FORT MYERS BEACH
TOWN COUNCIL MEETING
OCTOBER 14, 2002
LAND USE HEARING
Town Hall - Council Chambers
2523 Estero Boulevard
FORT MYERS BEACH, FLORIDA

I. CALL TO ORDER

The Land Use Hearing of October 14, 2002 was opened by Mayor Daniel Hughes on Monday, October 14, 2002, at 9:00 a.m..

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

Excused absence from meeting: Council member Bill Thomas

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

II. PLEDGE OF ALLEGIANCE

All assembled and recited the Pledge of Allegiance.

III. PUBLIC COMMENT ON AGENDA ITEMS

None.

IV. PUBLIC HEARING: Jeanne Sanders Addition. Case Number VAR2002-00014. Variance in the Multiple-Family Residential District for additions to an existing single-family residence. The subject property is located at 5266 Estero Blvd.

Mayor Hughes began by asking the Council for any ex parte communications. Council member Van Duzer will need to abstain from participating in this case. He does have a relationship with Jeanne Sanders and a conflict exists.

Steven Roberts came forward to request several variances for setbacks for Lot 31. This case has gone past the LPA and the result is a 7-foot setback in front (northwest side of lot) and 7-foot in the back rather than the 4-foot and 6-foot requested. Staff is recommending there be a 20-foot setback on the northeast side. He pointed out the setbacks on the plat. A less than normal side setback (northeast boundary line) will put an unreasonable constraint for a building this lot.

Mayor Hughes commented on the attachment “D” for the survey. The easement coming in off of Estero Blvd. is a lot over and a house covers both lots. There is no connection between the easement from Estero Blvd. to the rear of the front lot and the 10-foot easement along this property. No evidence of any means of access exists on the survey before Council. After looking at the survey he personally inspected the property. He explained the process of driving onto the property.

Mayor Hughes was looking for an easement, which would allow access to this lot? Steven Roberts replied that the easement is by custom only and nothing written exists that he is aware of.

Mayor Hughes is concerned that this may be terminated by the adjacent property owner. Steve Roberts replied that in the case of having an interior lot with no access the Sanders right of easement of pertinent would come into play. Someone would be asked to settle for an easement rather than going into some type of suit. Mayor Hughes added that a number of factors would be involved. A difficult legal position exists and he is uncomfortable with the situation.

Steven Roberts commented that he does not see how this addresses the footprint of the house on this lot. He does not feel that dedicating any portion of this lot within itself will grant any further access to the lot.

Mayor Hughes does not feel it would be appropriate for the Town Council to grant a variance, if the Council feels there is a lot which is landlocked.

Mayor Hughes indicated that there must be unique circumstances found by the Council to grant the request. Steven Roberts replied that since this lot is undersized, shape of the lot and access make it unique.

Mayor Hughes questioned why it would be necessary to build a larger home? Steven Roberts replied that by today's standards of room sizes alone would justify a larger home on a valuable piece of property.

Kirk Crane, Planner from Zoning Division of the County, came forward.

Mayor Hughes asked for clarification on the ruling by Town Manager Segal-George with regard to the MUD determination.

Kirk Crane replied that attachment "E" is a recommendation from the County to the Town of Fort Myers Beach, which was a determination this property did not qualify for a MUD based on the County's recommendation. He passed out an administrative interpretation, which is a determination that one single family residence is a permitted use.

