FORT MYERS BEACH
TOWN COUNCIL MEETING
MONDAY, NOVEMBER 10,2003
Town Hall-Council Chambers
2523 Estero Boulevard
FORT MYERS BEACH, FLORIDA

I. CALL TO ORDER: The Land Use Meeting of the Fort Myers Beach Town Council was called to order on Monday, November 10, 2003 by Mayor Daniel Hughes at 9:00 A.M.

Members present at the meeting: Mayor Daniel Hughes, Vice Mayor Terry Cain, Councilman Bill Van Duzer, Councilman Bill Thomas, and Councilman Howard Rynearson.

Excused absence from the meeting: None.

Staff present at the meeting: Town Counsel Richard Roosa, Community Development Director Dan Folke, John Hagan, Pam Houck of Lee County Developmental Services.

II. PLEDGE OF ALLEGIANCE: All present assembled and recited the Pledge of Allegiance.

III. PUBLIC COMMENT: None.

IV. ADMINISTRATIVE AGENDA:

PUBLIC HEARINGS:

1. SEZ2003-00023 Resort Restaurants Inc. in ref. to Snug Harbor Waterfront Restaurant. A request for a Special Exception in the Downtown zoning District to expand an existing outdoor seating area associated with second floor for food service for restaurant and on premises consumption of alcoholic beverages. The subject property is located at 1131 First Street.

Mr. Ed Cusak of Snug Harbor Restaurant came forward to present this request. He described the location of the Snug Harbor in the Downtown Zoning District at the north end of the redevelopment area and read a portion of the former overlay district objectives which he believes applies to his request. They presently have approval for 170 outdoor seats, which he illustrated on a chart. 60 of these seats are in the brick courtyard area. They are making application to extend the outside deck on the second level seating area by approximately 750 square feet and the maximum number of outdoor seats to a total of 235 of which 72 would be on the brick courtyard. There is ample room in the courtyard area to add four additional tables. The new deck extension area on the second floor will seat approximately 50 – 60 outdoors. There is ample approved parking in accordance with Chapter 34 of the Town's Land Development Code and relief granted by Town Council on March 3, 2003. A total of 121 total parking spaces are required. Their existing development order shows 307; however four of those were eliminated by the relocation of the dumpster which is an excess of 182 parking spaces.

Mayor Hughes asked at this time whether there had been any ex parte communications. There had been none.

Vice Mayor Cain clarified that when Mr. Cusak referred to 750 square feet, the correct figure is 650 square feet.

Councilman Van Duzer asked whether Mr. Cusak intended to address the amplified music issue, and Mr. Cusak replied that he did not. He hopes to address that issue in another forum at a later date.

John Hagan came forward to present the Staff Report dated October 6, 2003. Staff is recommending approval with four conditions. One of the conditions stipulated a white PVC fence; however, the applicant suggested brown which is acceptable. The fence will provide additional buffering for the increased intensity.

Councilman Thomas asked for clarification regarding the location of the fence. Mr. Hagan said that it his understanding that it will be on the applicant's property. Community Development Director Dan Folke also clarified this point. Mr. Thomas also asked whether the dumpsters in the parking area would be enclosed. Mr. Folke replied that Mr. Cusak working on this. Mayor Hughes noted a fifth condition recommended by the LPA.

Mayor Hughes asked about Condition 4 and why this does not refer to outdoor dining as well as consumption of alcoholic beverages. The way he interprets this is that food cannot be served. Mr. Hagan replied that this was not the intention. Mayor Hughes specified that this wording should be amended accordingly.

Mr. Cusak described the PVC fence and its location as well as the color. The shrubs buffering the FP&L equipment will be on Town property, but the fence is entirely on their property. He also described relocation of the dumpsters and the reasons therefore, and how his employees convey the trash from the building to the dumpsters. With respect to his ABC license, the intent was to limit alcoholic beverage service to certain hours. Food can be served at any time the restaurant is open. This was his understanding and is in fact a condition of their development order. Mayor Hughes suggested that this sentence be reworded for clarity.

