

# MIAMI BEACH

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## COMMITTEE MEMORANDUM

TO: Land Use and Development Committee

FROM: Jimmy L. Morales, City Manager

DATE: July 24, 2019

SUBJECT: **DISCUSSION TO CREATE OPTIONS FOR INDOOR AMBIENT ENTERTAINMENT.**

### HISTORY

On January 16, 2019, at the request of Commissioner John Elizabeth Aleman, the City Commission referred the following discussion item to the Land Use and Development Committee (Item C4 AD) in order to create equity between the current entertainment exemption for recorded ambient music and ambient music performed by live musicians:

***DISCUSSION REGARDING AN ORDINANCE TO CREATE AN EXEMPTION FROM THE DEFINITION OF "ENTERTAINMENT ESTABLISHMENT" FOR PERFORMANCES CONDUCTED AT A VOLUME THAT DOES NOT INTERFERE WITH NORMAL CONVERSATION.***

On March 6, 2019, the Land Use and Development Committee (LUDC) discussed the item and recommended that the City Attorney's Office draft a revised Ordinance for consideration. The LUDC continued the item to the April 3, 2019 meeting. On April 3, 2019, the item was continued to the June 12, 2019 meeting.

On May 28, 2019, City staff and the item sponsor met with affected stakeholders from the Sunset Harbour neighborhood to discuss potential options being developed by City staff. At this meeting, the issue of 'amplified' vs. 'non-amplified' music was addressed. Due to the First Amendment implications of regulations that could be deemed "content-based," the primary focus of the discussion, and the future options evaluated, have focused on limiting the volume of performances (i.e. at an ambient level), rather than amplification.

On June 10, 2019, the LUDC held a lengthy discussion and continued the item to a date certain of July 24, 2019. Also, at the request of the item sponsor, the title of the item was amended as follows:

***DISCUSSION TO CREATE OPTIONS FOR INDOOR AMBIENT ENTERTAINMENT.***

The LUDC also directed the City Attorney to draft a non-LDR amendment, in accordance with option 1 (as further defined below), including the following additional operating

standards:

1. The permit process will be administered by the Tourism and Culture Department, in a manner similar to special event permits.
2. Code Compliance shall be granted full access to the venue as a pre-condition of a permit.
3. There will be a cap on the number of permits issued during the pilot to mitigate any staffing impact for Code Compliance.

Additionally, the Administration was directed to look at the areas of the City where indoor entertainment is currently permitted, and identify sub-areas where the current CUP process may be onerous and could be modified. Additional recommendations regarding these areas will be provided.

On July 9 and 11, 2019, public outreach (town hall) meetings were held in North and South Beach, in order to provide an opportunity for additional public outreach and stakeholder input.

### **BACKGROUND**

Chapter 114 of the City Code provides the following definition for entertainment establishment:

***Entertainment** establishment means a commercial establishment with any live or recorded, amplified or nonamplified performance, (excepting television, radio and/or recorded background music, played at a volume that does not interfere with normal conversation, and indoor movie theater operations). Entertainment establishments may not operate between the hours between the hours of 5:00 a.m. and 10:00 a.m., except as provided for under subsection 6-3(3)(b).*

Under Chapter 142 of the City Code, myriad regulations exist regarding entertainment within eating and drinking establishments. The attached chart provides a grid outline of where entertainment is permitted as of right, where conditional use approval (CUP) is required and where entertainment is prohibited outright. These locations have also been identified in the attached map.

### **RESEARCH**

Staff reviewed the codes of several local governments, and summarized regulations that were relevant to regulating entertainment uses. The cities analyzed define entertainment differently when compared to Miami Beach, and generally, the cities reviewed in Florida do not regulate where and how music can be played. Instead they regulate where alcoholic beverage establishments and specific types of entertainment venues can locate, and primarily deal with noise-related concerns through noise ordinances. Coral Gables and Fort Lauderdale do provide some regulation on hours of operation when music can be, but playing music is permitted in all commercial districts of those cities.

Staff also reviewed the codes of Austin, Texas which is known for its nightlife. Austin does regulate where entertainment can take place; however, they make certain allowances for restaurants and bars, allowing live entertainment with strict noise limits. Issues related to entertainment are primarily dealt with through a noise ordinance which has a permitting process for exceeding base noise limits.

A summary of the applicable regulations for each of the cities analyzed is attached.