Kirk Crane went on to explain that this is a substandard lot, which is 6,000 square feet in size. It is 43.3 feet deep and 140 feet wide. The residence on the property fronts the Gulf of Mexico. The Gulf of Mexico is not the street or front of the lot. This home is turned 90 degrees from what is the legal front of the property. He pointed to attachment "B." The 1978 Coastal Control Line has an existing open deck, stairs and a portion of the residence extending onto this line. This home was built in 1948 and was before the Coastal Control Line was established. The lot is accessed from Estero Blvd. by an easement. There is no connective easement to the rear of the property. There is a 10-foot walkway easement running along the northwest side of the property. This is technically the legal front of the property. 1.7 feet of the property was sold sometime prior to 1974. Too rebuilt this home there would be a private street setback of 20 feet and a rear setback of 20 feet on a property that is 43.3 feet deep. This would leave 3.3 feet of buildable area. A reduction in the minimum setbacks would be required to build a home on this property. He indicated that this property is zoned RM-2. The structure to be built will be as large as the property adjoining it presently. Staff feels this variance should be approved with conditions.

Kirk went on to discuss the memorandum written by himself directed to the Town Council. At the LPA hearing the recommendation from staff was that the northeast property line setback should be 20-feet. The LPA Counsel felt that the 7-feet was in her opinion the maximum that could be requested. Staff feels the 20-feet is justified, because this is the rear of the residence. Staff feels there are exceptional extraordinary circumstances. The single family home setbacks have been applied to the way the home is oriented on the lot. A recommendation of approval was expressed with the three conditions listed on page 2 of 6 on the staff report.

Mayor Hughes questioned the unique circumstances? Kirk Crane replied one of the unique circumstances is the depth of the lot at 43.3. Most of the lots elsewhere that are narrow do not meet the minimum lot width requirement and have a street perpendicular to the narrow portion of the lot.

Mayor Hughes questioned if there is any information specific in the Land Development Code with regard to the right of an individual seeking a variance on every side of the property and can relief be granted on three sides and increase the burden on the fourth side? Kirk Crane replied that they believe variances can be conditioned. The variances can be conditioned to greater than the minimum required. The LPA made their recommendation based on the opinion that was stated at the hearing by the LPA. Staff's recommendation remains unchanged.

Attorney Dick Roosa commented that staff's consideration is very persuasive, but is based upon the theory that the front of the site is being changed. The application is not requesting this change, but is requesting a reduction in the front and rear setback. He feels the side setback could be modified, if there were circumstances to justify this. He does not feel that reclassifying the lot as a front and side setback would be a sufficient basis to justify the expanding of a 7-foot setback into a 20-foot setback. When the applicant applied they had the right to a 7-foot side setback. Merely granting a reduction in the front and rear setbacks is not sufficient justification to expand this to a 20-foot setback.

Council member Rynearson is concerned with setting a precedence? Attorney Dick Roosa does not feel precedence will be set because each case must be considered separately. A unique circumstance exists in this case, because the access is merely an easement. It would be a different set of circumstances, if it were a paved road and traffic was running up and down the road. The front and rear setback should only be considered. The side setback is already set and is consistent with the code and applies uniformly.

Attorney Roosa addressed the access concern. It is customary in a purchase of real property to obtain Title Insurance. It would be rare to purchase real estate without Title Insurance. One of the fundamental issues in issuance of Title Insurance is access to the property. The survey may not completely show the records. Some other document of record may exist to give them access. The Title Insurance Company would be required to provide access.

Town Manager Segal-George indicated that this is the second time this type of problem has arisen. She questioned if the Council would like to direct staff to amend the code to deal with properties on the beach side where orientation seems to be a problem. This is the only area a problem has existed. She believes if the Land Development Code provision is changed to allow a determination of a different orientation because of the beach the setbacks could be adjusted.

Mayor Hughes agrees and feels this issue could be addressed by an amendment to the ordinance. Town Manager Segal-George added that it does take a certain period of time to amend the ordinance and move it through the process. She indicated that this case would be tied up waiting for this change.

Vice Mayor Cain also feels this issue should be addressed. She is unsure how many other homes will have an easement walkway down the side. There are some landlocked properties.

Mayor Hughes asked if anyone wished to address Council on this matter. None was heard. The public hearing was closed.