Mayor Hughes had a question regarding the LPA recommendation for a white PVC fence. Mr. Hagan replied that after subsequent physical inspection with a fence supplier it was decided that the tan color was more appropriate. Mayor Hughes also asked whether this fence meets the hurricane standards. He was told that it does.

Mayor Hughes opened the meeting for public comment at this time. There was none.

Mayor Hughes called the Council's attention to the LPA draft resolution and the five requirements, with the requested rewording as referred to above. The word "white" is to be stricken from Number 5. In Number 4, start with the sentence, "The service of alcoholic beverages in the outdoor seating area will only be between the hours of 11:00 and 12:00 …"

MOTION: Motion was made by Councilman Rynearson and seconded by Councilman Thomas to adopt the resolution in draft form as presented with the changes as discussed in Paragraphs 4 and 5, and in "Now therefore be it resolved …" strike "denies." 1 through 4 on the first page of the resolution to be inserted on the second page under "Subject to the following conditions." Change 12:00 A.M. to 12:00 Midnight.

DISCUSSION: Councilman Van Duzer asked for clarification as to whether Item 3 was under consideration. Mayor Hughes replied that this had been withdrawn by the applicant. Mr. Van Duzer then stated that he did not want to vote for the motion as stated because he feels entertainment is appropriate in that location and this issue should be addressed at this time instead of having the applicant return to have it considered separately. Mayor Hughes referred to the LPA minutes which included no adverse testimony from neighbors. There was discussion as to whether it would be proper for the Council to address the issue of music in view of the way the public hearing had been advertised, and that there were none in attendance to voice opposition. Mr. Roosa replied that the Council has the authority to make changes if so desired. There was lengthy discussion about amplified versus non-amplified music and how approval might be worded.

It was pointed out that the matter which is before Council at this meeting is the expansion; therefore, it would not be appropriate to include the issue of music when it has not been advertised. The scope of this application is the expansion, and there has not been a request to amend the music portion of the application to apply to the entire outdoor seating area. If the motion is amended in accordance with Councilman Van Duzer's recommendation, it will only apply to the 650 foot addition. There will have to be another request at a later date for approval to cover the entire outdoor seating area. It was pointed out that the applicant specifically stated he wanted to exclude this issue. Mr. Cusak was requested to come forward for clarification and was asked whether he preferred to address this issue at this time or defer to a later date. He stated that he had rescinded this item because it had resulted in such lengthy discussion at LPA without resolution and he believes the subsequent case being heard today will also address this issue. Since there is already a noise ordinance in effect, he believes this covers all types of sound levels, including music. Further discussion centered around the appropriateness of addressing the entire seating area versus the area covered by this application. Mr. Roosa advised that he would be concerned about any application to existing areas that were not advertised. Mayor Hughes asked whether those making and seconding the motion would agree as follows: After "11:00 P.M." strike the rest of Number 3, and insert "after 11:00 P.M. in the 'deck extension area.'" which is defined in 2 as the 650 additional square feet. Councilmen Rynearson and Thomas agreed to this modification. Mr. Cusak was asked for his opinion, and he pointed out that the application to increase the seating was not limited to the deck. He felt, therefore, that the entire outside area was being addressed.

VOTE: Motion as amended was approved by unanimous vote.

2. CDI2001-00067 Douglas Spiern-Smith in reference to Matanzas Inn. A request to rezone from Commercial Planned Development (CPD) to CPD (primarily lodging) to permit a maximum to a total of 106,112 square feet of mixed commercial uses on 2.03 total acres of land. The subject properties are located at 141/416 Crescent Street, 420/430/440 Old San Carlos, 1010 Second Street and 1042 Second Street.

Mayor Hughes inquired whether there had been any ex parte communications regarding this matter. Councilman Van Duzer reported that he met with Carlton Rifle at Town Hall and had a lengthy discussion with him and examined the documents to be presented at this hearing. Vice Mayor Cain and Councilman Thomas also met with Carlton Rifle at Town Hall. Councilman Rynearson had a meeting with the same party at Town Hall and also talked with Doug Spiern-Smith. Mayor Hughes also had contact with him.