### **PLANNING AND LEGAL ANALYSIS**

Subsequent to the March 6, 2019 LUDC meeting, City staff discussed the feasibility and practicality of shifting to a decibel-based standard for noise enforcement. Based upon the reasons previously cited by the City Attorney's Office, as well as concern from Code Compliance regarding the objectivity of the use of decibel meters, the Administration does not recommend shifting from the current normal conversation standard to a decibel-based standard.

Additionally, at the March 6, 2019 meeting, the LUDC directed the Administration and the City Attorney's office to explore other options to allow indoor restaurants to have ambient live performances, as the original proposal to exempt ambient performances from the definition of entertainment was met with community resistance due to concerns of excessive, unenforceable noise. In response, the following three separate, potential options to address the proposal were presented to the LUDC on June 12, 2019:

#### **Option 1: Revocable Permit for Ambient Entertainment**

As a pilot program, amend the City Code to authorize the City Manager to issue a revocable permit for ambient entertainment, with conditions (i.e. like a special event permit); the following would apply to this option:

- Sunset or revisit ordinance in one year;
- Identify districts where permitted;
- Limit to indoor restaurants only;
- Establish maximum occupancy and hours; and
- Establish a maximum number of permits issued by district.

The following additional operating standards were presented on the floor, as part of option 1:

1. The permit process will be administered by the Tourism and Culture Department, in a manner similar to special event permits.
2. Code Compliance shall be granted full access to the venue as a pre-condition of a permit.
3. There will be a cap on the number of permits issued.

#### **Option 2: Create a Separate Definition for Ambient Entertainment**

The following definition for "ambient entertainment", as a new use, would be created and included in chapter 114 of the city code:

*Ambient entertainment establishment means a commercial establishment with any live or recorded, amplified or nonamplified performance played or conducted indoors at a volume that does not interfere with normal conversation (excepting television, radio and/or recorded background music, played at a volume that does not interfere with normal conversation, and indoor movie theater operations). Ambient entertainment establishments may not operate between the hours between the hours of midnight and 10:00 a.m., except as provided for under subsection 6-3(3)(b).*

For comparison purposes, the following is the definition for “entertainment establishment” in the city code:

*Entertainment establishment* means a commercial establishment with any live or recorded, amplified or nonamplified performance, (excepting television, radio and/or recorded background music, played at a volume that does not interfere with normal conversation, and indoor movie theater operations). Entertainment establishments may not operate between the hours between the hours of 5:00 a.m. and 10:00 a.m., except as provided for under subsection 6-3(3)(b).

Additionally, the following would apply to this option:

- Identify districts where ambient entertainment is a permitted use;
- Limit to indoor restaurants only;
- Establish maximum occupancy and hours; and
- Require a separate BTR / CU for ambient entertainment.

### **Option 3: Original Proposal**

Amend the current definition of “entertainment” to exclude indoor performances played or conducted at ambient volume levels, as follows:

*Entertainment establishment* means a commercial establishment with any live or recorded, amplified or nonamplified performance, (excepting television, radio and/or recorded background music, and any other indoor performance played or conducted at a volume that does not interfere with normal conversation, and indoor movie theater operations). Entertainment establishments may not operate between the hours between the hours of 5:00 a.m. and 10:00 a.m., except as provided for under subsection 6-3(3)(b).

As indicated previously, options 1 and 2 both create equity between the current entertainment exemption for recorded ambient music, and ambient music performed live by musicians (or any other performance conducted at ambient volume levels). By creating a separate, defined category for ambient entertainment establishments, there would no longer be the need for an exception to the definition of entertainment establishment. Further, the revocation of a revocable permit as outlined in option 1 and issuance of a violation and fine, for option 2, would penalize rogue or bad operators ultimately resulting in the loss of the permit or a business’s ambient entertainment BTR in a relatively short period of time. These enforcement mechanisms would be separate and apart from the more severe measure of revoking the business’s BTR and shutting the entire establishment down.

Finally, the item sponsor has indicated that an opportunity for a neighborhood to opt out of any of the options noted above will be considered for those areas of the City that currently prohibit entertainment. This can be done legislatively, by excluding the affected areas from the different options noted above. In order for those areas that currently allow for entertainment, but with a mandatory CUP review regardless of occupational content (e.g., the west side of Alton Road), additional legislative changes can be explored.

