

**RESOLUTION NO. 16- 223**

**A RESOLUTION SETTING FORTH THE FINDINGS OF FACT AND CONCLUSIONS OF THE BREVARD COUNTY BOARD OF COUNTY COMMISSIONERS PERTAINING TO THE DENIAL OF REQUEST FOR A SMALL SCALE COMPREHENSIVE PLAN AMENDMENT FROM RESIDENTIAL-15 AND COMMUNITY COMMERCIAL TO ALL COMMUNITY COMMERCIAL ON PROPERTY OWNED BY BANANA RIVERFRONT, LLC.**

**BE IT RESOLVED** by the Board of County Commissioners of Brevard County, Florida as follows:

**STATEMENT OF THE CASE AND FACTS**

Three items, a request for a comprehensive plan amendment, a request for rezoning and a request for a conditional use permit, came before the Brevard County Planning and Zoning Board (P&Z) and Local Planning Agency (LPA) on September 12, 2016 after being tabled by P&Z and LPA on July 11, 2016 and August 8, 2016. R-371-372, 373-378, 379-400. The LPA and P&Z recommended approval of all three items subject to conditions. R- 379-400. The items came before the Brevard County Board of County Commissioners on November 3, 2016 after being tabled on August 4, 2016, September 1, 2016 and October 13, 2016. The Board of County Commissioners heard the applicant and members of the public and denied all three of the requested actions. R-458-513.

The record is attached as Exhibit "A". The pages will be cited as R- .

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| Location Map, Future Land Use Map, Aerial Map and Zoning Map   | A-001 to A-004 |
| Certification and Brevard County Planning and Development Office file for 16PZ00055 and SSA 16S.05 Banana Riverfront, LLC (Squid Lips)                 | A-005 to A-370 |
| Map TOWNSHIP 25, RANGE 37, SECTION 26 16PZ00055 and 16S.05   | A-006          |
| Brevard County Planning And Development Application For Zoning Action, Comprehensive Plan Amendment Or Variance 16PZ00055 and SSA 16S.05               | A-007          |
| Brevard County Planning And Development Supplement to Application For Zoning Action, Comprehensive Plan Amendment Or Variance 16PZ00055 and SSA 16S.05 | A-008 to A-011 |
| Receipt dated 5/12/16, Zoning Information Worksheet, Notice to Applicants for Change of Land Use 16PZ00055   | A-012 to A-014 |
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| P&Z Staff Comments, 9/12/16 16PZ00055  | A-088 to A-119 |
| Affidavit of H J Underill III – Posting of Public Hearing Notice   | A-120          |
| Boundary Survey Maps (Exhibit “A” and “B”)   | A-121 to A-122 |
| Draft Binding Development Plan between Brevard County, FL and Banana Riverfront, LLC drafted by Kim Rezanka, Esq.                        | A-123 to A-126 |
| Emails and supporting documents  | A-127 to A-162 |
| Timeline of Squid Lips Violations, 2200 Orlando Ave, Cocoa Beach, and emails   | A-163 to A-166 |
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| Aerial Map, Banana Riverfront LLC 16PZ00055 for years 2016, 2015, 2014, 2013, 2012, 2011, 2010, 2009, 2006 (2), 2005 (2), 2002, 1999 (2) | A-172 to A-186 |
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The applicant, Banana Riverfront, LLC requested a Small Scale Amendment to the Future Land Use Map of the Brevard County Comprehensive Plan to change the designation from Residential 15 and Community Commercial to all Community Commercial. R-7-14. In addition, the applicant requested rezoning from multifamily residential, RU- 2-15, to Commercial, BU-1. R- 7-14. A conditional use permit for the sale of alcoholic beverages for on premises consumption was also requested. R-15-69, 7-14.

The subject property is located in Cocoa Beach west of A1A and east of the Banana River, approximately 415 feet north of Crescent Beach Drive. R-1 Access to the property is from the southbound one way portion of A1A. R-2-4, 88 . The parcel is 2.44 acres with a divided Future Land Use designation of Community Commercial on 1.18 acres abutting A1A and a multifamily land use designation, Residential 15 on the riverfront portion of 1.26 acres. R-88. The entire 2.44 acres is zoned multifamily, RU-2-15. R-94. Based on the existing land use designation and zoning classification, the property could be developed as six residential units. R-93. The land use designations to the north and south of the property are Residential 15 on the river. There is a mix of Community Commercial and Neighborhood Commercial land use designations in the neighborhood along the west side of A1A. Across A1A on the east side of A1A, the land use designation is primarily Residential 15 with a Neighborhood Commercial designation nearby.

R-2-4,88,89. The property is bounded by property zoned multifamily, RU-2-15 R-94. The property to the north is known as the Magnolia Bay Condominium; to the south the multifamily zoning is undeveloped. There is multifamily zoning to the east, and across A1A property is developed as single family and multifamily. The Banana River is on the west. R-2-4 and R-94.

As to the amendment to the future land use map, also known as a change to the comprehensive plan, the staff comments describe the surrounding land use designations and development. The staff noted there is a pre-existing and nonconforming restaurant use on the property. The restaurant can continue to operate as a non-conforming use in the original footprint. R-89. "The applicant however, seeks to legalize an expansion of the restaurant and therefore requires a Community Commercial land use along with a rezoning to BU-1." R-89." Staff noted a 500 foot surface water protection buffer is required from Class II waters, per Policy 3.3 of the Conservation Element of the Comprehensive Plan R-98. A portion of the staff report is provided below:

This request represents the applicant's desire to re-establish the existing restaurant, "Squid Lips", also known previously as the "Lobster Shanty". In 2006, the subject property was rezoned to RU-2-15 and the Future Land Use designation was changed to Residential 15, for the development of a multi-family project (Z-11289). However it appears that there is no longer a desire to develop the property as multi-family and the property has been sold to another restauranteur.(sp) Historically, the property has been previously zoned BU-1 for the restaurant use with a CUP for alcohol in 1974 (Z-3712).

As the restaurant continued to operate and the use was never abandoned, the restaurant has been able to continue as a "non-conforming" use, as defined in Section 62-1181 and could continue to do so now. Without seeking County approval, however, the current owner has expanded the restaurant footprint to provide additional seating space including an outside covered patio, enclosed previously open areas and added asphalt in areas of the parking lot that were previously serving as heat islands and landscaping. Since non-conforming structures cannot be expanded pursuant to Section 62-1182, it is necessary for the property to be rezoned to commercial (BU-1) in order for the restaurant use to be continued and expanded as the applicant desires. Additionally, the CUP for alcoholic beverages needs to be re-established pursuant to section 62-1901 (e).

The Land Development Regulations require one parking space for every 100 square feet of the establishment including any outside seating areas. Until the appropriate permits and site plan revisions are made to the subject property showing the improvements, it is not clear how many seats or outside seating areas will be required/provided. However, the subject property as a stand-alone restaurant has designated parking available on the east side of the property. Staff notes, however, that complaints regarding overflow of parking onto nearby residential properties have been received since the operation was illegally expanded beyond its nonconforming footprint. R-94.

In the summary of the comments, the staff noted that nonconforming uses cannot expand pursuant to Section 62-1182. This property was enlarged without permits and the changes are needed to reach a legal status and allow issuance of the permits necessary for the unpermitted additions. R-97.

The conditional use permit application was also addressed by staff. R-95-97. The staff noted Section 62-1901 of the Code of Ordinances of Brevard County, Florida provides the criteria applicable to requests for conditional use permits. The Code criteria requires a consideration of the impacts on adjacent property, compatibility, noise, traffic, odor, diminution of value, and other factors listed in Section 62-1901. R-95-97. Generally, the applicant asserted the conditional use permit would be compatible since the restaurant had been there since 1952 and that there would be no change to ingress and egress and there would be no new noise impacts. R- 95-97.

The summary provided by staff below shows the applicant's statements regarding the criteria in bold and the staff comments in italics.

The Board should consider the compatibility of the proposed CUP pursuant to Section 62-1151(c) and to Section 62-1901, as outlined on pages 6-9 of these comments. Section 62-1901 provides that the approval of a conditional use shall authorize an additional use for the affected parcel of real property in addition to those permitted in the applicable zoning classification. **The initial burden is on the applicant to demonstrate that all applicable standards and criteria are met. Applications which do not satisfy this burden cannot be approved.** Section 62-1151(c) directs the Board to consider the character of the land use of the property and its surroundings; changes in the conditions of the land use being considered; impact upon infrastructure; compatibility with land use plans for the area; and appropriateness of the CUP based upon consideration of applicable regulations relating to zoning and land use within the context of public health, safety and welfare. The applicant has submitted documentation in order to demonstrate consistency with the standards set forth in Section 62-1901 and Section 62-1906, on-premises consumption of alcohol. The applicant's responses are indicated in **bold** and staff observations are provided in *italics*. Section 62-1901(c)(1)(a) Impact upon adjacent and nearby properties from the proposed use:

Number of persons using property;  
Noise, odor, particulates, smoke, fumes and other emissions; and  
Increase in traffic within the vicinity.

**The requested "renewal" of the conditional use for on-premises consumption of alcoholic beverages will not result in a substantial or adverse impact on adjacent or nearby properties as the restaurant is only expanding its outside seating that faces the Indian River Lagoon. The property has been used as a restaurant since 1952. Outdoor seating has been a part of the property for at least 30 years. The anticipated expansion of outdoor seating is 50 seats. "Exhibit A" reveals the expanded elevated dock and walkway; Exhibit B shows the extent of the deck and walkway before expansion. The hours of operation and outdoor entertainment will remain the same as the historical use, with closing hours of 10 p.m. Sunday through Thursday, and 11:00 p.m. on Friday and Saturday. The restaurant will meet all performance standards.**

Section 62-1901(c)(1)(b) Compatibility with the character of adjacent and nearby properties with regard to use:

Adjacent properties;  
Operating hours;  
Amount of traffic generated;  
Building size and setbacks; and  
Parking availability.

**The renewal of the conditional use will be compatible with the character of the adjacent and nearby properties as it has since the Property operated as a restaurant in 1952. The Conditional Use Consumption on Premises of Liquor, Beer & Wine was approved by the County Commission on July 11, 1974. See "Exhibit C".**

Furthermore, the County acknowledged on January 15, 2016, that the property complied with the County zoning requirements for the sale of alcoholic beverages on the property. See "Exhibit D".

*Staff has received complaints from neighboring residential property owners regarding the overflow of restaurant parking onto their properties.*

Section 62-1901(c)(1)(c) Impact upon property values of abutting residential properties:

**The renewal of the conditional use will not cause any diminution in value of the multi-family property to the north as the restaurant (and 1974 CUP) is not expanding its hours and will meet all performance standards.**

Section 62-1901(c)(2)(a) Adequacy of ingress and egress to serve the use without burdening adjacent and nearby uses:

**There will be no change to the ingress and egress to the property or the restaurant due to the renewed conditional use.**

Section 62-1901(c)(2)(b) Noise, glare, odor, particulates, smoke, fumes, etc.:

**The renewal of the conditional use will not create any additional noise, glare, odor, particulates, smoke, fumes or other emissions.**

Section 62-1901(c)(2)(c) Actual Noise Levels:

**The restaurant will continue to comply with the County noise standards.**

*The applicant has expressed an intent to have outside music, which based upon complaints to the county have impacted adjacent residential properties.*

Section 62-1901(c)(2)(d) Impact upon solid waste disposal level of service:

**There will be no need for additional solid waste disposal due to the renewed conditional use.**

Section 62-1901(c)(2)(e) Impact upon potable water and waste water levels of service:

**There will be no additional need for potable water or wastewater-due to the renewed conditional use.**

Section 62-1901(c)(2)(f) Screening and buffering:

**There will be no additional screening or buffering due to the renewed conditional use.**

Section 62-1901(c)(2)(g) Signage and glare from lighting:

**There will be no additional signage or due to the renewed conditional use. There will be additional lighting on the expanded deck and walkway that will be directed into the seating area or shielded so it does not cause spillage on adjoining properties.**

Section 62-1901(c)(2)(h) Hours of operation:

**The hours of operation will remain the same as the current restaurant hours and will not adversely affect the multi-family residents to the north.**

Section 62-1901(c)(2)(i) Height of proposed use:

**The building already exists and meets County height limitations.**

*The existing building is one story.*

Section 62-1901(c)(2)(j) Impact of off-street parking and loading areas upon adjacent properties:

**The parking and loading areas have existed in the same configuration since 1955, when the smaller building was constructed. This requested CUP will not increase the need for parking spaces or loading zones as the interior seating has been reduced to accommodate the additional exterior seating. Additionally, Banana Riverfront has entered into an agreement with Living Bread Christian Fellowship, Inc., to provide**

**additional parking of approximately 45 spaces for use by the property's employees and customers. See "Exhibit E"**

*From historical aerial photos it appears that the parking lot has removed previously existing landscaped heat islands and other non-asphalted areas to add parking spaces. Staff has received complaints from neighboring residential property owners regarding the overflow of restaurant parking onto their properties.*

This request should be evaluated in the context of **Section 62-1906** which governs alcoholic beverages for the on-premises consumption of alcohol which states in, specifically 62-1906 (3) and (5)

- 3) Except for restaurants with more than 50 seats, no alcoholic beverages shall be sold or served for consumption on the premises from any building that is within 300 feet from the lot line of a school or church if the use of the property as a school or church was established prior to the commencement of the sale of such alcoholic beverages. For the purposes of this subsection, a school shall include only grades kindergarten through 12. For the purpose of establishing the distance between the proposed alcoholic beverage use and churches and schools, a certified survey shall be furnished from a registered engineer or surveyor. Such survey shall indicate the distance between the front door of the proposed place of business and all property lines of any church or school within 400 feet. Each survey shall indicate all such distances and routes.

*The existing restaurant has more than 50 seats and is not subject to this requirement.*

- 5) Imposition of additional operational requirements. When deemed appropriate, as based upon circumstances revealed through the general and specific standards of review set forth in this division, the Board shall have the option of imposing operational requirements upon an establishment approved for a conditional use for on-premises consumption of alcoholic beverages. Requirements may include, but are not limited to, the following: maximum number of patrons; hours of operation; limitations upon outdoor seating and service of alcoholic beverages; limitations upon outside music and/or public address systems; additional buffering requirements; additional parking requirements; internal floor plan arrangement; or other specific restrictions based upon special neighborhood considerations. Additional requirements shall not exceed the limits of regulatory authority granted to local governments in the State Beverage Law, F.S. § 562.45.

