

**FORT MYERS BEACH
TOWN COUNCIL MEETING
APRIL 6, 1998**
NationsBank Building, Council Chambers
2523 Estero Boulevard
FORT MYERS BEACH, FLORIDA

I CALL TO ORDER

Mayor Anita T. Cereceda opened the meeting on Monday, April 6, 1998 at 3:00 P.M. Present at the meeting were: Mayor Cereceda; Vice-Mayor Ted FitzSimons; Council Members Ray Murphy, Garr Reynolds, and John Mulholland; Town Manager Marsha Segal-George; Deputy Town Manager John Gucciardo; and Town Attorney Richard Roosa.

II PLEDGE OF ALLEGIANCE

All assembled recited the Pledge of Allegiance to the flag.

III INVOCATION

The Council was led in prayer by The Reverend Dick Tafel of The New Church.

IV PUBLIC COMMENT ON AGENDA ITEMS

A JOE CROKER

Dr. Croker, spoke about a letter that went out to 112 people over his signature regarding the business ordinance. The letter mentioned Mr. FitzSimons as the person who sponsored the draft. It turns out that was a mistake and he apologized to Mr. FitzSimons for the mistake. He will send out a letter to those people telling them of the mistake.

V APPROVAL OF MINUTES FROM MARCH 12, 1998 AND MARCH 16, 1998

Motion: Mr. Murphy moved and Mr. FitzSimons seconded that the minutes of both meetings be approved as submitted. The motion passed unanimously.

VI PUBLIC HEARING: ANTHONY KUHN'S

Motion: Mr. Murphy moved and Mr. FitzSimons seconded that this hearing be continued until April 20, 1998, at the request of the applicant. The motion passed unanimously.

VII PUBLIC HEARING: FORT MYERS BEACH MOVIE THEATER (HARVEY B. HOFFMAN) 98-01-227.01S

Mayor Cereceda reminded the council that they need to fill out ex parte forms if they have had any communications regarding this case. Mr. Mulholland said he has received letters and telephone calls and made a site visit on April 4, at which time he was joined by one of the neighbors. Mr. FitzSimons said he also had numerous communications from residents, both verbal and by letter. Mr. Reynolds said he has also had many conversations and letters. Mr. Murphy said he received a letter from the property owner, many calls from residents, and has talked with Mr. Hoffman. Mayor Cereceda said went to the Marco theatre and talked with the manager, Nick Campo. She also went to the theater to attend a movie, has been to visit the site on the island, and has had conversations with Dan Hughes and Betty Simpson of the LPA and with many residents regarding the theater and the subject of commercial expansion. Ms. Neale Montgomery, attorney for the applicant, asked if any of the council members had made up their mind since there had been so many communications. Each of the members said they would make up their mind on the basis of the facts in the hearing.

Ms. Montgomery stated the issues of this appeal: did the county staff correctly apply Policy 18.2.1 and LDC Section 34-2015? The policy says that if someone has property commercially zoned they can use it commercially until the city adopts other zoning. One parcel has been zoned commercial for 30 years and the other for over 10 years. The owner bought the property with the expectation that he could use it as zoned. At the LPA meeting the public raised issues of traffic (they meet all requirements), buffering (they meet and exceed all requirements), and drainage (they have a Water Management District permit.) The project meets the code and rules in every respect. Section 34-2015 has already been interpreted and their

project is consistent with that interpretation. The comp plan has already been interpreted by Judge Gerald, and their project is consistent. The 2nd District Court of Appeals says that if there is a prior judicial decision, it stands unless you change zoning. There is a Supreme Court ruling that the legislative history follows the Comp Plan and the LDC unless you have made specific changes. From a legal standpoint, this appeal should be in favor of the applicant. She knows, however, that the Council and public want to know what they plan to do and what the project will look like, so she brought several persons to make statements.

Mr. Hoffman, the applicant, was sworn in. He stated he has not tried to unduly influence any members of the council. He said he spoke with Mr. FitzSimons once, but it was a long time ago. He stated that in 1993 he opened a theatre in Marco Island that has small tables, food, and a wait staff. They sell soda, pop corn, hamburgers, etc. He showed pictures of the inside of the theater and passed out a menu. He will operate this theatre in same way. It will be upscale and cater to families and children. There will be no smoking in the theater, even by the staff even if they are outside on their break. He does not show horror shows or movies with strong sexual material. There will be adult supervision at all times. The residents of Marco Island feel that it is a safe environment to drop off their children. They participate in the Renaissance Program in 3rd through 5th grades, where a student gets movie passes good grades. They give free tickets to charitable organizations. He feels sure that if you surveyed the residents and tourists of this island, they would be overwhelmingly in favor of the theater. The opposition is from the neighbors. Ms. Montgomery asked Mr. Hoffman if he looked at any other locations. Mr. Hoffman said he talked with the manager of Santini, but there was not sufficient space. At one time he looked at the Eckerds site. He also looked at Times Square (Helmerich) but there was not enough parking available. Q: Have you talked with the neighbors? A: He tried to contact all the neighbors, and he offered for any resident to come to Marco to see how they operate there. Q: Can residents walk or ride to the theater? A: It is near the Holiday Inn and many high rises. He thinks many patrons will walk rather than drive. Q: Will most patrons come from the beach or somewhere else? A: He thinks 99% will come from beach, either residents or tourists. People who now drive off island to go to the movies will now stay on the island and there will be less traffic for the island as a whole. Q: What, besides no smoking and the menu, will you do to be upscale? A: He has decided to use architecture that is upscale. They want people to have a good experience. Mr. Reynolds asked why he had talked to two council members and not all five. He said that Mrs. Segal-George had asked him to talk to Mr. FitzSimons, and that a mutual friend had asked him to talk to Mr. Murphy. Mr. FitzSimons asked if they plan to build a dock? He replied no. Ms. Cereceda asked what size building he needs. He said that the theater in Marco is 7500 square feet. The space that Eckerds is in now is 5000 feet, and even combined with the hardware store, it would not be enough.

