SPIKOWSKI PLANNING ASSOCIATES

1617 Hendry Street, Suite 416
Fort Myers, Florida 33901-2947

telephone: (941) 334-8866
fax: (941) 334-8878

e-mail: bill@spikowski.com
web site: www.spikowski.com

MEMORANDUM

TO: Fort Myers Beach Local Planning Agency
FROM: Bill Spikowski
DATE: October 10, 2001
SUBJECT: SHORT-TERM RENTALS

We discussed the potential treatment of short-term rental units at your September 18th workshop on the land development code.

I had presented you with a conceptual proposal that would break short-term rentals into three groups: rentals of longer than one month, longer than one week, and daily rentals. Under this proposal, monthly rentals would be allowed even in single-family neighborhoods anywhere in the town; weekly rentals for the tourist market would be allowed in "Residential Conservation," Santos, and multifamily zoning districts; and daily rentals would be limited to resort districts.

Although many LPA members were supportive of this proposal, questions were raised about exactly what the *current* regulations say about short-term rentals, and how much of an impact this proposal might have on current property owners who may have purchased homes with the intention of weekly rentals which might become clearly illegal under this proposal (at least in some neighborhoods). This exact issue has been very controversial in Monroe County and the cities of Islamorada, Marco Island, and Sanibel.

Earlier in that same workshop, the possibility of a registry of rental units was discussed. Such a registry would be one way to address the rights of owners with existing short-term rental units if stricter rules were adopted.

In addition, back in June we discussed potential new rules for small bed-and-breakfast inns. This issue is also closely related because these inns, although allowing *daily* rentals, might have impacts similar to weekly rentals of larger dwelling units, and perhaps should be allowed in the same areas.

All of these discussions about short-term rentals are likely to be controversial when adopting the new land development code, so for your October 16 meeting (beginning at noon at Town Hall) we will step back from code-writing details and discuss these larger issues.

This memo summarizes the existing and historic rules on short-term rentals and then discusses the directions set in the new comprehensive plan. This memo also discusses two related subjects from your recent meetings, potential B&B locations and registry of rental properties.

EXISTING AND HISTORIC RULES ON SHORT-TERM RENTALS

When Lee County adopted detailed countywide zoning regulations in 1962, dwelling units were clearly limited to the "use of one family only," with family defined as one or more persons related by blood or marriage and "distinguished from a group occupying a boarding-house, a lodging house or hotel." There was no specific reference to the duration of the "use of one family" — making it unclear whether a different family could occupy the same dwelling unit every day (or week, or month).

Similar definitions were maintained until the mid-1980s, when the definition of "dwelling unit" was modified into its current form, as follows:

> *Dwelling unit* means a room or rooms connected together, which could constitute a separate, independent housekeeping establishment for a family, for owner occupancy, <u>or for rental or lease on a weekly, monthly or longer basis</u>, and physically separated from any other rooms or dwelling units which may be in the same structure, and containing sleeping and sanitary facilities and one kitchen. The term "dwelling unit" shall not include rooms in hotels, motels or institutional facilities.

The addition of the underlined words clarifies the issue of duration — but not necessarily in a way that contributes to a high quality of life in Fort Myers Beach neighborhoods. (This definition can of course be modified in your new code.)

For much of Lee County, weekly rentals of single-family homes are unusual; however, in popular tourist areas near the beaches, this definition may have a profound impact by reducing the stability of residential neighborhoods. A simple reading suggests that any home can be legally filled with however many weekly tenants can physically fit. That is not accurate, however, because the term "family" is also defined in the code. The current definition is:

> *Family* means one or more persons occupying a dwelling unit and living as a single, nonprofit housekeeping unit, provided that a group of five or more adults who are not related by blood, marriage or adoption shall not be deemed to constitute a family. The term "family" shall not be construed to mean a fraternity, sorority, club, monastery, convent or institutional group.

This definition is cumbersome and difficult to enforce, but is generally interpreted as meaning, for instance, that five adults could not share the rental of a home unless ALL are interrelated by blood, marriage or adoption. In other words, two married couples not otherwise related would be considered a family because there were no more than four persons occupying the dwelling; but two married couples and one adult child would not be considered a family because their number exceeds four and they are not all interrelated.

The difficulties of interpreting this definition, let alone enforcing it, are obvious – especially in a transient situation.

Further complicating this history are:

- Historically lax enforcement of zoning regulations;
- The 1984 comprehensive plan that limited the number of dwelling units per acre;
- The 1984 floodplain regulations, which are sometimes ignored in order to place illegal dwelling units on the ground floor of post-1984 elevated homes.