*The Board may wish to impose operational limitations on outside music given the proximity of residential uses. R-95-97.*

At the P&Z and LPA meetings the attorney for the applicant, Kim Rezanka, and members of the public were in attendance. Ms. Rezanka stated:

"We are here before you on three matters. The first is a comp plan amendment on 1.26 acres, Neighborhood Commercial to Community Commercial to allow the rezoning. The second is a rezoning from RU-2-15 to BU-1 with a binding development plan to limit the use of this property to only a restaurant, no other commercial uses. This is what the property has been used for over 60 years. The rezoning is an attempt to cure a non-conforming use, which exists since the 2006 rezoning when the property went from BU-1- which it always has been- to RU-2-15. Again, that was in 2006 when everyone was going to condos, but this property was never developed into a condominium because of market conditions. The property remained a restaurant like it had been since 1952. As

you know, the purpose of the ordinances involving non-conformities is to end or remove a non-conforming use. This restaurant is part of the character of Cocoa Beach and in fact all the beach front property, since 1952.” R-387.

The attorney went on to say the property was formerly the Lobster Shanty. She stated the third item was a conditional use permit for the onsite consumption of alcoholic beverages. She stated the CUP was originally granted in 1974, but alcohol was served in the 50’s and 60’s. This was an oversight when the property was rezoned in 2006 according to Ms. Rezanka. They continued to sell alcohol from 2006 until they sold the property in 2015. “I believe this could be a grandfathered use or vested right issue.” stated Ms. Rezanka. R- 387. She passed out pictures of the improvements on the property and introduced Buzz Underill as the owner of the property. R-388, 187-208.

Cynthia Fox, Planning and Zoning Manager, described the nonconforming use status of the property after the commercial zoning was removed in 2006. She stated that you cannot expand the footprint of a non-conforming use per the code, but the applicant did expand the improvements. She stated that now the applicant is trying to make multiple changes to land use and zoning regulations to come into compliance with the code. R-388.

Buzz Underill testified that he was aware of the nonconforming status when he bought the property. He thought he had to re-open in 180 days. He said he signed an application for a building permit. He gave it to an individual to pull a permit, and could show it to the Board. The deck was installed and some infill improvements were constructed such as a canopy. When the roof was going up he asked if the foundation passed inspection and discovered there was no permit. He went to a general contractor who said he wouldn’t take on the liability of the partial construction. Underill decided to finish and pay a fine. They opened in February. The sidewalk leading off the deck was 33 inches instead of 44 inches, they didn’t have a voice activated alarm system for fire protection and there was no exit on the southern portion of the deck in case of fire. He said there were some operational issues that made things difficult for residents at Magnolia Bay and some neighbors across the street. “We made changes,” he said, and “would like to move to the next step.” R-388,389 .

Henry Minneboo asked if Mr. Underill had met with the residents to the north. Mr. Underill said he had. R-389.

Ms. Rezanka then spoke extensively about the staff comments and the Public Interest Determination needed due to the violation of the 50 foot setback from Class II Waters. She described all the improvements to the restaurant and said it was a great addition. She listed a number of people in favor of the project. She said the property owner would limit the noise with a sound barrier and stop music at approximately 10 pm. She said the

property was recreational waterfront property and should be protected per the requirements of the comprehensive plan. She mentioned the Tingley Marina project and said it received public interest determinations regarding the surface water buffer protection issue. Finally, she discussed a procedure for mitigating nonconformities. R-390-392.

Sam Shake spoke and said that it took a lot of guts to come talk to the homeowners. But he said “What we don’t know is what happens now with the proposed conditions; Buzz has made some promises, I assume he is going to follow through, but what happens if that doesn’t work?” R- 392.

Mark Holloway spoke from Magnolia Bay and said the proposal as restricted looked good. His concern was the buffer from the water and the health of the lagoon. It should not be ignored. R-392.

Dave Couch from Julep Drive in Magnolia Bay discussed his time in Brevard County since 1991 and his residence at Magnolia Bay since 2011. His concern was that the music was going to change and the value of the adjacent properties would go down. R-392.

Susan Suplee of Julep Drive spoke to describe her concern with wildlife conservation. She was concerned how the sound shields would factor into the conservation district. She also questioned how decibel levels would be measured. R392,393.

The Chairman asked Cindy Fox where the decibel levels would be measured and she said on the receiving property boundary line. R-393.

Bob Baugher of Sunset Cove said some poor operational decisions had been made but he was for the project with the limitations on operation that were presented. R-393.

Henry Minneboo asked if the restaurant could continue if the zoning were denied, and Ms Fox responded yes, as a non-conforming restaurant. There would be limitations on the expansion. R-393.

There was an extended discussion regarding the kinds of additions built and types of restrictions that could be placed on the property. R-394-400.

Mr. Underhill spoke and said the timeline presented was unfair. (See timeline of violations at R-209-210.) He said they used licensed contractors and they had an exemption from permitting under Chapter 489, Section 103, item 3. He said he is willing to pay the price

for failing to get a permit and he has paid penalties. Now he just wants to jump through the hoops to get the proper permits. R-394.

Ms. Rezanka spoke to address various comments. As to Mr. Shake's concern about compliance, she stated, "You all know he can be shut down." There are performance standards in the code and the decibel level is "like 55 after 7 pm and 65 before 10 pm and normal conversation is about 50 -55 decibels." R-395. She listed the conditions agreed to and offered more conditions if the board wanted them. R-395.

There was a discussion about the items to be removed if the rezoning was denied, including the deck, 1,900 square feet of infill, the canopy and a walkway. It was stated seating is anticipated at 380 where before it was 459. R-393-398. Out buildings were discussed. Off-site parking was discussed with valet parking. R-397. The details of the sound blanket were discussed. R-398. The property owner agreed to a binding development plan limiting the use to a restaurant only because the mortgagee would not agree to the rest of the conditions. R-398-400. The rest of the conditions were placed in the CUP for the sale of alcoholic beverages for on premises consumption. R-399-400. The noise levels were dictated and the music had to end at 10 pm. The restrictions are shown at R-123-126 in a binding development plan. In summary, the LPA and P&Z approved all three items with numerous conditions in the CUP to reduce the impact of the noise and traffic on the neighboring condominium. R- 399-400.

At the hearing before the Board of County Commissioners on November 3, 2016, the staff introduced the item and the commissioners disclosed prior meetings with the applicant, the applicant's attorney and members of the public regarding the items before the board. Commissioners stated emails received on the topics had been forwarded to the zoning department to be included in the zoning file. R- 463,464,245-298,501,504.

The applicant's attorney, Kimberly Rezanka, began by stating that although there was a public interest determination on the agenda related to this site that the applicant wished to defer that item. R-464. At the end of the hearing on the comprehensive plan, rezoning and conditional use permit items, the attorney withdrew the public interest determination request. R-496.

The applicant submitted a written additional written documentation at the Board of County Commissioners meeting on November 3, 2016. R-498-508.

At the public hearing on November 3, 2016, the attorney for the applicant stated use on the property is nonconforming. R-464-465. She also discussed the use as a water enhanced use which provides shoreline access and access to marine resources. She stated the comprehensive plan requires that such uses be preserved. R- 465,466. She stated the restaurant has been there 64 years and it is compatible. R-467, 468. The attorney stated

many citizens like this type of restaurant and bar. R-467. There is canoe and kayak access, but rentals are not being provided. R-467. A 1982 site plan shows 123 parking spaces on a shell parking lot. R-467. She stated we are trying to fix the code violation problems. R-468. There is no public safety problem. There will be no boat rentals. R-467. She said the opposition is “castastrophizing” (sp) and a sound curtain could be provided. R-467. At P&Z only a few people spoke, now there are many people speaking. She asked the Board not to judge the applicant on 5 weeks of operation. R-468.

The owner of Banana Riverfront, LLC, Buzz Underill spoke. He said the timeline of code violations (R-209-210) presented by staff is inaccurate. R-468. He said he replaced rotten wood, and all the riverfront decking was there before he started. He said alcohol was served on the deck and there was music on the outside deck when the property was operated as the Lobster Shanty. R-468. He said he did not intend to fail to pull permits. He stated he hired someone to do the work and it was as the roof went up he discovered no permits had been pulled. He said he went to two engineers to try to get them to certify the improvements so he could get permits. They wouldn’t do it, but someone told him to finish up and then get an after the fact permit. R-469. He said there was a perfect storm in that he opened the bar in the season from February to May and there were spring breakers and seasonal visitors in town. He admitted he should have controlled the bands better. He said he had the same problem in Melbourne at the Squid Lips and a sound curtain resolved the problem there. R-469. He went on to describe his target group as 55 to 75 year olds. He said he didn’t have problems with 65 year olds getting drunk and getting into fights. R-469. He said in Melbourne at the Squid Lips there, he had 72 calls to the police in 24 months. R-470.

Commissioner Infantini commented that she is the age bracket he mentioned and she does not like loud music. R-470.

Mr. Underill responded the group that was loud was called Hot Pink and it attracted a younger crowd and he would not hire Hot Pink again. R-470. He said decibels can be measured every 30 minutes. R-470.

Residents appeared to express concerns.

Barbara Schluraff, Unit 203 Julep Drive is a broker and realtor. She stated she was excited to have a restaurant, but the noise levels were very loud. She could not go on her patio. When she met the owner she was told the target audience was the 40-60 year old market. She has listings in Magnolia Bay and buyers are very concerned about noise. She stated she would like it to remain nonconforming with light music. R-472.

Tony Cook testified she sent two emails. She bought in 2011. She knew about the Lobster Shanty and it was not noisy. When Squid Lips came in the noise came through the doors and the windows of the condominium when they were closed. The owners agreed to reduce the noise, but nothing happened. R-472-473.

She testified the condominium property spent two years to get a permit to trim vegetation in the conservation area next to the river and spent 3 years staging the trees down. They try to be good stewards of the environment. It is frustrating to see someone do what Squid Lips did with no permits, no zoning and no inspections. She stated we have seen what will happen with Squid Lips. "It is not compatible." she said, and asked the item be denied. R-472-473.

Dave Couch, Unit 102 Julep Drive, lives adjacent to the subject property. He has lived at Magnolia Bay since 2011 and lived in Brevard County beginning in 1991. He knew the Lobster Shanty. He said he was excited when Squid Lips opened, then the noise hit them. Mr. Couch commented that 60 decibels is conversation volume, but even that is too much 3-4 hours a day. He went on to question whether the petitioner would live up to his obligations. He stated the marketability of the units would be impacted and the values and taxes would go down. Mr. Couch said we can be compatible with some restaurant music now and again, not a band. He also commented on the reduction in value of the units impacting the advalorem taxes. R-473.

Sam Shake, Unit 2022 Julep Drive stated he received Rezanka's card before the P&Z meeting. He met with Underill and thought he seemed sincere. There was discussion of a "bad evening". Later he learned Rezanka and Underill were told to meet with the Magnolia Bay residents and he heard the list of violations by Squid Lips. He stated Squid Lips is incompatible with our neighborhood and he will not be happy with the noise. He said the Melbourne Squid Lips had 72 calls to police in 2 years and that type of activity would ruin the neighborhood. R-474.

Ms. Rezanka asked to cross examine Mr. Shake and was advised she could raise the issues during her rebuttal time. R-474,475.

Carol Shake of Julep Drive said she ate lunch in Squid Lips and the piped in music was so loud you couldn't talk to other diners. There was no willingness to listen to concerns about sound. She stated a sound curtain would not work on the piped in music. R- 475.

Mark Holloway spoke and expressed his concerns about the proposed use. He said begging for forgiveness is more profitable. They already expanded without permits. He stated the applicant has no regard for the river; the expansion was not good for the lagoon. R-475, 476.

Heather Couch stated she moved in 5 years ago. The Lobster Shanty was compatible; Squid Lips is not. Squid Lips is more of an entertainment establishment catering to a younger demographic. The bands were too loud and the traffic and parking became a safety hazard. R-475.

Susan Julep, Unit 306, Julep Drive asked whether the applicant would be allowed to continue to violate the comprehensive plan and zoning regulations. The County does the hard work of

adopting the code and then someone just disregards it. She said she retired to a quiet community, but if the zoning goes through she will have to move. She discussed smoke, traffic, parking issues, inconsistency with the numbers, the failure to present a preliminary plan and the actual square footage seems to be unknown. Where are 771 people going on 1 acre? No fire safety is in place. She stated, "Our lives are jeopardized." She said she cannot sit on her deck and read a book. The music is 7 days a week, 2-4 bands a day. She said she is strongly opposed to the zoning change and said the board should uphold the comprehensive plan. R-476,477.

Karen Frustaci stated she moved to Cocoa Beach because of friends and to be near her children. She said the Lobster Shanty was there when she moved in and the Lobster Shanty was respectful of the residents. But in February 2016, sitting on her balcony to have wine became a nightmare. The age group of the patrons was spring breakers. She did not choose to live next to Coconuts on the Beach. Squid Lips will be a hangout for a younger crowd. She said the board should adhere to the original zoning. The area is primarily residential. R-477.

James Suplee, of Julep Drive, spoke and said he has been a resident of Brevard County since 1951. He doesn't want to see the Squid Lips business fail. He recommends making it a destination restaurant, like River Rocks. There was a missed opportunity to improve the restaurant. R-477-478.

Joan Friedman, Julep Drive, focused on what life was like when Squid Lips was open. When she bought 2 and half years ago, she knew of the Lobster Shanty. She was looking forward to the new restaurant. But they got traffic and parking problems, loud noise every night and all weekend. The vocalists were also very loud. She said you can hear and feel the bass of those bands inside the condominium building. Her feelings have moved from frustration to anger to helplessness. Contact with the operators of the restaurant would just result in lip service. She said even her hard of hearing husband had to buy ear plugs to block the sound. She said Squid Lips is not compatible with the current location. R-478.

Randy Berner spoke. He said the neighbors stole his thunder, but he would add that Underhill told him the target demographic for Squid Lips was the 40-65 age group. Mr. Burnes said the music played was for a younger group. He went on to say all along the river is residential use, changing to commercial is worse than the nonconforming use. It establishes a bad precedent for other undeveloped parcels. He said he knew the Lobster Shanty was there. The Lobster Shanty and Squid Lips are like night and day. There is noise, traffic, loud patrons and the sound of gun shots from the parking lot. He also stated he was concerned about the dedication to the lagoon and storm water issues. Past practices show little regard for the rules, so why should anyone trust the applicant now? This is a nonconforming use in the neighborhood. There was a denial of another commercial application recently at Summer Street. This item should be denied also. R-478, 479.

Sheryl Berner, Julep Drive, Unit 208, stated she previously sent emails describing the area as primarily multifamily with small commercial uses that primarily appear to have been in place before the comprehensive plan was adopted. Safety is an issue for patrons and residents. With the impairment of drinking a fatality could occur due to traffic issues involving ingress and egress. She discussed the expansion that have been made are in violation of the comprehensive plan She also said she represented Jam Szmanski's email concerns. Also, she said approving this item would contradict a prior action of the board denying a commercial use in the area. R-480-481.

