

**FORT MYERS BEACH
TOWN COUNCIL MEETING
MARCH 13, 2000
NationsBank, Council Chambers
2523 Estero Boulevard
FORT MYERS BEACH, FLORIDA**

I. CALL TO ORDER

Mayor John Mulholland opened the meeting on Monday, March 13, 2000, at 9:00 a.m.

Council members present at the meeting: Anita Cereceda, Daniel Hughes, John Mulholland, Ray Murphy and Garr Reynolds.

Town Staff present: Pam Houck, Attorney Richard Roosa.

II. PLEDGE OF ALLEGIANCE

Everyone recited the pledge of allegiance.

III. PUBLIC COMMENT ON AGENDA ITEMS

IV. PUBLIC HEARING: FIRST CENTRAL INV., CORP., IN REFERENCE TO EDISON BEACH HOUSE. CASE #SEZ1999-00028.

A special permit in the Commercial Planned Development (CPD) district to permit Consumption on Premises with outdoor seating per LDC 34-1265(a)(2). This property is located at 830 Estero Boulevard.

The Applicant's beginning comments were inaudible.

Applicants would like to sell liquor from the office for guests. It was established that non-guests could not purchase liquor there, as all liquor will be charged to guests' rooms.

Councilwoman Cereceda ascertained that the alcohol stocked would be beer, wine, and cocktails for two. Mr. Yax said as far as the extra items, he has talked to the 7-11 across the street about stocking some extra things they would like to see the guests have, and they expressed an interest in doing so.

Councilman Reynolds stated he didn't know if we could act on something like this unless it was written up, and he'd like to see this run by the planners and also by the LPA. In other words, he thinks we need more detail before we can act on something like that. He doesn't know how this would play, especially through Code Enforcement and Planning.

John Mulholland said that when a variance was granted by the LPA, it was quite clear to him that consumption was going to be in the guest rooms. The applicant explained that there might be a combination of liquor stocked in the office and in the guest rooms.

Councilman Reynolds advised he had visited the site and he expressed his pleasure in the architecture of the building. He felt that Code Enforcement needed to be aware of the change in plans, however, before the Council acts.

Councilwoman Cereceda felt that this was a convenience for the guests and nothing more.

County Input:

Dan Faulk of the Lee County Department of Community Development advised that the staff recommendation for this request was for denial of the consumption on premises with outdoor seating, as was the decision of the LPA. At the LPA meeting it was decided that whether alcohol is purchased from a bar by a pool or from the office it would still be considered

consumption on premises. Mr. Faulk outlined the reasoning that led to the denial.

Vice Mayor Hughes stated that a major difference in the request is that liquor will not be sold to non-guests.

Anita Cereceda said that this property is going to be one of the premier properties on the Beach. She is a little concerned that currently under the permit the applicant has right now, a guest cannot take his drink out to the pool. She asked what Mr. Faulk's recommendation would be to us at this point as to how we could accommodate the request and stay with the spirit of the original approval to Mr. Yax. Mr. Faulk said it wasn't realistic to think that people are just going to sit in their rooms with their drinks and that it would be possible to approve the request with some conditions.

Councilman Reynolds said that as far as carrying drinks to the pool or anyplace else, he doesn't think we would have that control on any establishment on the island. Selling it, however, is a whole different ball game, so it is a definite change from the original request. We need to refer this back to the planners and let them react to this.

MOTION: Moved by Garr Reynolds and seconded by
that we send this request back to the planners and the LPA for
a restudy and additional information for Council.

The motion dies for lack of a second.

Mayor Mulholland advised that he thinks we have sufficient information.

Mr. Faulk stated that staff's concern was keeping alcohol on premises.

Vice Mayor Hughes said that he hadn't conceived of guests bringing their drinks to the pool because of sales in the guest rooms. What they had wanted to prohibit was a bar that was available to the public and particularly the people adjacent to Lynn Hall Park. And, incidentally, there are a number of bars that are within 500 feet of Lynn Hall Park on the other side. He felt there was no way that we are going to prohibit people from sitting around the pool having drinks. The main thing to him is that the public is not invited there.

Councilwoman Cereceda asked Attorney Roosa if the guest who brought a drink from his room and goes down to the pool with it was legally doing so. Attorney Roosa said, yes, he believes he is. So what is the difference between a person purchasing a Miller Light from room 603 and purchasing a Miller Light from the hotel office and going to the pool and drinking it? Attorney Roosa said that the original permit allowed for in-room bars, so he thinks it would require an amendment to that permit to allow the purchase of liquor in the office. As to the mechanics of what's different, he thinks testimony has been presented that there could be a larger inventory at the office than would be provided in a refrigerator, and that might have some impact. Asked if he believed that there would be greater control as well, Mr. Roosa said yes, there would obviously be more control. There's no control to prevent teen-agers from drinking out of a refrigerator in a room with their parents, whereas if they tried to purchase it from an office, they would realize they were not eligible to do so. Ms. Cereceda asked how we would go about amending the original approval to allow for one additional location of sales. Mr. Roosa said that obviously the applicant has amended the application and so if we just approve the amended application that would accomplish that request. It is within our jurisdiction to approve it today without any further input.