Mr. Roosa swore in Bob Thinnas, certified planner with Grady Minor and Associates, and Dean Smith, a registered engineer. Mr. Thinnas said that until new zoning is adopted, property can be developed consistent with that zoning. He said that a neighborhood is a community region or area with similar characteristics. He showed a map with commercial areas in yellow, and multi-family in green. Most of the yellow areas were along Estero Blvd, and the property in question is within that area and is of the same character. He passed out photographs numbered with the name and use, which was keyed to the map. To the north is Charlie Browns Restaurant, and to the south is the Dolphin Inn (although RM-2, it is listed in the phone book as a motel.) The two lots behind the site are on Curlew and Egret. There is a mangrove fringe on the east side on the canal. There will be a wall between the property and residential property pursuant to Lee county code. The canal fits the description of a water body dividing line between neighborhoods. The residential property is different from the Estero corridor. This project would not be intruding; it would be in a different community. Policy 6.15 says that commercial development will be permitted on infill of small parcels where existing commercial development would make residential use unreasonable. Residential use would not be appropriate on that site. It would be on a high traffic arterial, there is a sewage lift station on the site, and it is not deep enough to buffer. He showed a conceptual drawing. There will be landscaping to screen parking from the street. Mr. Hoffman has not hired an architect yet because he does not have approval, but he has already decided to use the Edison Misner theme. Ms. Cereceda said the picture could be misleading if that is not what it is going to look like. Ms. Montgomery said the landscaping could be a condition of approval. This may not be precisely the building, but it is essentially what they want to build. Mr. Thinnas said it would fit in with the vision of the Town. All facades will have the same architecture, not just the front. They will use much heavier landscaping than is required by the LDC. They will have a continuous screening hedge which will be maintained at 36". They will plant 32 trees and not disturb the mangroves. There will be trees in all the islands. They will plant a hedge along the mangrove line along the parking lot to provide understory screening. The

height of the mangroves will not be trimmed. The wall will have vegetative landscaping on the residents' side of the wall. Regarding access, the plan is not what they wanted, but Lee will not give them any access off Estero. If the Council can convince the county, they will take the access off Curlew. Mr. Mulholland asked why they didn't put the building closer to the canal. He replied that the only parcel that is permitted for a theatre is the one they had to use. Regarding the parking lot, Mr. Hoffman has said that he will place both lots under single ownership, which will fit the definition of "same premises." He said that county staff has said that CT and CS-1 are not similar zonings, but 16 of the 35 permitted uses under CS-1 are also under CT, so they are similar. Seawatch Resort is 300 feet to the south and it was developed on two plots with two zonings. In his opinion, the use is consistent and will further the goals and objectives of the plan. It will upgrade the area, and the commercial use will meet the use of the residents. Ms. Montgomery asked whether any of the green parcels have parking lots abutting Estero and whether they have headlight hedges. A: Almost all of them have parking lots in front but he didn't know of any with solid buffering hedges. Q: Will the buffering by the residential area help protect the residents from Estero noise? A: It would because only berms and walls are good noise barriers. The wall will be 8 feet high. Mr. FitzSimons said that the council has passed a plan a year and a half ago, and that policy 18.2.1 does apply. He asked Mr. Thinnes if he lives here? A: No. Q: Has he experienced the traffic intensity during our busy season and does he know that this is a constrained road? A: Yes. Mr. FitzSimons said that permitting done by Lee County prior to incorporation, such as Sea Watch, should not be held as an model to follow. Regarding infill, he asked if there was any place on Estero where we don't have a mixture of commercial and residential. A: He doesn't see that it is so severe until further north on the island. In this area he finds high-density multi-family and mixed commercial.

Mr. Smith showed a site plan. The property is 9/10 acre on Estero. They are proposing a 10,000 foot theatre with entrances on Egret and Curlew, because the parcel has a condition that does not allow an entrance on Estero. In their opinion it would be better circulation for the neighborhood and for the theater to have access on Estero. They have done a traffic study showing trip generation. They used the one which shows the most traffic generation even though he does not think that is the most accurate. They also expect to receive a significant amount of walking traffic. Staff has reviewed the site plan and they had no concerns on engineering issues. But he wanted to address concerns raised at the LPA meeting. Regarding water management, they have been through review and have a permit for storage and quality of water. There will be dry detention areas in the landscaped areas which will retain water, a control structure that will control discharge into the canal, and a spreader swale with a low berm so the discharge won't be erosive. There was also a concern about vehicles losing their way and driving into the residential area. That is a legitimate concern and they would offer additional signage saying there is no outlet. They are planning enhanced landscape buffering and walls to protect the adjacent residential areas. Ms. Montgomery asked if they are requesting any variance or rezoning and he answered no. She asked if the plan was consistent regarding drainage and transportation and he replied yes. Mr. Reynolds asked how many parking spaces would be under the building and he answered 19. Altogether there will be one space for 4 seats, which meets the LDC requirement. Mr. FitzSimons asked if this would be a restaurant with movies or a theatre with food. Ms. Montgomery said it doesn't make a difference because the only points here on are 18.2.1 and 34-2015. Mr. Hoffman said the primary purpose is to show movies and food is an adjunct. Other theatres also offer food such as nachos, cappuccino and pizza. Mr. FitzSimons asked Mr. Hoffman if he is resident of this community, and he answered that he is not, nor in Marco either. He asked if he was aware of the impacts of traveling on this road. He answered yes, but traffic studies have shown that a theatre on the island will generate less traffic than one off the island.