Robert Sullivan of the Driftwood House across from the subject parcel on A1A spoke and said everyone wants to eat on the river. The restaurant could still be enjoyed. He said Jason Uvarro and others were involved in a rezoning nearby. That parcel was commercial then was rezoned residential during the boom. The owners recently applied to go back to commercial and were denied. Mr. Sullivan stated, "Buzz bought knowing it was residential." R-481-492 . "If the board denied the prior rezoning how could it rezone this property?" he asked. R-481-492. He went on to say Marco Villas is in opposition along with Malcolm Kirschenbaum and Jim Swann. Between them, those owners hold 450 feet of oceanfront property. Mr. Sullivan went on to say if there are police out front as people leave they will go to the beach. There will be loud noise and security will be needed. He said Buzz is a likable guy, but the neighborhood had been getting better and this is the wrong direction. R-481-492.

Courtenay Yecze has lived in the area 9 years. She loved being a neighbor to the Lobster Shanty. But who is to prevent jet skiing and a water park on the property? There is manatee zone nearby. She said the trust is broken with this developer. R-483.

Zach Potter, 1515 Bayshore in Snug Harbor north of Squid Lips, says it is not just grumpy old people mad about Squid lips. He has an MBA from FloridaTech and is an investor. He said when the items first came up his neighbors asked if they should be concerned. He said no because the Board had previously denied a similar item nearby. Also, this applicant clearly broke rules. He said approving this item sets a dangerous precedent. And a sound barrier will only deflect sound to the south. He said the current zoning should be maintained. The site is not a concert venue, yet the website has tickets for bands on sale. R-483,484.

Robert Love, Julep Drive, knew about the Lobster Shanty. He knew it was residentially zoned when he bought is property. The zoning board is to protect people. He thought he heard the radio the first time he went out on his balcony and heard the band. He can no longer use his porch. He said there is an inconsistency between the claimed demographic and the loud music. Hot Pink is not what they wanted to hear. He said everyone in the condominium would have to move if the rezoning was approved. R-484,485.

Yane Zana of Vero Beach said he has been buying and developing land in South Cocoa Beach for some time. Ocean Cove and Cocoa Cabanas are just two of his projects. He stated the area is primarily residential and that is why it was rezoned. He agreed with Rob Sullivan about the precedent of rezoning back to commercial. It would be a detriment and he would have to decide what to do with his other residentially zoned properties. R- 485.

Kimberly Rezanka, attorney for the applicant, spoke in rebuttal. R-486-490. She said as to Mr. Shake's comments regarding the 72 police reports there was no evidence of what those were about. R-486.

She said the restaurant had been in existence for 62 years, it is historical and there are no precedential impacts. The impacts on the neighbors are addressed in a binding development agreement limiting the site to restaurant use only. She said applicant is just "trying to make it right." R-486.

She said the French drains on the property improve the storm water treatment on the site. R-487.

She stated there is no evidence of ticket sales on the site. She said sound barriers absorb sound they don't deflect sound. She stated there is no evidence property values will drop. R-487-488 She said Bob Baugher says it will be good for tourism. R-488.

The commissioners raised questions regarding the violations on the property. Information was presented regarding who built the deck and the use of unlicensed contractors. There were also questions about exemptions from permitting. R-488-490

Maggie Castellano, county employee, spoke on those issues. She said the restaurant was not closed, only the outside deck was shut down. There is only an exemption under Chapter 489 for projects less than \$1,000.00 when the project is not part of a larger structure. In this case, the improvements were part of a larger structure so the exemption could not apply. R-488-490. Ms. Rezanka requested an opportunity to question Ms. Castellano, and she was granted that request. R488-490. Ms. Rezanka asked if Dan Heller was originally at the inspection. She asked, "Isn't it true the next inspection wasn't until May? Ms. Castellano agreed, stating the May inspection related to drywall in the downstairs area, and the ADA exit ramp. There were questions regarding stringers and posts and size of the inside area. There was mention of stucco repair by an employee and whether or not that repair required a permit. R-488-490.

The commissioners commented on the prior denial of commercial rezoning in the area and discussed who was on the commission at that time. R-491. The staff, through Ms. DeFabio, indicated the other item was approximately one block north. Historically, the parcel was zoned BU-1, commercial, but it was rezoned to multifamily residential in the mid 2000's. At the public

hearing on that item residents pointed out the character of the area has changed since the 50s and 60s from the commercial area it might have been to residential. R-491.

Commissioner Barfield stated need for the zoning change and the comprehensive plan is for the all new deck area. In 2006, the property was rezoned to multi-family. The restaurant continued and can continue now. Commissioner Fisher asked, "Can it still operate?" The staff answered it could operate as a nonconforming use the way it did before the expansion. Commissioner Barfield went on to say the requests were incompatible. R-491-492. Commissioner Barfield stated:

All right, so just let me go through this. I've been making a lot of notes. I hope I can read it. So, in 2006 the property was rezoned to RU-2-15, which is multifamily. The restaurant continued to operate as a nonconforming, as nonconforming, and and continued to do that even now. So, without Conty approval, the current owenr expanded, added asphalt covered the outside patio, etc., but since nonconforming structures cannot be expanded, the property has to be rezoned commercial, BU-1, that's the reason, to continue and expand. As Robin said, it can still operate as it is. No permits have been requested, and as it is now, its an illegal structure. No site plans have been provided, which that hasn't happened, it doesn't have to yet. But many complaints of parking issues, and there was a five-week period there. There's outside music complaints. Magnolia Bay will be impacted, as will any other areas around there, and what amazes me is that Snut Harbor, too, that's a number of different homes. And one of the things they're proposing and that's off-site parking; and the off-site parking with agrements. I don't think there's any way you can commit to that because those properties can change and that can be used somewhere else. They may want change and not, they may sell the property and not allow it, and the main thing is that is incompatible for expansion... R-492.

A motion was made by Commissioner Barfield to deny the Comprehensive Plan amendment. The motion was seconded by Commissioner Infantini. The motion passed. R- 492, 493.

A motion was made to deny the rezoning request. Commissioner Barfield stated, "I make a motion that we deny the zoning request because of incompatibility with the current zoning in the area and change of classification from RU-2-15 to BU-1 and deny that." R-494. Commissioner Infantini seconded the motion. R-494. The motion passed. R- 494.

A motion was made to deny the condition use permit for the sale of alcoholic beverages for on-site consumption. The motion passed. R-495,496.

Thereafter, the applicant's attorney withdrew the Public Interest Determination also scheduled for November 3, 2016. R-496 .

**FINDINGS OF FACT**

The Board of County Commissioners finds:

1. The subject property is designated Residential 15 on the river frontage and Community Commercial on the road frontage.
2. The subject property has land use designations to north and south of Residential 15 in the same approximate depth as the subject property.
3. Increasing the depth of Community Commercial land use to the river frontage in this area would be inconsistent with the surrounding future land use designations and would constitute the only commercial land use on the river anywhere in the neighborhood.
4. The parcel does not meet the locational and development criteria for commercial land use.
5. A future land use designation of Commercial in this area would intrude upon existing residential development.

**CONCLUSION**

Based on the foregoing, the Board of County Commissioners hereby finds the proposed Small Scale Amendment to the Future Land Use Map of Brevard County from Residential 15 to Community Commercial is not consistent or compatible with the surrounding land use designations and development. Accordingly, the requested Small Scale Amendment to the Future Land Use Map from Residential 15 to Community Commercial is denied.

**DONE AND RESOLVED** this 20 day of Dec., 2016.

**ATTEST:**

By:

  
Scott Ellis, Clerk

By:

  
Curt Smith, Chairperson

As approved by the Board on: 12/20/16

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**RESOLUTION NO. 16- 224**

**A RESOLUTION SETTING FORTH THE FINDINGS OF FACT AND CONCLUSIONS OF THE BREVARD COUNTY BOARD OF COUNTY COMMISSIONERS PERTAINING TO THE DENIAL OF REQUEST FOR REZONING FROM RU-2-15 (MULTI-FAMILY) TO BU-1 (COMMERCIAL) ON PROPERTY OWNED BY BANANA RIVERFRONT, LLC.**

**BE IT RESOLVED** by the Board of County Commissioners of Brevard County, Florida as follows:

**STATEMENT OF THE CASE AND FACTS**

Three items, a request for a comprehensive plan amendment, a request for rezoning and a request for a conditional use permit, came before the Brevard County Planning and Zoning Board (P&Z) and Local Planning Agency (LPA) on September 12, 2016 after being tabled by P&Z and LPA on July 11, 2016 and August 8, 2016. R-371-372, 373-378, 379-400. The LPA and P&Z recommended approval of all three items subject to conditions. R- 379-400. The items came before the Brevard County Board of County Commissioners on November 3, 2016 after being tabled on August 4, 2016, September 1, 2016 and October 13, 2016. The Board of County Commissioners heard the applicant and members of the public and denied all three of the requested actions. R-458-513.

The record is attached as Exhibit "A". The pages will be cited as R- .

| Description  | Page Numbers   |
|--|----------------|
| Location Map, Future Land Use Map, Aerial Map and Zoning Map   | A-001 to A-004 |
| Certification and Brevard County Planning and Development Office file for 16PZ00055 and SSA 16S.05 Banana Riverfront, LLC (Squid Lips)                 | A-005 to A-370 |
| Map TOWNSHIP 25, RANGE 37, SECTION 26 16PZ00055 and 16S.05   | A-006          |
| Brevard County Planning And Development Application For Zoning Action, Comprehensive Plan Amendment Or Variance 16PZ00055 and SSA 16S.05               | A-007          |
| Brevard County Planning And Development Supplement to Application For Zoning Action, Comprehensive Plan Amendment Or Variance 16PZ00055 and SSA 16S.05 | A-008 to A-011 |
| Receipt dated 5/12/16, Zoning Information Worksheet, Notice to Applicants for Change of Land Use 16PZ00055   | A-012 to A-014 |
| Conditional Use Permit Application Worksheet and supporting documents, 16PZ00055   | A-015 to A-069 |

|  |                |
|--|----------------|
| P&Z Staff Comments, 7/11/16 16PZ00055  | A-070 to A-075 |
| P&Z Staff Comments, 8/8/16 16PZ00055   | A-076 to A-087 |
| P&Z Staff Comments, 9/12/16 16PZ00055  | A-088 to A-119 |
| Affidavit of H J Underill III – Posting of Public Hearing Notice   | A-120          |
| Boundary Survey Maps (Exhibit “A” and “B”)   | A-121 to A-122 |
| Draft Binding Development Plan between Brevard County, FL and Banana Riverfront, LLC drafted by Kim Rezanka, Esq.                        | A-123 to A-126 |
| Emails and supporting documents  | A-127 to A-162 |
| Timeline of Squid Lips Violations, 2200 Orlando Ave, Cocoa Beach, and emails   | A-163 to A-166 |
| Photographs  | A-167 to A-171 |
| Aerial Map, Banana Riverfront LLC 16PZ00055 for years 2016, 2015, 2014, 2013, 2012, 2011, 2010, 2009, 2006 (2), 2005 (2), 2002, 1999 (2) | A-172 to A-186 |
| Photographs  | A-187 to A-208 |
| Timeline of Squid Lips, 2200 Orlando Ave, Cocoa Beach, 3/4/16 – 5/25/16  | A-209 to A-210 |
| Brevard County Contractor Licensing Board Citations 16CT-00385, 16CT-00386 & 16CT-00387 with emails                                      | A-211 to A-215 |
| Email exchange between D2 and Pete Farrell, 08/17/16 – 8/17/16, and Meeting Dates between Comm Barfield, Kim Rezanka, and Buzz Underill  | A-216 to A-219 |
| D2 Commission Office Meeting Sign-In Sheet, 10/24/16, Subject Squid Lips, and Email exchange between D2 and Joe French, 11/3/16          | A-220 to A-222 |
| Presentation by Kimberly Rezanka, Esquire, 11/3/16   | A-223 to A232  |
| Brevard County Code Enforcement CAP report, 16CT-00222   | A-233 to A-239 |
| Brevard County Contractor Licensing Board Citations 16CT-00189, 16CT-00240, 16CT-00239, 16CT-00242 (1 each for Logan and Tucker)         | A-240 to A-244 |
| Objections   | A-245 to A-298 |
| Request to Table   | A-299          |
| In Favor   | A-300 to A-370 |
| P&Z Board Minutes, 7/11/16   | A-371 to A-372 |
| P&Z Board Minutes, 8/8/16  | A-373 to A-378 |
| P&Z Board Minutes, 9/12/16   | A-379 to A-400 |

|   |                |
|---|----------------|
| Addition to Jack Baker's Pelican Point Site Plan, approved by Brevard County Public Works, 5/19/82/ | A-401          |
| Brevard County Ordinances Sec. 62-1372; 62-1482; 62-1906; 62-1901; 62-1255;                         | A-402 to A-441 |
| Addition to Jack Baker's Pelican Point Inn documentation  | A-442 to A-449 |
| Brevard County Administrative Policies 1 thru 8,  | A-450 to A-453 |
| Brevard County Comprehensive Plan Conservation Element I-4 thru I-7                                 | A-454 to A-457 |
| BCC Zoning Meeting Minutes August 4, 2016   | A-458-460      |
| BCC Zoning Meeting Minutes September 1, 2016  | A-461-462      |
| BCC Zoning Meeting Minutes November 3 2016  | A-463-496      |
| BCC Zoning Meeting submission by Attorney Rezanka   | A-498-508      |
| Email   | A-509          |
| List of meeting attendees   | A-510-511      |
| Email   | A-512-513      |

The applicant, Banana Riverfront, LLC requested a Small Scale Amendment to the Future Land Use Map of the Brevard County Comprehensive Plan to change the designation from Residential 15 and Community Commercial to all Community Commercial. R-7-14. In addition, the applicant requested rezoning from multifamily residential, RU- 2-15, to Commercial, BU-1. R- 7-14. A conditional use permit for the sale of alcoholic beverages for on premises consumption was also requested. R-15-69, 7-14.

The subject property is located in Cocoa Beach west of A1A and east of the Banana River, approximately 415 feet north of Crescent Beach Drive. R-1 Access to the property is from the southbound one way portion of A1A. R-2-4, 88 . The parcel is 2.44 acres with a divided Future Land Use designation of Community Commercial on 1.18 acres abutting A1A and a multifamily land use designation, Residential 15 on the riverfront portion of 1.26 acres. R-88. The entire 2.44 acres is zoned multifamily, RU-2-15. R-94. Based on the existing land use designation and zoning classification, the property could be developed as six residential units. R-93. The land use designations to the north and south of the property are Residential 15 on the river. There is a mix of Community Commercial and Neighborhood Commercial land use designations in the

neighborhood along the west side of A1A. Across A1A on the east side of A1A, the land use designation is primarily Residential 15 with a Neighborhood Commercial designation nearby. R-2-4,88,89. The property is bounded by property zoned multifamily, RU-2-15 R-94. The property to the north is known as the Magnolia Bay Condominium; to the south the multifamily zoning is undeveloped. There is multifamily zoning to the east, and across A1A property is developed as single family and multifamily. The Banana River is on the west. R-2-4 and R-94.

