FORT MYERS BEACH
TOWN COUNCIL MEETING
SEPTEMBER 16, 2002
LAND USE HEARING
Town Hall - Council Chambers
2523 Estero Boulevard
FORT MYERS BEACH, FLORIDA

I. CALL TO ORDER

The Land Use Hearing of September 16, 2002 was opened by Mayor Daniel Hughes on Monday, September 16, 2002, at 9:00 a.m..

Council members present at the meeting: Mayor Daniel Hughes, Vice Mayor Terry Cain, Howard Rynearson - Council member, Bill Van Duzer - Council member, Bill Thomas - Council member

Excused absence from meeting: None

Staff present at meeting: Town Manager Marsha Segal-George, Deputy Town Manager John Gucciardo, Damon Grant, Attorney Dick Roosa, Dan Folke, Bill Spikowski and Jerry Murphy.

II. PLEDGE OF ALLEGIANCE

All assembled and recited the Pledge of Allegiance.

III. PUBLIC COMMENT ON AGENDA ITEMS

None.

IV. PUBLIC HEARING: Richard and Sheila Watts in ref. to Santos by the Beach. Case number ADM2002-00011. Appeal of an administrative interpretation by the Department of Community Development denying a commercial building permit application COM2002-00722 on the basis that the application was in violation of the following sections of the Town of Fort Myers Beach Land Development Code (LDC) 34-694 (c) Purpose and intent of RS residential single-family districts, 34-694 use regulations for one-family residential districts as to permitted dwelling units, 34-3241 Non-conforming buildings and structures and 34-3242 Non conforming uses of buildings. The subject property is located at 1321 Santos Road

Mayor Hughes began by asking for ex parte communications from the members of the Town Council. None were heard.

Beverly Grady came forward to represent Mr. and Mrs. Watts on the appeal 2002-00011. The issue before the Council today is whether the internal alteration of an existing unit is proper or improper under the Fort Myers Beach Land Development Code. A request for overturning the staff's interpretation is being requested. The applicant hopes the Council will find that internal improvements are permissible, as they always have been, within dwelling units and non-conforming dwelling units. She indicated that three exhibits are to be recognized. It is important to recognize the structure is located 1321 Santos Road, which has three units and is zoned single family. Everyone is in agreement that three units are legal at this property. One would be permitted by right and the other two are non-conforming legal units. One unit is on the ground floor and two units are on the second. The focus is only on one unit on the ground floor. When the boundaries of the units remain unchanged you may do internal alterations. The provision in the Town's code is the same as Lee County's.

Beverly Grady reviewed all the agreements with staff. There is one ground floor unit at 1321 Santos Road, which is a legal non-conforming unit. No issues exist with the two units on the second floor. The boundaries of the one ground floor unit are the same. Prior to the current owner acquiring this parcel a prior owner changed the one ground floor unit into two. The building was built in 1950. At some point prior to 1962 when zoning came into effect in Lee County the structure contained three units. On March 15, 1982 there was a zoning request to rezone this application. The application was denied, but it does document that the Board of County Commissioners recognized there were three units on this property. Also, this was grandfathered in as a non-conforming use that was allowed to continue in a single family unit. The prior owner obtained building permits for this structure, which included improvements to the two ground floor units. In 1997, Lee County on behalf of the Town of Fort Myers Beach inspected the structure and approved the construction as being in compliance with the codes in effect within the Town of Fort Myers Beach. The current owner acquired this property by a deed dated October 31, 1997 that was recorded November 4, 1997. The current owner had some remodeling to improve the structure with no problems. A code violation/notice of hearing from September 2002 was received with regard to the fourth unit not being permitted properly. This owner filed a building permit on April 5, 2002 to cure the problem. This application combines the two units into one. This application also fixes the problem. June 5, 2002 Lee County rendered its administrative interpretation denying the permit. The appeal of this building permit is being heard today by Council due to the summer break. The attorney for the property owners had a long scheduled vacation and she is present on behalf of the property owner.

