

**FORT MYERS BEACH  
TOWN COUNCIL MEETING  
DECEMBER 13, 1999  
NationsBank, Council Chambers  
2523 Estero Boulevard  
FORT MYERS BEACH, FLORIDA**

**I. CALL TO ORDER**

Mayor Ray Murphy opened the meeting on Monday, December 13, 1999, at 9:02 a.m.

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

**Town Staff present:** Deputy Town Manager John Gucciardo, Attorney Richard Roosa and Pam Houck, Service Delivery Coordinator for the Town of Fort Myers Beach.

**II. PLEDGE OF ALLEGIANCE**

All assembled recited the Pledge of Allegiance.

**III. INVOCATION**

None was given.

**IV. PUBLIC COMMENT ON AGENDA ITEMS**

**A. VIRGINIA SMITH**

Virginia Smith presented a petition signed by residents of Egret Street requesting that "no parking" signs be placed on Egret Street.

**V. PUBLIC HEARING: FORT MYERS BEACH MOVIE THEATER. 99-09-245.01S.**

A special permit in the CT zoning district for Consumption on Premises (a 2COP license) per Land Development Code (LDC) Sections 34-843 and 34-1264. The property is located at 6325 & 6345 Estero Blvd. (on the east side of Estero Blvd. between Curlew St. & Egret St.).

**Presentation by County Staff:**

Chip Block of the Lee County Division Development Services advised that staff has reviewed this request and has recommended approval of it with a series of conditions. This matter was heard by the Town's LPA, which has also recommended approval and also with a series of four conditions. The only difference between the recommendations of County Staff and the Town LPA are the hours of operation under Condition 2. The County recommended hours from 12 noon until 10:00 p.m. and the LPA recommended 12 noon until 11:00 p.m. All other conditions are the same.

The theater is limited to a 2-COP license, which is for beer and wine only, and beer and wine sales are to be within the theater itself and not outside of the theater. If the theater ever changes hands and a different use is picked up, the new owner would have to come back for a new COP license.

Chip Block explained that this would be the only theater in Lee County selling beer and wine and having a sit-down menu. Garr Reynolds spoke against serving beer and wine in the only theater that we have in town. He has a problem with setting up a 2-COP bar situation within 20 feet of a home. He does not think that beer and wine have anything to do with the success of that theater. He hopes that if the good neighbor concept prevails, that this will not have to be.

Councilman Reynolds also stated that since the County has approved this, he hopes Mr. Block realizes that we have more bars per square mile than probably the rest of Lee County. He doesn't know why we need one more.

Councilwoman Cereceda thanked Mr. Block for the usual thoroughness of his report and the quality of his presentation and for recognizing that the gentlemen who developed this property have gone above and beyond the call of duty as far as putting something in this community that everyone can be very proud of. She has been overwhelmed with how professionally it has been constructed, the professionalism of the workers in the area, the consideration they've shown to the neighboring streets and residents and the quality of the product they've produced. It is definitely going to be a gem for this community, something that will

create more of a community for the south end, as they have a place to go and enjoy themselves. And it was known to all of us at the beginning when the presentation was made what type of movie theater was going to be put there -- one that was exactly like the Marco Island Theater, to which she has been and has found to be run very professionally.

Councilman Hughes said he would have to concur with Anita Cereceda. It had been very clear to the LPA and to us that the theater owners intended to seek this licensing. They had even invited all of us to go to the Marco Island theater to see how it's working out down there. It was anticipated and is not something that the owners are bringing up at this late date.

Vice Mayor Mulholland and Mayor Murphy also concurred that this had been discussed at length and did not come as a surprise to us today.

Councilman Reynolds said he is surprised and he may be in error but he doesn't recall an alcohol license ever being discussed with this. A statement approved by the LPA was that it didn't conflict with being close to a neighborhood, but Staff indicated that they approved it even though it was closer than the 500 feet they normally approve. This made him wonder why the LPA approved this without realizing that they were within that zone. Evidently they were not aware of it either according to the explanation that's given here today.

Mr. Block was thanked by Mayor Murphy for his presentation.

**Comments by Agent for Applicant:**

Dean Smith introduced himself, agent for the applicant. They agree with the Staff's comments as they were modified at the applicants' request. He noted that the operation isn't really something that you could describe as a bar operation. The service of beer and wine is along with the food service. They will not be providing beer and wine at the concession area but only within the theater area by the service staff. They have a very tight control over the service of those beverages.

With him this morning, Dean Smith advised, is Nick Campo, manager for the theater, who would like to address that issue for us as well.

**Comments by Nick Campo:**

Mr. Campo, the manager for the theater, said that one of the things he wanted to address was the extension of the hours and the reasons why he asked for that. It works out perfectly he said because it's going to happen the very first day they open. One of their opening movies is "The Green Mile," a 3-hour movie.