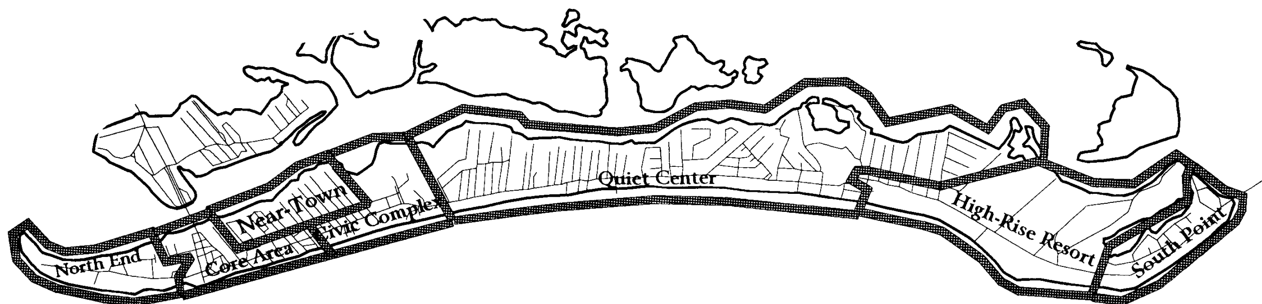
Zoning and land development codes have always struggled with definitions of "family." The unending enforcement difficulties that such a definition presents are a good reason to avoid relying on it for regulatory purposes. In other words, I would much prefer to see your new code be either strict or lenient about where weekly rentals are allowed, rather than relying on the definition of "family" to control overcrowding abuses in transient rentals.

HOW THE NEW COMP PLAN ADDRESSES SHORT-TERM RENTALS

The town's 1999 comprehensive plan didn't deal conclusively with questions of short-term rentals. However, it addressed related concerns in two different ways:

- The "future land use map" distinguished between neighborhoods that contained predominately single-family homes and all other residential neighborhoods by separating them into two land-use categories: "Low Density" and "Mixed Residential." This separation was based on a prevalence of single-family homes on larger lots. The origin of this category is apparent when comparing the two color maps in your comprehensive plan; yellow was used to denote single-family homes in the upper map (which showed existing land uses), and used again in the lower map for the "Low Density" category.[1]

- Although not part of the adopted "future land use map," another concept in the 1999 comprehensive plan identified broader geographical areas within Fort Myers Beach that shared common characteristics. These seven distinct areas became the basis for defining the desired vision for the future of Fort Myers Beach. The original map from Page 3–4 of the plan is shown here.



Either of these delineations could become the basis of assigning zoning districts (or used to formulate an overlay district) that would carry out public policy.

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[1] There are two areas that did not strictly follow this pattern. The first was gulf-front lots beginning at Anthony's and the second was the bay-side streets beginning at Primo. In each case, there were actually more multiple dwellings in existence than were reflected on the existing land use map.

The new comprehensive plan also dealt extensively with "accessory apartments," which means a second apartment that is physically part of a freestanding home. However, the issue of whether that apartment could be used for short-term vs. long-term rentals was not specifically addressed.

CURRENT ISSUES:

(1) Jane Plummer has begun to survey local real estate brokers to determine the general locations of the majority of short-term (weekly) rental units that are represented by the larger brokers. This information will help the LPA assess the impacts of potential new regulations on existing property owners (and on neighborhoods).

(2) In June we discussed potential new regulations for bed-and-breakfast (B&B) inns. My proposal was to define them as containing nine or fewer guest units in one or a cluster of buildings, with the owner or operator required to live on-site. This definition would distinguish them from hotels or motels which could be much larger, and from freestanding dwellings in a transient rental pool (which do not require on-site residence with the resulting closer oversight).

A major question raised by LPA members was where new B&Bs might be located, and whether that approval would be "by right" (not needing a public hearing) or would require a special exception or other approval following a public hearing.

Here are three major alternatives:

- Allow B&Bs to be located "by right" in certain zoning districts, for instance the same districts that I have suggested for weekly rentals of other dwelling units (e.g. "Residential Conservation," "Santos," Residential Multifamily," and "Commercial Resort.")

- Allow B&Bs to be located in those same zoning districts, but only if granted a special exception following a public hearing.

- Create an overlay district on the zoning map that defines areas suitable for B&Bs (and possibly weekly rentals). This overlay could, for instance, exclude the "Quiet Center" and "South End" or some other variation of these broader categories; or it could include only a smaller area, such as Crescent Street to Bowditch Point.

The success of either of the first two options would depend largely on what land is assigned to the "Residential Conservation" zoning district. The draft zoning map would assign this category primarily to subdivisions that have been zoned for duplexes or multifamily, and also to several subdivisions now zoned single-family that are in the "Near-Town" area on the map on the previous page. The following streets are currently shown in the new "Residential Conservation" zoning district: Carlos Circle, Lagoon, Harbor, Third, Primo to Delmar, Tropical Shores, School, Bay, Nature View, Voorhis to Jefferson, Mid-Island, Connecticut, Anchorage, Dakota area, Indian Bayou, Widgeon, and Gulf Road. However please remember that this map was very preliminary and can easily be adjusted to conform with whatever zoning concepts are selected for the new land development code.

(3) On several occasions, most recently in September, LPA members have suggested that the town establish some type of formal registry for the purpose of licensing or permitting rental properties.