Ms. Montgomery said that Paul O'Connor, director Lee County Zoning, who was subpoenaed has not arrived yet, and she asked to reserve legal comment until he shows up.

Pam Hauck, senior planner with Lee County was sworn in. She said the denial of the development order was based on commercial intrusion into a residential neighborhood, and parking in two separate zoning districts. It was also not consistent with 6.1.5 of the Lee Plan preventing the opening of new areas to scattered or strip development. The area to the north is commercial. To the northeast are single family residential neighborhoods. Across Estero it is residential, even though it is high density with condos and motels. On the south, the Dolphin Inn is listed as a condo on Lee County rolls even though it looks like a motel. The staff looked at the entire area as a residential neighborhood and believes it would be an intrusion. They did not just look east of the property. They also denied on the parking issue because the LDC requires all parking on same premises, or on parcels with the same or similar zoning. Accessory parking is permitted in both CT and CS-1, but theatre is only permitted in CT. The two lots are under

separate ownership, but Mr. Hoffman says that will be corrected before any building permits. Ms. Montgomery asked Ms. Hauck if she was familiar with the policy that all commercial zoning is similar, so a parking lot can go on one lot and the use on another lot as long as it is permitted. A: That is the policy in effect in unincorporated Lee County, and if this application were made there, it would have been allowed. Q: When the Town Council adopted the LDC, was there a clear statement by the council that that zoning application would not apply? A: She was not present when it was adopted, but she understands from what she has been told that the legislative history did not follow it to the Town. Q: Was there anything in the interlocal agreement between the county and town that stated that the legislative history does not apply? A: Not to her knowledge. Q: How did she conclude that if that is the way it had always been applied that it did not apply that way in this instance? A: It was the director's interpretation. She does not know specifically how the director got that interpretation. Q: Is the inconsistency with 18.2.1 a compatibility kind of review? A: Yes. Q: Is Policy 6.1.2 again based on compatibility? A: Yes. Q: Regarding Comp Plan standard 13.1(e), factors applicable to commercial land use at the rezoning and development order stages (impact on adjacent land uses and surrounding neighborhoods) is that a compatibility review? A: Yes. Q: When does it say you do that review? A: At rezoning. Q: It doesn't say at the development order stage? A: No. Q: So that kind of review is not appropriate at this stage? A: According to that standard. Q: So it would be inconsistent with that standard and a violation of the comp plan? A: Yes. Mr. FitzSimons asked Ms. Hauck if goal 18 doesn't say that where there is a conflict in the comp plan, that the more strict will apply. A: Yes. It says when there are conflicts between policies in goal 18 and policies contained elsewhere, the more restrictive will apply except for the buildback policy. Ms. Montgomery asked which is more general: goals, policies or objectives. A: Goals, then objectives, then policies. Q: The most restrictive is standards? A: Yes. Q: You don't see that review except at the rezoning stage? A: In this application she thinks the sentence in goal 18 applies. Q: That goal says "conflict between policies", but this is standards? A: Yes. Q: Regarding the order from Judge Gerald that was in the appeal application, did he consider 18.2.1? A: Yes. Q: Did he concur that if you had commercial zoning, that could be used? A: Yes. Q: Was that on FMB? A: Yes, but prior to incorporation. Mr. FitzSimons said since the case occurred prior to incorporation and we had not adopted the Lee Plan at that time, the only thing that applied was Goal 18, so any interpretations apply only to Lee County. Mayor Cereceda said that by adopting the Lee Plan we are bound by judicial, not legislative, interpretation of it. Ms. Montgomery said she believes the Town is bound by both. Ms. Montgomery asked Ms. Hauck if, since the town council was aware of that case, they could have changed the language but they didn't? A: Yes. Mr. FitzSimons said that 18.2.1 says "until that zoning plan is adopted". He said that during period of the CRA, a zoning plan was developed for Estero Island called Core Area Master Plan and it was adopted by council. Mr. Roosa said that plan was adopted for the Times Square area, but he is not sure it applies island-wide. Mayor Cereceda asked Ms. Hauck if this were before the county, would it have been approved? A: Yes. The county believes that existing zoning is the primary factor. The issue is if legislative history followed from the county to the town. If it did follow, the town would have to take the same track as the county. Mr. FitzSimons asked if the comp plan is higher than the LDC. A: Yes. Ms. Montgomery asked Ms. Hauck if Policy 5.1.5 states not that commercial will be denied, but that buffer areas will be maintained? A: Yes. Q: Is the buffering plan consistent? A: Yes. Q: Is the parking plan consistent? A: Yes. Q: Is the TIF consistent? A: Yes. Q: Didn't she ask Ms. Hauck previously if there was a CRA project adopted for this property? A: Yes. There is no plan adopted for this property. Mr. Murphy asked Ms. Hauck if an exit on Estero is possible. She replied that anything is possible.