MOTION: Made by Vice Mayor Terry Cain and seconded by Council member Howard Rynearson to approve the resolution as drafted and prepared with the findings that there are exceptional circumstances and to include the three conditions. **(Motion Amended)** To include a condition the applicant must provide evidence by way of Title Insurance Policy or Abstract showing ingress and egress to the property.

Discussion: Vice Mayor Cain has concerns with pulling in under the home to be constructed. She feels the extra space may be needed.

Council member Rynearson commented he felt this would be addressed with the 20-foot on the east side. He has concerns with crossing over someone else's property and would like to have that matter solved before a final decision is made.

Mayor Hughes also has this concern. He questioned the Town Attorney if this could be a condition, which must be satisfied to staff prior to the issuance of a building permit? Attorney Roosa replied if evidence could be satisfied by display of a Title Insurance Policy it would be legitimate. A Title Insurance Policy or Abstract must be provided to show access.

VOTE: **Motion passes unanimously.**

V. PUBLIC HEARING: Ostego Bay Construction, Inc., in reference to Waterside at Fort Myers Beach. Case Number ADM2002-00014. Appeal of staff's denial of building permit. The subject property is located at 4141 Bay Beach Lane.

Mayor Hughes began by asking for ex parte communications. None were heard.

Mark Ebelini came forward representing Ostego Bay Construction, Inc.. Some hearing exhibits have been shared with staff and provided to the Town Council. He indicated that he is present with regard to staff's denial of the building permits for 16 pool side cabanas to serve the Waterside V and VI Condominiums. The basis for denial was Mr. Stewart's opinion that the proposed cabanas are "residential accessory structures that must be elevated above base flood elevation and do not qualify for flood proofing as nonresidential structures." He summarized the flood plane regulations at issue. He indicated that all new construction of permanent buildings in the Town other than accessory buildings without utilities must be elevated or flood proofed to the base flood elevation. Under the Town's flood regulations non residential construction, including hotel and motels, must have the lowest floor elevated to or above the base flood elevation or be dry flood proofed, so that the base flood level will be water tight. The flood plane regulations do not define residential or nonresidential construction. The Federal Emergency Management Agency has a definition of nonresidential construction, which includes pool houses, clubhouses and recreational buildings. A third category of uses, which are described in the flood plane regulations, are accessory structures. These are defined in the Town's regulations as being exempt from the elevation requirements as long as they do not float and the total cost does not exceed the greater of $16,000.00 or 10% of the value of the principal building, and also are not used for non-habitable recreational purposes. Mr. Stewart, in his letter of denial, defined these cabanas as accessory structures. He also labeled them as residential and determined they could not be flood proofed and must be elevated. Today's position and evidence show that

the cabanas are nonresidential structures intended for daytime recreational use as a pool side amenity.

Mark went on to summarize the exhibits before Council. He showed that the new cabanas are virtually an identical amenity serving two other buildings in Waterside. He indicated that the cabanas are limited common areas which will be maintained and owned by the master association. No cabana may be used as a residence or occupied overnight by anyone.

Michael Johnson who is a licensed Florida Real Estate Broker and General Contractor came forward. He is a consultant to Giles Development, who is the developer of the project and Ostego Bay Construction who is the general contractor. He previously has worked with Stardial. He was involved with the existing permitting for Waterside III and IV and he indicated that these cabanas were submitted as accessory structures without flood proofing. The review of the building department determined that these cabanas would need to be flood proofed due to being below base flood level. The average unit cost at the new Waterside V will be approximately $400,000.00 with a total of 22 million in cost. The actual sales amount will be higher. It costs approximately $19,000.00 for each cabana. The cabana floor would need to be 3 foot 6 inches above the pool deck. Another alternative would be to raise the pool area above base flood elevation.