### **SUMMARY/UPDATE**

#### **Draft Ordinance creating an Ambient Entertainment Permit Program**

Pursuant to the direction of the LUDC on June 12, 2019, to proceed with Option 1, the City Attorney's Office has prepared the attached draft Ordinance, creating an Ambient Entertainment Permit Program. The Ordinance, in pertinent part, defines the scope of the Program; identifies eligible establishments (restaurants, with an occupant content of 299 or fewer persons, which are located in zoning districts where entertainment is a permitted or conditional use); creates operating standards and conditions; provides for enforcement; and requires annual review.

The Ordinance also provides that, as a condition of obtaining a permit, a permittee shall agree and acknowledge that (i) the permit shall be subject to immediate revocation in the event of a violation, and (ii) the permittee shall be required to provide unobstructed and immediate access to the business establishment for inspection by Tourism and Culture staff and Code Compliance officers, in order to ensure compliance with the provisions of the Ordinance and all other applicable laws.

### **Potential amendments to existing conditional use regulations**

With regard to the request of the LUDC to explore areas of the City where the current CUP process may be onerous and could be modified, staff has identified the CD-2 and RM-3 areas of North Beach (east of Indian Creek), as well as the CD-3 properties along 41<sup>st</sup> Street. In this regard, both of these sub-areas, which are composed of high intensity multifamily residential and medium-high intensity commercial, zoning districts, have been identified for redevelopment. Currently, the affected properties along 41<sup>st</sup> Street, and those zoned CD-2 in North Beach, must obtain CUP approval for any type of indoor entertainment, regardless of the occupational content of the venue. For the RM-3 properties in North Beach, indoor entertainment would be allowed as an accessory use and the occupational content must exceed 200 persons before a CUP review is required.

The following is a potential amendment to Chapter 142, Article V, Divisions 6 of the LDR's, modifying the definition of neighborhood impact establishment (NIE), by reducing the minimum thresholds for entertainment related CUP's in these areas:

#### *Sec. 142-1361. - Definitions.*

\* \* \*

*Neighborhood impact establishment means:*

- (1) An alcoholic beverage establishment or restaurant, not also operating as an entertainment establishment or dance hall (as defined in section 114-1), with an occupant content of 300 or more persons as determined by the chief fire marshal; or*
- (2) An alcoholic beverage establishment or restaurant, which is also operating as an entertainment establishment or dance hall (as defined in section 114-1), with an occupant content of 200 or more persons as determined by the chief fire marshal.*
- (3) For properties located in the CD-2 and RM-3 districts north of 63<sup>rd</sup> Street, south of 72<sup>nd</sup> Street and east of Indian Creek, as well as properties zoned CD-3 with a lot line on 41<sup>st</sup> Street, an alcoholic beverage establishment or restaurant, which is also operating as an indoor entertainment establishment (as defined in section 114-1), with an occupant content of 300 or more persons as determined by the chief fire marshal.*

It should be noted, that the properties identified in these sub-areas would still be subject to CUP approval once the occupational content hits 300 persons, regardless of whether

entertainment is proposed or not.

**CONCLUSION**

The Administration recommends the following:

1. The attached draft Ordinance incorporating Option 1 be transmitted to the City Commission for consideration on First Reading in September.
2. The proposed revisions to Sec. 142-1361, pertaining to 41<sup>st</sup> Street, as well as the CD-2 and RM-3 districts in North Beach, be sent to the City Commission for discussion and potential referral to the Planning Board as an Ordinance amendment.

JLM/SMT/TRM

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## **Research Summary – Entertainment Regulations**

### ***City of Miami, Florida***

An entertainment establishment in the City of Miami is defined and includes a cinema, billiard parlor, teen club, dance hall, or video arcade. The zoning ordinance allows entertainment establishments by right in Commercial (T4-O, T5-O, and T6-O), High Density Limited Commercial (T6-L), Light Industrial (D1), and Industrial (D2) zoning districts, and by an administrative special permit in Medium Density Limited Commercial districts (T5-L). Alcoholic beverage establishments, not including restaurants, are also regulated and require the equivalent of a conditional use permit be approved by the City's Planning Board (Article 4, Table 3, Miami 21 Code), with certain exceptions. Food service establishments, which may serve alcoholic beverages, are permitted in all commercial and limited commercial districts.

The city code provides additional regulations for the location and distance separation of alcoholic service establishments, which excludes restaurants serving alcohol. Alcoholic service establishments are required to be a minimum of 1,500 feet from other establishments of the same type, in addition to separation from churches and schools. The code also establishes entertainment districts such as Wynwood, Little Havana, Brickell Village, Brickell Riverside, Park West, etc., Establishments located in these districts are approved administratively thru a conditional use permit and are not subject to distance separation requirements. The number of establishments within a district are capped and hours of operation and operating conditions apply (Chapter 4, Miami Code of Ordinances). Additionally, the administrative review for the conditional use permit requires that a noise attenuation plan addressing noise control be submitted for staff review.

