

RESOLUTION NUMBER 24-73

A RESOLUTION OF THE TOWN COUNCIL OF THE TOWN OF FORT MYERS BEACH, FLORIDA; MAKING FINDINGS; APPROVING AN ADMINISTRATIVE CODE SETTING FORTH PROCEDURES FOR THE APPLICATION AND APPROVAL OF DEVELOPMENT AGREEMENTS WITH DEVIATIONS; AND PROVIDING AN EFFECTIVE DATE.

WHEREAS, Florida Statutes provide that municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal service, and exercise any power for municipal purposes, except when expressly prohibited by law; and

WHEREAS, Article X of the Town Charter of the Town of Fort Myers Beach empowers the Town to adopt, amend, or repeal such ordinances and resolutions as may be required for the proper governing of the Town; and

WHEREAS, Sec. 2-96, “Applications for Development Agreements”, of the Town’s Land Development Code provides in pertinent part that:

No person shall have the right to apply for or receive development agreement approval, unless such right is so provided in an appropriate administrative code which establishes procedures for such applications. Should such an administrative code be adopted, then the town shall establish a schedule of fees and charges which shall be imposed for the filing and processing of each such application.

WHEREAS, after discussion during public meetings before the members of the Fort Myers Beach Land Planning Agency and the Fort Myers Beach Town Counsel, and after allowing input from the public, an administrative code providing for the procedures to be followed for the application for, and the approval of, development agreements with deviations has been decided upon; and

WHEREAS, the Town Council has determined it is in the best interest of the Town of Fort Myers Beach and its residents and business owners to adopt this Resolution.

NOW THEREFORE, BE IT RESOLVED BY THE TOWN COUNCIL OF THE TOWN OF FORT MYERS BEACH, FLORIDA, AS FOLLOWS:

Section 1. The above recitals are true, correct, incorporated herein by this reference, and adopted as the legislative and administrative findings of the Town Council.

Section 2. The Town Council hereby adopts the attached Exhibit “A” as the Town of Fort Myers Beach Administrative Code Providing Procedures for Development Agreements with Deviations.

Section 3. This Resolution shall be effective immediately after the adoption by Resolution of the schedule of fees and charges which shall be imposed for the filing and processing of each application for a Development Agreement with Deviations.

The foregoing Resolution was adopted by the Town Council upon a motion by Council Member King and seconded by Vice Mayor Atterholt, and upon being put to a roll call vote, the result was as follows:

Dan Allers, Mayor	Aye
Jim Atterholt, Vice Mayor	Aye
John R. King	Aye
Scott Safford	Aye
Karen Woodson	Aye

ADOPTED this 1st day of April 2024, by the Town Council of the Town of Fort Myers Beach, Florida.

FORT MYERS BEACH TOWN COUNCIL

Dan Allers
Dan Allers (Apr 12, 2024 14:28 EDT)

Dan Allers, Mayor

ATTEST:

Amy Baker
Amy Baker (Apr 23, 2024 12:30 EDT)

Amy Baker, Town Clerk

**APPROVED AS TO FORM AND LEGAL SUFFICIENCY FOR THE USE
AND RELIANCE OF THE TOWN OF FORT MYERS BEACH ONLY:**

Nancy Stuparich
Nancy Stuparich (Apr 25, 2024 21:28 EDT)

Vose Law Firm, LLP, Town Attorney

This Resolution was filed in the Office of the Town Clerk on this 12th day of April 2024.

**TOWN OF FORT MYERS BEACH
ADMINISTRATIVE CODE PROVIDING
PROCEDURES FOR DEVELOPMENT AGREEMENTS WITH DEVIATIONS**

Pursuant to Section 2-100 and 2-96 of the Town's Land Development Code, the Town may enter into a Development Agreement with Deviations with a property owner. A Development Agreement with Deviations is a non-statutory development agreement that may allow for approval of amendments, modifications, variances or exceptions ("deviations") from the Town's Land Development Code, and, if appropriate under the provisions of the Town's Comprehensive Plan, relief from the building height limitations in the Comprehensive Plan. Approval of a Development Agreement and the deviations provided for in such Development Agreement shall be considered tantamount to and commensurate to a planned development for purposes of determining consistency with the Comprehensive Plan. Approval of a Development Agreement with Deviations shall be subject to the procedures set forth herein.