Mr. Campo noted that they do things completely differently from any other movie theater in the world. He put an intermission in the 3-hour movie so that his customers have a little bit of a break to use the facilities and to get something at that time if they wish to. They are running this movie right now in Marco Island and it works out to exactly two hours, which means that the break will be at 10:00 p.m. when somebody might want another glass of wine or a beer. This doesn't happen very often, but that's why he's asking for just the additional hour.

This isn't a bar situation. People are there to watch a movie and very rarely have an additional beer or glass of wine. It's usually the very first order and then the movie starts. When you are watching a movie, you're not there socializing like you are in a restaurant or a bar. It pretty much stops at that point.

Mr. Campo said he's very much concerned with handling the alcohol in the proper way and that's why they sell nothing at the counter. They control underage drinking. There's no way that a 21-year-old boy can come up and buy a pitcher of beer for his twelve 19-year-old friends back in the theater. Everybody is carded, everybody is checked, and fake IDs are confiscated and destroyed on the spot. An officer will be coming into the theater to train his staff, the same as was done on Marco Island. It's a very clean operation. This is the first theater built from the ground up to do this.

Vice Mayor Mulholland complimented Mr. Campo for the job he did on the building, saying that it looked terrific. He asked if he had had any problems with the Marco Theater regarding drinking and was told absolutely not because they are very very careful with that. Any problems that they've had over six years have been less than he can count on one hand, and in all cases the person came in inebriated and had been cut off. He won't allow anyone to get any worse. However, he has had situations where a glass has been broken here and there, and his management is trained to immediately remove those people from the theater; 911 is programmed into the phone and they have no reservations about calling the sheriff to handle the situation for them. They do not handle it themselves.

Councilwoman Cereceda also complimented Mr. Campo on his theater. She admitted she had been

a little concerned about the color; and after speaking with the painter, he told her just wait until we get it all on there, he thinks she's going to like it. She finds it to be awesome. The landscaping is beautiful, the lighting is lovely. He has paid attention to details and has given us a quality product.

Councilman Hughes also expressed an admiration for the theater, but advised that it had been brought to his attention that the landscaping along the back lot line on the southeast corner of the property is not in accordance with the landscape plan. He asked if it was complete at this point and was told that it was completed there as far as landscaping goes. They actually have additional plantings over and above what was shown on the approved plan. They are still working on an 8-foot fence to shield the parking area from the adjacent property.

Vice Mayor Mulholland said he seemed to recall that the house closest to the theater asked for a buffer so that they wouldn't have headlights shining on their property. He was told that there is an 8-foot-high solid wood fence abutting the property there that runs from the building across the parking area on that side of the property.

Councilman Reynolds told Mr. Campo that he complimented him on building such a nice attractive building. Mr. Campo assured him that the beer and wine sales have never been an issue on Marco Island, even with the matinee. As he has told the LPA, they are probably the number one babysitting service on Marco Island and are very proud of the fact that parents can actually drop their children off and know that they are in a safe, supervised environment.

Mr. Reynolds told Mr. Campo that he is sure that he will do the best he can, but that it's a strange concept to him to have beer and wine served in a theater.

Mayor Murphy stated that he remembers when he spoke to the chamber last year that he had just received the rendering of the theater and thinks he made the statement that it's destined to be one of the, if not the most, beautiful buildings on the boulevard. And he thinks that's been lived up to and we're all very proud of it and appreciate their efforts.

#### **Public Comments:**

Anita Kerley stated that she lived in Fairview Isles on Sunview Boulevard. Mrs. Kerley also stated that if this had been approved back when the original designs were submitted, why are we having this meeting now. She was told that this particular license was not approved then. They had received the approvals that they required to go ahead with the building, but this was certainly contemplated at the time. It was very specifically brought to our attention that this was the type of operation that they would be conducting there. We all knew that. And today we are just going through the formality of approving this license. Mrs. Kerley said that she would voice her disapproval, because she does not think that beer and wine should be allowed where children come to view "Toy Story 2" and things like that. Movie theaters can be very distracting when you have the wrong group of people in there. Most taverns don't even allow children where they're serving beer and wine.

Anita Cereceda made a motion to approve the request by the applicant.

**MOTION:** Made by Anita Cereceda and seconded by John Mulholland to approve the request by the applicant for a special permit in a CT zoning district for consumption on premises with the change of hours as recommended by the LPA to 11:00 p.m.

#### **Discussion:**

Councilman Hughes advised Councilwoman Cereceda that we had in our materials a draft of the resolution. He finds errors in that on the second page. He would ask that the resolution be amended by striking the word "denying" in the heading and in the "Therefore be it resolved" clause to strike the word "denies." The word "denial." in the last line of the "Findings and Conclusions" should be struck. In paragraph 1 of the "Findings" strike the words "did not." Paragraph 2 reads "There is no error or ambiguity in the Land Development Code of Lee Plan." This should read "There is no error or ambiguity in the Land Development Code or the Fort Myers Beach Comprehensive Plan." In paragraph 2 strike the word "inappropriate." In paragraph 4 strike the word "inconsistent" and change "Lee Plan" in two places to the "Fort Myers Beach Plan." In paragraph 6 strike "will not." In the very last line above the signatures of the Mayor and Town Clerk, strike the word "denied." Also noted was that there was an error in the address which was shown as 6325 and 6445 and should be written as 6325 and 6345.