The ability to have live music in other types of establishment is not regulated by the City. However, noise is regulated through the city's noise ordinance (Chapter 36, Miami Code of Ordinances). The ordinance provides that it is unlawful for noise or music to be "*plainly audible at a distance of 100 feet from the building, structure, vehicle or premises in which or from which it is produced.*" The city commission is authorized to provide exceptions from these provisions for special occasions by resolution.

### ***City of Fort Lauderdale, Florida***

The City of Fort Lauderdale Unified Land Development Code generally allows for bars, cocktail lounges and nightclubs as a permitted use in several of the city's commercial districts and as an accessory to hotels containing 100 or more rooms (Chapter 47, Article II, Fort Lauderdale Unified Land Development Code).

The code provides additional regulations regarding the sale of alcohol, including distance separation requirements. It also requires that no establishment, except nightclubs, allow, after 11:00 p.m., playing of instrumental music, singing or conduct other forms of entertainment, in any room where beer, wine, liquor or alcoholic beverages are sold or offered for sale, indoors or outdoors, unless such room or rooms are soundproofed, (Chapter 5, Article II, Fort Lauderdale Code of Ordinances). The code also allows for the establishment of special entertainment overlay Districts for areas of two acres or larger under common control. The overlays include operational criteria, but removes distance separation requirements and allows for music, singing and other forms of entertainment whether amplified or not to be played indoors at any time

that the business is open and for outdoor music until midnight on weekdays and 1 a.m. on weekends (Chapter 5, Article III, Fort Lauderdale Code of Ordinances).

While there are some limitations in hours for entertainment in alcoholic beverage establishment that aren't sound proofed, the City of Fort Lauderdale does not prohibit entertainment in other types of establishments. However, noise is regulated by the city's noise control ordinance (Chapter 17, Fort Lauderdale Code of Ordinances). The ordinance establishes decibel levels by types of sounds, during different hours, and by use. It also provides for greater decibel levels within a special entertainment district overlay.

#### ***City of Coral Gables, Florida***

The City of Coral of Coral Gables Zoning Code defines "*Entertainment Use*" as "*a commercial accessory use where entertainment, either passive or active, is provided for the pleasure of the patrons of the principal use, including but not limited to vocal and instrumental music, dancing, comedy, and theater, but not including an adult use.*" Nightclubs are also defined as an accessory use to a restaurant. Since entertainment use is an accessory to commercial uses, it is allowed in all districts where commercial uses are permitted. The zoning code provides specific conditions for the playing of music, including hours of operation and noise limitations subject to the city's general noise ordinance; however, entertainment use is not prohibited in any area, but accessory only to commercial uses.

Like other cities, Coral Gables regulates noise emanating from a property, and provides decibel limits for different types of sound emanating from different districts, along with hours in which sound can emanate (Chapter 34, Article VI, Coral Gables Code of Ordinances). The playing of music is subject to these limitations found therein.

#### ***City of West Palm Beach, Florida***

The City of West Palm Beach land development regulations do not define entertainment. The regulations do allow for bars, lounges, and related entertainment, as a permitted use in most commercial districts and with extra requirements in neighborhood commercial and office commercial districts. The code provides for operating hours and special requirements for such uses, along with modified hours for specific streets.

The code establishes requirements for the sale of alcoholic beverages and establishes separation requirements from other establishments and residential districts, hours of operation, and other requirements, along with providing specific exemptions and limitations for the downtown area, (Chapter 6, West Palm Beach Code of Ordinances).

The city has a noise control ordinance which establishes limits for sound citywide and also provides for specific areas where higher levels of noise are permitted, which include the city's downtown and entertainment areas (Chapter 34, Article II, West Palm Beach Code of Ordinances).