Ms. Montgomery stated that Mr. O'Connor was under subpoena from the Town and if he doesn't show up, she asked that he be held in contempt. Mr. Roosa said the Town does not have the authority to hold in contempt. He is a county employee and we expected him to comply and his attorney has said he would be here. The Council decided to hold the public hearing first to allow Mr. O'Connor more time.

The Council took a break at 5:08 PM and reconvened 5:34 PM. The public hearing was opened.

A MICHAEL MICELI

Mr. Miceli was sworn in. He said he purchased the property with CT zoning in 1981 or 1982. He pays taxes as a commercial property. When he got sick he put the property up for sale and Mr. Hoffman was interested. All his dealings with Mr. Hoffman have been first class. Even with all the delays, he didn't try to get out of the contract because he feels Mr. Hoffman is sincere. This theater would be first class. His CT zoning should be honored because he paid for it and he has paid taxes ever since. It is unfair to try to change that now.

B BOB KEENE

Mr. Keene was sworn in. He said he owns property on Curlew. He brought a petition signed by 226 residents regarding intrusion into their neighborhood and urging denial. He encouraged the applicant to seek a commercial property around Times Square or Santini, because that site is part of their neighborhood. He asked council to deny the request.

C NANCY SMITH

Ms. Smith was sworn in. She lives on Curlew and enjoys a peaceful neighborhood. She is opposed to the location. The residents have empowered the council to protect and improve the quality of life on the island. Egret and Curlew are in the quiet zone. She asked the town to purchase the land for a park. If the town wants a theater, find a proper spot. Traffic is a big problem. New attractions should be where most other attractions are already located. In summer, Mr. Hoffman will want the support of the town to keep his theater going. We must work together to find a site.

D KENNETH MELLOR

Mr. Mellor was sworn in. He lives across the street. The county staff found intrusion into an existing residential area. He feels it is intrusion because of the parking. Having 73 parking spaces assumes that all employees will walk or bicycle or park somewhere else. If all 73 spaces are available for patrons, the ratio is one to four. All cars will not have 4 people in them, and some will walk. Church of the Ascension has a parking lot ratio of 1:3.3. If we use that ratio for the theatre, they are short 8 to 10 parking spaces when the theater is at capacity.

E CHARLES ROWE

Mr. Rowe was sworn in. He is vice-president of Sunset condos. His group supports the staff review that there is inconsistency. There is a no turning lane in the area. He did a traffic study by his condo. The Town was founded on local control. There have been three deaths in 3 years in that area including an accident a week ago.

F PAT DEVINCENT

Mr. DeVincent was sworn in. He said 9 years ago this area was called a blighted area because of conditions on Estero. Some of safety changes in the Times Square area has help. Lee County gave away a street so Diamondhead could be built. The Town was created to stop the policy of intrusion and the increase in traffic. A theater in this area will exacerbate traffic, intrusion and blight. The exits will be on narrow residential streets that cross a pedestrian bide path. It is a deadly safety situation. Three people have been killed in three years and we are lucky no lawsuits have been filed yet. But the likelihood of lawsuits will increase if we allow a theater. Safety must be preserved. Preservation of life is progress.

G GENE PISCITELLI

Mr. Piscitelli was sworn in. He lives on Egret and this would be 27 feet from his bedroom. The wall will block out his views. He will not be able to leave his bedroom window open with all the traffic and deliveries. The Marco theater is in a mall with lots of parking. How do you keep people from loitering? Will light shine into his windows? How will they handle the dumpsters? They will have a problem with flooding there. This project will not fit in with the proposed comp plan. It will intrude into the quiet zone. It will produce more problems than good.

H VIRGINIA SMITH

Ms. Smith was sworn in. She lives on Egret Street. She read a letter from her landlord that objected to the entrance on a residential street that is narrow and not intended for commercial traffic. A building of that size and proximity does not fit into a residential neighborhood. It will obstruct their view and sunlight. There is not enough parking. There will be problems with runoff from the parking lot, trash container location, etc. It is too large with insufficient parking. There will be increased traffic congestion. Mr. Hoffman is not a resident and will not have to live with problems he creates. The letter was signed by Steve and Nancy Jarrett.

I JIM DEFOE

Mr. Defoe was sworn in. He lives on Egret, and has owned and resided here for nearly 35 years. He likes the serenity and quietness and family atmosphere. The streets are narrow and occupied by residents, children, visitors, strollers and bicycles. There will be traffic from the many parking spaces and delivery trucks. The city has a vision for the future, and this area was to be mixed, but only with commercial that does not adversely impact the residents. They will be impacted. Accidents will happen. This property could be bought by the city for tennis courts, trolley stop, etc.

J BILL WOLF

Mr. Wolf was sworn in. He lives on Egret and is opposed to the theater. One of the reasons the town was created was for local control. A theater could be good for the beach but not in that area. The #1 consideration must be the safety of the citizens. There have been three deaths in three years. Egret and Curlew are so narrow that when you pass another car or truck you must use extreme care. Traffic will only add to that problem. Also this is a place for beer and alcohol, which will also add to the problem. In case of fire or medical emergency, it would be impossible to get a vehicle down Curlew or Egret when cars were coming or going to the theater. Charlie Brown's and Dolphin Inn are nearby, but both have access to Estero, not side streets. No business has the right to enter an area when it destroys the quality of life of the residents. He asked the council members what if they lived on Egret or Curlew--what would their decision be?

