

Anne Dalton, Esquire
2044 Bayside Parkway
Fort Myers, Florida 33901
(239) 337-7900

Memorandum

To: Chair, Vice Chair, LPA Members, Town of Fort Myers Beach
CC: Town Manager, Community Development Director, Town Clerk
Date: July 3, 2009
Subject: Draft Open Alcoholic Beverage Container Ordinance/Legal
Comments

Pursuant to the direction of the LPA, below are legal comments regarding the draft Open Alcoholic Beverage Container Ordinance which is attached hereto for LPA review. It contains a watermark of "070309" to distinguish it from the last draft presented for LPA review.

1. **Definition of Beach.** (Section 4. Definitions)
 - The LPA is currently reviewing the Beach Furniture Ordinance. Please keep in mind that Ordinance 07-03, which is the beach furniture ordinance previously passed by the Town Council on April 2, 2007, contains its own definition of "Beach," which is different from this definition.
2. **Town Council Approval** (Section 5 (c) COP, Resolution Procedure, conditions)
 - This Town Council approval process must be consistent with the Special Events Ordinance requirements. If this is changed, the Special Events Ordinance (and any parts of the LDC Special Events requirements) must be reviewed.

**TOWN OF FORT MYERS BEACH
ORDINANCE NO. 09-___**

AN ORDINANCE OF THE TOWN OF FORT MYERS BEACH, FLORIDA, TO BE KNOWN AS THE TOWN OF FORT MYERS BEACH OPEN ALCOHOLIC BEVERAGE CONTAINER ORDINANCE; PROVIDING AUTHORITY; TITLE AND CITATION; FINDING OF NECESSITY; DEFINITIONS; CONSUMPTION OR POSSESSION OF ALCOHOLIC BEVERAGES ON A BEACH, PUBLIC AREA, OR SEMI-PUBLIC PARKING LOT; EXCEPTIONS; PENALTY; PROVIDING SEVERABILITY; REPEALING CLAUSE AND REPEALING ORDINANCE NO. 96-05; AND PROVIDING EFFECTIVE DATE.

WHEREAS, Article VIII, Section 2 of the Constitution of the State of Florida and Chapter 166 of the 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 services, and exercise any power for municipal purposes except when expressly prohibited by law; and

WHEREAS, Article X of the Town Charter 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, the Town Council finds that there is a public need affecting life, health, public peace, safety, security, welfare and property of persons inside the municipal limits of the Town so as to require the Town to pass regulations and restrictions regarding consumption or possession of alcoholic beverages on a beach, public area or semi-public parking lot and further that such passage is needed for the effective administration and operation of the Town.

IT IS HEREBY ORDAINED BY THE TOWN OF FORT MYERS BEACH, FLORIDA as follows:

SECTION 1: Incorporation of “Whereas” Clauses.

The above “Whereas” clauses are hereby incorporated by reference.

SECTION 2: Authority, Title and Citation.

This Ordinance is enacted pursuant to the provisions of Chapter 95-494, Laws of Florida, Chapters 163 and 166, Florida Statutes, and other applicable provisions of law. It will hereafter be known and cited as the “TOWN OF FORT MYERS BEACH OPEN ALCOHOLIC BEVERAGE CONTAINER ORDINANCE.”

SECTION 3. Finding of Necessity.

The Town Council finds that the passage of this Ordinance regulating open alcoholic beverage containers is necessary for the effective administration and operation of the Town and the health, safety, security and welfare of the residents, business owners, visitors and the general public within the Town.

SECTION 4. Definitions.

For the purpose of this Ordinance the following terms, phrases, words, and their derivations have the meaning given herein. When not inconsistent with the context, words used in the present tense include the future, words used in the plural include the singular, and words used in the singular include the plural.

Alcoholic beverage means distilled spirits and all beverages containing one-half (1/2) of one percent (1%) or more alcohol by volume. This definition is intended to accord with the definition in the Beverage Law, Chapters 561 through 565, 567, and 568, Florida Statutes.

Beach means the land between the mean high and mean low water lines owned by the State of Florida and the zone of unconsolidated sand extending landward from the mean high water line to the place where there is a marked change in material or physiographic form or the line of permanent vegetation, usually the effective limit of storm waves; including any beach areas owned by the town or Lee County, and any beach area that has arisen upon it a right of customary use by the public or a public easement, prescriptive or otherwise; and the foreshore of tidal navigable waters.

Container means any bottle, can, cup, glass, or other receptacle.

Open container means any container of alcoholic beverage that has been opened, has its seal broken, had its contents partially removed, and is not located in the locked glove compartment, locked trunk, or other locked non-passenger area of a vehicle, or from which consumption is capable immediately.¹ This definition is intended to accord with the definition in Section 316.1936 Florida Statutes.

Public area means an area open to the public, including any auditorium, beach, bridge, building, canal, causeway, dock, lake, lagoon, marina, museum, open space, park, parkway, pier, playground, pool, preserve, range, recreational facility and/or field, roadway, semi-public parking lot, sidewalk, stream, waterway, and abutting lands and adjacent littoral waters, and all rights-of-way and public service facilities located on grounds, buildings, and structures that are under the

¹ A bottle of wine that has been resealed and is transported pursuant to F.S. § 564.08 is not an open container under the provisions of F.S. § 316.1936.

jurisdiction, control, and administration of the town, special district, county, state, or federal government, within the municipal limits of the town.