Mayor Mulholland asked if the office would ask for proof before a guest could make purchases of alcohol. Mr. Roosa said the owner would violate his permit if he sold to anyone other than a guest. There would be better control if all sales were handled through the desk rather than in the room. Technically the sale is to the adult occupant of the hotel room and he is the one who would be responsible for not permitting access to a teen-ager.

Councilman Reynolds said he would just as soon have the liquor sold outside the office from a tiki hut as he would in the office. It would be more appropriate.

Public Comment:

A. Chris Lieb

Mr. Lieb said he is president of the Royal Beach Club, a family-oriented establishment, which is adjacent to the Edison Beach House. He sees no problem with selling alcohol in the office and charging it to the rooms so that the public cannot avail themselves of it.

MOTION: Moved by Ray Murphy and seconded by Dan Hughes to approve the amended request by the property owner to include the conditions that were stated prior by Attorney Roosa. Sales should be during daylight hours only.

Dan Hughes moved to amend the motion by adopting a resolution that would be approved as stated by Councilman Murphy with the conditions stated, but changing the time to from 12:00 noon until 8:00 p.m. He would also add a fourth condition that would just be a clarification of the others: That there be no bar set up or tableside service. It would strictly have to fall within the conditions set forth by Councilman Murphy.

MOTION: Moved by Dan Hughes and seconded by Ray Murphy to approve the amended request by the property owner, including the conditions stated prior by Attorney Roosa, but changing the time stated by Councilman Murphy from daylight hours to from 12:00 noon until 8:00 p.m. He would also add a fourth condition that would just be a clarification of the others: That there be no bar set up or tableside service. It would strictly have to fall within the conditions set forth by Councilman Murphy.

Discussion:

Councilwoman Cereceda asked if the motion includes that sales be only to registered guests and only be transacted by a charge to the room. She was told yes.

Attorney Roosa offered to read what he understands the motion to be. "Alcohol is to be available at the office desk, limited to guests only and charged to an occupied room between the hours of 12:00 noon and 8:00 p.m. No bar or poolside service." The amended motion was further amended to show this wording.

MOTION: Moved by Dan Hughes and seconded by Ray Murphy to amend the amended motion to read as follows: Alcohol is to be available at the office desk, limited to guests only and charged to an occupied room between the hours of 12:00 noon and 8:00 p.m. No bar or poolside service.

Discussion:

Mayor Mulholland said he saw no advantage in moving the sales from the rooms to the office.

Motion carries 3-2 with John Mulholland and Garr Reynolds dissenting.

V. PUBLIC HEARING: JOHN C. & L. DIANE GURIK, CASE #99-07-176.05V

A variance in the Residential Single-Family district (RS-1) from the Land Development Code (LDC) Section 34-1575, to allow a deck addition to an existing single-family residence that will extend 4.7 feet seaward of the 1988 CCCL. This property is located at 8200 Estero Boulevard.

Applicant's Representative:

Brett Moore advised that the previous request was filed on behalf of the Guriks by the contractor and was scheduled for December 13 and then withdrawn. Since that time they have worked with the Guriks, the Department of Environmental Protection and the Town staff to develop a plan that would be acceptable to each. The current plan before us has been approved as a field permit by the DEP. They have reviewed the staff report and agree with the findings and conclusions.

Mr. Moore passed out two site plans. One focuses in on the deck and the other is an aerial photograph of the area. The property is on the southwest end of the island, somewhat sheltered by Little Estero Island. This particular area is somewhat stable historically. The coastal setback line is not a common setback for mean high water for each property. It was established back in 1976 based on some computer modeling projecting some erosion limits at 1000-point intervals and then a line was drawn between those points. Across the Gurik's property it happens to run at an angle.

The proposed deck actually extends only 2.2 feet from the eastern end and 4.7 feet on the western end, totaling just about 105 square feet. The concrete deck and the wooden deck which are referred to in the staff report have been removed and will eventually be replaced with pavers.

The Gurik property is one of the few properties that has no dune stabilizing vegetation. So they have incorporated a proposed restoration program to fill a gap along a section of the beach. The dune is not going to protect the property from a hurricane, but it will certainly afford some protection from a high frequency storm event and, also, closing that gap with a vegetated dune would afford some protection to the adjacent properties. And once you get the dune vegetation established, it will help collect windblown sand and then perpetuate from that point onward.

The representative said that when they went to the LPA, one of the members had suggested that this residence was sticking out the furthest on the beach. This is why he has given us the aerial photograph. It is certainly not the furthest out on the beach, but it could have given that perception because there is no vegetated dune area in front of the structure.

With regard to item 5 in the conditions proposed by the staff, in lieu of building a dune walkover structure, they have proposed a diagonal pathway through the dune. This has been reviewed with the staff, and the reason for the walkover is to limit where access would be across the dune to help the dune survive. Applicants felt that the diagonal pathway would do the same thing. There is also a concern about building a walkway over a relatively small dune. The walkway has to be breakaway construction, and under a major storm it could be a potential problem for the house by generating debris.