A registry might be established for one or more of the following purposes:

A. Ensure enforcement of minimal safety regulations (such as smoke detectors), or compliance with building codes if construction hadn't been inspected, or the payment of proper taxes (including property taxes on additional units, and sales and tourist taxes on short-term rentals).
B. Make the public aware of *legal* rental units, especially ones that don't conform to today's regulations, in order to reduce the number of official complaints that are sometimes filed against perfectly legal units.
C. Stop the continuing unlawful spread of rental units by setting a firm date by which existing rental units must be declared and documented.
D. Determine whether the declared rental units were legal at the time of creation, or should be either removed or "grandfathered in" if they were not created legally, or subject to after-the-fact building code enforcement if constructed without permits.

Despite these useful purposes, I am urging great caution before proceeding down this road.

Some of the benefits are relatively minor, considering the level of effort that would be required by public and private parties to implement a complete registry system. For instance, as to A above, it has already become fairly difficult to evade sales and tourist taxes on continuing short-term rentals due to the diligence of the county tax collector, whose office monitors advertising for seasonal rentals, even regularly combing obscure ads across the Internet. As to property taxes, "hidden" dwelling units may or may not even be taxed at higher rates per square foot than the same floor space assumed to be part of the main dwelling units. Smoke detectors and fresh batteries could probably be distributed free at a lesser cost than administering a registry.

As to B above, this information could simply be provided from records of the zoning enforcement officers for any rental units that have already been investigated.

Item C above would probably be the most valuable contribution of a registry system.

Item D would essentially be an acceleration of the process that already takes place when complaints are filed. These complaints are now investigated and resolved as they come in; this is a very difficult process, as it is often nearly impossible to determine with any certainty when some improvements were made. Questionable units for which complaints have never been filed are obviously not addressed, while units exhibiting problems with noisy tenants and sloppy conditions are likely to receive higher levels of attention (a strong incentive for landlords).

One concept would be to make participation in the registry voluntary. Participants would in effect "pre-screen" their properties to be sure that only clearly legal units were placed on the registry (and thus exposed to scrutiny). This type of registry might serve purposes A and B above.

Expanding the registry concept to serve purposes C or D above would require the registry to be effectively be mandatory. Establishing a final date for owners to bring forth all rental units would create a nearly impossible burden on the current system. Additional staffing would certainly be required, as would an adjudicatory process to resolve all the disputed claims. I would not advise assuming that the county's hearing examiners could handle this assignment, because on code enforcement cases they have become unwilling to enforce any violation that isn't *absolutely* clear-cut; this might mean that illegal rental units would become permanently sanctioned merely because of inadequate effort on the town's part to research and document past conditions.

Unfortunately, documenting past conditions is extremely difficult. Legitimate payment of tourist taxes, even continuously over a decade, cannot be verified, because this data is protected by an exemption in Florida's sunshine laws. Building permits even from the early 1980s cannot be located. The records of the property appraiser are unreliable even in determining even whether a second or third unit exists in a home, and have no value whatever in trying to determine whether existing units are legal or not.

These kinds of conflicts are often resolved as a last resort by affidavits, which are an extremely unreliable way to determine the legality of past improvements.

Obtaining "approved" status for their rental units would be extremely important to most landowners. The town would need to assume that lawyers would be frequently employed to challenge the criteria and the process, or simply to obfuscate, because the cost of losing would be simply too high to many landowners. And landowners who lose can be expected to litigate, or press the town for variances, or new rules, or lower standards, or all of the above. The town's recent experience with enforcing the stricter rule for substandard vacant lots, which is fairly easy to understand and affects a much smaller number of owners, can be considered a microscopic laboratory as to how those affected would react.

Of course, many of the same concerns may also arise if the town implements stricter new requirements, for instance on weekly rentals in single-family subdivisions. However, I believe it will be far easier to implement and enforce a clearly stated policy that is determined by the town to be in the public interest than it would be to adjudicate many hundreds of complex individual interpretations of what was legal in the past. Individual interpretations will inevitably veer into personal hardships, removing the town's focus from the purpose of the broader public policy that is being implemented.

Focusing on the public policy rather than individual circumstances will still cause some hardships. For instance, houses purchased with the primary intention of maximizing rental income may end up with lower returns from longer-term tenants, or the house may have to be sold to others who are looking for a seasonal or permanent home for themselves. However, these results, however difficult for the individuals involved, will move the town in the chosen direction. (A variation would be to write the new rules to exempt all *existing* landowners for a period of say three years if they can demonstrate that they had been regularly offering short-term rentals; these changes would still move the town in the chosen direction, although at a slower pace.) However, if the new rules allowed full "grandfathering" of current rental practices, the effort will have all the controversy but little value, and in fact will create ambiguities that will only get more difficult to unravel as time passes.

If after considering these cautionary remarks the LPA still wishes to pursue the registry approach, I would urge that it not be part of the first edition of the new land development code. The code is already behind schedule and needs to be adopted in the very near future. The provisions of the code will be regularly revisited, and the registry concept can be further investigated at any time in the future.