**MOTION:** Made by Anita Cereceda and seconded by John Mulholland to approve the request by the applicant for a special permit in a CT zoning district for consumption on premises with the change of hours as recommended by the LPA to 11:00 p.m. Corrections in the resolution as pointed out by Councilman Hughes should also be made. Passed with a 4-1 vote, with Garr Reynolds dissenting.

**VI. PUBLIC HEARING: JOSEPH VELLA, 99-09-214.05V 01.01.**

A variance in the TFC-2 district from LDC 34-695, which requires a street setback of 25 feet and a side setback of 7.5 feet, to permit street setbacks of 13 feet and 17 feet, and to permit a side setback of 4 feet 8 inches. The property is located at 2651 Estero Blvd.

**Presentation by County Staff:**

Dan Folke, a planner with Lee County Development Services, announced that this was his first time before the Fort Myers Beach Town Council.

Mr. Folke advised that Staff has recommended approval of this request and the LPA has recommended approval of this request with one condition, which is that the variances are limited to a 13-foot street setback for the existing front deck on the south side, by a 17-foot street setback for the new front deck on the south side, and a 4 foot 8 inch setback on the west side for the existing structure as shown on the site plan, which was attachment B to the Staff report.

When reviewing this case, Staff had considered that a remodel permit had been taken out on the property in 1987, which did show the existing decks as they were at that time and not the setbacks as they are today. The property owner had rebuilt the deck and it has been rebuilt in the footprint as it existed in 1987. The current owner purchased the property in 1989. In the TFC-2 zoning district, a minimum lot size is required of 7500 square feet. The TFC-2 zoning district also requires a minimum of 75 feet in width. This lot is 50 feet in width. The lots were platted back in 1939, and so because this lot does not meet the minimum width of the TFC-2 district, he does feel that a variance in the side setback is appropriate. For these reasons Staff is recommending approval, as has the LPA..

**Council Input:**

Councilman Hughes advised that a motor home appeared to be a permanent fixture on the property and takes up the whole back lot. Dan Folk said it is his understanding that this doesn't have any bearing on the request for the variances on the setbacks and he had asked Code Enforcement about it. Dan Hughes wished to know if that was a permitted use there. Mr. Folk said that if someone is living in it, then it would have to be considered as a dwelling unit. The TFC-2 zoning district does permit duplexes. He doesn't think it would be permitted in the TFC-2 district, but he would have to check the code. Dan Hughes said that these are really two separate structures and it appears to him that the motor home is a quasi-permanent residence on this property. And although it's not in the area where the variations are being granted, it certainly has an effect on the overall intensity of use of that lot. He would like to see this checked out further.

Councilman Reynolds would like to see Code Enforcement take a look at that. It does concern him a little that this request is going to go closer to that 20-foot easement or public access. Someone should put buffering in there. That was supposed to have been improved when we built the pool, but there was a shortage of money. Some day in the near future we are going to try to make that a decent public access for cut through.

Dan Folke said that in his research for this case he understands that the setback that they're requesting on that side is not new construction but has been there. This is basically to legitimize an existing structure. They have not added anything nor have they increased the distance to the property line. This was on the remodel permit of 1987, which was prior to when the property owner purchased the property.

Vice Mayor Mulholland stated that he had a problem with the fact that this is not mentioned in the Staff report. Councilman Hughes noted that it was mentioned as an airstream trailer but that he would describe it as a huge motor home.

Members were asked to submit any ex parte site visits. Attorney Roosa said that it was only necessary to announce such visits at the hearing.

**Public Hearing:**

None.

**MOTION:** Made by Anita Cereceda and seconded by Ray Murphy to approve the resolution striking the negative responses from the resolution. Motion defeated by a vote of 3-2 with Vice Mayor Mulholland, Councilman Hughes and Councilman Reynolds dissenting.

**Discussion:**

Councilman Reynolds said he feels we should have attached to this a statement indicating that the trailer should be removed, and that's why he couldn't go along with the motion. We're not sure that that's permitted, and until that's cleared up, he cannot vote for something he's not knowledgeable about. Mayor Murphy said he didn't see what bearing that had on this matter today. It is a Code Enforcement issue that should be taken up, but it's not before us today.

Vice Mayor Mulholland said he wondered if we could add "without prejudice" to allow them to come back and comment on what they would do with that trailer. Councilman Reynolds said that he would agree.

Pam Houck, after being sworn in so that she could give testimony, stated that they did have one of their inspectors go out and check the trailer. It was not being occupied and you are allowed to store a recreational vehicle on your residential lot. It is in compliance with the Town's code. Non compliance would be if someone lived in it and occupied it as a dwelling.

Mayor Murphy asked if anyone who had voted against the request would like to reconsider their vote after hearing Pam Houck's input.