K ANDY PRIEM

Mr. Priem was sworn in. He is a resident and voter and asked that this request be denied. Do not yield to arguments because the theater would be a welcome addition to the town. This area should be low-rise, low impact that does not intrude. An office or a small motel would be OK. Development should be allowed, but at appropriate sites. Santini Plaza would be perfect. There will be other proposals for this site that will be more appropriate. The Comp Plan must be approved by the state, and it will send a detrimental message to the state that we are not serious if we start granting variances. Stay true to the vision and the plan. Mr. Hoffman's project is welcome, but not at that site.

L CHERYL BARNHART

Ms. Barnhart was sworn in. She brought a poster that showed 73 parking spaces. Allowing 3 persons per car and 20% walkins, there would be 103.6 cars at every movie change if all seats were sold. She lives on Curlew. Money will be made by the tourists and spring breakers. Money won't be made by our residents all year.

M CHERIE SMITH

Mrs. Smith was sworn in. A lot of people would like to have a theater, but we can live without a theater, especially if the cost is the residents. She has been to the Marco theater and it is everything they say and she had a lovely time, but she would like to see it built elsewhere. They incorporated for our voices to be heard. She implores them to listen to them. Why does Mr. Hoffman want to place the theater where they are hostile because it is encroaching on their private lives and will deteriorate their property values. He should relocate where there is lots of redevelopment.

N BETTY HENRIKSEN

Ms. Henriksen was sworn in. She lives on Curlew and she asked everyone who was opposed to raise their hand. The movie theater is an intrusion, and the county staff and the LPA and the residents agree. If it looks, sounds and feels like intrusion, it is intrusion. You don't need a definition from a dictionary. Please vote for denial on the basis on residential intrusion. CT and CS-1 is incompatible zoning. She went to see Mr. Durett at FishTale Marina and asked if he has space at Santini that is large enough for a theater, and he said yes. She gave his card to Mr. Hoffman.

O JACK HENRIKSEN

Mr. Henriksen was sworn in. This is a mixed residential area and is in the quiet zone. He was on the scene of two of those deaths in the area and he has had nightmares about it. Using the arguments of Diamondhead is ludicrous. This would be a vote for beer and wine. We can't control grandfathered rights, but we can control this. The well-being of residents is more important than the interests of a man who doesn't live here and doesn't even own the property yet. Before voting, identify all the reasons for voting for that project. If they are honest, the vote for denial will be compelling.

P KEVIN MULHEARN

Mr. Mulhearn was sworn in. He stated that he has had a prior business relationship with the developer, but he has no interest in this project personally or financially.. The theater would be fabulous for the island. It would be clean and professionally run. The buffering and landscaping are first rate. It fits the existing usage in terms of what is on Estero already. If possible, it would be good to give a variance that would help those two streets. Estero is constrained, but it is always going to have traffic four months of the year. There is no theater in Bonita, so most people go northbound to go to the theater. They also spend their money for dinner outside of town. Then they come back on the island on the north end where the traffic is. Mr. Hoffman is relying on the locals for 8 months out of the year. He will not make enemies.

Q JENNIFER KAESTNER

Ms. Kaestner was sworn in. Three years ago they looked at a house on Egret that was within their price range, but it was only a couple of houses away from a commercial lot so they did not even consider it because they knew they couldn't stop development. They do not want their tax dollars spent defending this in court. Vote for approval.

R BILL KILBERG

Mr. Kilberg was sworn in. He lives on Curlew. He did not see any provisions for new sewage. Will a new plant be built?

S BETTY SIMPSON

Ms. Simpson was sworn in. She said the reason that stands out is intrusion. But she also wanted to mention property values on those two streets. There are many for sale signs on those streets. We must support the integrity of future land use, which is incompatible. Having a 240-seat theater filling and emptying 3 times a day in a quiet area is uncalled for. There would be congestion, traffic, and noise. Cars already miss the corner at Charlie Brown's and turn around in people's driveways. There will be dumpsters and delivery trucks. There have been three fatalities in three years. Last week someone was hurt there. We can't do anything about grandfathered rights, but we can do something about this one. She asked Mr. Hoffman to please have patience and purchase property in the commercial area. You will get the support of everyone in the right area.

T DR. SEDLACK

Dr. Sedlack was sworn in. He lives on Egret. He is opposed to the theater at that location. It is a hazard to life and welfare. Six months ago his mother had a heart attack and he had to call 911. If the movie theater had been there, the ambulance might not have gotten there. We call ourselves Treasure by the Sea. We are here because we think it is special. He would like to preserve that.

The public hearing was closed.

Ms. Montgomery handed out a memo responding to the staff report. She also asked the council to inquire why Mr. O'Connor did not show for the subpoena. For the record she stated what she believed his testimony would show. Mr. O'Connor was contacted by Ms. Hauck after they filed the appeal, and he agreed with the position of the applicant. Ms. Montgomery personally contacted Mr. O'Connor after the LPA hearing, and he said his opinion had not changed.

Ms. Montgomery began to rebut the public comments, but Mayor Cereceda asked her to stick with the issue of the interpretations. Ms. Montgomery said that would be fine, because that meant that all the talk about traffic, parking, setbacks, the new comp plan, waste water treatment, access points, etc. is irrelevant. There are only two issues. One has to do with parking on two different zonings, and it has historically been interpreted that all commercial districts are similar. This council has never said those words mean anything different. Two courts have said that when you adopt words, it means the same thing as it did before. If commercial districts were similar before, they are the same now. The other issue regards intrusion. The plan that Mr. FitzSimons referred to doesn't change the zoning or affect this property. There is no plan that has been adopted that rezones this property. It is zoned commercial. If it is zoned commercial, it can be used commercial until another plan is adopted. The landowner has owned it for 17 years and has been paying taxes based on commercial. It is fair and just and right to let someone use property for what it has been zoned. This policy was discussed in the Diamondhead issue, and the judge said the thing you must look at is if it is commercial it can be used commercially. The town did not have to accept that language, but they did. It won't make a lot of people happy, and she knows that it is a concern for the Council, but the fair and right thing to do is to approve the development order.