Under the current code applicants could build a gazebo structure further seaward on the property without needing a variance. Representative feels that their request is very modest. It's just an open, elevated deck. And with the conclusion of the dune restoration program, they feel that the project as a whole is unique and is warranted, a net gain, and they ask for our support.

Comments by Council:

Mayor Mulholland asked Mr. Moore the difference in what he is saying to us and what he said to the LPA. Mr. Moore said he made the same arguments at the LPA. The only difference would be that he had indicated at the LPA meeting that they had met with the Department of

Environmental Protection on the site to help develop a plan with them, and since that time they have been issued a permit for the deck and the dune.

Vice Mayor Hughes asked Mr. Moore to elaborate on the proposed dune restoration. Mr. Moore advised that there is no dune stabilizing vegetation across the property. The dune plan is to tie in the seaward limit of the established vegetation on the two adjacent lots. They would truck in approximately 44 cubic yards of compatible sand from an upland source and then plant that area with sea oats, which is one of the best dune stabilizing species. He believes staff had also recommended introducing a few other species for diversity. The dune would then have a crest elevation two feet higher than the elevation where it is now.

Vice Mayor Hughes also asked for clarification of the existing deck that would be replaced and then putting pavers on the sand, and why there would be a need to put anything on the sand. Mr. Moore explained that the Guriks inherited a wooden deck and a concrete deck when they purchased the property. Through the review process, staff indicated that those were not previously authorized by the Town or by the county and that they needed to be removed. They said in lieu of that they could put in simple pavers set on sand so that they would at least have an outdoor patio area on grade in that vicinity. No variation is needed for the pavers.

Mayor Mulholland asked for an explanation of the coastal construction control line. Mr. Moore advised that the first line that is out there that is adopted by the county and now the Town as a setback is the line that was established by what was then the Department of Natural Resources. It was intended to regulate coastal construction. Then the state reset this line further landward because it was positioned based on the technical analysis of where an impact zone would be along the shoreline. Historically, the DEP, the Town and the county have taken a position of not allowing major construction to extend seaward of that. An issue that's being weighed is what's major construction. In this case an open, elevated wooden deck is considered by the Department of Natural Resources, and now DEP, to be minor. It's not advancing habitable construction. It's just attached to the seaward side of an existing residence.

Mayor Mulholland asked Pam Houck if the deck would also be considered minor in our Town code. Ms. Houck stated that in the Town code the deck would be considered part of the principle structure, which is the residence, and would therefore be major.

Councilman Reynolds asked if the pavers were considered minor because they were not a fixed structure. If water hits them they come apart. Mr. Moore said that's correct. If they were set on concrete that would be a problem, but because they're just set on sand they are considered to be expendable.

Regarding the drawing, Councilman Reynolds asked why they had extended the little walkway over to the spiral stairs rather than putting the stairs near the end of the deck. Mr. Moore explained that that was an elevated level and the spiral stairway was needed to get one down to the ground. They want to keep the minor extension of the deck area that's already landward of the line.

Dan Faulk advised that staff has recommended approval of the request before us this morning. The LPA recommended denial. Staff has also recommended five conditions, all included in his staff report. Staff worked very closely with the Environmental Sciences staff of the Planning Division with Lee County Community Development on these conditions, and staff feels that the conditions will probably limit the size of the deck and will also ensure that the dune restoration program will be reviewed by Environmental Sciences to make sure that it's a real quality restoration project.

Staff has also recommended that a dune walkover be depicted on the plan, because this is one of the goals or policies that is included in the Town's comprehensive plan.

Mr. Faulk noted that the project is located in the combination of the low density and the recreation land use categories. The home is located in the low-density section and the coastal construction line separates the low density from what becomes the recreation land use, and he

explained the allowable uses in this category. Staff believes that when taken as a whole the project meets the intent of what the recreation land use category is designed for. Mr. Faulk said he believes that the main reason for LPA's denial is because there has not been a variance to permit construction over the coastal construction line. If approved, approximately 105 sq. ft. of elevated deck will be located in the recreation land use category. Staff believes that this is a very minimal variance and will not be injurious to the neighborhood or otherwise detrimental to the public welfare. The project will create 1200 sq. ft. of new beach vegetation in dune.

Mr. Faulk quoted the comp plan objectives involved.

As a whole, staff sees the project as very positive.

Questions from Council:

Vice Mayor Hughes asked at what point in the process is the approval of the DEP sought. Mr. Faulk said he believed applicants would need that permit prior to the building permit.

Vice Mayor Hughes referred to item 2 in their findings and conclusions where they say that extraordinary conditions are not the result of actions of the applicant taken subsequent to the adoption of the ordinance, and asked what ordinance is being referred? He was told that practically everything would be prior to the adoption of any code we have. This building was built in 1986, and at that time the '78 CCCL was in effect but the '88 was not. Mr. Faulk said that because the Town originally adopted the county's land development code, he would consider the adoption of the county's land development code at that time and whatever changes the Town has made to that code.

