. Ostdiek said it would be similar, other than the fact that the wall of his pool would be hidden by mangroves. Councilman Massucco asked how the equipment would be brought in to do the work, and Mr. Ostdiek said they would use the side yard, which would probably tear it up. He said they planned to replant the area with trees, flowers and stone rather than grass, which he felt would be better in terms of maintenance, as it would require no watering. Councilman Massucco asked how many gallons of water the pool would hold, but Mr. Ostdiek didn't know, although it would be relatively small – 8 feet by 25 or 30 feet. Councilman Massucco said he had a pool of that size up north, and it had required a lot of flushing of the filter system. He asked Mr. Ostdiek where he would be directing the flushed water from his system. Mr. Ostdiek said he was not sure, but assumed the system would have a self-flushing feature, as the pool next door did. He had never observed any water coming from his neighbor's pool. He said he was looking into a salt water pool that filters out the salt.

Councilman Reynolds remarked that if he built the pool in the side yard, it would require no variance. He said he had read in Mr. Ostdiek's materials that there were 25-foot high mangroves in the back of his house, but when he had looked at the property, there were only two trees of that height. Mr. Ostdiek said three had gone down during the hurricane last year. Councilman Reynolds said he noticed in the pictures Mr. Ostdiek had distributed that the neighbor's pool extended closer to the bay than Mr. Ostdiek's pool would.

Mayor Van Duzer explained that after the Town made its presentation, Mr. Ostdiek would have the opportunity to address anything that came up.

Sean LeMay of Lee County Community Development, Division of Zoning, came forward to represent the Town of Ft. Myers Beach in this case. He said the Staff Report VAR2004-00038 was dated April 18, 2005, and then entered the report into the public record. He read the report, which stated that the property was located in a Residential/Conservation Zone, and was surrounded with properties zoned the same. After studying the proposed variances in the context of the applicant's written narrative proposal and impacts on the surrounding development pattern and designation, Staff had to ensure that request qualified for a variance. He said Staff had concluded the following:

- There are no exceptional conditions to the property that warranted a raise pool at the proposed location.
- The request was a result of actions of the applicant taken after the adaptation of the regulation in question.
- The applicant has other options for placement of a pool on the property, therefore granting the variance was not the minimum that would relieve the applicant.
- The applicant had been unable to demonstrate hardship in his request.
- Denial of the request did not unreasonably restrict use of the property.

Based on the findings and conclusions outlined in the report, Staff recommended denial of the requested variances.

Mayor Van Duzer said when Mr. LeMay had presented the report to the LPA, there had been a statement that said Staff had been strict in its view of the zoning, but that the LPA could look at gray areas that Staff could not consider. This was something Mayor Van Duzer wanted to address further.

Mr. LeMay said the pool could go elsewhere on the property, so strict interpretation of the ordinance would say the pool could go elsewhere. Having said that, Mr. LeMay said, looking at the current streetscape, the side yard would probably not be the best place for a raised pool. Mayor Van Duzer stated that if the Council determined Mr. Ostdiek's was a reasonable request and approved the variance, they would not be in violation of the Town's LDC or Comp Plan, as they had the authority to grant the request if it met the criteria listed in the Comp Plan and LDC. Mr. LeMay said he had reviewed Resolution 2005-09 that had been passed by the LPA, and was satisfied with the conditions that had been placed on the applicant.