Bob Stewart, Chief Building Official for the Town, came forward. He also serves as the Flood Plane Coordinator. He indicated his reason for classifying the cabanas as accessory structures are due to the fact that they are subordinate and incidental to the principal structure. The determination for residential or nonresidential was based on the application of the Flood Plane Regulations in the Town of Fort Myers Beach, which provides that residential construction must be elevated and nonresidential could be flood proofed. In reviewing the plans, discussion of use and the indirect contact of FEMA determined this structure to be more on the side of residential. The purpose of the Flood Plane regulation is to minimize the potential for damage or loss in the event of a flood.

Charlie Edwards, who owns his own company called Building Code Solutions, came forward. He is a consultant and deals with the operations and analysis of code issues on Fort Myers Beach. He reviews plans and give interpretation of codes. He has worked with Lee County for approximately 18 years and was the Senior Plans Examiner for commercial construction. He has dealt with new flood ordinance situations. He is familiar with the Waterside project and originally reviewed the Waterside III and cabanas. He believes the cabanas are capable of being flood proofed. He reviewed a definition of residential, which refers to sleeping within the unit. When he determined no sleeping will be permitted within the cabanas he felt this would not be classified as residential. He e-mailed David Thomas of NFIP (National Flood Insurance Program) with the details of the cabanas. David Thomas responded that FEMA under the NFIP would consider the cabana building as described as a nonresidential structure.

Bob Stewart came forward and explained the issue is regarding residential or nonresidential. There is no absolute definition for the cabanas. He referred to the handout from FEMA called the nonresidential flood proofing requirements and certification and distributed this information to Council. He also referred to an e-mail he distributed to Council from FEMA, which indicated the cabanas would be classified as residential. Looking farther he found another publication from FEMA, which states that you can have accessory structures low, but cannot be used for human habitation to include living room, restroom or kitchen area.

Council member Rynearson questioned Mr. Stewart as long as the residents are utilizing the cabanas they would be considered residential? Bob Stewart replied that this is correct.

Council member Van Duzer feels human habitation is the key. He needs the definition of habitation. Bob Stewart replied that one of the terms in habitable is living. The direction from FEMA is that the pool house would be considered nonresidential and could have flood proofing.

Council member Rynearson commented if the cabanas are being used the same as the clubhouse then why is it good for one and not the other? Bob Stewart replied that he is unsure why FEMA requires you flood proof nonresidential and elevate residential is at issue. FEMA has determined that the clubhouse and pool house are nonresidential.

Dan Folke asked if the pool bath could be built as part of a single family home at grade or below base flood elevation? Bob Stewart replied no not generally.

Dan went on to explain that this is not allowed for residential uses. The determination goes back to whether or not this is residential or nonresidential. It is tied to a residential use and this is the reason for the denial.

Mark Ebelini commented that there is a specific regulation in Chapter 6 (Flood Plane Regulations) that states new construction or substantial improvements of elevated buildings both residential and

nonresidential may contain space below the base flood elevation that is usable solely for parking, building access or storage. This is not the issue. He went on to add that this can be considered nonresidential construction which can be flood proofed, residential construction which can only be elevated or accessory use that will not require either. He still feels residential and nonresidential are the issues at hand today. Mr. Stewart commented that making this determination comes down to the use. FEMA's own definitions define the activity in the cabanas as nonresidential. He feels this answers the question with the FEMA issue. The Land Development Code defines a residence as a dwelling unit, living unit or housing unit. The Flood Plane Coordinator is stating that these do not fall under those classifications. Clearly none of the definitions of a residence in the Land Development Code define the cabanas, so how can they be residential under the Land Development Code. He reviewed the exhibits and pointed out several cases and language pertaining to this case. The cabanas are specifically intended to be daytime recreation use and are restricted in this manner. The cabanas are nonresidential and not intended to be used as a residence.

Council member Rynearson asked for the specific use of the cabanas? Mark Ebelini replied daytime recreational use. It is an alternative to the pool house. The use is a one time payment. A document is recorded in the public record. The use can be transferred with the unit if sold or could be transferred to another owner within the Waterside V or VI.

(Mayor Hughes announced a five minute recess)

Mayor Hughes asked if anyone wished to address the Council.