Vice Mayor Mulholland wished to know why the trailer was on the property if it was not being used. Pam Houck's reply was that it was just being stored.

Councilwoman Cereceda stated that the request was being denied for a reason that was not pertinent to the application. She would hope that those who voted against it would reconsider their votes now that they have the information from Pam and re-address the question to save this resident of our community another \$850 for legal remedies against us for this decision. Mayor Murphy said he totally agreed.

Councilman Hughes said that wasn't the reason he had voted against it, but because he didn't think that the Council can, in fact, make finding B, that this is not a result of the actions of the applicant. If Staff could address that, he could reconsider this.

Dan Folke advised that the site plan shows that the side setback was there in 1987. The front deck that required the greater variance was also something that was existing on the remodel permit and the applicant had rebuilt. He believes they were cited by Code Enforcement for not having the proper permits and that's how this case resulted. Again, they rebuilt a structure that had previously been existing, so in Staff's opinion they were not in essence creating a new need for a variance. The portion which he refers to as the new portion of the deck is, in fact, a new structure. But because it was closer to the structure than what was existing, Staff considered that as not creating a need for a new setback.

Dan Hughes asked if it was correct to say that the present owner of the property has not expanded what existed in 1987 and was told this was correct. The front porch existed in 1987; the side existed in 1987. The current property owner purchased the property in 1989. They rebuilt the existing deck and made an addition, which in essence provides access to this part of the structure, and this is referred to as the new portion of the deck. But it is within what had existed prior to when the property owner purchased the property.

Councilman Hughes noted that what was built in 1987 was built in violation of an ordinance at that time and he asked doesn't a person who acquires title acquire it with the sins of his predecessor? Is it a factor in County Staff's position that this guy didn't do anything himself in violation of it and it existed prior to his acquisition? Dan Folke advised that was a factor. Additional factors were development in the area is consistent with other development in the area -- it is a residential neighborhood. The development is consistent with what's permitted in that land use category. Those were all part of the Staff's consideration.

Councilman Reynolds told Dan Folke that he was led to believe earlier in his statements that perhaps this (trailer) was being lived in and now we're being told by Pam Houck that it was not being lived in. Dan Folk said he thinks what he said was that there was a trailer in the back yard and that Code Enforcement had been notified and they were checking into it. He's not aware of whether somebody is living in it or not.

**MOTION:** Made by Dan Hughes and seconded by John Mulholland to reconsider this matter. Passed unanimously.

Attorney Roosa advised that to reconsider the original motion, we need not make another motion. What we need is a roll call on the original motion, which is to approve the variance.

**MOTION:** Made by Anita Cereceda and seconded by Ray Murphy to approve the resolution striking the negative responses from the resolution.

**Discussion:**

Vice Mayor Mulholland said that in view of the remarks made by Pam Houck and by Staff on the non use of the trailer, which is just being stored there, he could go along with the move to approve. It was determined that the original motion is now approved 5-0.

Councilman Hughes said that he is troubled by granting variations that legitimize prior violations. However, he would go along with Staff here because this particular area is replete with variances, whether they have been granted or not granted on the side yard and the setback areas.

**MOTION:** Made by Anita Cereceda and seconded by Ray Murphy to approve the resolution striking the negative responses from the resolution. Passed unanimously.

**VII. PUBLIC HEARING: JOHN C. & L. DIANE GURIK. 99-07-176.05V.**

A variance in the Residential Single-Family District (RS-1) from the Land Development Code (LDC) Section 34-1575, which states development, other than minor, shall not be allowed seaward of the coastal construction line as established by the State Department of Environmental Protection, as such line existed in 1988 pursuant to LDC 34-1575(a) to allow a deck addition to an existing single-family residence that will extend 13.5 feet seaward of the 1988 CCCL. The property is located at 8200 Estero Blvd.

**County Input:**

Pam Houck advised that this case was reviewed by Staff and the LPA with a recommendation of denial by both. The engineering firm hired by the applicant submitted to Mrs. Houck last week a revised plan for the proposed deck addition. She hasn't reviewed the request and just has the facts right now. She has discussed this with the applicant's agent. It is her recommendation that we remand this back to the LPA since it is virtually a new plan of development and Staff would have the privilege of reviewing the new request and making a new recommendation.

Vice Mayor Mulholland asked Mrs. Houck the differences between the old request and the new one. She said she didn't have all the details at this point, but it was a new deck design. They are proposing mitigation of their impacts on the shoreline. The deck size is somewhat reduced. Those are the three primary things which she thinks warrant additional review.

**MOTION:** Made by Dan Hughes and seconded by Garr Reynolds that this matter be referred back to the LPA for a hearing on their revised plan. Passed unanimously.