Councilman Reynolds, with a written statement, said: “I agree with the variances of Resolution 05-31, Sections 1, 2, 3 and 4 and the two conditions as stated. The pool should be allowed as approved by LPA. They have obviously studied both the CP and the LCD (sic) carefully and have reached a fair and common sense conclusion. The applicant’s request should be approved for the following reasons: Number one, I agree with Item A, as I just stated, the approval as stated because it is common sense and allows Variance, #1 – 4, along with the two conditions; and B – this will throw you – because I also agree with the planners who had rejected the application because they had followed the Comp Plan and the LDC to the very letter. To follow the two plans so closely, they had no option but to reject unless they gave variances which they chose not to do. But, I must reject their decision for the following reasons: Number One, I find the Comp Plan and the LDC often does not offer equal and fair treatment to residences and small businesses. And my reference to residents would be just what we’re talking about up here – that rejection. Under guidance of the present Comp Plan, I believe the planners should strive harder to follow both plans more equally for both residences and commercial small businesses. I believe that is often not the case. I’m hoping the planners will give that some thought. Number three, my assessment is that the Comp Plan and the LDC definitely favors commercial applicants as it is written, and I would reference that to the office building that the Council approved last week, 10-10-05 and also by the planners and the LPA. Many wide variances were given in this case while three Councilmen did not even ask one question, which really bothered me at the time. For some reason, it did pass 5-0. Item four, many are not aware that the so-called award winning Comp Plan was approved 4 – 1 by Town Council before it was sent to the state for approval. The reason one Council member did not vote for approval was that there were too many unfair and unclear areas and sections dealing with the small commercial businesses and residences. Dealing with large developers and commercial investors may work as it is now if Council members and the Town Manager and the Town Attorney prove strong enough to enforce those two plans. Both plans desperately need revisiting though. Item C, for that reason stated, I would encourage Council to approve Resolution 05-31 as presented in Sections 1, 2, 3 and 4 along with the two conditions stated.”

Councilman Reynolds said the applicant had been fighting for approval for three years, and felt he had gone through a lot of trouble for it. He believed it had been looked at carefully, and appreciated the planners work on it, and admired the LPA’s decisions on it.

MOTION: Councilman Reynolds made a motion to approve Resolution 05-31 as stated. Councilman Massucco seconded the motion.

Mayor Van Duzer asked if Mr. Ostdiek wished to respond to the Staff Report. Mr. Ostdiek came forward and said that unless there were any questions or doubts about his intentions, the LPA report spoke for him. Mayor Van Duzer offered Mr. Ostdiek the reserved right to come back up to address anything he felt needed to be addressed.

Attorney Dalton asked the Mayor if he had closed the hearing with a reservation to re-open it. Mayor Van Duzer said he had.

Councilman Massucco said he agreed with a lot of what Councilman Reynolds had said with regard to the Comp Plan and LDC being less fair to residences and small businesses. He remarked that big businesses and developers offered incentives for approval, such as view corridors and bus stops, and a variety of other incentives. He said a homeowner was at a disadvantage because he or she could not do that. He saw nothing wrong with the applicant's plan. He had viewed the property, and felt putting the pool in back of the house seemed logical. Although he agreed with the Staff Report, he felt they needed to be flexible, as the entire street was a beautiful property and putting the pool in the side yard would affect the esthetics of the neighborhood. He said he would support Resolution 05-31.

Ken Katcko said he disagreed with the comments made by Councilmen Massucco and Reynolds for several reasons. He said while he was sympathetic to the applicant, the Staff Report had stated that the reduced rear and water body setbacks were not consistent with the intent of Town's LDC and Comp Plan. He said the pool could be built elsewhere on the property. He said an elevated pool of the size requested was not consistent with the Flamingo Harbor condominium community. He said the pool could be built attached to the rear of the home if it were not elevated. He said no other variances from the required rear setback and mean high water mark had been approved on other lots in the vicinity. He thought approval of this request might spark more requests for setback reductions for additions in the area. He said an elevated pool was not typical of the community. He said all that information was included in the Staff Report and he agreed with it. He noted that there had only been five LPA members present when they had heard the case, and it had been approved 3 – 2, thus was not an overwhelming vote of confidence, and Ms. Plummer had had reservations. He also felt providing sunlight and a view was not something for which Council should grant a variance. He said the request was for two large variances, and while he was sympathetic to the applicant, he felt it would set a precedent to approve the project. He did not believe Council should approve a variance for esthetics, but only for extraordinary hardships.