Councilman Reynolds noted that he only saw four votes denying the approval of the resolution that came from the LPA. He was told that the LPA only had five members present when the vote was taken.

At this point Chairman Mulholland asked if there had been any ex parte communications to divulge either on this case or in the previous one. All the members with the exception of Councilman Murphy admitted to a site visit to the Gurik property.

Public Comment:

None.

Comments by Council Members:

Councilman Murphy said he really didn't have a problem with this proposal at all. He's very familiar with the beach down at that end of the island and confident that the dune restoration will be effective in light of the fact that this portion of the beach is going to be renourished in the years to come. His only concern is with how it would affect our relationship with FEMA, if they would view this somewhat of a policy decision on our part that we're going to be approving projects forward of the CCCL line. He has read in the minutes of the hearing that this question was asked and that it would not have an adverse effect on our FEMA regulations and our relationship with FEMA. Our Deputy Town Manager has just gone through the whole process of our certification with FEMA and has landed us terrific rates with FEMA as regards our flood insurance and he wouldn't want to see any impact on this favorable rating.

Attorney Dick Roosa said he was not aware of any FEMA concerns regarding the coastal construction setback. Their concerns are elevation and so this would not impact them at all.

Noted by Councilman Murphy is that the DEP have given their conditional approval of it already.

Councilman Reynolds referred to Mr. Moore's statement that this was the first time he knew that we had allowed something beyond the construction line. Six months ago we approved a whole home to be built on a vacant lot. Pam Houck said that that house got sides and front setbacks and not setbacks from the coastal construction line. It is to be constructed entirely landward of the '78 and '88 coastal construction line.

Vice Mayor Hughes commended the staff for an excellent report on this matter. Normally he doesn't favor variations, but in this case he agrees with the conclusion of the staff that the 4.7 feet at one end and 2.2 at the other is minimal. On the other hand we're getting the removal of 500 sq. ft. of ground level pavement wood deck. Most important to him is that the project will create 1200 sq. ft. of new beach vegetation and dune.

MOTION: Moved by Dan Hughes and seconded by Anita Cereceda that we approve the application as presented in the form of the resolution presented to the Town and modified to show the approval. And where it refers to conditions, to incorporate conditions 1-5 of the staff report.

Discussion:

Councilman Murphy said he agreed with the motion except for condition 5. In light of the fact that it's a single-family residence, he doesn't think a walkover is necessary but is an unneeded expense to the property owner. He also agrees with the suggestion that this could be a potential hazard during a storm, not only to the property owner but also to surrounding property owners. He would eliminate condition 5 and amend the motion to that effect.

Vice Mayor Hughes asked for an explanation of a walkover and was told that it was a structure made of planks that enabled one to get across the sea oats.

Attorney Roosa voiced his concern about eliminating condition 5, because as he understands it, there is a requirement in our comprehensive plan that dune walkovers should be constructed where they do not exist and that existing structures should be maintained. The plan would have to be amended before this action could be taken.

Mayor Mulholland said his concerns were about the coastal construction control line and what we have in our comp plan that is not in agreement with going over the CCCL. The LPA had a problem with this.

Vice Mayor Hughes stated that there was a general statement to that in Policy 5D1ii, but wondered if it applied to single-family situations. Subject to this one issue on the walkover, there is really no incompatibility with our comp plan nor have we heard any testimony in opposition to this matter.

Attorney Roosa said that Policy 5D1ii was not really clear. He stated that you have to look at the original goal, which in part says "to keep the public aware of the potential effects of hurricanes and tropical storms and to plan a more sustainable redevelopment pattern that protects coastal resources, minimizes threats to life and property and limits public expenditures to areas subject to destruction by the storms." Mr. Roosa felt it was pretty restrictive to say that we envision the Town at some period in the future to have access only through dune walkovers. He doesn't feel that a great deal of our shoreline is single-family residential and it doesn't make an exclusion for single-family residential.

Vice Mayor Hughes felt that in the language just quoted by Mr. Roosa, there were two policies that seem to him to be in conflict with each other. One is that there should be no structures beyond the coastal construction line and the other favors dune walkovers. It seems much more intrusive to him to have a whole series of dune walkovers or manmade structures beyond the coastal line. He accepted the proposed amendment by Councilman Murphy and modified his original motion accordingly. Councilwoman Cereceda said that she agreed.

MOTION: Moved by Dan Hughes and seconded by Anita Cereceda that we approve the application as presented in the form of the resolution presented to the Town and modified to show the approval. And where it refers to conditions, to incorporate conditions 1-4 of the staff report. Passed 4-1 with John Mulholland dissenting.

B R E A K -- 10 MINUTES

VI. PUBLIC HEARING: GORE RESIDENCE ADDITION. CASE #VAR1999-00024

A variance in the Residential Single-Family district (RS-1) from the Land Development Code (LDC) Section 34-695, which requires a minimum water body setback of 25 feet to permit a water body setback of 12 feet for a single-family residence. The property is located at 221 Primo Drive.