Mayor Cereceda said regardless of how many people are here, she believed the council will make the decision on whether it is the right decision.

Motion: Mr. FitzSimons moved that the denial of the development order be affirmed. Mr. Reynolds seconded the motion. **Discussion:** Mr. FitzSimons said there has been a denial issued by our staff. The majority of that area is residential, either houses or condos, and they have to put up with what is allowed to go in. The theater might be a good idea somewhere, but not in such a highly residential area of our community. We have two areas that we are working on for redevelopment. It scares him to think of all the pedestrian traffic to the theater because they would have to cross Estero. Mr. Murphy said he has a lot of friends on Curlew and Egret, but he is considering the two policy decisions and the law that backs them up. It is so weighted against the town that denial on these two points would be indefensible and would cost the town an inconceivable amount. The property is zoned commercial. They say we should

make it a park, but no one has said they would buy it and turn it into a park. The man bought it as commercial and paid taxes. How do we reconcile this man and compensate him? If we deny this and someone else buys it, someone else will come in. What will go in then? Perhaps a McDonalds or a gas station. They would be permitted and are much more offensive. It is commercial and it is going to be commercial. He doesn't think that it is the best location for the theater, and he doesn't think the ingress and egress on those streets are good. But that is not what we are discussing. We are not going to win this one in court. Mr. Reynolds said he is not an attorney, but he thinks it does not meet the requirements. He asked the town attorney for his opinion. Is that property zoned for this? Mr. Roosa said certainly CT is zoned for theater. The other parcel you cannot put a theater on. There is no question that if this property were in the county it would have been approved. That is a significant and relevant issue that will be presented to the judge. Part of our town charter includes the Lee Plan as part of the town plan and the LDC. The town could have modified that but they didn't. The LPA has been working on the comp plan, but that is not before us and has not been adopted or approved by the state of Florida. The relevant issue is the parking in CS-1. Generally the character of parking is by the principal use of property. If this were a restaurant rather than a theater, there would be more parking spaces required. We would not be here today because a restaurant is in both CT and CS zoning. Staff has taken the position that since the theater cannot be constructed in CS zoning, then parking for a theater cannot be in CS zoning either. Regarding 18.2.1, it says you must be consistent with the land use and development regulation. Prior judicial interpretations of the Lee plan and the LDC are as much a part as the documents themselves. If the county attorney has issued an opinion, it would not be binding on this council because it never went through the legislative process, but judicial interpretations are binding. Mr. Reynolds said it means we are dealing with a fine line, and he would have to go with the opinion of the county planners. Mr. Mulholland said the applicant has made very good points about the law. It is commercial and they have rights. But the property owners have rights too. We were incorporated so we could have a say. He takes issue with the safety and parking issues. Ms. Cereceda said she takes exception to the idea that if she votes for the theater, she would be denying our incorporation. She also takes exception that a neighborhood is only homes. Times Square is a neighborhood. The whole island is a neighborhood. She can't buy into the commercial expansion in this case because she feels she would be setting a precedent for the entire length of Estero that if you own commercial property on Estero, don't even think about developing it. The Council must decide what 18.2.1 means to them. The residents say to buy the property and make it into a park. But when the council tried to do two things to make that possible, the community voted them down. When it comes to paying for it, there is no mechanism, which leaves the council in a quandary. The residents argue that we must look at the vision, but those same people argued against that vision in the Eckerds case. She is concerned about parking. If the zoning was different but a theater was permitted on both, there would be no question. But this would set a precedent for the future. The parking issue is a reason to deny, not commercial intrusion. If the applicant applied for a CPD and locked the two properties together, then the town could have some control. She feels that no matter what goes on that property, there will be an argument that it is commercial intrusion. She can't support the motion because it includes both issues. Intrusion is subjective.

The council took a break at 7:28 and reconvened at 7:35 PM.

Action on the motion: Mr. FitzSimons, aye; Mr. Mulholland, aye; Mr. Reynolds, aye; Mr. Murphy, no; and Mayor Cereceda, no. The resolution carried and the denial of the development order was affirmed.

VIII COUNCIL MEMBER ITEMS AND REPORTS

A RAY MURPHY

Mr. Murphy had no items to bring before the Council.

B GARR REYNOLDS

Mr. Reynolds had no items to bring before the Council.

C JOHN MULHOLLAND

Mr. Mulholland passed out the informational card that was printed by the MRTF. It will go to all the marinas and will also be put in the newspaper. He said that two islands have been posted with

signs saying to stay away because it will disturb nesting of birds. He said the MRTF has had two beach raking meetings, and that discussion will continue.

D TED FITZSIMONS

Mr. FitzSimons said he has had complaints regarding a temporary parking lot and whether it is residential or commercial. Our ordinance allows commercially zoned lots to be parking lots. He asked the staff to look into this. He thanked Dr. Croker for the apology, but he supports the ordinance anyway. Regarding water sports, he said that the Florida recreational boater accident report states that Florida leads the nation in accidents and deaths year after year. More and more people are moving here and we are the fastest growing area of the state. He also has had comments from several people about Times Square after 11 PM at the bridge area. It took 45 minutes to get over the bridge, and kids were everywhere and stopping vehicles. They bang on cars with fists and shout obscenities. It seems to be kids from age 12 to 20, and did not seem to be spring breakers.