**VIIA. TOWN ATTORNEY'S REPORT**

Attorney Roosa advised they had submitted the credit application and purchase order on the sweeping equipment, and the lender has denied our application because we put in the provision that the warranties had to go with the assignment. They cannot accept that. They are merely a lender providing the funds. What that would amount to, as we discussed before, is if the equipment fails and if the manufacturer failed to repair the equipment, the obligation for the payments would still continue, at least until the end of the year, at which time there would be no funds budgeted and then it would end. Commitments are made for one year at a time for a total of three years without the right to stop making payments.

Councilman Hughes said he didn't know when Anita Cereceda made the motion that we had made that a condition. He had asked if he could see if he could get a waiver of defenses by the assignee. Mayor Murphy said he remembers him saying try to get that stricken.

Councilman Hughes said he also remembers asking how we can bind by charter future councils for a period of three years, and he thought that this was binding on the future councils, notwithstanding whether you budgeted it or not. Attorney Roosa explained that we are authorized to do a three-year commitment under the charter. We can lease equipment up to three years. But there is also a provision in there that if the project is discontinued and not funded, that also terminates the obligation to make the payments. It's done on an annual basis. Councilman Hughes asked if that was in the assignment and was told yes. He said he would ask to amend it to remove that assignment condition so that we would be allowed to purchase the equipment.

**MOTION:** Made by Dan Hughes and seconded by Anita Cereceda that we eliminate the condition that required that the assignee be subject to defenses and that the staff goes ahead and proceeds with the lease of the equipment with the assignment as approved by the Town Counsel and the assignee. Passed unanimously.

#### **VIII. BALLOON SNOWMAN**

Councilman Reynolds said he had asked the Town Manager that another part of the agenda be published as an emergency item to be brought forth at Council because the original copy was out. Attorney Roosa had called him with a problem last Friday and he wanted Council to reconsider the situation. He had asked the Town Manager to write a little short page and put it out so that when people came in they could get a copy of it, and he didn't get a copy of it so he doesn't know if it was done or not. But he would like to bring it to the Council whether written or not. Mayor Murphy asked the Council if they wished to put it on the agenda. There were no objections.

Garr Reynolds referred to the balloon structure of Mr. Snowman as a holiday decoration. He said the number one point is that he realizes it is a balloon type structure as stated on page 9, Section G. He also notes that in Section 8 holiday decorations are excepted in that statement. On page 11, Section A, paragraph 8, it's labeled "Holiday Decorations." He believes that this reference clearly states where Mr. Lucas is coming from and which he recognizes as a holiday decoration. He tends to ignore the first point about the balloon reference, because it says nothing at all except those two words. He is not really concerned about what this decoration is supported by. It can be by wire frame, like many of the Town's decorations are, or it can be by a wood structure like most of the private businesses he's noticed have. This one is supported by air. So it's not really important or relevant to him how Mr. Snowman is supported. Holiday decorations are paramount to this issue and he trusts the Council will see it that way and not create further problems for any businesses. As an extra note, he sees holiday decorations as large and perhaps larger than the one we're discussing here. Since this has become such a controversy he suggests that the sign ordinance be returned to the LPA for a restudy and maybe amended. He would like for Council, if it can't just do what he suggested here and get rid of this problem, then at least give Mr. Lucas a chance to respond and explain his side of the problem.

Councilwoman Cereceda advised that this situation was resolved on Friday. She told Mr. Reynolds that she took tremendous exception to the language he used in his letter and she takes great exception to the comment that the Council is creating further problems. As she has said to the media who have latched on to this, she thinks that the best thing that could have happened to Mr. Lucas was the controversy over this sign, because she doesn't think that Key Estero Shops has been talked about as much since its existence as it has over the Snowman. So it has been a tremendous benefit, financially and businesswise to Mr. Lucas for the Snowman to be so controversial. But ultimately the ordinance was enforced as the ordinance was written. Our Code Enforcement person did her job. Our Town Manager did her job. The fines that were assessed are fines that are outlined in the ordinance that was passed by this Council, and so the stories that have been generated about the Town being a grinch; about the Town Manager having a vendetta against Christmas; about the Council creating problems for business people in this community is absolutely ludicrous, false and offensive. None of it is true. The bottom line is that we have an ordinance that prohibits balloon signs.

Councilwoman Cereceda referred to a rather mean-spirited article written by Mr. Melsek of the

News-Press, and that when he asked her what action would be taken, she had told him she would ask the Town Manager if it is possible for us to let the balloon stand through the holidays and refer it back to the LPA. This was done on Friday and it was okayed and that was the end of the story. Everything else that has gone on in the last three days is pure unadulterated hype and she takes exception to it. The Town has acted responsibly and as it should and Mr. Lucas has been the beneficiary of some excellent publicity.

Vice Mayor Mulholland said he was quite surprised by this uproar; however, it is quite clear in the ordinance that balloon signs are not acceptable. He wishes that some of the people who have objections to this would have been here when we were discussing the sign ordinance so that everyone knew what was going on. But communication is one of our problems and he welcomes the discussion today.