Joe McHarris, Doug Spiern-Smith, and Carlton Rifle came forward and were sworn. Mr. Spiern-Smith gave an overview of the proposal. This is a review of an existing CPD that was approved by Council in 1999. There have been many changes since that time, and when a Development Order was submitted to proceed under the original CPD, with the implementation of the Downtown Plan for Old San Carlos there was more of a vision for the entire area. This resulted in a different configuration for the units from the canal parcel to the Old San Carlos side. The plan submitted with this application is more consistent with the Downtown Plan. The applicant agrees with the Staff Report at the LPA meeting with the exception of two issues. One was Deviation 12, which relates to unit size on the canal front motel parcel, on which Staff recommended denial, but LPA recommended approval. Their intent is to create an all-suite motel with an average size of 800 square feet on the motel parcel to accommodate their clientele.

The other issue is that of continuation of their outdoor music. At the time of the 1999 approval there had been a complaint about the outdoor music which had been addressed by providing for a commitment by the applicant that when the restaurant would be redeveloped, the music would be changed to a different orientation whereby the sound would remain inside the commercial core instead of the residential areas across the canal. Although the property has not yet been redeveloped, they have during the

past summer reoriented the music and installed a new system similar to that at Diamond Head. Mr. Spiern-Smith said that music is a critical part of their business and he is requesting permanent approval for this.

Carlton Rifle came forward as a representative of Matanzas Inn. He gave a description of the site using Attachment D of the application package. He had no comment on the Staff Report and its deviations since there is basic agreement, with the exception of two points. Over the 19 years that Mr. Spiern-Smith has owned the property there have been many deviations, and Mr. Rifle has been involved with the property over that period. He said that at Staff's request the numbers were adjusted to be consistent with current rules, and those that were no longer needed have been eliminated. The proposed project is consistent with the plans for the Downtown area, including parking. The design includes the option to relocate some of the parking in the event Bayfront Plaza comes to pass. They are open to any future development of that area. He pointed out that the property actually consists of four parcels and that this would be an opportunity to implement the plans for the Downtown area.

The two portions of the Staff Report which are of concern apply to music and size of the units. On Page 5, Number 11, Staff recommends limiting outdoor music to unamplified music only. He pointed out that Matanzas has had music for approximately ten years, as opposed to the previous applicant, in whose case this is a new request. He said that this condition was included in the Staff Report due to the objection of one property owner out of the total of 71 who received the required notification. This is unacceptable to the applicant because music is a critical part of their business. In response to the one property owner who objected, the speakers have been redirected toward the Bay instead of down the canal. He described a new Muzak system which has been installed and which is now being tested and adjusted. They have no problem with music being restricted after 10:00 P.M. He has a noise meter which is certified to meet the Town ordinance of 60 decibels maximum at the property line, and he proceeded to describe how he has taken readings on different occasions. Mayor Hughes pointed out that 60 decibels applies after 10:00 P.M. Before 10:00 P.M. the limitation is 75 decibels. Mr. Rifle described in detail the different positions and weather conditions under which readings were taken, while music was being played, and that all readings were in compliance. In summary, he said that the applicant has made every effort to mitigate the concerns of the neighbor and that Matanzas has never been fined for violation of the noise ordinance, with which they will continue to comply. With respect to Condition 11 on Page 5 of the Staff Report which prohibits amplified music, if Council agrees with this he respectfully requested the applicant be permitted to withdraw the application and develop the property consistent with the 1999 conditions.

Concerning unit sizes, on the bottom of Page 6 of the Staff Report denial is recommended of the requested deviation for the motel unit sizes of an average of 800 square feet with a maximum of 1,200 square feet. These are not all two-bedroom suites, there is a mixture. By looking at just the motel parcel, that would be a Floor/Area Ratio of about 3. However, by looking at all the parcels as a unit, which is how he believes it should be done, the FAR would not exceed 1.2, which is permitted. The larger room sizes allow for suites which, will help to attract people to the back bay area. Staff supported another requested deviation which would allow for storage or office area up to 25 percent of the ground floor area. There is an excess of parking spaces.