E ANITA CERECEDA

Mayor Cereceda said that we have a workshop on public safety scheduled for May 14, but that is the same day and time as the boat parade. She asked if the council wanted to reschedule. There was no objection.

IX FINAL PUBLIC HEARING: BUSINESS INSPECTION ORDINANCE (CONTINUED FROM MARCH 16)

Mr. Roosa said that the ordinance was originally prepared because of a perceived need by the staff to make inspections in code enforcement. Since then, code enforcement has said it is not needed and wouldn't solve the problem. He recommended withdrawing it. There is already a provision that if they refuse to give us access, we can get a search warrant from the county court. It was not known how long it would take to get the warrant. Code enforcement said they did not believe they would use this ordinance. Mr. FitzSimons said we have several businesses that have denied us access. Mrs. Segal-George said recently we had a complaint about a local inn. When our code enforcement officer went there, he was refused inspection, so she still perceives a need. It would take staff time to get the warrant together. She suggested that the council table this again to see why there is a difference of opinion on need. Mr. Roosa said that in the case Mrs. Segal-George mentioned, our ordinance would not apply because it was a duplex, not commercial, and we would need the permission of the owner. If it is a safety issue, we do not need a warrant. He can find no other town in Florida that has a similar ordinance. Mr. Reynolds said he feels we do have a problem.

Motion: Mr. FitzSimons moved and Mr. Reynolds seconded that this ordinance be tabled and withdrawn. The motion passed unanimously.

X FINAL PUBLIC HEARING: AMENDMENT TO LAND DEVELOPMENT CODE REGARDING SEA TURTLES

Mayor Cereceda read the titles. The public hearing was opened. There being no comment, the public hearing was closed. Mr. Mulholland said he got a voice mail from someone saying the lighting requirement was too vague about specific measurement, and was difficult to adhere to.

Motion: Mr. Mulholland moved and Mr. Murphy seconded that the ordinance be adopted. **Action:** Mr. Mulholland, aye; Mr. FitzSimons, aye; Mr. Murphy, aye; Mr. Reynolds, aye; Mayor Cereceda, aye. The motion passed unanimously.

XI FINAL PUBLIC HEARING: ORDINANCE ESTABLISHING THE TOWN PUBLIC SAFETY TASK FORCE

Mayor Cereceda read the titles. The public hearing was opened. There being no comment, the public hearing was closed.

Motion: Mr. Murphy moved and Mr. Mulholland seconded that the ordinance be adopted. **Action:** Mr. Mulholland, aye; Mr. FitzSimons, aye; Mr. Reynolds, aye; Mr. Murphy, aye; Mayor Cereceda, aye. The motion carried unanimously.

The staff said that the openings will be advertised. Chief Markus has said he would like to serve, and the sheriff's department would like to have someone serve. Mayor Cereceda felt they should be a part of the task force, but not in place of residents. Or they could apply and be voted on. Mr. Gucciardo said he does

not think they care if they are on as committee members. They just want to have input and participate in the best way the council sees fit. Mr. Reynolds agreed there should be nine members who are residents. Mr. Mulholland disagreed. He thought they would make excellent members, but he questioned if they would make all the meetings. Mr. Roosa said section 13 talks about staff and experts. Those two could be appointed as staff without compensation and they would be non-voting.

XII FIRST READING: YOUTH PROTECTION ORDINANCE

Mayor Cereceda read the titles. The ordinance was set for public hearing on April 20. Mr. FitzSimons said this subject came up before, but Lee County would not allow it. We can look at it as how we can help ourselves, not so much as controlling the juveniles of the community, but the juveniles it attracts. He hopes the town will be vocal about how they feel about it. Mr. Mulholland said a positive program for youth is better. Also enforcement is a problem. Mr. Reynolds said he doesn't see why we wouldn't offer our parents and officers a little support after 11 PM during the week. We are talking about minors who shouldn't be out after midnight on the weekend. A youth program is fine but we have a program at Bay Oaks and youth sports organizations. But the ones we are talking about will be the ones that don't want to be in those programs. We also have a lot of runaways here and this will give the sheriff a reason to approach them and offer assistance. Mayor Cereceda said she agrees with Mr. Mulholland's comments. She also wants to know before the public hearing what the sheriff will charge to enforce this ordinance, because it will be a new law.

XIII FIRST READING: ORDINANCE ESTABLISHING NEIGHBORHOOD IMPROVEMENT/MAINTENANCE DISTRICTS

Mayor Cereceda read the titles. The ordinance was set for public hearing on April 20.

XIV RESOLUTION: URGING THE LEGISLATURE TO PASS THE "HOMEOWNERS' PROTECTION ACT"

Motion: Mr. Murphy moved and Mr. FitzSimons seconded that the resolution be adopted. The motion passed unanimously.

XV NEW BUSINESS

A RESOLUTIONS FROM THE LPA

1. TRAFFIC STUDY

Mrs. Segal-George said if the Council agrees with the LPA, they can ask the town attorney to draft the necessary legislation.

Motion: Mr. FitzSimons moved and Mr. Murphy seconded that Mr. Roosa be directed to draft a resolution for the Council. The motion passed unanimously.