As to the amendment to the future land use map, also known as a change to the comprehensive plan, the staff comments describe the surrounding land use designations and development. The staff noted there is a pre-existing and nonconforming restaurant use on the property. The restaurant can continue to operate as a non-conforming use in the original footprint. R-89. "The applicant however, seeks to legalize an expansion of the restaurant and therefore requires a Community Commercial land use along with a rezoning to BU-1." R-89." Staff noted a 500 foot surface water protection buffer is required from Class II waters, per Policy 3.3 of the Conservation Element of the Comprehensive Plan R-98. A portion of the staff report is provided below:

This request represents the applicant's desire to re-establish the existing restaurant, "Squid Lips", also known previously as the "Lobster Shanty". In 2006, the subject property was rezoned to RU-2-15 and the Future Land Use designation was changed to Residential 15, for the development of a multi-family project (Z-11289). However it appears that there is no longer a desire to develop the property as multi-family and the property has been sold to another restaurateur.(sp) Historically, the property has been previously zoned BU-1 for the restaurant use with a CUP for alcohol in 1974 (Z-3712).

As the restaurant continued to operate and the use was never abandoned, the restaurant has been able to continue as a "non-conforming" use, as defined in Section 62-1181 and could continue to do so now. Without seeking County approval, however, the current owner has expanded the restaurant footprint to provide additional seating space including an outside covered patio, enclosed previously open areas and added asphalt in areas of the parking lot that were previously serving as heat islands and landscaping. Since non-conforming structures cannot be expanded pursuant to Section 62-1182, it is necessary for the property to be rezoned to commercial (BU-1) in order for the restaurant use to be continued and expanded as the applicant desires. Additionally, the CUP for alcoholic beverages needs to be re-established pursuant to section 62-1901 (e).

The Land Development Regulations require one parking space for every 100 square feet of the establishment including any outside seating areas. Until the appropriate permits and site plan revisions are made to the subject property showing the improvements, it is not clear how many seats or outside seating areas will be required/provided. However, the subject property as a stand-alone restaurant has designated parking available on the east side of the property. Staff notes, however, that complaints regarding overflow of parking onto nearby residential properties have been received since the operation was illegally expanded beyond its nonconforming footprint. R-94.

In the summary of the comments, the staff noted that nonconforming uses cannot expand pursuant to Section 62-1182. This property was enlarged without permits and the changes are

needed to reach a legal status and allow issuance of the permits necessary for the unpermitted additions. R-97.

The conditional use permit application was also addressed by staff. R-95-97. The staff noted Section 62-1901 of the Code of Ordinances of Brevard County, Florida provides the criteria applicable to requests for conditional use permits. The Code criteria requires a consideration of the impacts on adjacent property, compatibility, noise, traffic, odor, diminution of value, and other factors listed in Section 62-1901. R-95-97. Generally, the applicant asserted the conditional use permit would be compatible since the restaurant had been there since 1952 and that there would be no change to ingress and egress and there would be no new noise impacts. R- 95-97.

The summary provided by staff below shows the applicant's statements regarding the criteria in bold and the staff comments in italics.

The Board should consider the compatibility of the proposed CUP pursuant to Section 62-1151(c) and to Section 62-1901, as outlined on pages 6-9 of these comments. Section 62-1901 provides that the approval of a conditional use shall authorize an additional use for the affected parcel of real property in addition to those permitted in the applicable zoning classification. **The initial burden is on the applicant to demonstrate that all applicable standards and criteria are met. Applications which do not satisfy this burden cannot be approved.** Section 62-1151(c) directs the Board to consider the character of the land use of the property and its surroundings; changes in the conditions of the land use being considered; impact upon infrastructure; compatibility with land use plans for the area; and appropriateness of the CUP based upon consideration of applicable regulations relating to zoning and land use within the context of public health, safety and welfare. The applicant has submitted documentation in order to demonstrate consistency with the standards set forth in Section 62-1901 and Section 62-1906, on-premises consumption of alcohol. The applicant's responses are indicated in **bold** and staff observations are provided in *italics*. Section 62-1901(c)(1)(a) Impact upon adjacent and nearby properties from the proposed use:

Number of persons using property;  
Noise, odor, particulates, smoke, fumes and other emissions; and  
Increase in traffic within the vicinity.

**The requested "renewal" of the conditional use for on-premises consumption of alcoholic beverages will not result in a substantial or adverse impact on adjacent or nearby properties as the restaurant is only expanding its outside seating that faces the Indian River Lagoon. The property has been used as a restaurant since 1952. Outdoor seating has been a part of the property for at least 30 years. The anticipated expansion of outdoor seating is 50 seats. "Exhibit A" reveals the expanded elevated dock and walkway; Exhibit B shows the extent of the deck and walkway before expansion. The hours of operation and outdoor entertainment will remain the same as the historical use, with closing hours of 10 p.m. Sunday through Thursday, and 11:00 p.m. on Friday and Saturday. The restaurant will meet all performance standards.**

Section 62-1901(c)(1)(b) Compatibility with the character of adjacent and nearby properties with regard to use:

Adjacent properties;  
Operating hours;  
Amount of traffic generated;  
Building size and setbacks; and  
Parking availability.

The renewal of the conditional use will be compatible with the character of the adjacent and nearby properties as it has since the Property operated as a restaurant in 1952. The Conditional Use Consumption on Premises of Liquor, Beer & Wine was approved by the County Commission on July 11, 1974. See "Exhibit C". Furthermore, the County acknowledged on January 15, 2016, that the property complied with the County zoning requirements for the sale of alcoholic beverages on the property. See "Exhibit D".

*Staff has received complaints from neighboring residential property owners regarding the overflow of restaurant parking onto their properties.*

Section 62-1901(c)(1)(c) Impact upon property values of abutting residential properties:  
The renewal of the conditional use will not cause any diminution in value of the multi-family property to the north as the restaurant (and 1974 CUP) is not expanding its hours and will meet all performance standards.

Section 62-1901(c)(2)(a) Adequacy of ingress and egress to serve the use without burdening adjacent and nearby uses:  
There will be no change to the ingress and egress to the property or the restaurant due to the renewed conditional use.

Section 62-1901(c)(2)(b) Noise, glare, odor, particulates, smoke, fumes, etc.:  
The renewal of the conditional use will not create any additional noise, glare, odor, particulates, smoke, fumes or other emissions.

Section 62-1901(c)(2)(c) Actual Noise Levels:  
The restaurant will continue to comply with the County noise standards.  
*The applicant has expressed an intent to have outside music, which based upon complaints to the county have impacted adjacent residential properties.*

Section 62-1901(c)(2)(d) Impact upon solid waste disposal level of service:  
There will be no need for additional solid waste disposal due to the renewed conditional use.

Section 62-1901(c)(2)(e) Impact upon potable water and waste water levels of service:  
There will be no additional need for potable water or wastewater-due to the renewed conditional use.

Section 62-1901(c)(2)(f) Screening and buffering:  
There will be no additional screening or buffering due to the renewed conditional use.

Section 62-1901(c)(2)(g) Signage and glare from lighting:  
There will be no additional signage or due to the renewed conditional use. There will be additional lighting on the expanded deck and walkway that will be directed into the seating area or shielded so it does not cause spillage on adjoining properties.

Section 62-1901(c)(2)(h) Hours of operation:  
The hours of operation will remain the same as the current restaurant hours and will not adversely affect the multi-family residents to the north.

Section 62-1901(c)(2)(I) Height of proposed use:  
The building already exists and meets County height limitations.  
*The existing building is one story.*

Section 62-1901(c)(2)(J) Impact of off-street parking and loading areas upon adjacent properties:

**The parking and loading areas have existed in the same configuration since 1955, when the smaller building was constructed. This requested CUP will not increase the need for parking spaces or loading zones as the interior seating has been reduced to accommodate the additional exterior seating. Additionally, Banana Riverfront has entered into an agreement with Living Bread Christian Fellowship, Inc., to provide additional parking of approximately 45 spaces for use by the property's employees and customers. See "Exhibit E"**

*From historical aerial photos it appears that the parking lot has removed previously existing landscaped heat islands and other non-asphalted areas to add parking spaces. Staff has received complaints from neighboring residential property owners regarding the overflow of restaurant parking onto their properties.*

This request should be evaluated in the context of **Section 62-1906** which governs alcoholic beverages for the on-premises consumption of alcohol which states in, specifically 62-1906 (3) and (5)

- 3) Except for restaurants with more than 50 seats, no alcoholic beverages shall be sold or served for consumption on the premises from any building that is within 300 feet from the lot line of a school or church if the use of the property as a school or church was established prior to the commencement of the sale of such alcoholic beverages. For the purposes of this subsection, a school shall include only grades kindergarten through 12. For the purpose of establishing the distance between the proposed alcoholic beverage use and churches and schools, a certified survey shall be furnished from a registered engineer or surveyor. Such survey shall indicate the distance between the front door of the proposed place of business and all property lines of any church or school within 400 feet. Each survey shall indicate all such distances and routes.

*The existing restaurant has more than 50 seats and is not subject to this requirement.*

- 5) Imposition of additional operational requirements. When deemed appropriate, as based upon circumstances revealed through the general and specific standards of review set forth in this division, the Board shall have the option of imposing operational requirements upon an establishment approved for a conditional use for on-premises consumption of alcoholic beverages. Requirements may include, but are not limited to, the following: maximum number of patrons; hours of operation; limitations upon outdoor seating and service of alcoholic beverages; limitations upon outside music and/or public address systems; additional buffering requirements; additional parking requirements; internal floor plan arrangement; or other specific restrictions based upon special neighborhood considerations. Additional requirements shall not exceed the limits of regulatory authority granted to local governments in the State Beverage Law, F.S. § 562.45.

*The Board may wish to impose operational limitations on outside music given the proximity of residential uses. R-95-97.*

At the P&Z and LPA meetings the attorney for the applicant, Kim Rezanka, and members of the public were in attendance. Ms. Rezanka stated:

“We are here before you on three matters. The first is a comp plan amendment on 1.26 acres, Neighborhood Commercial to Community Commercial to allow the rezoning. The second is a rezoning from RU-2-15 to BU-1 with a binding development plan to limit the use of this property to only a restaurant, no other commercial uses. This is what the property has been used for over 60 years. The rezoning is an attempt to cure a non-

conforming use, which exists since the 2006 rezoning when the property went from BU-1- which it always has been- to RU-2-15. Again, that was in 2006 when everyone was going to condos, but this property was never developed into a condominium because of market conditions. The property remained a restaurant like it had been since 1952. As you know, the purpose of the ordinances involving non-conformities is to end or remove a non-conforming use. This restaurant is part of the character of Cocoa Beach and in fact all the beach front property, since 1952.” R-387.

The attorney went on to say the property was formerly the Lobster Shanty. She stated the third item was a conditional use permit for the onsite consumption of alcoholic beverages. She stated the CUP was originally granted in 1974, but alcohol was served in the 50’s and 60’s. This was an oversight when the property was rezoned in 2006 according to Ms. Rezanka. They continued to sell alcohol from 2006 until they sold the property in 2015. “I believe this could be a grandfathered use or vested right issue.” stated Ms. Rezanka. R- 387. She passed out pictures of the improvements on the property and introduced Buzz Underill as the owner of the property. R-388, 187-208.

Cynthia Fox, Planning and Zoning Manager, described the nonconforming use status of the property after the commercial zoning was removed in 2006. She stated that you cannot expand the footprint of a non-conforming use per the code, but the applicant did expand the improvements. She stated that now the applicant is trying to make multiple changes to land use and zoning regulations to come into compliance with the code. R-388.

Buzz Underill testified that he was aware of the nonconforming status when he bought the property. He thought he had to re-open in 180 days. He said he signed an application for a building permit. He gave it to an individual to pull a permit, and could show it to the Board. The deck was installed and some infill improvements were constructed such as a canopy. When the roof was going up he asked if the foundation passed inspection and discovered there was no permit. He went to a general contractor who said he wouldn’t take on the liability of the partial construction. Underill decided to finish and pay a fine. They opened in February. The sidewalk leading off the deck was 33 inches instead of 44 inches, they didn’t have a voice activated alarm system for fire protection and there was no exit on the southern portion of the deck in case of fire. He said there were some operational issues that made things difficult for residents at Magnolia Bay and some neighbors across the street. “We made changes,” he said, and “would like to move to the next step.” R-388,389 .

Henry Minneboo asked if Mr. Underill had met with the residents to the north. Mr. Underill said he had. R-389.

Ms. Rezanka then spoke extensively about the staff comments and the Public Interest Determination needed due to the violation of the 50 foot setback from Class II Waters. She described all the improvements to the restaurant and said it was a great addition. She listed a number of people in favor of the project. She said the property owner would limit the noise with a sound barrier and stop music at approximately 10 pm. She said the property was recreational waterfront property and should be protected per the requirements of the comprehensive plan. She mentioned the Tingley Marina project and said it received public interest determinations regarding the surface water buffer protection issue. Finally, she discussed a procedure for mitigating nonconformities. R-390-392.

Sam Shake spoke and said that it took a lot of guts to come talk to the homeowners. But he said "What we don't know is what happens now with the proposed conditions; Buzz has made some promises, I assume he is going to follow through, but what happens if that doesn't work?" R- 392.

Mark Holloway spoke from Magnolia Bay and said the proposal as restricted looked good. His concern was the buffer from the water and the health of the lagoon. It should not be ignored. R-392.

Dave Couch from Julep Drive in Magnolia Bay discussed his time in Brevard County since 1991 and his residence at Magnolia Bay since 2011. His concern was that the music was going to change and the value of the adjacent properties would go down. R-392.

Susan Suplee of Julep Drive spoke to describe her concern with wildlife conservation. She was concerned how the sound shields would factor into the conservation district. She also questioned how decibel levels would be measured. R392,393.

The Chairman asked Cindy Fox where the decibel levels would be measured and she said on the receiving property boundary line. R-393.

Bob Baugher of Sunset Cove said some poor operational decisions had been made but he was for the project with the limitations on operation that were presented. R-393.

Henry Minneboo asked if the restaurant could continue if the zoning were denied, and Ms Fox responded yes, as a non-conforming restaurant. There would be limitations on the expansion. R-393.

There was an extended discussion regarding the kinds of additions built and types of restrictions that could be placed on the property. R-394-400.

Mr. Underill spoke and said the timeline presented was unfair. (See timeline of violations at R-209-210.) He said they used licensed contractors and they had an exemption from permitting under Chapter 489, Section 103, item 3. He said he is willing to pay the price for failing to get a permit and he has paid penalties. Now he just wants to jump through the hoops to get the proper permits. R-394.