Mayor Hughes had a procedural question concerning Page 4 of the Staff Report wherein the applicant was to furnish a revised Master Concept Plan, and in Paragraphs 5 and 6, architectural elevation drawings. Mr. Rifle replied that these are being presented by the next witness. Paragraph 15 has additional requirements, but it was felt that the MCP would be sufficient.

Councilman Van Duzer had a question about the FAR differentials. Mr. Rifle repeated what he had said above. Mayor Hughes requested clarification on different usages of the individual parcels. He questioned incorporating parcel B, which has been permanently set aside for parking, as part of the overall FAR dimensions. There was discussion about how this had been arrived at for density purposes.

Councilman Thomas had a question regarding the size of the units as it would apply to the intensity of use. Mr. Rifle said he did not believe it would increase the intensity. He said that motel guests in today's market prefer more room.

Joe McHarris of McHarris Planning and Design came forward representing the applicant on the conceptual design aspects of the plan. His firm has done other design projects in the area and is aware of what would be suitable in the area. Using architectural drawings, he described the design being proposed for the property as a wharf type atmosphere with four-sided design aspects. The project will be pedestrian friendly, with parking hidden beneath the buildings.

Several members had questions about various aspects of the design, which Mr. McHarris clarified by use of the drawing he had presented. The proposed driveway and intersection measurements were also discussed. There was comparison made between the different drawings. Under the 1999 plan there were four driveways; now there are two.

The Staff Report was presented by John Hagan. He stated that he is taking the place of Jerry Murphy, who is out of town. The applicant has provided materials, including an MCP, fifteen days prior to the hearing as requested. There are three minor changes requested on the MCP which he identified using the applicant's exhibit. In response to some questions, Dan Folke pointed out that the exhibit being presented today is slightly different from the one in the Council members' packets. Some unnecessary material and comments have already been removed at Staff's request so that there would be no conflict between the resolution and the MCP. Mr. Hagan identified the notes and comments that Staff wants to have removed. Many of the requested deviations have already been approved under the prior Planned Development. The number of motel units is being reduced. This architectural drawing is in better compliance with the pedestrian commercial land use policy and the proposed development of this area. It also reduces the height of the hotel, which is an important issue in this Planned Development.

He also addressed Deviation 12 which Staff recommends be denied. With respect to Condition 11, Staff stands by their recommendation that there be no amplified music.

Mayor Hughes cited the schedule of uses on Page 3 and asked whether this were not broader than what the applicant is seeking. Mr. Hagan replied that the wording was intended to bring the schedule of uses under the MCP in compliance with the newly adopted Chapter 34 zoning code.

Councilman Thomas wanted clarification about the reasons why Staff recommends denial of Deviation 12. Mr. Hagan said it is his understanding that there was not sufficient justification for approval and that 450 square feet maximum should apply. Town Manager Segal-George clarified this by saying that the applicant did not demonstrate in their application that the increase in intensity was appropriate for that location. Councilman Van Duzer and Mayor Hughes had a discussion with Mr. Folke about the method used to compute density and FAR and whether it was appropriate to include of Parcel B for purposes of computing the FAR. Mr. Folke said that if the zoning is approved and the parcels are combined, all the other issues are eliminated provided the applicant stays within the 1.2 limitation as recommended. Discussion centered around the representation that there are 12 less units on the Crescent Street side, and this was clarified by the applicant. They are within the density limitation on Old San Carlos, which is 1.8, and well below 1.2 on Crescent Street.

Mayor Hughes opened the public hearing at this time.