Semi-public parking lot means any area wherein motor vehicles are parked by the public in conjunction with any business, enterprise, commercial, or noncommercial establishment, office building, or multiple-family building.

SECTION 5. Consumption or Possession of Alcoholic Beverages on a Beach, Public Area, or Semi-Public Parking Lot; Exemptions.

(a) ***General prohibition in public areas.*** Consuming, using, or selling any alcoholic beverage, or manually possessing any open container of any kind that contains any alcoholic beverage while on or within any public area, or while on or within any vehicle located in a public area is prohibited. It is further prohibited for any intoxicated person to enter or remain in any public area.

(b) ***Exceptions.*** The following activities are not subject to the prohibitions of subsection (a) of this Section:

- (1) A person under a written contract with the town to allow sales and service of beer and wine may distribute, and persons of age not prohibited by the patron age provisions of Division 5, Article IV, Chapter 34 of the Land Development Code or other Town ordinance or state law, may consume such permitted beer and wine only within the licensed premises designated by the town without violating the provisions of this Ordinance.
- (2) The consumption or possession of an alcoholic beverage in an open container, in a public area specifically authorized and approved by the town for outdoor seating or a special event pursuant to the Land Development Code or other Town ordinance or state law.
- (3) Notwithstanding any other provision of law, an alcoholic beverage establishment licensed to sell wine on the premises may permit a patron to remove one unsealed bottle of wine for consumption off the premises if the patron has purchased a full course meal and consumed a portion of the bottle of wine with such meal on the licensed premises. A partially consumed bottle of wine that is to be removed from the licensed premises must be securely resealed by the licensee or its employee before removal from the licensed premises. The partially consumed bottle of wine must be placed in a bag or other container that is secured in a manner such that it is visibly apparent if the bag or other container has been subsequently opened or tampered with, and a dated receipt for the bottle of wine and full course meal must be provided by the licensee and attached to the container. If transported in a motor vehicle, the container with the resealed bottle of wine must be placed in a locked glove compartment, a locked

trunk, or the area behind the last upright seat of a motor vehicle that is not equipped with a trunk or glove compartment capable of being locked.

(4) A person engaged only in picking up empty beverage containers for purpose of collecting the value of the empty containers or litter control.

(5) A passenger of a:

a. vehicle in which the driver is operating the vehicle pursuant to a contract to provide transportation for passengers and such driver holds a valid commercial driver's license with a passenger endorsement issued in accordance with the requirements of Ch. 322 Florida Statutes; or

b. bus in which the driver holds a valid commercial driver's license with a passenger endorsement issued in accordance with the requirements of Ch. 322 Florida Statutes; or

c. self-contained motor home that is in excess of 21 feet in length.

(6) Any wine in the possession of a minister, pastor, priest, rabbi or other official of a religious organization that is to be used solely during religious services.

(c) ***Resolution procedure, conditions.*** Notwithstanding the prohibition in subsection (a) of this section, the town council may approve, by resolution, the sales or service and consumption on the premises of alcoholic beverages in a public area for a one-time event. The entity making application for the resolution must secure a temporary permit or license authorized by Florida Statutes § 561.422. All beverages so approved must not be served in glass or other breakable containers and the director may place further restrictions or limitations on the special event.

SECTION 6. Penalty.

Any person convicted of violation of Section 5 of this Ordinance may be punished by a fine not to exceed \$500.00 or by imprisonment in the County jail for a period not to exceed 60 days, or both. Such fine and imprisonment will apply to each such offense. If said violation involves the operation or occupation of a motor vehicle in violation of Section 316.1936 Florida Statutes, such person will also be guilty of a non-criminal moving traffic violation, punishable as provided in Ch. 318 Florida Statutes.

SECTION 7. Severability.

If any one of the provisions of this Ordinance should be held contrary to any express provision of law or contrary to the policy of express law, although not expressly prohibited, or against public policy, or should for any reason whatsoever be held invalid, then such provision will be null and void and will be deemed separate from the remaining provisions of this ordinance, and in no way affect the validity of all other provisions of this Ordinance.

SECTION 8. Repealing Clause.

Ordinance 96-05 is specifically repealed by this Ordinance. All other town ordinances or parts thereof in conflict with the provisions of this Ordinance are, to the extent of such conflict, hereby superseded and repealed.

SECTION 9. Effective Date.

This Ordinance will become effective immediately upon its adoption.

The foregoing was enacted by the Town Council upon a motion of Council Member _____ and seconded by Council Member _____ and, upon being put to a vote, the result was as follows:

Larry Kiker, Mayor _____
Herb Acken, Vice Mayor _____
Tom Babcock _____
Jo List _____
Bob Raymond _____

DULY PASSED AND ENACTED this _____ day of _____ 2009.

ATTEST: TOWN OF FORT MYERS BEACH, FLORIDA

By: _____ By: _____
Michelle Mayher, Town Clerk Larry Kiker, Mayor

Approved as to form by:

Anne Dalton, Esquire
Town Attorney