Ms. Rezanka spoke to address various comments. As to Mr. Shake's concern about compliance, she stated, "You all know he can be shut down." There are performance standards in the code and the decibel level is "like 55 after 7 pm and 65 before 10 pm and normal conversation is about 50 -55 decibels." R-395. She listed the conditions agreed to and offered more conditions if the board wanted them. R-395.

There was a discussion about the items to be removed if the rezoning was denied, including the deck, 1,900 square feet of infill, the canopy and a walkway. It was stated seating is anticipated at 380 where before it was 459. R-393-398. Out buildings were discussed. Off-site parking was discussed with valet parking. R-397. The details of the sound blanket were discussed. R-398. The property owner agreed to a binding development plan limiting the use to a restaurant only because the mortgagee would not agree to the rest of the conditions. R-398-400. The rest of the conditions were placed in the CUP for the sale of alcoholic beverages for on premises consumption. R-399-400. The noise levels were dictated and the music had to end at 10 pm. The restrictions are shown at R-123-126 in a binding development plan. In summary, the LPA and P&Z approved all three items with numerous conditions in the CUP to reduce the impact of the noise and traffic on the neighboring condominium. R- 399-400.

At the hearing before the Board of County Commissioners on November 3, 2016, the staff introduced the item and the commissioners disclosed prior meetings with the applicant, the applicant's attorney and members of the public regarding the items before the board. Commissioners stated emails received on the topics had been forwarded to the zoning department to be included in the zoning file. R- 463,464,245-298,501,504.

The applicant's attorney, Kimberly Rezanka, began by stating that although there was a public interest determination on the agenda related to this site that the applicant wished to defer that item. R-464. At the end of the hearing on the comprehensive plan, rezoning and conditional use permit items, the attorney withdrew the public interest determination request. R-496.

The applicant submitted a written additional written documentation at the Board of County Commissioners meeting on November 3, 2016. R-498-508.

At the public hearing on November 3, 2016, the attorney for the applicant stated use on the property is nonconforming. R-464-465. She also discussed the use as a water enhanced

use which provides shoreline access and access to marine resources. She stated the comprehensive plan requires that such uses be preserved. R- 465,466. She stated the restaurant has been there 64 years and it is compatible. R-467, 468. The attorney stated many citizens like this type of restaurant and bar. R-467. There is canoe and kayak access, but rentals are not being provided. R-467. A 1982 site plan shows 123 parking spaces on a shell parking lot. R-467. She stated we are trying to fix the code violation problems. R- 468. There is no public safety problem. There will be no boat rentals. R-467. She said the opposition is “castastrophizing” (sp) and a sound curtain could be provided. R-467. At P&Z only a few people spoke, now there are many people speaking. She asked the Board not to judge the applicant on 5 weeks of operation. R-468.

The owner of Banana Riverfront, LLC, Buzz Underill spoke. He said the timeline of code violations (R- 209-210) presented by staff is inaccurate. R-468. He said he replaced rotten wood, and all the riverfront decking was there before he started. He said alcohol was served on the deck and there was music on the outside deck when the property was operated as the Lobster Shanty. R-468. He said he did not intend to fail to pull permits. He stated he hired someone to do the work and it was as the roof went up he discovered no permits had been pulled. He said he went to two engineers to try to get them to certify the improvements so he could get permits. They wouldn’t do it, but someone told him to finish up and then get an after the fact permit. R-469. He said there was a perfect storm in that he opened the bar in the season from February to May and there were spring breakers and seasonal visitors in town. He admitted he should have controlled the bands better. He said he had the same problem in Melbourne at the Squid Lips and a sound curtain resolved the problem there. R-469. He went on to describe his target group as 55 to 75 year olds. He said he didn’t have problems with 65 year olds getting drunk and getting into fights. R-469. He said in Melbourne at the Squid Lips there, he had 72 calls to the police in 24 months. R-470.

Commissioner Infantini commented that she is the age bracket he mentioned and she does not like loud music. R-470.

Mr. Underill responded the group that was loud was called Hot Pink and it attracted a younger crowd and he would not hire Hot Pink again. R-470. He said decibels can be measured every 30 minutes. R-470.

Residents appeared to express concerns.

Barbara Schluraff, Unit 203 Julep Drive is a broker and realtor. She stated she was excited to have a restaurant, but the noise levels were very loud. She could not go on her patio. When she met the owner she was told the target audience was the 40-60 year old market. She has listings in Magnolia Bay and buyers are very concerned about noise. She stated she would like it to remain nonconforming with light music. R-472.

Tony Cook testified she sent two emails . She bought in 2011. She knew about the Lobster Shanty and it was not noisy. When Squid Lips came in the noise came through the doors and the windows of the condominium when they were closed. The owners agreed to reduce the noise, but nothing happened. R-472-473.

She testified the condominium property spent two years to get a permit to trim vegetation in the conservation area next to the river and spent 3 years staging the trees down. They try to be good stewards of the environment. It is frustrating to see someone do what Squid Lips did with no permits, no zoning and no inspections. She stated we have seen what will happen with Squid Lips. "It is not compatible." she said, and asked the item be denied. R-472-473.

Dave Couch, Unit 102 Julep Drive, lives adjacent to the subject property. He has lived at Magnolia Bay since 2011 and lived in Brevard County beginning in 1991. He knew the Lobster Shanty. He said he was excited when Squid Lips opened, then the noise hit them. Mr. Couch commented that 60 decibels is conversation volume, but even that is too much 3-4 hours a day. He went on to question whether the petitioner would live up to his obligations. He stated the marketability of the units would be impacted and the values and taxes would go down. Mr. Couch said we can be compatible with some restaurant music now and again, not a band. He also commented on the reduction in value of the units impacting the advalorem taxes. R-473.

Sam Shake, Unit 2022 Julep Drive stated he received Rezanka's card before the P&Z meeting. He met with Underill and thought he seemed sincere. There was discussion of a "bad evening". Later he learned Rezanka and Underill were told to meet with the Magnolia Bay residents and he heard the list of violations by Squid Lips. He stated Squid Lips is incompatible with our neighborhood and he will not be happy with the noise. He said the Melbourne Squid Lips had 72 calls to police in 2 years and that type of activity would ruin the neighborhood. R-474.

Ms. Rezanka asked to cross examine Mr. Shake and was advised she could raise the issues during her rebuttal time. R-474,475.

Carol Shake of Julep Drive said she ate lunch in Squid Lips and the piped in music was so loud you couldn't talk to other diners. There was no willingness to listen to concerns about sound. She stated a sound curtain would not work on the piped in music. R- 475.

Mark Holloway spoke and expressed his concerns about the proposed use. He said begging for forgiveness is more profitable. They already expanded without permits. He stated the applicant has no regard for the river; the expansion was not good for the lagoon. R-475, 476.

Heather Couch stated she moved in 5 years ago. The Lobster Shanty was compatible; Squid Lips is not. Squid Lips is more of an entertainment establishment catering to a younger

demographic. The bands were too loud and the traffic and parking became a safety hazard. R-475.

Susan Julep, Unit 306, Julep Drive asked whether the applicant would be allowed to continue to violate the comprehensive plan and zoning regulations. The County does the hard work of adopting the code and then someone just disregards it. She said she retired to a quiet community, but if the zoning goes through she will have to move. She discussed smoke, traffic, parking issues, inconsistency with the numbers, the failure to present a preliminary plan and the actual square footage seems to be unknown. Where are 771 people going on 1 acre? No fire safety is in place. She stated, "Our lives are jeopardized." She said she cannot sit on her deck and read a book. The music is 7 days a week, 2-4 bands a day. She said she is strongly opposed to the zoning change and said the board should uphold the comprehensive plan. R-476,477.

Karen Frustaci stated she moved to Cocoa Beach because of friends and to be near her children. She said the Lobster Shanty was there when she moved in and the Lobster Shanty was respectful of the residents. But in February 2016, sitting on her balcony to have wine became a nightmare. The age group of the patrons was spring breakers. She did not choose to live next to Coconuts on the Beach. Squid Lips will be a hangout for a younger crowd. She said the board should adhere to the original zoning. The area is primarily residential. R-477.

James Suplee, of Julep Drive, spoke and said he has been a resident of Brevard County since 1951. He doesn't want to see the Squid Lips business fail. He recommends making it a destination restaurant, like River Rocks. There was a missed opportunity to improve the restaurant. R-477-478.

Joan Friedman, Julep Drive, focused on what life was like when Squid Lips was open. When she bought 2 and half years ago, she knew of the Lobster Shanty. She was looking forward to the new restaurant. But they got traffic and parking problems, loud noise every night and all weekend. The vocalists were also very loud. She said you can hear and feel the bass of those bands inside the condominium building. Her feelings have moved from frustration to anger to helplessness. Contact with the operators of the restaurant would just result in lip service. She said even her hard of hearing husband had to buy ear plugs to block the sound. She said Squid Lips is not compatible with the current location. R-478.

Randy Berner spoke. He said the neighbors stole his thunder, but he would add that Underhill told him the target demographic for Squid Lips was the 40-65 age group. Mr. Burnes said the music played was for a younger group. He went on to say all along the river is residential use, changing to commercial is worse than the nonconforming use. It establishes a bad precedent for other undeveloped parcels. He said he knew the Lobster Shanty was there. The Lobster Shanty and Squid Lips are like night and day. There is noise, traffic, loud patrons and the sound of gun shots from the parking lot. He also stated he was concerned about the dedication to the lagoon

and storm water issues. Past practices show little regard for the rules, so why should anyone trust the applicant now? This is a nonconforming use in the neighborhood. There was a denial of another commercial application recently at Summer Street. This item should be denied also. R-478, 479.

Sheryl Berner, Julep Drive, Unit 208, stated she previously sent emails describing the area as primarily multifamily with small commercial uses that primarily appear to have been in place before the comprehensive plan was adopted. Safety is an issue for patrons and residents. With the impairment of drinking a fatality could occur due to traffic issues involving ingress and egress. She discussed the expansion that have been made are in violation of the comprehensive plan She also said she represented Jam Szmanski's email concerns. Also, she said approving this item would contradict a prior action of the board denying a commercial use in the area. R-480-481.

Robert Sullivan of the Driftwood House across from the subject parcel on A1A spoke and said everyone wants to eat on the river. The restaurant could still be enjoyed. He said Jason Uvarro and others were involved in a rezoning nearby. That parcel was commercial then was rezoned residential during the boom. The owners recently applied to go back to commercial and were denied. Mr. Sullivan stated, "Buzz bought knowing it was residential." R-481-492 . "If the board denied the prior rezoning how could it rezone this property?" he asked. R-481-492. He went on to say Marco Villas is in opposition along with Malcolm Kirschenbaum and Jim Swann. Between them, those owners hold 450 feet of oceanfront property. Mr. Sullivan went on to say if there are police out front as people leave they will go to the beach. There will be loud noise and security will be needed. He said Buzz is a likable guy, but the neighborhood had been getting better and this is the wrong direction. R-481-492.

Courtenay Yecze has lived in the area 9 years. She loved being a neighbor to the Lobster Shanty. But who is to prevent jet skiing and a water park on the property? There is manatee zone nearby. She said the trust is broken with this developer. R-483.

Zach Potter, 1515 Bayshore in Snug Harbor north of Squid Lips, says it is not just grumpy old people mad about Squid lips. He has an MBA from FloridaTech and is an investor. He said when the items first came up his neighbors asked if they should be concerned. He said no because the Board had previously denied a similar item nearby. Also, this applicant clearly broke rules. He said approving this item sets a dangerous precedent. And a sound barrier will only deflect sound to the south. He said the current zoning should be maintained. The site is not a concert venue, yet the website has tickets for bands on sale. R-483,484.

Robert Love, Julep Drive, knew about the Lobster Shanty. He knew it was residentially zoned when he bought is property. The zoning board is to protect people. He thought he heard the radio the first time he went out on his balcony and heard the band. He can no longer use his

porch. He said there is an inconsistency between the claimed demographic and the loud music. Hot Pink is not what they wanted to hear. He said everyone in the condominium would have to move if the rezoning was approved. R-484,485.

Yane Zana of Vero Beach said he has been buying and developing land in South Cocoa Beach for some time. Ocean Cove and Cocoa Cabanas are just two of his projects. He stated the area is primarily residential and that is why it was rezoned. He agreed with Rob Sullivan about the precedent of rezoning back to commercial. It would be a detriment and he would have to decide what to do with his other residentially zoned properties. R- 485.

Kimberly Rezanka, attorney for the applicant, spoke in rebuttal. R-486-490. She said as to Mr. Shake's comments regarding the 72 police reports there was no evidence of what those were about. R-486.

She said the restaurant had been in existence for 62 years, it is historical and there are no precedential impacts. The impacts on the neighbors are addressed in a binding development agreement limiting the site to restaurant use only. She said applicant is just "trying to make it right." R-486.

She said the French drains on the property improve the storm water treatment on the site. R-487.

She stated there is no evidence of ticket sales on the site. She said sound barriers absorb sound they don't deflect sound. She stated there is no evidence property values will drop. R-487-488 She said Bob Baugher says it will be good for tourism. R-488.

The commissioners raised questions regarding the violations on the property. Information was presented regarding who built the deck and the use of unlicensed contractors. There were also questions about exemptions from permitting. R-488-490

Maggie Castellano, county employee, spoke on those issues. She said the restaurant was not closed, only the outside deck was shut down. There is only an exemption under Chapter 489 for projects less than \$1,000.00 when the project is not part of a larger structure. In this case, the improvements were part of a larger structure so the exemption could not apply. R-488-490. Ms. Rezanka requested an opportunity to question Ms. Castellano, and she was granted that request. R488-490. Ms. Rezanka asked if Dan Heller was originally at the inspection. She asked, "Isn't it true the next inspection wasn't until May? Ms. Castellano agreed, stating the May inspection related to drywall in the downstairs area, and the ADA exit ramp. There were questions regarding stringers and posts and size of the inside area. There was mention of stucco repair by an employee and whether or not that repair required a permit. R-488-490.

The commissioners commented on the prior denial of commercial rezoning in the area and discussed who was on the commission at that time. R-491. The staff, through Ms. DeFabio,

indicated the other item was approximately one block north. Historically, the parcel was zoned BU-1, commercial, but it was rezoned to multifamily residential in the mid 2000's. At the public hearing on that item residents pointed out the character of the area has changed since the 50s and 60s from the commercial area it might have been to residential. R-491.