Matt Uhle came forward representing Mr. Jim Shenko, who is also present and will also address the Council on the noise aspects. Mr. Shenko lives on Primo Drive, a few hundred feet from Matanzas Inn. Mr. Shenko's family has owned the property since the 1970s, and he has personally owned the property since 1984, prior to the advent of outdoor entertainment at Matanzas Inn. His property is in the Residential Conservation Zoning District, meaning that he has a reasonable expectation that he will be free from

excessive and obnoxious noise in his single family neighborhood, as protected by the Town's land use code and the Comprehensive Plan. On an almost nightly basis for the past fifteen years, the client is able to hear music inside his house with the windows closed and the air conditioner on. There have been previous hearings on this issue dating back to the 1980s. He described how his client and other neighbors have made approximately 24 calls to the Sheriff's Office in an 18-mohth period, and that he does not believe the noise ordinance is sufficient to deal with the problem. The recent changes and additional equipment described by the applicant have not been in place long enough to evaluate their effectiveness and have not been incorporated into any condition at this point. One remedy would be to ban outdoor entertainment at this location. With the increase in size of the restaurant by 40 percent, he believes there is sufficient room inside for bands and entertainers. Another option, as Mr. Uhle indicated during the LPA hearing, would be to pursue possible engineering solutions to this problem which could be made a condition attached to the development order and which would be acceptable to his client. He referred to a memo on this subject by Staff. Mr. Uhle has written such a condition, which he will present in the event the Council wishes to pursue this issue. A third option would be to ban amplified music, which he does not believe would be enforceable or appropriate. He questioned Mr. Rifle's qualifications for the use of noise meters and stated that this testimony was not disinterested and requested that it be disregarded.

Mayor Hughes verified with Mr. Uhle that his client has received no satisfaction by calling the Sheriff and that no citations were ever issued. Mr. Uhle stated that his client will speak to this issue. Mayor Hughes asked Mr. Uhle to read the suggested condition.

Mr. Uhle stated that the condition would read as follows: "The applicant is required to identify and implement a list of best management practices designed by a noise expert to reduce to the maximum extent feasible the amount of noise emitted over residential property lines as a condition of development order approval for the proposed restaurant expansion." Mayor Hughes asked if this were available in writing and was told by Mr. Uhle that it is handwritten which would not be legible.

Councilman Rynearson asked whether the 24 calls to the Sheriff had been documented, and Mr. Uhle replied that this was correct. This document was identified for the record and was admitted into the record by Mayor Hughes.

Mr. Shenko, the owner of 255 Primo Drive, came forward and stated that he is directly across the canal from the Matanzas Inn and that he was also the previous owner of 241 and 243 Primo Drive. His family has owned this property since the 1970s when the applicant's property was still vacant land. He described his ongoing problems with the noise situation since the 1980s. He referred to a hearing in 1999 at which time the applicant agreed to redirect the sound, but said that this was not done until October 2003. He said that what has been done has helped, but not much. He described his neighborhood with respect to which are affected by the sound.

Mayor Hughes closed the public hearing at this time and asked the applicant if there were any rebuttal. Mr. Spiern-Smith came forward to clarify several points. He referred to the 1999 hearing and stated that they intended to make the agreed upon changes when they added to the upper deck, but that this addition was delayed because of the timing of the application and revision of the CPD. There had been no calls from Mr. Shenko between 1999 and 2003, either to himself or his on-site manager. He said that although there had been 34 calls on music, there were no violations of any ordinance. He has talked to Mr. Shenko's neighbor, Bob Leasure, who has said he supports outdoor music. He said that they are willing to work with the neighbors and to make reasonable changes. Mayor Hughes recalled the 1999 hearing and the discussion on music at that time and asked whether the speakers had been reversed as agreed. Mr. Spiern-Smith said that this had not been done, and that he wishes changes had been made earlier, but that he was not aware of the magnitude of the problem because he had not been called and told about it. Mayor Hughes inquired whether Mr. Spiern-Smith would agree with the proposed condition as read by Mr. Uhle. Mr. Spiern-Smith said that

they are open to any reasonable conditions that will help the situation but would not agree if the expressed outcome is to totally guarantee elimination of all problems for all parties.