1. Development Agreement with Deviations Application Procedures.

The following information/exhibits shall be required with the application for a Development Agreement with Deviations (hereinafter "Development Agreement"):

- 1.1. Legal description and address of the parcel of land which will be the subject of the Development Agreement (hereinafter "Land").
- 1.2. The name, address and telephone number of the applicant and any attorney or agent who is or will be representing the applicant.
- 1.3. A title opinion from a Florida attorney (which opinion is in a form acceptable to and in favor of the town), which shall identify and provide the names, addresses and telephone numbers of all legal and equitable owners having interest in the Land, as well as all mortgage or lien holders, holders of easement interests, and other encumbrances, upon the Land. As of the date of recordation of any Development Agreement, the applicant shall be required by the town to update the foregoing information in this subparagraph to the date of recording of the Development Agreement.
- 1.4. An application signed by, or on behalf of, the owner and any lien holder(s) as to the Land subject to the Development Agreement, and if not signed by the owner a notarized consent signed by the owner authorizing the person to sign the application.
- 1.5. Payment of any required application fee as set by resolution of the town council.

1.6. A survey of the Land showing the approximate location of all environmentally sensitive lands, or lands subject to the jurisdiction of the U.S. Army Corps of Engineers, Florida Department of Environmental Regulation, the Southwest Florida Water Management District or Lee County, Florida.

1.7. A statement and finding demonstrating that the proposed Development Agreement will be consistent with the comprehensive plan of the town.

1.8. The desired duration of the Development Agreement shall not be less than the expected completion of the development on the Land.

1.9. Development uses and regulations currently legally permitted on the Land, including densities, intensities, heights of structures, and setbacks; and, if different, any of the same that are currently on the Land, or that were on the Land at any time in the last 24 months.

1.10. Development uses and regulations, including densities, intensities, heights of structures, and setbacks being requested on the Land.

1.11. A description of the public facilities which will provide services to support the development, the approximate date that new public facilities, if needed, will be constructed, and a schedule to assure that the public facilities and services will be available concurrent with the impacts of development.

1.12. A description of any current or proposed reservation or dedication of land for public purposes.

1.13. Any deed restrictions existing or being imposed upon the Land, and a description of any current or proposed reservation or dedication of land for public purposes.

1.14. The application must explicitly identify each instance of conflict with existing ordinances and expressly provide for the Development Agreement to control, or else all of the provisions of such conflicting ordinances shall control to the extent that the Development Agreement fails to expressly provide otherwise. Any ambiguity with respect to whether a Development Agreement or an ordinance is to control shall be interpreted to favor the ordinance. A statement listing all contemplated zoning districts or land use modifications or requests for more flexibility that will be required if the proposed Development Agreement were to be approved.

1.15. A sketch of site plan showing where buildings (with heights), structures, parking, and other features/amenities of the proposed development shall be located. If the Land is located on the water, any view corridors or public access location(s), if any, will be located.

1.16. A statement that a copy of the Development Agreement with Deviations Application has been furnished by First Class U.S. Mail to all property owners within 100 feet of the boundaries of the Land at the addresses of such property owners found on the Lee County Property Appraiser website, and a list of such property owners and addresses.

1.17. A concise and complete recital of the proposed contents of the Development Agreement using the Form of Development Agreement with Deviations attached as Ex. "A".

2. Development Agreement Minimum Content Requirements.

The following information shall be required within a Development Agreement.

2.1. A legal description of the land subject to the agreement and the identification of all persons having legal or equitable ownership therein.

2.2. The duration of the development agreement, which duration shall not be less than the anticipated time period needed to fully build out the development.

2.3. The development rights to be permitted on the land, and setting forth densities, intensities, building height(s), and setbacks. Uses of the land shall be those allowed in the underlying zoning district unless otherwise specifically provided, such as when a special exception is a part of the development agreement.

2.4. A description of the public facilities and services, including on-site improvements that will serve the proposed project, including designation of the entity or agency that shall be providing such facilities. Additionally, if new facilities are needed to serve the project, the date by which such facilities will be constructed and a schedule to assure that public facilities and services shall be available concurrent with the impact of the development project.