This case was continued.

VII. PUBLIC HEARING: SAX ON THE BEACH. CASE #CP2000-00001.

A special permit in the C-1 district for consumption on premises (a 2COP license for beer and wine) for a Group III restaurant with outdoor seating per LDC section 34-1264(a)(2)a.2. The property is located at 1901 Estero Boulevard.

In an ex parte communication, Mayor Mulholland said he had been to the property several times while it was under construction and talked with a neighbor, Mr. Adams. He also met with Mr. Sax and Mr. and Mrs. Richardson to discuss this case. There is nothing in any of those visits to prevent him from being objective in this case.

Vice Mayor said he received and had a telephone conversation with Mr. Sax and has reviewed the site.

Councilman Murphy said he had received a phone call from Mr. Sax and returned his call and had a brief conversation with him. Also, one day he saw the Richardsons and just briefly asked how things were going down there.

Councilman Reynolds said he doesn't see driving by a property as significant to report if they don't get out and inspect it. Attorney Roosa agreed.

Representative's Input:

Charles Richardson was sworn in before giving testimony. He stated that he and his wife own Pelican Plaza at 1901 Estero Boulevard and opposite the Diamond Head Convention Resort. He displayed photographs of the property involved. He advised they were hoping to have a zoning approval to allow his tenant, Dan Sax, to operate a restaurant there and to serve beer and wine with his meals. The LPA recommended approval; however, they did have some conditions, some of which concern his tenant.

Applicant's Input:

Daniel Sax stated that the major concern over the restrictions is to limit the hazards, the nuisance and basic problems that are associated with certain restaurants and bars, primarily bars. The pictures will show that the parking is primarily in front of the restaurant. The entryway is more towards the center of the building and not on the side where it might be a nuisance and hazard to the neighbors. He handed out amendments to the restrictions that were imposed by Lee County and the Local Planning Agency.

Residents and business owners are trying to upgrade the community and make it a better place for those who live here and for visitors. He's not asking for anything beyond what other respectable restaurants on the island are asking for.

Condition 1: This is fine.

Condition 2: Asked for is a total seating of up to 250 seats as per the plumbing code, as to the fire code for safety, and as per the Department of Hotels and Restaurants to comply with the health and safety issues that go along with the restaurant.

Condition 3. This is fine.

Condition 4. Would like to sell alcohol in the outdoor area for up to 11:30 p.m. and until 12:30 p.m. inside, or whatever is customary with other restaurants in the area.

Condition 5. Okay.

Condition 6. Would like to have entertainment and live music but restricted to non amplified acoustic music such as, but not limited to, classical guitar, violin, cello and a tableside musician.

Conditions 7 & 8. Okay.

Condition 9. Full menu is going to be available during his entire hours of operation. He is a restaurant serving beer and wine and does not want to be a bar.

Some sample menus have been provided.

Comments by Council:

Councilwoman Cereceda asked what the hours of operation would be for the restaurant. Mr. Sax said he would like to seat people indoors until midnight. The restaurant will be emptied most likely by 1:00 a.m. He wants to be able to seat people outdoors until 11:00 p.m. with service of alcohol until 11:30 p.m.

Councilman Reynolds questioned Mr. Sax about his decision to extend his hours of service. Mr. Sax explained he is trying to do business along the same lines of the other restaurants in the area. The hours listed on his menu are from 11:00 a.m. until midnight. Those are the hours of seating. He is allowing himself to be limited to 12:30 inside because he doesn't want to be there until 2:00 a.m. But he would like it to be clear on the record that it's okay for someone to have a second glass of wine with their dinner. He wants to be able to have complete service.

Councilman Reynolds remarked on Mr. Sax's decision to increase seating capacity from 20 to 50. Mr. Sax said there has been some confusion over the permit for beer and wine for the building and the actual beer and wine license. He was under the impression that he would have to deal with that when he made an application for a license. The plan that was submitted was submitted to give a basic idea of the seating arrangements, as it would be done with the Department of Hotels and Restaurants. They want to see the general type of seating to make sure that it's going to be within safety codes. Had he known he was going to be held exactly to the number of seats, he certainly would have aimed for 50. He would like to have the ability to seat up to 50 people in the entire restaurant.

The LPA denied condition 6 regarding live music outdoors, Councilman Reynolds said. He has reinstated this. What has changed to make him think this should be reinstated? Mr. Sax explained that the type of music he would have would be very quiet, classical music that wouldn't affect anyone outside of the restaurant.

Mayor Mulholland noted that the plan for seating that Mr. Sax submitted to staff limited seating to 41 and now he is asking for 50. Mr. Sax advised he was asking for 50 because that would be within the legal code. Mayor Mulholland also remarked that the LPA had stated that any indoor music must be contained so that the music cannot be heard outside of the restaurant. Mr. Sax said what he is asking for is an amendment to that restriction to allow for some quiet, non-amplified, very simple entertainment. He would be happy to modify that to indoors only, but doesn't see how this type of music would cause a hazard or a nuisance in the community. It could only add a little bit of class and culture to the community.