Councilman Rynearson referred to the applicant's contract with Muzak and that this firm is generally known to have expertise in the sound industry. Mr. Rifle said that the system had been installed last Friday and that the system is undergoing testing and adjustment. The readings were taken by the manager of the Matanzas Inn, who uses the meter frequently, while Mr. rifle watched, and the readings were all under the maximum allowed under the noise ordinance. Mr. Rifle said that the manager, Chris Aronberg, gave Mr. Shenko his home phone, cell phone and office phone numbers, but that he had never received any calls from him. When the Sheriff's Office responded to complaints there were no citations issued because the readings were always within the allowable level. He said that the Muzak system was obtained because of the LPA meeting where a similar system that had been approved at Diamond Head was discussed. Mayor Hughes recalled the Diamond Head hearing and said that to his knowledge there had been no complaints from the condominium association since their system was installed.

Mr. Roosa pointed out that two of the Staff members had testified without being sworn. This was done at this time. The public hearing was closed at this time. Mr. Roosa had no comments on the proposed resolution.

Councilman Van Duzer observed that the resolution does not address the outdoor music issue.

MOTION: Councilman Van Duzer made a motion to approve the request and Resolution 3-35 including Condition Number 2, Schedule of Uses, the Condition requiring the applicant to have a Development Order on Parcel B within 48 months, Condition Number 19 having to do with the proposed language of the Matanzas Inn which was not considered in the LPA hearing, Deviation Number 12 which was recommended for denial by Staff but recommended for approval by the LPA, a new Deviation Number 21 with respect to building heights and the enclosed non-living space; his motion would include consideration of all the items listed A through L and the findings A through G, including outdoor music or entertainment be allowed but must cease no later than 10:00 P.M. and that it be required that the applicant hire a sound consultant and work in a reasonable manner to meet the issues concerning noise emanating from that site. Mayor Hughes pointed out that all the conditions and deviations set forth in the Staff Report, Pages 3 through 7, must be included and the other items must be included as modifications thereto. Mr. Van Duzer said he agrees. Mr. Van Duzer said he has taken his wording from the Staff Report with the addition of the word "reasonable." Mayor Hughes asked for Mr. Uhle's proposed condition but was unable to read it, so Mr. Uhle was asked to read the document again, which he did. Mayor Hughes asked Mr. Van Duzer Mr. Van Duzer to add "hire an independent consultant and implement the recommendations of that consultant within …" and include a time frame. There was discussion about imposing a time frame and whether the new equipment would prove to be a solution. Mr. Spiern-Smith was asked for his opinion and stated that he would pursue it actively but has no knowledge of the time required to do this. After further discussion it was agreed to include a six-month limit and be implicit that the noise ordinance must be met. This would be included in Condition 11. The wording was verified with Mr. Roosa. This motion was seconded by Councilman Rynearson.

VOTE: The resolution was approved by unanimous vote.

V. COUNCIL MEMBER ITEMS AND REPORTS:

Vice Mayor Cain reported on the sand sculpting contest.

Councilman Van Duzer had a hostile call about the sand sculpting event from an individual who had to wait over an hour for the trolley to arrive.

Mayor Hughes commented that although Snug Harbor and Matanzas were addressed today, the noise ordinance should be reconsidered in the "Entertainment District" area, which does not exist in the Land Use Code. He feels there should be a distinction between such areas and other areas of the community. He feels this should be referred to the LPA. Everyone agreed except Councilman Rynearson, who felt that the current noise ordinance is adequate. Mayor Hughes said that Deputy Town Manager John Gucciardo had discussed this with personnel from the Sheriff's Office who felt the Town should revisit this issue.

VI. TOWN MANAGER'S ITEMS: Not present.

VII. TOWN ATTORNEY'S ITEMS: Mr. Roosa reported that his law partner will be sitting in next Monday's meeting as Town Attorney. Mr. Roosa is going to Rome and will receive a group audience with the Pope.

VIII. PUBLIC COMMENT: None.

IX. ADJOURNMENT: Mayor Hughes adjourned the meeting at 12:12 P.M.

Respectfully submitted,

Patricia L. Middlekauff
Transcribing Secretary