Attorney Roosa stated that as has been pointed out, balloon signs are prohibited. Municipalities have the authority to prohibit and regulate the size of signs, the location of signs, the size of the letters, the types of materials signs are made out of, the design of signs, but they are not permitted to regulate the information that's on the signs, the word content of the signs, because of the constitutional freedom of speech. A sign is a balloon sign even though it changes its shape and size and becomes Frosty the Snowman, and it is the type of sign that is being regulated by Fort Myers Beach in this instance. Dick Roosa compared this to a dress code that permitted neckties but prohibited hats, but allowed for an exception during the holidays. What we have here is a lawful regulation of a type of sign. Balloon signs are not permitted whether they are Frosty the Snowman, Rudolph the Red Nosed Reindeer, or a shark sitting on top of a roof.

Councilman Reynolds said that whether we object to his letter or not doesn't concern him. What he said was that there was overreaction, and he believes that it calls for a 15-day notice and this gentleman was given three days or he would be charged from \$100 to \$500 a day. That was overkill and that's what he stated in his letter. It wasn't necessary to move that fast and was not in accordance with the ordinance. And as he indicated, with a tunnel vision you could say this is a balloon and balloons are not allowed. Secondly, in the very section below that, it gives an exception for holiday decorations. And then it goes over to another location in that ordinance and it gives ... for exceptions, for holiday decorations and spells it out. And he believes that this snowman symbol is accepted in that section. And that's where he's coming from on this, and he thinks it's such a miniscule thing that he doesn't know why we're even talking about it. This is a holiday season and it should be allowed. It's been allowed for four years in a row and now that we're a Town he doesn't know why we should change the direction on that. If we do that, there's a huge huge sign that says "Happy 2000" that's bigger than this one he thinks. And then there's another one with Santa's sleigh and reindeer. He would say that they're probably as big as this. He doesn't know why anyone would object to a holiday decoration whether supported by a frame or by air. What's the difference? He knows we can be picky on these things, but if we do this, we're doing an injustice to these businesses. And as far as Key Estero Plaza benefiting from this type of thing, he thinks that's about as ludicrous as anybody can say. And if they do, so what. He doesn't think this is the type of attention anybody wants to get if they can avoid it. He has always enjoyed the signs. He hopes that this goes back to the LPA for clarification so that this won't happen again. And when it does go back to the LPA, there are some other issues that are going to have to be noted too. And whether or not these other huge signs are supported by air he thinks is insignificant.

Councilman Hughes stated that being specific in terms of the exception to which Councilman Reynolds refers, the first clause of that exception for holiday decorations refers to banners, pennants or flying paraphernalia, of which this is not. Therefore, that provision is not applicable. The overkill here was reacting to inquiry from an investigative reporter. Nobody here is saying that this is in fact in compliance and is not an illegal sign. It clearly is. He is concerned that our staff should be called asinine, ludicrous and ridiculous for enforcing an ordinance which it is their job to enforce.

Councilman Hughes said that if he could find a different interpretation of this ordinance, he would be in favor of trying to do so. The ordinance should be reexamined and the language itself has to be changed to meet this situation in the future. In the meantime, he would ask that the code violation proceedings be held in abeyance if we are, in fact, going to refer this back to the LPA. Asked if this would mean that the balloon would stay up while this was going on, Mr. Hughes said yes.

**MOTION:** Made by Dan Hughes and seconded by Anita Cereceda that that the matter be referred to the LPA to conduct a hearing on this issue.

**Discussion:**

Vice Mayor Mulholland stated that we're guaranteeing a violation of an ordinance which is quite clearly pointed out by Councilman Hughes. So we've suspended the fines, we've suspended everything, we've suspended the law in this case. So it's a big victory for everyone concerned except the people who worked on drafting the sign ordinance. Mr. Mulholland said he's heard of Y2K compliant, but are we going to be known as a council that is complaint compliant?

Councilman Reynolds said he didn't want to look at this as a winner or a loser. He just thinks that we're allowing the holiday season to continue without interruption and he thinks that's the whole idea. He's just real happy that one of our merchants isn't being pressured into a \$100 or \$500 a day fine over something that is meant merely as holiday cheer.

Attorney Roosa remarked that if the Council wanted to direct Code Enforcement not to hold a hearing before February 1, by that time he is sure that the applicant would have complied with the ordinance and that would solve the problem. Anita Cereceda asked what was wrong with Dan's motion. Mr. Roosa said that you're asking that they continue to enforce the code, but in this particular instance he is quite confident that that problem will be resolved by not scheduling that Code Enforcement hearing before February 1. It accomplishes the same thing but without suspending any violation. It just addresses the scheduling of a hearing. Councilwoman Cereceda said that her concern is that there are going to be 100 balloons on Fort Myers Beach in the next week. We're not saying that balloon signs are okay. What we're saying is hold this in abeyance. And Mr. Lucas is running the risk that if he LPA says no, they're in violation, period and then the Council reviews it and says yes, balloon signs are banned, period, then, in fact, he may be held to these fines. Mr. Roosa said that you can't impose fines retroactively. You can only impose them from the first finding of violation and there's been no finding of violation yet.