2. TRUCK DELIVERIES

Mayor Cereceda asked if we couldn't just ask the sheriff to enforce parking by the trucks. Mrs. Segal-George said that a resolution would set up times when deliveries are allowed and where. She suggested meeting with people who are affected by deliveries so they can have some input. It would give the attorney some parameters. The council agreed.

B RESOLUTION FROM SANIBEL ON SPEARFISHING OF SNOOK

The Council asked the staff to send a letter saying that the Town Council supports the Sanibel resolution.

C APPROVAL OF NAME CHANGE TO OLD SAN CARLOS.

Mr. Dillon said that everybody calls it Old San Carlos, but that is not the official name. If the council concurs, we can move forward with 911 and have correct signs posted.

Motion: Mr. Murphy moved and Mr. FitzSimons seconded that the staff move forward with the name change. The motion passed unanimously.

D PROPOSAL TO HIRE A CONSULTANT ON CRA

Mrs. Segal-George said that the council has a proposal from Carol Cunningham that outlines work to be done. If the council wants to do this, it has to be done by June 30, 1998. There is a lot of property in the overlay area that is being sold and will be reassessed, and if we are going to freeze the tax base in order to start collecting the TIF, we need to do it now. There are funds in the Professional Services line item to cover the consultant. If we establish our own CRA, the expenses can be reimbursed from the TIF. The council would appoint the members of the CRA.

Motion: Mr. FitzSimons moved and Mr. Murphy seconded that the proposal be accepted. **Discussion:** Mr. FitzSimons asked how this relates to the MSTU. Mrs. Segal-George said they are totally different. As the TIF is collected it may affect how the council allocates some of the percentages for improvements or maintenance of the square. It could have an impact on the Mainstreet program. Additional security or traffic control could be funded out of the TIF. We could take advantage of some of the appreciation of the properties as the redevelopment causes them to appreciate. This would apply to the overlay district. A CRA is the same as a DRA, depending on what you want to call it. The town will have to reestablish blight. The council will have to pass certain resolutions. **Action:** The motion passed unanimously.

XVI TOWN APPOINTMENTS

A MARINE RESOURCES TASK FORCE

The council discussed how many openings there are. Mr. Mulholland said there is one opening already, but that Mr. Lee has indicated that he does not want to continue. They have been unable to contact him, but he has missed more than three consecutive meetings. It was decided that the MRTF needs to vote to make his appointment vacant before it is filled. The council agreed to pull this until after the MRTF meets again. The town will not advertise again, but they can still receive applications.

XVII TOWN MANAGER'S ITEMS AND REPORTS

A VOLUNTEER APPRECIATION DINNER

Mrs. Segal-George said there are a lot of volunteers that work all year for the town. It would be nice for the Council to host a dinner and recognize all the people who have donated their time and effort. Mr. FitzSimons said he had no problem with the idea but with the dollars. Perhaps we could host a carry-in supper. The town was formed on the premise that volunteers could do a lot of the work and save the town money.

Motion: Mr. Mulholland moved and Mayor Cereceda seconded that the Council host a catered dinner.

Action: Mayor Cereceda, Mr. Mulholland, Mr. Murphy, and Mr. Reynolds voted in favor of the motion. Mr. FitzSimons was opposed. The motion carried.

B WORKSHOP SCHEDULE

A workshop was originally scheduled with San Carlos on April 16, but they had to cancel because of a conflict. It will be rescheduled in June. The pool was ready to hold the workshop, but it had to be changed to Thursday, April 23 at 5:30 PM.

XVIII TOWN ATTORNEY'S ITEMS

A MOUND HOUSE TITLE WORK

Mr. Roosa said there have been several offers that would resolve the acquisition of the property, but there are legal issues because of the pending lawsuits. He needs to investigate the status of litigation and probate so he can advise council of the best option. One option is that we would accept the responsibility of the litigation. Another would be that they continue to pursue it, but we need to assess the legal status. Mrs. Segal-George said we still need to complete the title work which requires a letter from the town attorney. He needs authorization to study this and write a letter. Mr. Roosa thinks the property owner is looking for the town to absorb some of their legal fees.

Motion: Mr. FitzSimons moved and Mr. Mulholland seconded that Mr. Roosa be authorized to move forward with this. The motion passed unanimously.

B Moss Marina

Mr. Roosa said that Pam Houck on behalf of the Town and David Dupree on behalf of the property owner have agreed on an informal basis to the substance and procedure to be followed. The property owner will submit the documentation as if for a formal application for the limited purposes of settlement and not to be used in any judicial or administrative proceeding. The review by the county staff will be within 10 days of presentation to expedite the process. It was clarified that it would not bind the council. Mr. Roosa said all the Town wanted was application on the part of the property owner so the county staff could assess the application and determine what they had to do to come into compliance. They do not want it interpreted that they are agreeing to an application. They want the council to accept if for settlement purposes only. There will be a development order that will resolve the entire case. Mr. Reynolds asked if that means they will have to follow the same procedures and fees that anyone else would have to. Mr. Roosa said they will not have followed the same procedures, but they will have to pay all the

fees, etc. Mr. Reynolds asked if we have another similar case, will we have the same problem. Mr. Roosa replied that next time we would go directly to code enforcement instead of to the courts.

Motion: Mr. FitzSimons moved and Mr. Reynolds seconded that the submission will be accepted for settlement only and will not be used in any litigation. The motion passed unanimously.

XIX PUBLIC COMMENT

There was no public comment.

XX ADJOURNMENT

The meeting was adjourned at 8:36 PM.

Respectfully submitted,

Peggy Salfen
Recording Secretary