Mayor Mulholland also said he wished to compliment the Richardsons for the great job they did in that building.

Vice Mayor Hughes stated that Mr. Sax wasn't breaking the 50 seats capacity down to what's inside and what's outside the restaurant. Looking at the site plan, he doesn't see that Mr. Sax could get a lot more seating outside -- maybe one more table of four. Mr. Sax said he was not going to try to put 50 seats outside. There are certain aisle way widths and restrictions that apply. Probably 24-26 would be the maximum he could put outside. But he is asking for up to

50 seats as long as they're not in violation of any of the fire codes or the Hotel Restaurant codes to protect the community and the public coming there. Fifty is the maximum number of seats permitted under the plumbing code for a restaurant with two fixtures men's and two fixtures women's with handicapped access. It is a state statute. He cannot speak for the fire code.

Mr. Richardson said that when the building was engineered, the engineer designed the space for a 50-seat maximum restaurant. When the fire inspections were made after the construction was completed, it did pass based on the permit that was obtained. So the space does comply with the fire codes in addition to the state-mandated codes regarding the restrooms and the ingress and egress. That's why there is a back door of a certain width and in a certain location.

Councilwoman Cereceda told Mr. Richardson that he was perfectly able to stand here and request whatever it is he wants to request regardless of the limitations that the LPA placed upon him.

County Input:

Brian Keller, Department of Community Development, advised that he had prepared the staff report for the LPA. The staff report recommended approval of the restaurant with consumption on premises and there were eight conditions. The hours of operation referred to consumption on premises and not to the service of food.

Mr. Sax was not at the LPA hearing and perhaps some of the concerns he has today could have been raised at that time. On March 8 he met with Mr. Keller and the Richardsons, who showed him a revised site plan with regards to the arrangements within the restaurant itself. On that site plan 47 seats were shown within the restaurant, with the outdoors still remaining at 20 seats. It just goes to show that when you do some arrangements you can get more seats than what was initially approved. Mr. Sax left open the number of seats inside and outside. The number of seats outside might be able to be raised from 20 to 24. The number of seats does not have an effect on the parking space square footage. So what we are talking about here is a number that the LPA and the Council would feel comfortable with.

Regarding condition 4, that the hours of operation be limited to from 11:00 a.m. to 10:00 p.m. daily, the staff recommendation was very specific to the outdoor seating but not to the indoor seating. The board went one step further with condition 9 that the restaurant may not sell alcohol after 10:00 p.m. either inside or outside. The concern was that there are sliding glass doors on the front of the building and these could be left open. Then it becomes very difficult to have one time for drinking inside and another for drinking outside. Also, with Papa Mondo next door, outdoor seating is restricted to 10:00 p.m., so 10:00 p.m. is consistent with other restaurants in the area.

Councilman Reynolds questioned the size of the railings. Mr. Sax indicated that the proper height would be taken care of.

Mayor Mulholland asked what is the capacity of the restaurant. Mr. Keller said he couldn't tell him what the maximum capacity would be whether through the fire department or the health department regulations. Councilman Murphy said we're not here to address the safety of this issue. That's all done in the permitting stages and in the construction. All we're here to address is the 2COP beverage license. We have to work under the assumption that the building is safe if they've gotten their certificate of occupancy.

Mr. Keller said that controlling whether the sliding glass doors should remain open or closed is another code enforcement nightmare and he thinks that's why there was a recommendation to restrict music to indoors.

Pam Houck explained to Councilwoman Cereceda that if the Council felt that 50 seats was an appropriate number, then that would be the maximum the restaurant could have. And if the health department felt that 45 were right, that's what the owner would end up with.

Vice Mayor Hughes asked why there was a restriction on outdoor seating hours and not

on indoor seating hours. He was told that outdoor seating affects the public and adjacent property owners. You don't have the same elements of concern with indoor seating that you would have with outdoor seating.

Public Comment:

Those wishing to speak were sworn in by the attorney.

A. Elizabeth Thomas E. Ladder

Mrs. Ladder said she was at the hearing for the zoning and objected for the following reasons:

1. Some of the 11 parking spaces in front of the building are in front of the public right-of-way to the side of the building.

2. Outside consumption of beer and wine is subject to loud, boisterous and vulgar language. It also leads to public indiscretions on adjacent private property.

3. The area is already congested. The beach access is directly in front of the building. Gradual expansion of the Times Square area into residential property has been happening for years. She knows there is a public walkway from Bay View to Estero Boulevard, and now there are parking spaces alongside of this building and on the opposite side of the walkway.

4. Self-discipline seems to disappear when a little bit too much alcohol is consumed. There are several locations in Times Square for the drinking of alcohol and beer. There is a new restaurant in Key Estero and probably they will be asking for outdoor consumption. She has heard public officials in the Town say that they want the Beach to be a family-oriented beach. She does not call this family-oriented, especially in this location. Anyhow, she is opposed to it and it seems the whole area has just gone down since she first bought property there in 1983. She does not believe that Times Square is a good influence even though it has been renovated and made pretty.