Bonita Latanier a resident from Waterside III came forward. She is an owner of a cabana. If the Council could visit the cabana, the idea of residing in one is laughable. The floor space is very limited and is the size of one of the tables in the Council Chambers. She sees no reason they should not have these cabanas available.

Reynold Finnegan from the Bay Beach area came forward. Is a cabana a unit or a cabana a building? Mayor Hughes replied that "16" is the number of cabanas, which are in more than one building. Reynold stated the cabanas are not necessary for the enjoyment of the condominium units. The cabanas are not owned by the condominium owner, but the owner does pay a huge amount of money for the use. The owner can keep anything they would like in this cabana, which would classify it differently than a pool side building open to the public. He believes that the Council should give the benefit of the doubt to Mr. Stewart's analysis that the cabanas are just like another room in your condominium. He feels the appeal should be denied.

Council member Rynearson clarified that Waterside has the right to put in these cabanas. The only decision today is whether they should be raised or placed at ground level.

George Fondville came forward and has the privilege of living in Waterside Building III. He has a unit on the sixth floor and is the closest unit to the pool and cabana buildings. The cabanas are very attractive and he has never seen anyone in the units inappropriately. He feels these are a positive asset to the people who use them for their intended purpose. He supports the request that these units be approved on grade, so there will not be stumbling and falling with steps and ramps.

Public hearing was closed by Mayor Hughes.

MOTION: Made by Council member Bill Van Duzer and seconded by Council member Howard Rynearson to reverse the building official's decision on the units in accordance with resolution 02-38.

Discussion: Council member Van Duzer feels these structures are not owned by the residents, but are owned by the Association. He does not feel that these can be called residential. You cannot reside in this structure. This is an upscale community and he sees no reason why this should not be allowed. Elevation would make it more restrictive and he feels flood proofing should be allowed.

Vice Mayor Cain has struggled with residential and nonresidential. She does not believe anyone would sleep in them, but she does have issues with the restroom and kitchen area.

Council member Rynearson considers the sink to be more of a wet bar than a kitchen. He feels this is an extra amenity to buy with the units.

Mayor Hughes cannot distinguish the cabanas from the nonresidential definition in the National Flood Insurance Programs definitions. A pool house and clubhouse have restrooms and normally have a kitchen, yet it is defined as nonresidential. The issue is whether it will be used for a residential purpose and he concludes that this is a nonresidential use.

VOTE: **Motion passes unanimously.**

VI. **PUBLIC HEARING: Fort Myers Beach Hooters.** Case Number COP 2002-00084. Request for a special exception for on premises consumption of alcoholic beverages and outdoor seating on deck enclosure expansion. The subject property is located at 1600 Estero Blvd.

Pam Houck came forward to announce that this case will need to be continued. The applicant failed to post notice. Dan Folke indicated this case will go back before the LPA on November 5, 2002 and come before the Council in December.

VII. **PUBLIC HEARING: Snug Harbor Waterfront.** Case Number COP 2002-00095. Request special exception for on premises consumption of alcohol beverages with outdoor seating for restaurant (currently under construction). The subject property is located at 1131 First St.

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

Ed Cusik came forward. He commented that this has been before the LPA and their recommendation is for approval with the following conditions. He expressed that they have agreed to the conditions. He asked Council to approve the recommendation of the LPA.

Jerry Murphy came forward and expressed that staff is in agreement with the representation made by the developer. The staff report provides their analysis of the case. The conditions have been modified and are reflected in the resolution before Council. Staff is in agreement with the conditions as well.

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

MOTION: Made by Council member Howard Rynearson and seconded by Council member Bill Van Duzer to accept the staff's recommendation with the conditions to approve and adopt the resolution as presented approving the request.

VOTE: **Motion passes unanimously.**

VIII. **PUBLIC COMMENT**

None.

VI. **ADJOURNMENT**

The meeting was adjourned at 12:10 p.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