Commissioner Barfield stated need for the zoning change and the comprehensive plan is for the all new deck area. In 2006, the property was rezoned to multi-family. The restaurant continued and can continue now. Commissioner Fisher asked, "Can it still operate?" The staff answered it could operate as a nonconforming use the way it did before the expansion. Commissioner Barfield went on to say the requests were incompatible. R-491-492. Commissioner Barfield stated:

All right, so just let me go through this. I've been making a lot of notes. I hope I can read it. So, in 2006 the property was rezoned to RU-2-15, which is multifamily. The restaurant continued to operate as a nonconforming, as nonconforming, and and continued to do that even now. So, without Conty approval, the current owenr expanded, added asphalt covered the outside patio, etc., but since nonconforming structures cannot be expanded, the property has to be rezoned commercial, BU-1, that's the reason, to continue and expand. As Robin said, it can still operate as it is. No permits have been requested, and as it is now, its an illegal structure. No site plans have been provided, which that hasn't happened, it doesn't have to yet. But many complaints of parking issues, and there was a five-week period there. There's outside music complaints. Magnolia Bay will be impacted, as will any other areas around there, and what amazes me is that Snut Harbor, too, that's a number of different homes. And one of the things they're proposing and that's off-site parking; and the off-site parking with agrements. I don't think there's any way you can commit to that because those properties can change and that can be used somewhere else. They may want change and not, they may sell the property and not allow it, and the main thing is that is incompatible for expansion... R-492.

A motion was made by Commissioner Barfield to deny the Comprehensive Plan amendment. The motion was seconded by Commissioner Infantini. The motion passed. R- 492, 493.

A motion was made to deny the rezoning request. Commissioner Barfield stated, "I make a motion that we deny the zoning request because of incompatibility with the current zoning in the area and change of classification from RU-2-15 to BU-1 and deny that." R-494. Commissioner Infantini seconded the motion. R-494. The motion passed. R- 494.

A motion was made to deny the condition use permit for the sale of alcoholic beverages for on-site consumption. The motion passed. R-495,496.

Thereafter, the applicant's attorney withdrew the Public Interest Determination also scheduled for November 3, 2016. R-496 .

## **FINDINGS OF FACT**

The Board of County Commissioners finds:

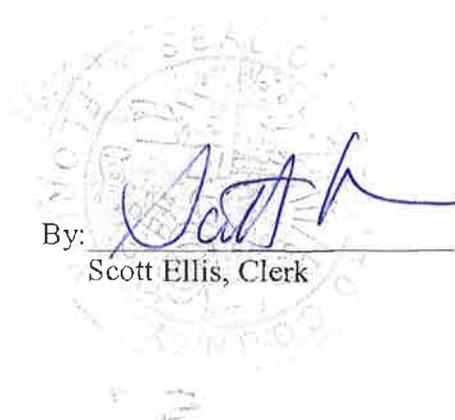
1. The subject property is designated Residential 15 on the river frontage and Community Commercial on the road frontage.
2. The request for rezoning to BU-1 (Commercial) is inconsistent with the Future Land Use Map of Brevard County Florida where the Future Land Use Map designation is Residential.
3. The request as presented violates Section, 163.3194(1)(a), Florida Statutes and Section 62-1255, Code of Ordinances of Brevard County, Florida which provides BU-1 zoning is not consistent with a Future Land Use Map designation of Residential 15.
4. Even if the requested rezoning could be authorized under the comprehensive plan, based on the testimony and emails of numerous residents it is well established that the expanded use of the property for a restaurant and bar has had a negative impact on to the neighborhood. There has been inadequate parking for the use, there has been excessive noise and there has been an increase traffic problems.
5. The proposed zoning would be incompatible with the surrounding uses.
6. The current residential zoning is compatible with the surrounding residential zoning to the north, south and across A1A.
7. A denial of this request for rezoning will not alter any existing rights to nonconforming uses or structures.

## **CONCLUSION**

Based on the foregoing, the Board of County Commissioners hereby finds the rezoning request of BU-1 is not consistent or compatible with the existing land use designations of the Brevard County Comprehensive Plan on the riverfront portion and therefore the request if approved would violate the Brevard County Comprehensive Plan. Further, the existing zoning classification of RU-2-15 is compatible and consistent with surrounding zoning classifications and existing development. Accordingly, the requested rezoning request is hereby denied.

**DONE AND RESOLVED this 20 day of Dec., 2016.**

**ATTEST:**



By: Scott Ellis  
Scott Ellis, Clerk

By: Curt Smith  
Curt Smith, Chairperson

As approved by the Board on: 12/20/16

**RESOLUTION NO. 16- 225**

**A RESOLUTION SETTING FORTH THE FINDINGS OF FACT AND CONCLUSIONS OF THE BREVARD COUNTY BOARD OF COUNTY COMMISSIONERS PERTAINING TO THE DENIAL OF REQUEST FOR A CONDITIONAL USE PERMIT FOR THE SALE OF ALCOHOLIC BEVERAGES FOR ON SITE CONSUMPTION**

**BE IT RESOLVED** by the Board of County Commissioners of Brevard County, Florida as follows:

**STATEMENT OF THE CASE AND FACTS**

Three items, a request for a comprehensive plan amendment, a request for rezoning and a request for a conditional use permit, came before the Brevard County Planning and Zoning Board (P&Z) and Local Planning Agency (LPA) on September 12, 2016 after being tabled by P&Z and LPA on July 11, 2016 and August 8, 2016. R-371-372, 373-378, 379-400. The LPA and P&Z recommended approval of all three items subject to conditions. R- 379-400. The items came before the Brevard County Board of County Commissioners on November 3, 2016 after being tabled on August 4, 2016, September 1, 2016 and October 13, 2016. The Board of County Commissioners heard the applicant and members of the public and denied all three of the requested actions. R-458-513.

The record is attached as Exhibit "A". The pages will be cited as R- .

| Description  | Page Numbers   |
|--|----------------|
| Location Map, Future Land Use Map, Aerial Map and Zoning Map   | A-001 to A-004 |
| Certification and Brevard County Planning and Development Office file for 16PZ00055 and SSA 16S.05 Banana Riverfront, LLC (Squid Lips)                 | A-005 to A-370 |
| Map TOWNSHIP 25, RANGE 37, SECTION 26 16PZ00055 and 16S.05   | A-006          |
| Brevard County Planning And Development Application For Zoning Action, Comprehensive Plan Amendment Or Variance 16PZ00055 and SSA 16S.05               | A-007          |
| Brevard County Planning And Development Supplement to Application For Zoning Action, Comprehensive Plan Amendment Or Variance 16PZ00055 and SSA 16S.05 | A-008 to A-011 |
| Receipt dated 5/12/16, Zoning Information Worksheet, Notice to Applicants for Change of Land Use 16PZ00055   | A-012 to A-014 |
| Conditional Use Permit Application Worksheet and supporting documents, 16PZ00055   | A-015 to A-069 |
| P&Z Staff Comments, 7/11/16 16PZ00055  | A-070 to A-075 |
| P&Z Staff Comments, 8/8/16 16PZ00055   | A-076 to A-087 |

|  |                |
|--|----------------|
| P&Z Staff Comments, 9/12/16 16PZ00055  | A-088 to A-119 |
| Affidavit of H J Underill III – Posting of Public Hearing Notice   | A-120          |
| Boundary Survey Maps (Exhibit “A” and “B”)   | A-121 to A-122 |
| Draft Binding Development Plan between Brevard County, FL and Banana Riverfront, LLC drafted by Kim Rezanka, Esq.                        | A-123 to A-126 |
| Emails and supporting documents  | A-127 to A-162 |
| Timeline of Squid Lips Violations, 2200 Orlando Ave, Cocoa Beach, and emails   | A-163 to A-166 |
| Photographs  | A-167 to A-171 |
| Aerial Map, Banana Riverfront LLC 16PZ00055 for years 2016, 2015, 2014, 2013, 2012, 2011, 2010, 2009, 2006 (2), 2005 (2), 2002, 1999 (2) | A-172 to A-186 |
| Photographs  | A-187 to A-208 |
| Timeline of Squid Lips, 2200 Orlando Ave, Cocoa Beach, 3/4/16 – 5/25/16  | A-209 to A-210 |
| Brevard County Contractor Licensing Board Citations 16CT-00385, 16CT-00386 & 16CT-00387 with emails                                      | A-211 to A-215 |
| Email exchange between D2 and Pete Farrell, 08/17/16 – 8/17/16, and Meeting Dates between Comm Barfield, Kim Rezanka, and Buzz Underill  | A-216 to A-219 |
| D2 Commission Office Meeting Sign-In Sheet, 10/24/16, Subject Squid Lips, and Email exchange between D2 and Joe French, 11/3/16          | A-220 to A-222 |
| Presentation by Kimberly Rezanka, Esquire, 11/3/16   | A-223 to A232  |
| Brevard County Code Enforcement CAP report, 16CT-00222   | A-233 to A-239 |
| Brevard County Contractor Licensing Board Citations 16CT-00189, 16CT-00240, 16CT-00239, 16CT-00242 (1 each for Logan and Tucker)         | A-240 to A-244 |
| Objections   | A-245 to A-298 |
| Request to Table   | A-299          |
| In Favor   | A-300 to A-370 |
| P&Z Board Minutes, 7/11/16   | A-371 to A-372 |
| P&Z Board Minutes, 8/8/16  | A-373 to A-378 |
| P&Z Board Minutes, 9/12/16   | A-379 to A-400 |
| Addition to Jack Baker’s Pelican Point Site Plan, approved by Brevard County Public Works, 5/19/82/                                      | A-401          |
| Brevard County Ordinances Sec. 62-1372; 62-1482; 62-1906; 62-1901; 62-1255;  | A-402 to A-441 |

|   |                |
|---|----------------|
| Addition to Jack Baker's Pelican Point Inn documentation            | A-442 to A-449 |
| Brevard County Administrative Policies 1 thru 8,                    | A-450 to A-453 |
| Brevard County Comprehensive Plan Conservation Element I-4 thru I-7 | A-454 to A-457 |
| BCC Zoning Meeting Minutes August 4, 2016                           | A-458-460      |
| BCC Zoning Meeting Minutes September 1, 2016                        | A-461-462      |
| BCC Zoning Meeting Minutes November 3 2016                          | A-463-496      |
| BCC Zoning Meeting submission by Attorney Rezanka                   | A-498-508      |
| Email   | A-509          |
| List of meeting attendees   | A-510-511      |
| Email   | A-512-513      |

The applicant, Banana Riverfront, LLC requested a Small Scale Amendment to the Future Land Use Map of the Brevard County Comprehensive Plan to change the designation from Residential 15 and Community Commercial to all Community Commercial. R-7-14. In addition, the applicant requested rezoning from multifamily residential, RU- 2-15, to Commercial, BU-1. R- 7-14. A conditional use permit for the sale of alcoholic beverages for on premises consumption was also requested. R-15-69, 7-14.

The subject property is located in Cocoa Beach west of A1A and east of the Banana River, approximately 415 feet north of Crescent Beach Drive. R-1 Access to the property is from the southbound one way portion of A1A. R-2-4, 88 . The parcel is 2.44 acres with a divided Future Land Use designation of Community Commercial on 1.18 acres abutting A1A and a multifamily land use designation, Residential 15 on the riverfront portion of 1.26 acres. R-88. The entire 2.44 acres is zoned multifamily, RU-2-15. R-94. Based on the existing land use designation and zoning classification, the property could be developed as six residential units. R-93. The land use designations to the north and south of the property are Residential 15 on the river. There is a mix of Community Commercial and Neighborhood Commercial land use designations in the neighborhood along the west side of A1A. Across A1A on the east side of A1A, the land use designation is primarily Residential 15 with a Neighborhood Commercial designation nearby. R-2-4,88,89. The property is bounded by property zoned multifamily, RU-2-15 R-94. The property to the north is known as the Magnolia Bay Condominium; to the south the multifamily

zoning is undeveloped. There is multifamily zoning to the east, and across A1A property is developed as single family and multifamily. The Banana River is on the west. R-2-4 and R-94.

As to the amendment to the future land use map, also known as a change to the comprehensive plan, the staff comments describe the surrounding land use designations and development. The staff noted there is a pre-existing and nonconforming restaurant use on the property. The restaurant can continue to operate as a non-conforming use in the original footprint. R-89. "The applicant however, seeks to legalize an expansion of the restaurant and therefore requires a Community Commercial land use along with a rezoning to BU-1." R-89." Staff noted a 500 foot surface water protection buffer is required from Class II waters, per Policy 3.3 of the Conservation Element of the Comprehensive Plan R-98. A portion of the staff report is provided below:

This request represents the applicant's desire to re-establish the existing restaurant, "Squid Lips", also known previously as the "Lobster Shanty". In 2006, the subject property was rezoned to RU-2-15 and the Future Land Use designation was changed to Residential 15, for the development of a multi-family project (Z-11289). However it appears that there is no longer a desire to develop the property as multi-family and the property has been sold to another restaurateur.(sp) Historically, the property has been previously zoned BU-1 for the restaurant use with a CUP for alcohol in 1974 (Z-3712).

As the restaurant continued to operate and the use was never abandoned, the restaurant has been able to continue as a "non-conforming" use, as defined in Section 62-1181 and could continue to do so now. Without seeking County approval, however, the current owner has expanded the restaurant footprint to provide additional seating space including an outside covered patio, enclosed previously open areas and added asphalt in areas of the parking lot that were previously serving as heat islands and landscaping. Since non-conforming structures cannot be expanded pursuant to Section 62-1182, it is necessary for the property to be rezoned to commercial (BU-1) in order for the restaurant use to be continued and expanded as the applicant desires. Additionally, the CUP for alcoholic beverages needs to be re-established pursuant to section 62-1901 (e).

The Land Development Regulations require one parking space for every 100 square feet of the establishment including any outside seating areas. Until the appropriate permits and site plan revisions are made to the subject property showing the improvements, it is not clear how many seats or outside seating areas will be required/provided. However, the subject property as a stand-alone restaurant has designated parking available on the east side of the property. Staff notes, however, that complaints regarding overflow of parking onto nearby residential properties have been received since the operation was illegally expanded beyond its nonconforming footprint. R-94.

In the summary of the comments, the staff noted that nonconforming uses cannot expand pursuant to Section 62-1182. This property was enlarged without permits and the changes are needed to reach a legal status and allow issuance of the permits necessary for the unpermitted additions. R-97.

The conditional use permit application was also addressed by staff. R-95-97. The staff noted Section 62-1901 of the Code of Ordinances of Brevard County, Florida provides the criteria

applicable to requests for conditional use permits. The Code criteria requires a consideration of the impacts on adjacent property, compatibility, noise, traffic, odor, diminution of value, and other factors listed in Section 62-1901, R-95-97. Generally, the applicant asserted the conditional use permit would be compatible since the restaurant had been there since 1952 and that there would be no change to ingress and egress and there would be no new noise impacts. R- 95-97.

The summary provided by staff below shows the applicant's statements regarding the criteria in bold and the staff comments in italics.