B. Jacob Sax

Mr. Sax said he was here to speak on behalf of his son both as a family matter and also as a business enterprise. He can assure us that whatever it's going to take to open this restaurant financially it is provided for. He and his wife own property on the Beach and have been here in excess of 10 years. They've watched it grow and progress. And especially since its incorporation, the changes are dramatic and all on the positive side. The purpose of going into this business is to go into business, but it's also their purpose to do it right.

When the notices for the hearing went out, Danny Sax did not receive one and, therefore, did not attend the hearing, and this created a major problem. They initially were given the wrong plans for the restaurant, which only allowed for 41 seats. At great expense they had to go back to the restaurant people and have them redesign the restaurant according to the new plans. They then came up with 47 seats. The plan that is now on file calls for 47 seats. The fire department has said based upon the square footage, they could get 50 seats. If we put a limitation on this and say that this restaurant won't seat more than 41 people, this won't fly, and Danny Sax has been waiting a year and a half to go back into business.

Mr. Sax said that the real issue here is inside versus outside. The gentleman from the planning agency said that the plan indicates about 20 seats outside. He feels that the most seats they can get on the outdoor deck is 24.

The purpose of this hearing is a 2COP license. What Danny Sax is asking for is that he be allowed to serve the alcohol and beverages from 11:00 a.m. until 11:30 at night on the deck. We can modify that until 12:30 p.m. indoors.

C. Robin Leahey

Ms. Leahey read a comment from Nancy Walker, who had to leave. Ms. Walker wrote that as a co-owner of 210 Pearl Street, she views the facility as proposed by Mr. Sax to be both an asset to the Beach and to the neighborhood. Ms. Leahey said she agreed with her. She knows

that Dan doesn't propose to make his restaurant a bar, nor will there be any loud and boisterous music or public intoxication. She would do anything in her power to help him achieve what he is trying to do.

Comments by Applicant:

Charles Richardson again advised that he and his wife Audrey own the property in question. Regarding the railings, when they were installed he had asked his builder why they were so high. The builder told him that they have to be that high because it is going to be a restaurant and it's on the second floor and they do meet all the code requirements for a railing in that application. He was hoping the builder could put them lower, but he couldn't.

Regarding parking places, all the parking places are only on their property. There are no parking places that have not always been that are now on somebody else's property. The plans showing the parking spaces have now been filed with the county.

Comments by Dan Sax:

Mr. Sax emphasized that they are a restaurant and not a bar. With regards to seating, basically indoor seating and outdoor seating are approximately the same square footage. An even number would place 25 seats inside and 25 outside. He would like a little later seating than Papa Mondo's has right now. They were approved for outdoor seating of up to 60 seats, which is more than he has in his entire restaurant, and he can understand a concern for a noise problem with that many seats outdoors. The outdoor seating for his restaurant will be on the second floor with fewer people and should be less of a noise problem. He has approval from the Department of Hotels and Restaurants for the 47-seat plan. If it would help as far as entertainment, he would be happy to agree to close his sliding glass doors at 10:30 or 11:00 p.m., whatever the Council sees as reasonable to contain any potential noise problem. As far as people urinating in public, he has more square footage in bathroom than he had in his original shop and does not think that's going to be a problem.

Regarding sound, Mr. Sax said that the pictures we have been given by the Richardsons will show us very clearly that where his seating is, it is completely buffered by the building which is made of 8-10 inches of concrete.

Fort Myers Beach is his home, Mr. Sax said, and he chooses to do business here. He is trying to set a standard for other people when they come in to open a restaurant.

There are self-policing clauses in the lease they negotiated. There is a clause in it that if his business does become a nuisance, he is violating his lease. If he doesn't fix the violation, he is out of business. He feels that he and the Richardsons have done everything they could to make these requests reasonable and fair and non-intrusive to the neighborhood or to the community. He would ask for our approval of what he is asking for.

Brian Keller advised that there was a problem in the layout of the site plan. There was a change in the layout. One of the problems with a site plan is that these things can change from time to time. The principal thing here is the number of seats and he'll have this available for the Council so that we can review it. Vice Mayor Hughes asked Mr. Keller if he had received the revised site plan showing 47 seats prior to making his staff report, would his condition 2 have so provided rather than what it does provide. Mr. Keller said yes.

Councilwoman Cereceda said she thinks that condition 6 should state that the entertainment will be restricted to contained indoor, non-amplified, acoustic style music. What she has a real problem with is how long to leave people on that deck. Vice Mayor Hughes said he is in agreement with Ms. Cereceda's statement. He also stated that sales of alcohol hours and hours of operation are not necessarily synonymous. He ascertained with Attorney Roosa that the state grants a liquor license and the local municipality establishes the hours, and the hours of operation don't necessarily have to be the hours they're permitted to serve liquor.

Councilwoman Cereceda felt that the distinction should be how long are you going to allow

the deck to be open. You don't want the deck to be open and not be able to order a dinner and a drink. The question of hours in her opinion is mostly relevant to the outside deck, because this is what is going to impact the surrounding area. What he does inside that restaurant is up to Mr. Sax even if he wants to keep it open until 2:00 a.m., which is the maximum allowed by the state.