Beverly highlighted two points of concern with staff's interpretation. The staff and staff report based their denial citing Section 34-3222, which prohibits a non-conforming use from being extended, enlarged or replaced by another use. The staff denial letter does not indicate the issues. The staff letter cites two sections of the RS-1 district and the other two sections it cites under the non-conforming use and non-conforming structure provisions. The applicant and representative disagree. The staff report and denial letter are both very confusing. Each states that the application is for an interior remodel that creates an additional rental unit. This is not correct. She addressed page 2 or 6 and read that the applicant is developing a four-plex on the subject property. This is not an application to develop a four-plex on the property, but is an application to cure the violation. It does not state anywhere in the staff report that the building permit application is to make the ground floor back to one unit. This is not a permit to remodel an additional rental unit. The applicant and representative respectfully submit that the property owner is in compliance with the code enforcement order to remove the fourth unit. The kitchen has been removed. The staff report is an attempt to regulate how many occupants are in a family by not allowing a separate bedroom within the confines of the existing unit. This is not supportable by the applicant.

In closing, Beverly would like Council to take in account their proposed Land Development Code. The proposed code on non-conforming uses specifically states that as to dwelling units they will be created as a non-conforming structure and not a non-conforming use. If you are looking within the confines of the structure there would be no limitation on what can be done. Dwelling units that are in excess of the density permitted on the property under today's plan or zoning, but are legal non-conforming will no longer be treated as non-conforming uses. The applicant respectfully requests that Council overturn the appeal and recognize that internal alterations can be within the confines of an existing unit, which is not an enlargement, extension nor a replacement. She filed for the record the zoning code beginning with Division I, Section 34-32 on non-conforming uses and structures, and a memorandum on the appeal citing case law. She would be happy to answer any questions and would like the opportunity to respond after staff has spoken.

Mayor Hughes indicated that the Council would need to take a short recess to read the

memorandum, which has been provided by the applicants representative.

Council member Thomas asked for clarification that at one time there was a fourth unit that was being rented. A violation was imposed by code enforcement, which has not been paid. He asked if this is correct? Beverly Grady replied that it is correct the fourth unit existed and was being rented. She indicated that there were two pieces to the violation and one was paid in January. The second one is not paid until you are abated. The permit needs to be resolved, so the finalization of the satisfaction can be completed.

Mayor Hughes referred to the floor plan, which is part of the staff report. He questioned the blacked out area? The applicant replied that this area was the kitchen. This kitchen has been removed since January.

Dave Perella spoke in response to some questions with regard to the floor plan. Mr. Perella is a co-owner along with Mr. Watts and did acquire property at the same time.

Vice Mayor Cain asked what the sitting area is? Dave Perella replied it is a sitting area with a table and four chairs. The bedroom to the left used to be the living room.

Mayor Hughes asked Beverly Grady to address the "after the fact permit?" Beverly Grady replied that the solution by the County on behalf of the Town was to obtain a building permit, so there would be an approved permit to match the floor plan.

Mayor Hughes questioned if remodeling was done without a permit? Beverly replied that she is unsure about the timing of the filing, but the kitchen was removed because of the hearing.

Dave Perella added when the applicants appeared before the hearing examiner last fall it was brought to their attention that the bathroom was not permitted. Dave Crabtree requested that an "after the fact permit" should be obtained.