Attorney Roosa noted that there are two different issues. Sending the ordinance back to the LPA is one issue. The second issue is the timing of the hearing on the violation. Under the rules of the Code Enforcement Board, if you are in compliance on the day of the hearing of the violation, there is no fine. You have met your obligations.

Councilman Hughes said he would amend his motion that the first part remain the same, that the matter be referred to the LPA to conduct a hearing on this issue. Secondly, that the hearing on the code enforcement be set for a date not later than February 1.

**MOTION:** Made by Dan Hughes and seconded by Anita Cereceda that the matter be referred to the LPA to conduct a hearing on this issue. Secondly, that the hearing on the code enforcement be set for a date not later than February 1.

**Discussion:**

Mayor Murphy remarked that there is an ordinance on the books already. It was beat around for months and months and months, if not used by the Local Planning Agency, and this is what they came up with, this is what was referred to the Town Council, and this is what we voted on, probably unanimously. He further remarked that when he puts up a string of lights around his business and poinsettias, those are decorations. When he puts up a big sign with his name on it, then it becomes an advertisement. To mix and match the two just doesn't sit well with him. He is proud of what our staff did. There is an existing law on the books and they enforced it. All this nonsense about being a grinch, who stole christmas, is nonsense. It's unfortunate that this has come up. He agrees with the other statements that were made. It's silly. It's silly that it was brought up, it's silly that it's on the front page of the only local newspaper around here, it's silly that today there are TV cameras in here covering this (with all due deference to the fellows here). He doesn't see the need to send this back to the LPA. A decoration is a decoration and an advertisement is an advertisement. If you can't tell the difference between the two, then there's something wrong.

Attorney Roosa stated that he had misled us. This is not going before the Code Enforcement Board but to the County Court because this has been cited as an ordinance violation. So there may well be a fine because the standards are different in County Court. All you have to establish is on the day of the citation that there was a violation. His motion is not relevant any more. Whether they're going to be fined or not is out of the hands of the Council.

Attorney Roosa said that all we can do under those circumstances is to direct Code Enforcement to withdraw the citation. Another possibility would be if we could have the owner testify as to the cost involved in obtaining this equipment, we might determine that there is an equitable estoppel in

interpretation just this one year.

Town Manager Marsha Segal-George said she'd be more than willing to have the citation withdrawn. The only issue she has is her concern about the proliferation of other balloon signs prior to some further determination from the LPA. For instance if we get a shark on top of someone's building with a wreath around its neck, is she supposed to allow that to stand because it's a shark in the holiday spirit; or a giant balloon crab like we had over Hooter's and it has a wreath around its neck, is it now a holiday crab that she should allow to exist? If the Council wants them to withdraw the citation, they will withdraw it. And if in this holiday season any other balloon signs appear that have some holiday decoration on them, do we want her to allow those to stand or do we want her to have a citation issued? They are willing to do whatever the Council wants them to do.

Mrs. Segal-George was asked why we banned balloon signs to begin with. Her reply was that the LPA felt they were unsightly and they didn't want them on the Island. And we have had a number of balloons on the Island. This was not something that the LPA ever debated in a sense of wanting to give exceptions or anything. They wanted balloon signs banned. She stated that she had copied us on a fax she had received this morning from Johanna Campbell. When Mrs. Campbell was on the LPA, this was a subject that she was involved in and felt strongly about. And there are other LPA members who felt strongly about it too. That's why under the list of prohibited signs in the ordinance, there is just a flat prohibition -- no balloon signs allowed. The Council passed this ordinance twice and on both occasions balloon signs were prohibited; and on both occasions when the LPA considered it and passed it on to the Council, balloon signs were prohibited. This was never a section that was under any additional review or looked at to amend. It has stayed constant throughout the process. She advised that we can take off the Snowman issue, but she needs direction on how to handle similar situations that may crop up.

Councilman Hughes said he would withdraw his motion.

Vice Mayor Mulholland said that the time to discuss an ordinance is at the time we pass it, and if we go along with it, don't jump on the Town Manager for doing her job. And he doesn't think that we can be selective.

Councilman Reynolds stated that he thinks that the Town Manager's suggestion is very much in order and he would hope that Council would accept the fact that she is willing to withdraw that. And he told Marsha that his criticism regarding strong-arm tactics was not directed at her but to the person who went down and served that initially. He would go along with the Town Manager's suggestion that we withdraw this at this time and deal with it at a more appropriate time so that this doesn't happen in the future.

Town Manager Segal-George said she had received a number of anonymous phone calls this morning accusing her of gestapo tactics, which was particularly upsetting to her because she had lost most of her family in World War II. Mayor Murphy told her that that was uncalled for and that the people who do that are unworthy of discussion.

Councilman Reynolds made a motion that died for lack of a second.