2.5. A description of any reservation or dedication of land for public purposes. The Development Agreement shall provide specifically how the land dedication obligation for the project, if any, is to be met. In the event that land or any interest herein is to be conveyed to the town or other entity in discharge of the foregoing, the Development Agreement shall provide that such conveyance or dedication will be by warranty deed or easement, or other instrument in form and substance acceptable to the town attorney, together with evidence of title in form acceptable to the town attorney prepared by an attorney who is a member of the Florida Bar, or a title company licensed in Florida, all depicting who is the owner in fee simple of the land subject to the conveyance or dedication, and the holders of any other interest or liens affecting said land.

2.6. A description of all local permits approved or needed to be approved for the development of the Land, specifically to include at least the following:

Any required submission to the Southwest Florida Regional Planning Council and any required permission of the State of Florida, Department of Environmental Regulation, the U.S. Corps of Army Engineers, the Southwest Florida Water Management District, the U.S. Environmental Protection Agency or any other required governmental permission. The Development Agreement shall specifically provide that said development permission will be obtained at the sole cost of the owner of the Land, and that any approvals previously given, including the Development Agreement, shall not in any manner obligate the town or any other governmental agency to grant other permit approvals. Under these conditions, action in reliance on the Development Agreement or expenditures in pursuance of its terms or any rights accruing to the project owner thereunder shall not vest any development rights in the owner of the Land or the project to a continuation of the Development Agreement.

2.7. A specific finding in the Development Agreement that the proposed project permitted or proposed is consistent with the town's Comprehensive Plan and Land Development Code, or that, if deviations are necessary for the zoning district or land use plan designations on the subject Land, such Development Agreement specifically lists such deviations in detail.

2.8. Statement in the Development Agreement showing how sidewalk and pedestrian travel is being addressed in a conceptual plan showing the proposed layout of streets, lots, green areas, conservation areas, bike ways, parks, public facilities and such other amenities.

2.9. A statement in the Development Agreement describing how environmentally sensitive land, if any, will be preserved and managed.

2.10. A statement in the Development Agreement describing how threatened or endangered species are being protected.

2.11. A statement in the Development Agreement explicitly identifying each instance of conflict with existing ordinances and expressly providing for the Development Agreement to control, or else all of the provisions of such conflicting ordinances shall control to the extent that the Development Agreement fails to expressly provide otherwise. Any ambiguity with respect to whether a Development Agreement or an ordinance is to control shall be interpreted to favor the ordinance. A statement indicating that failure of the Development Agreement to address a particular permit condition, term or restriction shall not relieve the owner or developer of the necessity of complying with the laws governing said permitting requirements, conditions, terms or restriction.

2.12. A provision that any matter or action required under existing ordinances of the town shall not be otherwise amended, modified or waived, unless such modification, amendment or waiver is expressly provided for in the Development Agreement with specific reference to the Code provision so waived, modified or amended (“deviations”).

2.13. A statement whereby if the applicant, upon approval of the Development Agreement, fails to comply with the terms of the agreement, the town may bring an action in a court of law with competent jurisdiction to protect its rights and interests. All associated reasonable costs and attorney's fees shall be reimbursed to the town if an action at law is necessary regardless of whether the Town is the prevailing party

2.14 Post-Development Agreement requirements. An acknowledgement that prior to the issuance of any building permits being issued for the development that:

2.14.1 All existing and proposed utilities and the manner in which existing utilities will be extended to the site and/or expanded for the use of the development including water, sewer, gas, electricity, cable television, and other utilities shall have been approved by the Town;

2.14.2 The proposed drainage plan for the proposed project shall have been approved by the Town;

2.14.3 The proposed grading plan and elevation requirements of the town, including, but not limited to those related to the National Flood Insurance Program as applicable to the town shall have been approved by the town;

2.14.3. The traffic impact and parking plans as applicable to the town shall have been approved by the town; and

2.14.4 All other town requirements are met that are necessary for the initial building permits to build the project on the Land.

2.15. An acknowledgement that the town shall not have any liability whatsoever for any expenses or other damages that may be incurred as a result of denial of the Development Agreement or for denial of building permits due to the failure to meet the town's requirements as to any Post-Development Agreement requirements.

2.16. A description of any special benefit to the Town as a result of the development such as, the promotion of economic development, affordable housing, hurricane recovery, provision of needed public facilities, provision of public land or recreation, and/or elimination of blight.

2.17. A finding that the proposed Development Agreement is reasonable and not arbitrary and in the best interest of the town.