Jerry Murphy from staff came forward to present the staff report. He feels the issue before the Council is relatively simple and can become complex. It is a question between the allowance of internal improvements and internal alterations. Exhibit D, floor plan layout, which was looked at by the Board of County Commissioner in 1982 went through a denial of a rezoning request. It was stated that this configuration would be allowed to continue as a grandfathered in non-conforming use. The applicant has subsequently completed without permits the floor plan Exhibit ADM-2002-00011. This is clearly for two units. A door leads into a bedroom and sitting room and another door leads into a living room. The regulatory aspect of trying to maintain that this will not be used in this manner is a difficult matter for Council to put upon themselves and staff. Without the elimination of the second entrance to the bedroom on the left-hand side in this rental structure it would be considered a lock off unit. He referred to Exhibit D and explained that this configuration was the floor plan allowed by the Board of County Commissioners prior to the incorporation of the Town. The applicant has altered the structural arrangement of this non-conforming unit to provide an additional bedroom and sitting room. He feels the Council should focus on the notion on page 5 of 6 with regard to repairs and maintenance of an existing non-conforming use. Ms. Grady has provided some case law and staff has not had the benefit of this case law or any of this information prior to today. Staff is not in agreement that one unit exists on the first floor. The blacking out of certain labels does not change this. Staff further believes if you could find this to be one unit it is not the three bedroom unit the Board of County Commissioners recognized 20 years ago. The applicant has lost their non-conforming use due to the alterations that have been made. The applicant should return to the status quo.

Jerry Murphy noted further that staff did not tell the applicant if they applied for "after the fact approval" they would be OK. The only way this could be permitted was through the approval of an "after the fact permit." This was presented to staff and while being reviewed it was discovered that this is not in compliance with the existing zoning. If you make an interpretation that any owner can do whatever they want within the four walls and ceilings of their building and still be in conformance think of how many additional units could be allowed in a non-conforming structure such as this. This is the matter that needs consideration while this decision is made. Staff recommends that Council adopt the suggested findings of the staff report.

Attorney Dick Roosa expressed that Counsel for the applicant pointed out that the application with regard to the FEMA regulations would not violate the substantial improvements. Are there any other restrictions under FEMA other than the restrictions which identify the residential and nonresidential? Jerry Murphy replied under Section VI - 472 b(2) of this provision it states electrical, plumbing and other utility connections are prohibited below the base flood elevation. The introduction of the bathroom and counter/sink along with electrical would be a violation of this provision in this remodel. This whole floor is below base flood.

Attorney Dick Roosa clarified for Council if the property owner had come in to request the addition of a bathroom within a dwelling unit would this be permitted or prohibited under the current code? Jerry Murphy replied that this would be prohibited.

Vice Mayor Cain questioned if a parking plan was submitted? Jerry Murphy replied that this was not part of the application. He expressed that this is an additional issue outside the scope of this appeal.

Mayor Hughes recapped that even if the property owners could get beyond the zoning issue it will seem unlikely they would be permitted? Jerry Murphy replied that he felt safe responding "yes."

Beverly Grady requested a continuance. The permit was filed in April 5 and she is standing before Council on September 16 trying to get this matter resolved. She disagrees and is not prepared to comment on the statements with regard to the ability to permit below base flood. This is not her understanding of the law. She would like staff to lay out all issues to the property owner.

Attorney Dick Roosa commented on the issues raised by Beverly Grady. One of the basis for the appeal was the issue of distinguishing between storage and living area. This whole concept is based upon the FEMA regulation. The issue was raised by the appeal when the appeal was filed.

Beverly Grady replied all that can be appealed is the denial. The denial is included in the June 5, 2002-letter.

Jerry Murphy added that staff did not base its appeal response on anything accept Chapter 34. He feels the Council can rule on the Chapter 34 provision with what has been brought before them today. The rejection was solely based on not meeting the requirements of Chapter 34. The project does not satisfy the requirements of Chapter 34 and cannot as it is currently laid out.

Beverly Grady expressed that the continuance needs to serve a purpose. The property owner is entitled to understand from the Town of Fort Myers Beach what does this application not meet.

Jerry Murphy replied if it is the desire of Council the applicant should be instructed to reapply and instruct the staff to review all issues. This is not standard procedure. Standard procedure is to look at zoning and if zoning is not met the application will be rejected.