Councilman Hughes moved that we direct the Town Manager to withdraw the citation, but the ordinance should stay as is. And although we haven't heard testimony from the property owner, he likes Attorney Roosa's suggestion that we rationalize this on the basis that it's been there before and even knowing that it's a clear violation of the ordinance, we'll treat it as an equitable estoppel and the ordinance shall remain in full force and effect.

**MOTION:** Made by Dan Hughes and seconded by Anita Cereceda that the matter be referred to the LPA to conduct a hearing on this issue.

We'll treat it as an equitable estoppel and the ordinance shall remain in full force and effect.

**Discussion:**

Vice Mayor Mulholland said that this sounded like double talk to him. The ordinance stands but the penalty does not. It just doesn't seem to hold water on this barrier island. It's embarrassing. We have the ordinance. There's a violation. Now you want to come in with an estoppel?

Councilwoman Cereceda said what it is is a compromise and a way out of this particular situation until some other point where there is a written description within the ordinance that does not enable balloon

signs to be used as decoration. And it is also taking the word of our citizen of the community who is saying that it is a decoration, not a sign, and it puts an end to it. It's an exception to a rule for this particular month.

Town Manager Segal-George asked for a clarification. Does this mean that if another balloon sign appears on this island tomorrow that has some kind of decoration on it that she is to proceed to issue a citation. She was told yes.

**MOTION:** Made by Dan Hughes and seconded by Anita Cereceda that the matter be referred to the LPA to conduct a hearing on this issue. We'll treat it as an equitable estoppel and the ordinance shall remain in full force and effect. Motion passes 3-2.

## **VIII. PUBLIC COMMENT**

### **A. ANITA KERLEY**

Mrs. Kerley noted that she has been a resident for three years and, of course, the traffic problem is never ending. She would like to make a suggestion. As you approach the big bridge from the north, there is a stop light where one goes into Buttonwood. Would it not be helpful to have a double sign where you make the right to go to Main Street at the bottom of the bridge on the north end, allowing one lane to go first and then putting a red sign and letting the left lane continue. When there are two red signs, the traffic from the side streets could then enter the traffic and proceed.

### **B. LEONARD LUCAS**

Mr. Lucas said that all this controversy came his way when the lady from Fort Myers came into his office and threatened him with five hundred of dollars in fines the other day. He was given a 48-hour notice, not a 15-day notice. He advised that he agreed with us that balloons were not permitted, but there also has been much discussion about the part of the ordinance that's on page 11, paragraph 8. The sentence with regards to holiday decorations says "Such signs may be of any type, number, area, height and illumination or animation and shall be set back 10 feet from the foundry property line of the lot, provided that clear visibility is maintained from a corner lot." Mr. Lucas stated that we all know they do have a corner lot, the sign is set back more than 10 feet and it's probably 75 feet or more back from the corner. But he thinks the key words here are "any type" may be used for holiday decorations. There are many other points that he could make, but he's not going to belabor this issue.

In addition to all the calls that he received over the weekend from the news media and others publicizing his plight, Mr. Lucas said he did receive one message on his answering machine just before he came here from a lady by the name of Jennifer Kaestner, who identified herself as being on the LPA. Her message said that she was told that the Snowman would be exempt because it would be up only for the holidays. She will go over her notes and get back to him with those notes today.

Mr. Lucas said he feels this is much ado about nothing. This is the holiday season. The Staff made their call as they see it and he has no problem with that. But he does think that any reasonable person after reading the sentence with the phrase "may be of any type" would assume it means just what it says.

### **C. VIRGINIA SMITH**

Mrs. Smith is a resident of Egret Street and stated that on her side of the theater there are definitely no bushes, only ferns with little tiny leaves on them. She would like to have that taken care of.

### **D. ROBERT VOLLMER**

Mr. Vollmer said that his company is Visionary Promotions and that he built the giant Snowman for Mr. Lucas. He noted that in the Prohibited Signs Section 30-4, basically all signs are illegal. And then they're made legal by them saying what is and what isn't permitted. Holiday decorations are consistent with all other Lee County municipalities. They are all allowed to use any kind of holiday decorations including inflatable signs. The county courts have also upheld holiday decorations.

Councilman Hughes asked if in the case where the court upheld the holiday decoration sign, if it had any text or wording on it. Mr. Lucas said it said "Happy Holidays from Gulf Coast Dodge." So it's not a commercial message.

Under holiday decorations it says, "Such signs may be of any type, number, area, height and illumination or animation." So in that way it says that all signs are illegal unless coming to us as a holiday decorations. And right now there are multitudes of code violations out there with banners, lights, pennants, streamers.

**IX. ADJOURNMENT**

The meeting was adjourned at 10:51 a.m.

Respectfully submitted,

Lorraine Calhoun  
Transcribing Secretary

**Items for action from the meeting of December 13, 1999**

1. The John C. & Diane L. Gurik case will be referred back to the LPA for a hearing on their revised plan.
2. The matter of the Snowman decoration will be referred to the LPA to conduct a hearing on this issue. We'll treat it as an equitable estoppel and the ordinance shall remain in full force and effect.