Councilman Murphy said he agreed with Councilwoman Cereceda that the issue is the deck. He said that the staff says 10:00 p.m. and he asked if anyone felt differently.

MOTION: Moved by Dan Hughes and seconded by John Mulholland that we adopt the resolution presented to us that this matter be approved pursuant to the staff report with the following modifications to staff's approval or the conditions of the staff recommendations and the approval of the LPA. Condition 1 stays the same. Condition 2 showing 20 seats on the outside and 21 seats inside should be changed to a maximum of 47 seats, no more than 24 of which shall be on the outside deck. Condition 3 stays the same. Condition 4 stays the same as the staff recommendation. Condition 5 stays the same as the staff recommendation. Condition 6 is as articulated earlier by Councilwoman Cereceda, to wit, entertainment and live music restricted to non-amplified acoustic music and only in a contained area. Condition 7 is okay as per staff report. Condition 8 is okay as per staff report. Condition 9 is an addition to the staff report to accept the proposed amendment submitted by the applicant.

Discussion:

Condition 9 was explained to be the full menu.

Councilwoman Cereceda said that 9 for the LPA meant that you could only sell alcohol until 10:00 p.m. Vice Mayor said he would change his 9 to "full menu including the service of alcoholic beverages until the hours of 1:00 a.m." Ms. Cereceda said that as far as she is concerned a full menu available during the hours of operation means whatever is on the menu he serves. Now beer and wine are going to be on the menu. So you're limiting outside and letting inside do what it wants to do until it closes.

MOTION: Moved by Dan Hughes and seconded by Anita Cereceda that we adopt the resolution presented to us that this matter be approved pursuant to the staff report with the following modifications to staff's approval or the conditions of the staff recommendations and the approval of the LPA. Condition 1 stays the same. Condition 2 showing 20 seats on the outside and 21 seats inside should be changed to a maximum of 47 seats, no more than 24 of which shall be on the outside deck. Condition 3 stays the same. Condition 4 stays the same as the staff recommendation. Condition 5 stays the same as the staff recommendation. Condition 6 is as articulated earlier by Councilwoman Cereceda, to wit, entertainment and live music restricted to non-amplified acoustic music and only in a contained area. Condition 7 is okay as per staff report. Condition 8 is okay as per staff report. Condition 9 should be changed to a full menu, including the service of alcoholic beverages until the hours of closing.

Discussion:

Councilman Murphy said he was a little disappointed that the light entertainment that Mr. Sax was talking about wouldn't be allowed outside at all. As long as that was regulated and didn't go beyond 10:00 p.m., he doesn't see why that would be that much of a problem. He does think that 10:00 p.m. on the outside deck is fairly reasonable.

Motion passes 3-1 with John Mulholland dissenting. (Councilman Reynolds left earlier.)

VIII. PUBLIC COMMENT

A. Inaudible

This member of the public wished for clarification of the hours of operation for the restaurant. Vice Mayor Hughes told her outdoors the hours were from 11:00 a.m. to 10:00 p.m. Inside, the hour of closing would be whatever is permitted. He understands it could be to 2:00 a.m. under the state statute.

The lady stated that at the other hearing they said that all restaurants usually closed between 10:00 p.m. and 11:00 p.m. The noise created by automobiles taking off on that heavy gravel is very hard to take and lights flash in the windows of residents in the back.

B. AUDREY RICHARDSON

Mrs. Richardson stated that originally most of the parking was along the side and around the back. There was mostly gravel and there was no parking in the front of the building. As we can see by the pictures now, the parking is going to be in the front of the building. At that hour of the night there is not another store open in that entire shopping center and nobody is going to park around the back and walk around to the front. They are going to park as close to the door as they can. So she truly hopes that they will not be a problem to the neighborhood. They want to be good neighbors.

C. Inaudible

This lady stated that she was a little confused as to the hours of operation, because as far as she knew, Dan wanted to be open for breakfast at 7:00 a.m. She was told that there was no prohibition for him being open for breakfast in this resolution. The condition relating to hours of operation related to the deck. The deck can't be open until 11:00 a.m. but the restaurant can open at 7:00 a.m.

D. Daniel Sax

Mr. Sax thanked everyone for going through this and making what he thinks is a fair decision. He didn't get everything that he wanted, but he is comfortable with this. He knows that he's not going to be a nuisance and he would like us to amend that one thing. He is a little bit offended at being compared to Shamrock, as that is a ground level street sign bar. He has an upstairs restaurant. He thanked staff for hearing him a second time and clarifying things for the Council and he also thanked Mr. Roosa for his clarifications.

Mayor Mulholland gave to the Council members a letter he is going to give to the county commissioners tomorrow morning.

IX. ADJOURNMENT

A motion was made to adjourn the meeting at 12:38 p.m.

Respectfully submitted,

Lorraine Calhoun
Transcribing Secretary