The Board should consider the compatibility of the proposed CUP pursuant to Section 62-1151(c) and to Section 62-1901, as outlined on pages 6-9 of these comments. Section 62-1901 provides that the approval of a conditional use shall authorize an additional use for the affected parcel of real property in addition to those permitted in the applicable zoning classification. **The initial burden is on the applicant to demonstrate that all applicable standards and criteria are met. Applications which do not satisfy this burden cannot be approved.** Section 62-1151(c) directs the Board to consider the character of the land use of the property and its surroundings; changes in the conditions of the land use being considered; impact upon infrastructure; compatibility with land use plans for the area; and appropriateness of the CUP based upon consideration of applicable regulations relating to zoning and land use within the context of public health, safety and welfare. The applicant has submitted documentation in order to demonstrate consistency with the standards set forth in Section 62-1901 and Section 62-1906, on-premises consumption of alcohol. The applicant's responses are indicated in **bold** and staff observations are provided in *italics*. Section 62-1901(c)(1)(a) Impact upon adjacent and nearby properties from the proposed use:

Number of persons using property;  
Noise, odor, particulates, smoke, fumes and other emissions; and  
Increase in traffic within the vicinity.

**The requested "renewal" of the conditional use for on-premises consumption of alcoholic beverages will not result in a substantial or adverse impact on adjacent or nearby properties as the restaurant is only expanding its outside seating that faces the Indian River Lagoon. The property has been used as a restaurant since 1952. Outdoor seating has been a part of the property for at least 30 years. The anticipated expansion of outdoor seating is 50 seats. "Exhibit A" reveals the expanded elevated dock and walkway; Exhibit B shows the extent of the deck and walkway before expansion. The hours of operation and outdoor entertainment will remain the same as the historical use, with closing hours of 10 p.m. Sunday through Thursday, and 11:00 p.m. on Friday and Saturday. The restaurant will meet all performance standards.**

Section 62-1901(c)(1)(b) Compatibility with the character of adjacent and nearby properties with regard to use:

Adjacent properties;  
Operating hours;  
Amount of traffic generated;  
Building size and setbacks; and  
Parking availability.

**The renewal of the conditional use will be compatible with the character of the adjacent and nearby properties as it has since the Property operated as a restaurant in 1952. The Conditional Use Consumption on Premises of Liquor, Beer & Wine was approved by the County Commission on July 11, 1974. See "Exhibit C".**

Furthermore, the County acknowledged on January 15, 2016, that the property complied with the County zoning requirements for the sale of alcoholic beverages on the property. See "Exhibit D".

*Staff has received complaints from neighboring residential property owners regarding the overflow of restaurant parking onto their properties.*

Section 62-1901(c)(1)(c) Impact upon property values of abutting residential properties:

**The renewal of the conditional use will not cause any diminution in value of the multi-family property to the north as the restaurant (and 1974 CUP) is not expanding its hours and will meet all performance standards.**

Section 62-1901(c)(2)(a) Adequacy of ingress and egress to serve the use without burdening adjacent and nearby uses:

**There will be no change to the ingress and egress to the property or the restaurant due to the renewed conditional use.**

Section 62-1901(c)(2)(b) Noise, glare, odor, particulates, smoke, fumes, etc.:

**The renewal of the conditional use will not create any additional noise, glare, odor, particulates, smoke, fumes or other emissions.**

Section 62-1901(c)(2)(c) Actual Noise Levels:

**The restaurant will continue to comply with the County noise standards.**

*The applicant has expressed an intent to have outside music, which based upon complaints to the county have impacted adjacent residential properties.*

Section 62-1901(c)(2)(d) Impact upon solid waste disposal level of service:

**There will be no need for additional solid waste disposal due to the renewed conditional use.**

Section 62-1901(c)(2)(e) Impact upon potable water and waste water levels of service:

**There will be no additional need for potable water or wastewater-due to the renewed conditional use.**

Section 62-1901(c)(2)(f) Screening and buffering:

**There will be no additional screening or buffering due to the renewed conditional use.**

Section 62-1901(c)(2)(g) Signage and glare from lighting:

**There will be no additional signage or due to the renewed conditional use. There will be additional lighting on the expanded deck and walkway that will be directed into the seating area or shielded so it does not cause spillage on adjoining properties.**

Section 62-1901(c)(2)(h) Hours of operation:

**The hours of operation will remain the same as the current restaurant hours and will not adversely affect the multi-family residents to the north.**

Section 62-1901(c)(2)(i) Height of proposed use:

**The building already exists and meets County height limitations.**

*The existing building is one story.*

Section 62-1901(c)(2)(j) Impact of off-street parking and loading areas upon adjacent properties:

**The parking and loading areas have existed in the same configuration since 1955, when the smaller building was constructed. This requested CUP will not increase the need for parking spaces or loading zones as the interior seating has been reduced to accommodate the additional exterior seating. Additionally, Banana Riverfront has entered into an agreement with Living Bread Christian Fellowship, Inc., to provide**

**additional parking of approximately 45 spaces for use by the property's employees and customers. See "Exhibit E"**

*From historical aerial photos it appears that the parking lot has removed previously existing landscaped heat islands and other non-asphalted areas to add parking spaces. Staff has received complaints from neighboring residential property owners regarding the overflow of restaurant parking onto their properties.*

This request should be evaluated in the context of **Section 62-1906** which governs alcoholic beverages for the on-premises consumption of alcohol which states in, specifically 62-1906 (3) and (5)

- 3) Except for restaurants with more than 50 seats, no alcoholic beverages shall be sold or served for consumption on the premises from any building that is within 300 feet from the lot line of a school or church if the use of the property as a school or church was established prior to the commencement of the sale of such alcoholic beverages. For the purposes of this subsection, a school shall include only grades kindergarten through 12. For the purpose of establishing the distance between the proposed alcoholic beverage use and churches and schools, a certified survey shall be furnished from a registered engineer or surveyor. Such survey shall indicate the distance between the front door of the proposed place of business and all property lines of any church or school within 400 feet. Each survey shall indicate all such distances and routes.

*The existing restaurant has more than 50 seats and is not subject to this requirement.*

- 5) Imposition of additional operational requirements. When deemed appropriate, as based upon circumstances revealed through the general and specific standards of review set forth in this division, the Board shall have the option of imposing operational requirements upon an establishment approved for a conditional use for on-premises consumption of alcoholic beverages. Requirements may include, but are not limited to, the following: maximum number of patrons; hours of operation; limitations upon outdoor seating and service of alcoholic beverages; limitations upon outside music and/or public address systems; additional buffering requirements; additional parking requirements; internal floor plan arrangement; or other specific restrictions based upon special neighborhood considerations. Additional requirements shall not exceed the limits of regulatory authority granted to local governments in the State Beverage Law, F.S. § 562.45.

*The Board may wish to impose operational limitations on outside music given the proximity of residential uses. R-95-97.*

At the P&Z and LPA meetings the attorney for the applicant, Kim Rezanka, and members of the public were in attendance. Ms. Rezanka stated:

“We are here before you on three matters. The first is a comp plan amendment on 1.26 acres, Neighborhood Commercial to Community Commercial to allow the rezoning. The second is a rezoning from RU-2-15 to BU-1 with a binding development plan to limit the use of this property to only a restaurant, no other commercial uses. This is what the property has been used for over 60 years. The rezoning is an attempt to cure a non-conforming use, which exists since the 2006 rezoning when the property went from BU-1- which it always has been- to RU-2-15. Again, that was in 2006 when everyone was going to condos, but this property was never developed into a condominium because of market conditions. The property remained a restaurant like it had been since 1952.As

you know, the purpose of the ordinances involving non-conformities is to end or remove a non-conforming use. This restaurant is part of the character of Cocoa Beach and in fact all the beach front property, since 1952.” R-387.

The attorney went on to say the property was formerly the Lobster Shanty. She stated the third item was a conditional use permit for the onsite consumption of alcoholic beverages. She stated the CUP was originally granted in 1974, but alcohol was served in the 50’s and 60’s. This was an oversight when the property was rezoned in 2006 according to Ms. Rezanka. They continued to sell alcohol from 2006 until they sold the property in 2015. “I believe this could be a grandfathered use or vested right issue.” stated Ms. Rezanka. R- 387. She passed out pictures of the improvements on the property and introduced Buzz Underill as the owner of the property. R-388, 187-208.

Cynthia Fox, Planning and Zoning Manager, described the nonconforming use status of the property after the commercial zoning was removed in 2006. She stated that you cannot expand the footprint of a non-conforming use per the code, but the applicant did expand the improvements. She stated that now the applicant is trying to make multiple changes to land use and zoning regulations to come into compliance with the code. R-388.

Buzz Underill testified that he was aware of the nonconforming status when he bought the property. He thought he had to re-open in 180 days. He said he signed an application for a building permit. He gave it to an individual to pull a permit, and could show it to the Board. The deck was installed and some infill improvements were constructed such as a canopy. When the roof was going up he asked if the foundation passed inspection and discovered there was no permit. He went to a general contractor who said he wouldn’t take on the liability of the partial construction. Underill decided to finish and pay a fine. They opened in February. The sidewalk leading off the deck was 33 inches instead of 44 inches, they didn’t have a voice activated alarm system for fire protection and there was no exit on the southern portion of the deck in case of fire. He said there were some operational issues that made things difficult for residents at Magnolia Bay and some neighbors across the street. “We made changes,” he said, and “would like to move to the next step.” R-388,389 .

Henry Minneboo asked if Mr. Underill had met with the residents to the north. Mr. Underill said he had. R-389.

Ms. Rezanka then spoke extensively about the staff comments and the Public Interest Determination needed due to the violation of the 50 foot setback from Class II Waters. She described all the improvements to the restaurant and said it was a great addition. She listed a number of people in favor of the project. She said the property owner would limit the noise with a sound barrier and stop music at approximately 10 pm. She said the

property was recreational waterfront property and should be protected per the requirements of the comprehensive plan. She mentioned the Tingley Marina project and said it received public interest determinations regarding the surface water buffer protection issue. Finally, she discussed a procedure for mitigating nonconformities. R-390-392.

Sam Shake spoke and said that it took a lot of guts to come talk to the homeowners. But he said "What we don't know is what happens now with the proposed conditions; Buzz has made some promises, I assume he is going to follow through, but what happens if that doesn't work?" R- 392.

Mark Holloway spoke from Magnolia Bay and said the proposal as restricted looked good. His concern was the buffer from the water and the health of the lagoon. It should not be ignored. R-392.

Dave Couch from Julep Drive in Magnolia Bay discussed his time in Brevard County since 1991 and his residence at Magnolia Bay since 2011. His concern was that the music was going to change and the value of the adjacent properties would go down. R-392.

Susan Suplee of Julep Drive spoke to describe her concern with wildlife conservation. She was concerned how the sound shields would factor into the conservation district. She also questioned how decibel levels would be measured. R392,393.

The Chairman asked Cindy Fox where the decibel levels would be measured and she said on the receiving property boundary line. R-393.

Bob Baugher of Sunset Cove said some poor operational decisions had been made but he was for the project with the limitations on operation that were presented. R-393.

Henry Minneboo asked if the restaurant could continue if the zoning were denied, and Ms Fox responded yes, as a non-conforming restaurant. There would be limitations on the expansion. R-393.

There was an extended discussion regarding the kinds of additions built and types of restrictions that could be placed on the property. R-394-400.

Mr. Underill spoke and said the timeline presented was unfair. (See timeline of violations at R-209-210.) He said they used licensed contractors and they had an exemption from permitting under Chapter 489, Section 103, item 3. He said he is willing to pay the price

for failing to get a permit and he has paid penalties. Now he just wants to jump through the hoops to get the proper permits. R-394.

Ms. Rezanka spoke to address various comments. As to Mr. Shake's concern about compliance, she stated, "You all know he can be shut down." There are performance standards in the code and the decibel level is "like 55 after 7 pm and 65 before 10 pm and normal conversation is about 50 -55 decibels." R-395. She listed the conditions agreed to and offered more conditions if the board wanted them. R-395.

There was a discussion about the items to be removed if the rezoning was denied, including the deck, 1,900 square feet of infill, the canopy and a walkway. It was stated seating is anticipated at 380 where before it was 459. R-393-398. Out buildings were discussed. Off-site parking was discussed with valet parking. R-397. The details of the sound blanket were discussed. R-398. The property owner agreed to a binding development plan limiting the use to a restaurant only because the mortgagee would not agree to the rest of the conditions. R-398-400. The rest of the conditions were placed in the CUP for the sale of alcoholic beverages for on premises consumption. R-399-400. The noise levels were dictated and the music had to end at 10 pm. The restrictions are shown at R-123-126 in a binding development plan. In summary, the LPA and P&Z approved all three items with numerous conditions in the CUP to reduce the impact of the noise and traffic on the neighboring condominium. R- 399-400.

At the hearing before the Board of County Commissioners on November 3, 2016, the staff introduced the item and the commissioners disclosed prior meetings with the applicant, the applicant's attorney and members of the public regarding the items before the board. Commissioners stated emails received on the topics had been forwarded to the zoning department to be included in the zoning file. R- 463,464,245-298,501,504.

The applicant's attorney, Kimberly Rezanka, began by stating that although there was a public interest determination on the agenda related to this site that the applicant wished to defer that item. R-464. At the end of the hearing on the comprehensive plan, rezoning and conditional use permit items, the attorney withdrew the public interest determination request. R-496.

The applicant submitted a written additional written documentation at the Board of County Commissioners meeting on November 3, 2016. R-498-508.

At the public hearing on November 3, 2016, the attorney for the applicant stated use on the property is nonconforming. R-464-465. She also discussed the use as a water enhanced use which provides shoreline access and access to marine resources. She stated the comprehensive plan requires that such uses be preserved. R- 465,466. She stated the restaurant has been there 64 years and it is compatible. R-467, 468. The attorney stated

many citizens like this type of restaurant and bar. R-467. There is canoe and kayak access, but rentals are not being provided. R-467. A 1982 site plan shows 123 parking spaces on a shell parking lot. R-467. She stated we are trying to fix the code violation problems. R- 468. There is no public safety problem. There will be no boat rentals. R-467. She said the opposition is “castastrophizing” (sp) and a sound curtain could be provided. R-467. At P&Z only a few people spoke, now there are many people speaking. She asked the Board not to judge the applicant on 5 weeks of operation. R-468.

The owner of Banana Riverfront, LLC, Buzz Underill spoke. He said the timeline of code violations (R- 209-210) presented by staff is inaccurate. R-468. He said he replaced rotten wood, and all the riverfront decking was there before he started. He said alcohol was served on the deck and there was music on the outside deck when the property was operated as the Lobster Shanty. R-468. He said he did not intend to fail to pull permits. He stated he hired someone to do the work and it was as the roof went up he discovered no permits had been pulled. He said he went to two engineers to try to get them to certify the improvements so he could get permits. They wouldn’t do it, but someone told him to finish up and then get an after the fact permit. R-469. He said there was a perfect storm in that he opened the bar in the season from February to May and there were spring breakers and seasonal visitors in town. He admitted he should have controlled the bands better. He said he had the same problem in Melbourne at the Squid Lips and a sound curtain resolved the problem there. R-469. He went on to describe his target group as 55 to 75 year olds. He said he didn’t have problems with 65 year olds getting drunk and getting into fights. R-469. He said in Melbourne at the Squid Lips there, he had 72 calls to the police in 24 months. R-470.