Mayor Van Duzer said the pool could be built in back of the house without any setback variances if it was in ground. He said because the request was to build the pool more than 42 inches above the ground, it required a variance because it was then considered a structure. He said whether it was 42 inches up or 7 or 8 feet up, it would be in the same location. He said variance was required strictly because of the height of the proposed pool, not because of the location. He felt it was one of the areas in the LDC where a body that considered this type of issue was important, as he felt it was an appropriate and reasonable variance to request. He said that, if in fact it couldn't be built at any height in that location, he would have a concern about it. He said the setbacks were fine at the lower height, and raising the pool invoked the need for the variance. He said he had looked at the property and thought putting the pool

in the side yard would be a detriment to the esthetics of the community. He said the Staff had responded to the request in the proper way, but that it was a reasonable request. He said if the Council approved the variance, it would not be in violation of the LDC or the Comp Plan.

Mayor Van Duzer offered Mr. Ostdiek an opportunity to respond to what had been said before he called the vote.

Mr. Ostdiek agreed with Mayor Van Duzer's remarks. He said if they were put the pool lower, he would have to tear off the back of the deck and reroute the stairs in order to make a normal sized pool. He said it would work in the side yard, but his neighbor, whose house was of high value, strongly objected to having the pool there. He offered to give the Council a copy of his neighbor's letter of objection. Mayor Van Duzer remarked that he had not received a copy of it, and didn't think any of the Councilmen had received it. He asked Mr. Ostdiek to pass the letter to the Council to look at, which he did.

Councilman Massucco commented that he would have been disappointed if Staff had made any other recommendation than the one they had, because they had followed the letter of the law. He pointed out, however, that the Council was allowed to bend it a bit, and each case had to be considered on its own merit.

Ms. Dalton asked if the Mayor had reclosed the public hearing. He thought he already had, but she pointed out that he had reopened it to allow Mr. Ostdiek to comment on the Council's remarks. Mayor Van Duzer closed the hearing.

Councilman Reynolds commented on the neighbor's letter of objection, which stated he had no problem with the elevated pool being in back of Mr. Ostdiek's house. Councilman Reynolds thought Mr. Ostdiek would use his pool more frequently if it were to be constructed as he requested, which he thought would be good for him, as he had had a heart attack last year. Councilman Reynolds felt the applicant's plan was the best option for that particular piece of property.

VOTE: The motion carried 3 – 2, with Vice Mayor Rynearson and Councilman Katcko dissenting.

Mayor Van Duzer told Mr. Ostdiek his variance had been approved.

VI. COUNCIL MEMBER ITEMS AND REPORTS

Mayor Van Duzer announced that Monofilament Madness was going to be held on Sunday, October 30th from safe light until noon, with drop off areas at Fish Tale Marina and the Mound House. The barbecue would be at the Mound House at noon. Mayor Van Duzer said that at any moment, he was going to get a call about his tenth grandchild being born.

Councilman Massucco said he had gone to the Edison Sailing Center Regatta the day before at the Holiday Inn. He said it was magnificent to see, and couldn't estimate the number of people in attendance, and the massive number of sails out on the Gulf. He said it had been the prettiest picture he had seen in a long time, and that they had already booked the next year's regatta. He said they had utilized over 300 hotel rooms on the Beach, which he said was a big plus for the businesses at this time of year. He was sure the restaurants got some business from that event as well. He felt the Town should support next year's event, but the group had complimented Jack Green for his efforts and assistance with getting it off the ground.

Councilman Reynolds said the delivery of the pumpkins for the Pumpkin Patch fundraiser was going to happen that day and anyone who could help unload them would be appreciated. He said more volunteers were needed to help sell the pumpkins, and reminded everyone that Saturday, October 22nd and 29th were the dates of the big events.

VII. TOWN MANAGER'S ITEMS

No items were presented.

VIII. TOWN ATTORNEY'S ITEMS

No items were presented.

IX. PUBLIC COMMENT

No one came forward.

X. ADJOURNMENT

Mayor Van Duzer adjourned the meeting at 10:45 AM.

Respectfully submitted,

Jo List
Transcribing Secretary