Beverly Grady commented on the staff report. She discussed the 1982 zoning denial. She reviewed the minutes and the resolution. It was denied, but it does document that there were three legal units. She referred to the plan and has spoken to Mr. Watts. If the issue is the second entrance into the bedroom, this could be made an exit only. The law states that internal changes can be made and those permits have always been issued. She stated when a non-conforming use is altered you do not lose it. She made a correction of a previous statement with regard to plan ADM2002-00011. The blacked out portion refers to a sitting area and the words which used to be in this location were "breakfast area" and not kitchen. The issue is does this meet the building code and does it meet the substantial improvement. She objects to staff putting on the record that this permit has these issues and will not be approved. She feels that this taints this case.

Jerry Murphy commented that in terms to what was done in 1982 by the Board Ms. Grady is correct that this was a request for rezoning that was denied. The language and conversation of the Board is what established that the Board recognized this as a grandfathered non-conforming

use. It is unknown if the property met the requirement of a non-conforming use at that time. Ms. Grady does not want to use the word alterations. Staff feels that alterations of non-conforming uses are not allowed. He read into the record page 4 of 6, third paragraph of the staff report.

Attorney Dick Roosa questioned if this dwelling unit included a garage under the house would zoning allow for the conversion of this garage into a bedroom or living area? Jerry Murphy replied "no."

Attorney Dick Roosa reviewed the two drawings with the Council. He discussed a substantial difference between the two areas on the plans labeled laundry and maintenance/supply. Access was discussed and he asked if there is an intrusion in the applicants area that is different from the rough sketch provided to the County Commission? Jerry Murphy replied that by just looking at the rough sketches it appears that the area, which was formally occupied by the refrigerator and is now blacked out, along with the area of the bathroom was added to take up part of the previous equipment/laundry area.

Mayor Hughes asked if anyone wished to address the Council. None were heard.

Beverly Grady asked for a continuance if the Town Council would direct staff to advise the applicant and Counsel of all issues pertaining to the permit. Jerry Murphy added that the applicant should be instructed to reapply. They have been rejected once.

Council member Van Duzer is unsure if a continuance should be granted. The decision Council will make will be based on the zoning issue.

MOTION: Made by Council member Bill Thomas and seconded by Council member Bill Van Duzer to deny the request for a continuance.

VOTE: **Motion passes unanimously.**

MOTION: Made by Council member Bill Van Duzer and seconded by Council member Bill Thomas to adopt the resolution in the package with the provision that the administrative official decision is affirmed. This resolution to include the modifications discussed.

Discussion: Council member Van Duzer commented without removal of the bathroom, which was constructed without a permit and the bedroom, this is not brought back to the plan as allowed in 1982 as a non-conforming use. In order to uphold the non-conforming use as granted it would need to be changed back to the condition that previously existed. He has never seen a sitting area and bedroom that you have to go through three doors and two bedrooms to get to. He feels the intent was for the use of a fourth unit. The fourth unit adds to the density and intensity. He also feels this was put in unlawfully and must be removed completely. It must go back to the original plan to be usable and maintain the very valuable determination give to them in 1982.

Mayor Hughes agrees with Council member Van Duzer. Ms. Grady has done an admirable job with what she has to work with. This plan looks like a lock off unit. All issues brought up by Council member Van Duzer indicated that this is not a conversion back to one unit.

Attorney Dick Roosa explained that the proper motion would be for the adoption of the resolution where the official decision is affirmed. He made a correction in the resolution at the second Whereas of Section 34-691(c). Motion above was amended to this language.

VOTE: **Motion passes unanimously.**

V. PUBLIC COMMENT

Beverly Grady asked for the time frame for the adoption of Chapter 34. Dan Folke replied that a joint workshop will be held next month with the LPA and Council. If the decision is made to hold public hearings at this workshop it will be November at the LPA and December with the Town Council. The intent was to this adopted by the end of the year.

VI. ADJOURNMENT

The meeting was adjourned at 10:27 a.m..

If a person decides to appeal a decision made by the **Council in any matter considered at this meeting/hearing, such people may need to ensure that verbatim record of the proceeding is made, to include the testimony and evidence upon which any such appeal is to be based.**

Respectfully Submitted,

Shannon Miller
Transcribing Secretary