Commissioner Infantini commented that she is the age bracket he mentioned and she does not like loud music. R-470.

Mr. Underill responded the group that was loud was called Hot Pink and it attracted a younger crowd and he would not hire Hot Pink again. R-470. He said decibels can be measured every 30 minutes. R-470.

Residents appeared to express concerns.

Barbara Schluraff, Unit 203 Julep Drive is a broker and realtor. She stated she was excited to have a restaurant, but the noise levels were very loud. She could not go on her patio. When she met the owner she was told the target audience was the 40-60 year old market. She has listings in Magnolia Bay and buyers are very concerned about noise. She stated she would like it to remain nonconforming with light music. R-472.

Tony Cook testified she sent two emails . She bought in 2011. She knew about the Lobster Shanty and it was not noisy. When Squid Lips came in the noise came through the doors and the windows of the condominium when they were closed. The owners agreed to reduce the noise, but nothing happened. R-472-473.

She testified the condominium property spent two years to get a permit to trim vegetation in the conservation area next to the river and spent 3 years staging the trees down. They try to be good stewards of the environment. It is frustrating to see someone do what Squid Lips did with no permits, no zoning and no inspections. She stated we have seen what will happen with Squid Lips. "It is not compatible." she said, and asked the item be denied. R-472-473.

Dave Couch, Unit 102 Julep Drive, lives adjacent to the subject property. He has lived at Magnolia Bay since 2011 and lived in Brevard County beginning in 1991. He knew the Lobster Shanty. He said he was excited when Squid Lips opened, then the noise hit them. Mr. Couch commented that 60 decibels is conversation volume, but even that is too much 3-4 hours a day. He went on to question whether the petitioner would live up to his obligations. He stated the marketability of the units would be impacted and the values and taxes would go down. Mr. Couch said we can be compatible with some restaurant music now and again, not a band. He also commented on the reduction in value of the units impacting the advalorem taxes. R-473.

Sam Shake, Unit 2022 Julep Drive stated he received Rezanka's card before the P&Z meeting. He met with Underill and thought he seemed sincere. There was discussion of a "bad evening". Later he learned Rezanka and Underill were told to meet with the Magnolia Bay residents and he heard the list of violations by Squid Lips. He stated Squid Lips is incompatible with our neighborhood and he will not be happy with the noise. He said the Melbourne Squid Lips had 72 calls to police in 2 years and that type of activity would ruin the neighborhood. R-474.

Ms. Rezanka asked to cross examine Mr. Shake and was advised she could raise the issues during her rebuttal time. R-474,475.

Carol Shake of Julep Drive said she ate lunch in Squid Lips and the piped in music was so loud you couldn't talk to other diners. There was no willingness to listen to concerns about sound. She stated a sound curtain would not work on the piped in music. R- 475.

Mark Holloway spoke and expressed his concerns about the proposed use. He said begging for forgiveness is more profitable. They already expanded without permits. He stated the applicant has no regard for the river; the expansion was not good for the lagoon. R-475, 476.

Heather Couch stated she moved in 5 years ago. The Lobster Shanty was compatible; Squid Lips is not. Squid Lips is more of an entertainment establishment catering to a younger demographic. The bands were too loud and the traffic and parking became a safety hazard. R-475.

Susan Julep, Unit 306, Julep Drive asked whether the applicant would be allowed to continue to violate the comprehensive plan and zoning regulations. The County does the hard work of

adopting the code and then someone just disregards it. She said she retired to a quiet community, but if the zoning goes through she will have to move. She discussed smoke, traffic, parking issues, inconsistency with the numbers, the failure to present a preliminary plan and the actual square footage seems to be unknown. Where are 771 people going on 1 acre? No fire safety is in place. She stated, "Our lives are jeopardized." She said she cannot sit on her deck and read a book. The music is 7 days a week, 2-4 bands a day. She said she is strongly opposed to the zoning change and said the board should uphold the comprehensive plan. R-476,477.

Karen Frustaci stated she moved to Cocoa Beach because of friends and to be near her children. She said the Lobster Shanty was there when she moved in and the Lobster Shanty was respectful of the residents. But in February 2016, sitting on her balcony to have wine became a nightmare. The age group of the patrons was spring breakers. She did not choose to live next to Coconuts on the Beach. Squid Lips will be a hangout for a younger crowd. She said the board should adhere to the original zoning. The area is primarily residential. R-477.

James Suplee, of Julep Drive, spoke and said he has been a resident of Brevard County since 1951. He doesn't want to see the Squid Lips business fail. He recommends making it a destination restaurant, like River Rocks. There was a missed opportunity to improve the restaurant. R-477-478.

Joan Friedman, Julep Drive, focused on what life was like when Squid Lips was open. When she bought 2 and half years ago, she knew of the Lobster Shanty. She was looking forward to the new restaurant. But they got traffic and parking problems, loud noise every night and all weekend. The vocalists were also very loud. She said you can hear and feel the bass of those bands inside the condominium building. Her feelings have moved from frustration to anger to helplessness. Contact with the operators of the restaurant would just result in lip service. She said even her hard of hearing husband had to buy ear plugs to block the sound. She said Squid Lips is not compatible with the current location. R-478.

Randy Berner spoke. He said the neighbors stole his thunder, but he would add that Underhill told him the target demographic for Squid Lips was the 40-65 age group. Mr. Burnes said the music played was for a younger group. He went on to say all along the river is residential use, changing to commercial is worse than the nonconforming use. It establishes a bad precedent for other undeveloped parcels. He said he knew the Lobster Shanty was there. The Lobster Shanty and Squid Lips are like night and day. There is noise, traffic, loud patrons and the sound of gun shots from the parking lot. He also stated he was concerned about the dedication to the lagoon and storm water issues. Past practices show little regard for the rules, so why should anyone trust the applicant now? This is a nonconforming use in the neighborhood. There was a denial of another commercial application recently at Summer Street. This item should be denied also. R-478, 479.

Sheryl Berner, Julep Drive, Unit 208, stated she previously sent emails describing the area as primarily multifamily with small commercial uses that primarily appear to have been in place before the comprehensive plan was adopted. Safety is an issue for patrons and residents. With the impairment of drinking a fatality could occur due to traffic issues involving ingress and egress. She discussed the expansion that have been made are in violation of the comprehensive plan. She also said she represented Jam Szmanski's email concerns. Also, she said approving this item would contradict a prior action of the board denying a commercial use in the area. R-480-481.

Robert Sullivan of the Driftwood House across from the subject parcel on A1A spoke and said everyone wants to eat on the river. The restaurant could still be enjoyed. He said Jason Uvarro and others were involved in a rezoning nearby. That parcel was commercial then was rezoned residential during the boom. The owners recently applied to go back to commercial and were denied. Mr. Sullivan stated, "Buzz bought knowing it was residential." R-481-492. "If the board denied the prior rezoning how could it rezone this property?" he asked. R-481-492. He went on to say Marco Villas is in opposition along with Malcolm Kirschenbaum and Jim Swann. Between them, those owners hold 450 feet of oceanfront property. Mr. Sullivan went on to say if there are police out front as people leave they will go to the beach. There will be loud noise and security will be needed. He said Buzz is a likable guy, but the neighborhood had been getting better and this is the wrong direction. R-481-492.

Courtenay Yecze has lived in the area 9 years. She loved being a neighbor to the Lobster Shanty. But who is to prevent jet skiing and a water park on the property? There is manatee zone nearby. She said the trust is broken with this developer. R-483.

Zach Potter, 1515 Bayshore in Snug Harbor north of Squid Lips, says it is not just grumpy old people mad about Squid lips. He has an MBA from FloridaTech and is an investor. He said when the items first came up his neighbors asked if they should be concerned. He said no because the Board had previously denied a similar item nearby. Also, this applicant clearly broke rules. He said approving this item sets a dangerous precedent. And a sound barrier will only deflect sound to the south. He said the current zoning should be maintained. The site is not a concert venue, yet the website has tickets for bands on sale. R-483,484.

Robert Love, Julep Drive, knew about the Lobster Shanty. He knew it was residentially zoned when he bought his property. The zoning board is to protect people. He thought he heard the radio the first time he went out on his balcony and heard the band. He can no longer use his porch. He said there is an inconsistency between the claimed demographic and the loud music. Hot Pink is not what they wanted to hear. He said everyone in the condominium would have to move if the rezoning was approved. R-484,485.

Yane Zana of Vero Beach said he has been buying and developing land in South Cocoa Beach for some time. Ocean Cove and Cocoa Cabanas are just two of his projects. He stated the area is primarily residential and that is why it was rezoned. He agreed with Rob Sullivan about the precedent of rezoning back to commercial. It would be a detriment and he would have to decide what to do with his other residentially zoned properties. R- 485.

Kimberly Rezanka, attorney for the applicant, spoke in rebuttal. R-486-490. She said as to Mr. Shake's comments regarding the 72 police reports there was no evidence of what those were about. R-486.

She said the restaurant had been in existence for 62 years, it is historical and there are no precedential impacts. The impacts on the neighbors are addressed in a binding development agreement limiting the site to restaurant use only. She said applicant is just "trying to make it right." R-486.

She said the French drains on the property improve the storm water treatment on the site. R-487.

She stated there is no evidence of ticket sales on the site. She said sound barriers absorb sound they don't deflect sound. She stated there is no evidence property values will drop. R-487-488 She said Bob Baugher says it will be good for tourism. R-488.

The commissioners raised questions regarding the violations on the property. Information was presented regarding who built the deck and the use of unlicensed contractors. There were also questions about exemptions from permitting. R-488-490

Maggie Castellano, county employee, spoke on those issues. She said the restaurant was not closed, only the outside deck was shut down. There is only an exemption under Chapter 489 for projects less than \$1,000.00 when the project is not part of a larger structure. In this case, the improvements were part of a larger structure so the exemption could not apply. R-488-490. Ms. Rezanka requested an opportunity to question Ms. Castellano, and she was granted that request. R488-490. Ms. Rezanka asked if Dan Heller was originally at the inspection. She asked, "Isn't it true the next inspection wasn't until May? Ms. Castellano agreed, stating the May inspection related to drywall in the downstairs area, and the ADA exit ramp. There were questions regarding stringers and posts and size of the inside area. There was mention of stucco repair by an employee and whether or not that repair required a permit. R-488-490.

The commissioners commented on the prior denial of commercial rezoning in the area and discussed who was on the commission at that time. R-491. The staff, through Ms. DeFabio, indicated the other item was approximately one block north. Historically, the parcel was zoned BU-1, commercial, but it was rezoned to multifamily residential in the mid 2000's. At the public

hearing on that item residents pointed out the character of the area has changed since the 50s and 60s from the commercial area it might have been to residential. R-491.

Commissioner Barfield stated need for the zoning change and the comprehensive plan is for the all new deck area. In 2006, the property was rezoned to multi-family. The restaurant continued and can continue now. Commissioner Fisher asked, "Can it still operate?" The staff answered it could operate as a nonconforming use the way it did before the expansion. Commissioner Barfield went on to say the requests were incompatible. R-491-492. Commissioner Barfield stated:

All right, so just let me go through this. I've been making a lot of notes. I hope I can read it. So, in 2006 the property was rezoned to RU-2-15, which is multifamily. The restaurant continued to operate as a nonconforming, as nonconforming, and and continued to do that even now. So, without Conty approval, the current owenr expanded, added asphalt covered the outside patio, etc., but since nonconforming structures cannot be expanded, the property has to be rezoned commercial, BU-1, that's the reason, to continue and expand. As Robin said, it can still operate as it is. No permits have been requested, and as it is now, its an illegal structure. No site plans have been provided, which that hasn't happened, it doesn't have to yet. But many complaints of parking issues, and there was a five-week period there. There's outside music complaints. Magnolia Bay will be impacted, as will any other areas around there, and what amazes me is that Snut Harbor, too, that's a number of different homes. And one of the things they're proposing and that's off-site parking; and the off-site parking with agreements. I don't think there's any way you can commit to that because those properties can change and that can be used somewhere else. They may want change and not, they may sell the property and not allow it, and the main thing is that is incompatible for expansion... R-492.

A motion was made by Commissioner Barfield to deny the Comprehensive Plan amendment. The motion was seconded by Commissioner Infantini. The motion passed. R- 492, 493.

A motion was made to deny the rezoning request. Commissioner Barfield stated, "I make a motion that we deny the zoning request because of incompatibility with the current zoning in the area and change of classification from RU-2-15 to BU-1 and deny that." R-494. Commissioner Infantini seconded the motion. R-494. The motion passed. R- 494.

A motion was made to deny the condition use permit for the sale of alcoholic beverages for on-site consumption. The motion passed. R-495,496.

Thereafter, the applicant's attorney withdrew the Public Interest Determination also scheduled for November 3, 2016. R-496 .

**FINDINGS OF FACT**

The Board of County Commissioners finds:

1. The subject property is zoned Residential RU-2-15.
2. The RU- 2- 15 zoning classification does not allow a conditional use for the sale of alcoholic beverages for onsite consumption.
3. Even if the conditional use permit requested was listed as a possible use under the Code of Ordinances of Brevard County, Florida, the use is incompatible with the area. This finding is made due to the illegal expansion of the property without permits which caused the neighborhood to experience the impacts of the proposed conditional use prior to the hearing on the request.
4. Based on the testimony and emails of numerous residents it is well established that the use of the property for a bar negatively impacted the neighborhood. There has been inadequate parking for the use, there has been excessive noise, and there has been a negative traffic impact.
5. The requested conditional use permit for the sale of alcoholic beverages for on premises in this location will cause a substantial and adverse impact on adjacent and nearby properties.
6. A denial of this request for a conditional use for the sale of alcoholic beverages for onsite consumption will not alter any existing rights to nonconforming uses or structures.

**CONCLUSION**

Based on the foregoing, the Board of County Commissioners hereby finds the conditional use permit for the sale of alcoholic beverages is not authorized under the Brevard County Code. Further, the proposed use would not meet the requirements of 62-1901 Code of Ordinances of Brevard County, Florida even if such a use were authorized. Accordingly, the requested conditional use permit is hereby denied.

**DONE AND RESOLVED** this 20 day of Dec., 2016.

**ATTEST:**

By:

  
Scott Ellis, Clerk

By:

  
Curt Smith, Chairperson

As approved by the Board on: 12/20/16