3. *Development Agreement with Deviations Review Procedures.*

The following regulations shall be followed during the review of a Development Agreement with Deviations.

3.1. Staff negotiation. The town manager or the town manager's designee (typically the town planner) shall review the proposed project and shall meet and hold preliminary nonbinding negotiations with the applicant regarding the appropriate terms and conditions on which said Land should be developed. At such time as a tentative agreement is reached as to the recommended terms and conditions of the development agreement, or the town manager or town manager's designee deems that no further negotiations would be useful because of the unlikely possibility of reaching a concurrence on the terms and conditions of a Development Agreement, the proposal shall be reduced to a nonbinding and unexecuted writing. Such tentative agreement, whether oral or written, shall not give rise to any development rights or equitably or legally vest any development rights in the owner of the Land or other substantially affected person.

3.2. Reduction of proposal to writing

3.2.1. In the event that the town manager or the town manager's designee and the applicant have negotiated the terms of a mutually acceptable, nonbinding and tentative Development Agreement, the terms of that Development Agreement shall be reduced to writing in a contractual form for review and for further discussion, consideration and approval or disapproval as provided herein. The Development Agreement may include a provision that authorizes administrative amendments to the site plan provided that height, density and intensity are not increased, and the plan remains consistent with the Town's Comprehensive Plan.

3.2.2. In the event that the town manager or town manager's designee and the applicant have been unable to negotiate a mutually satisfactory Development Agreement, within thirty (30) days of said determination by the town manager or the town manager's designee, the applicant may prepare a proposed Development Agreement consistent with all requirements hereof for review by the town's Local Planning Agency ("LPA").

3.2.3 It shall not be required for the town manager, or designee to make a recommendation as to whether the town council should approve or not approve a Development Agreement.

3.3. Public hearings

3.3.1. At such time as the Development Agreement has been reduced to written nonbinding contractual form, or the applicant has prepared a Development Agreement as set forth above in subsection 3.2, the town manager or town manager's designee shall transmit such Development Agreement to the LPA.

3.3.2. A public hearing shall be held by the LPA concerning said application, and the LPA shall issue a recommendation for approval or denial of the Development Agreement to the town council. Thereafter a public hearing shall be held by the town council as to the Development Agreement.

3.3.3. Notice of each of the public hearings shall be noticed on the town's website, and said notice shall be mailed to all property owners within a five hundred (500) foot radius of the boundaries of the Land at the addresses of such property owners found on the Lee County Property Appraiser website prior to the first public hearing. Said advertisement and notice of each of the two public hearings may be combined in one notice, but must include:

3.3.3.1. Location of the Land subject to the Development Agreement.

3.3.3.2. Proposed development's project land use, building intensities, estimated population and building heights.

3.3.3.3. Location where a copy of the proposed Development Agreement may be reviewed.

3.3.3.4. Date, time and place of the public hearing(s),

3.3.3.5. At the public hearings and in compliance with any and all procedures established by law for the conduct of said hearings, the LPA and the Town Council shall accept any public comment on the terms of the Development Agreement. Following the town council public hearing, the town clerk shall immediately dispatch, postage prepaid by regular, first class, U.S. mail and in writing, a copy of the determination of the town council to the applicant, or anyone who has requested a copy advising them of the town council's decision. The determination shall state that the decision of the town council is final agency action.

4. Development Agreement Execution Procedures and Recording.

Development Agreements shall be executed as established below:

4.1. All Development Agreements shall be executed on behalf of the applicant by all persons having legal or equitable title in the Land subject to the Development Agreement, including the fee simple owner and any mortgagees or other lien holders or owners of other equitable interests in the Land, unless the town attorney approves the execution of the development agreement without the necessity of such joinder or subordination in that the substantial interests of the town will not be adversely affected thereby.

4.2 Development Agreements shall not be executed on behalf of the town and shall not be recorded unless and until all Post-Development Agreement requirements have been met as set forth in Sec. 2-14 above. The applicant shall bear the expense of recording the Development Agreement, which shall be recorded by the town clerk.

5. Amendment to Development Agreement.

5.1 Except for Administrative Amendments, if allowed in the Development Agreement, an amendment to a Development Agreement shall not occur unless and until there have been hearings thereon before the LPA and before the town council. Noticing of the LPA and town council hearings shall be in the same manner as for the original hearings for Development Agreements.