#### ***City of Austin, Texas***

The City of Austin Land Development Code establishes requirements for permitting entertainment uses within the city (Title 25, Article 1, Land Development Code of Austin). "*Indoor entertainment*" is a *conditional use, permitted use, or not permitted use* depending on the zoning district. "*Outdoor entertainment*" is a *conditional use or not permitted* depending on the zoning district. However, the code provides that live

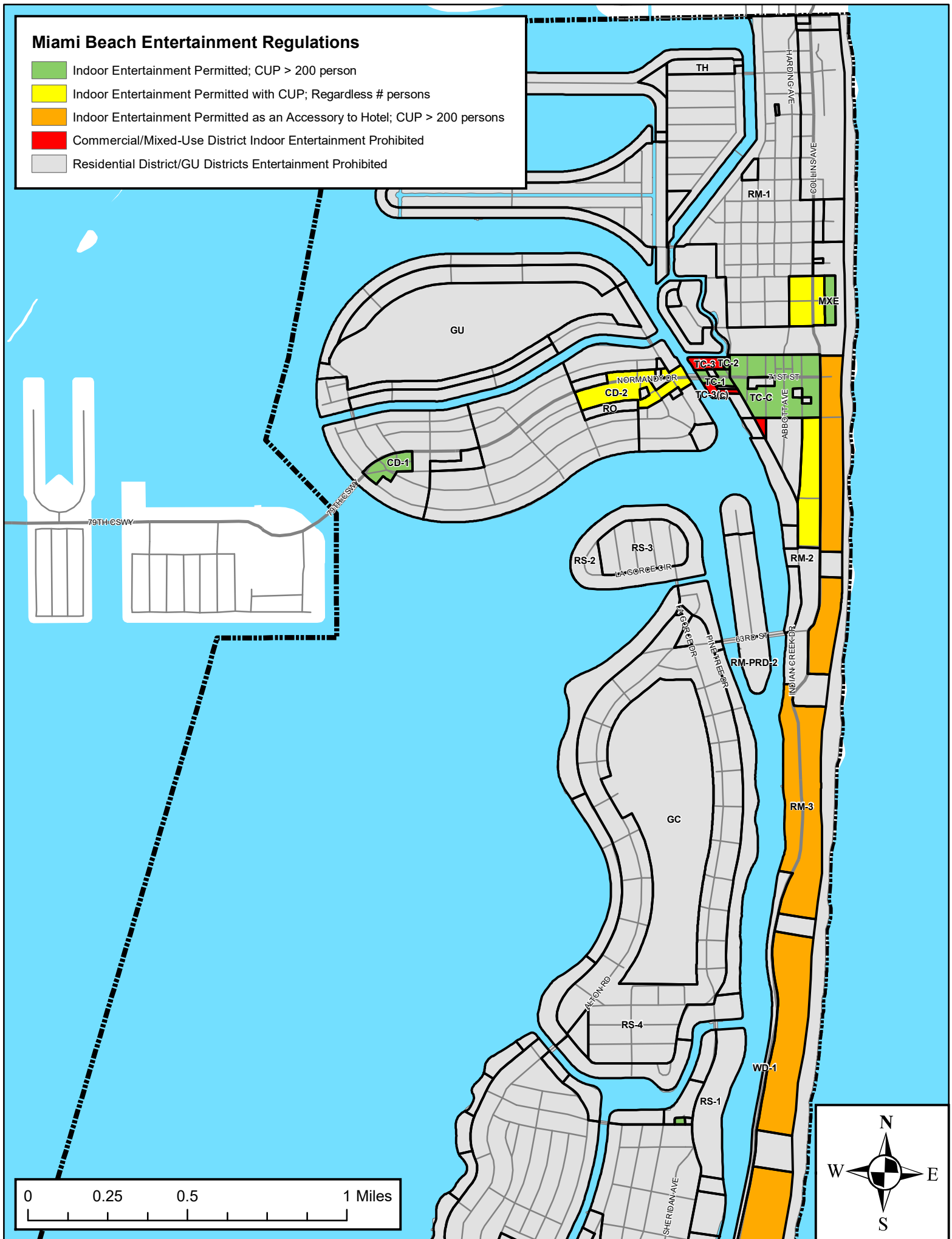


entertainment is permitted at restaurants and cocktail lounges if the amplified sound does not exceed 70 decibels, measured at the property line of the licensed premises.

Additionally, the code provides additional regulations regarding noise and amplified sound and establishes decibel limits for sound at the property line. (Chapter 9-2, Code of Austin). For example, a business cannot operate equipment that produces sound in excess of 85 decibels between 10:00 a.m. and 2:00 a.m. and audible at the property line between 2:00 a.m. and 10:00 a.m. Any sound that exceeds the prescribed decibel levels requires a permit to operate sound equipment audible to the public. The ordinance also has separate requirements for “*outdoor music permits*” and outdoor “*live music permits*,” which have different standards depending on the specific neighborhood. Permits are issued administratively, however, they have specific criteria which must be considered before they can be issued.

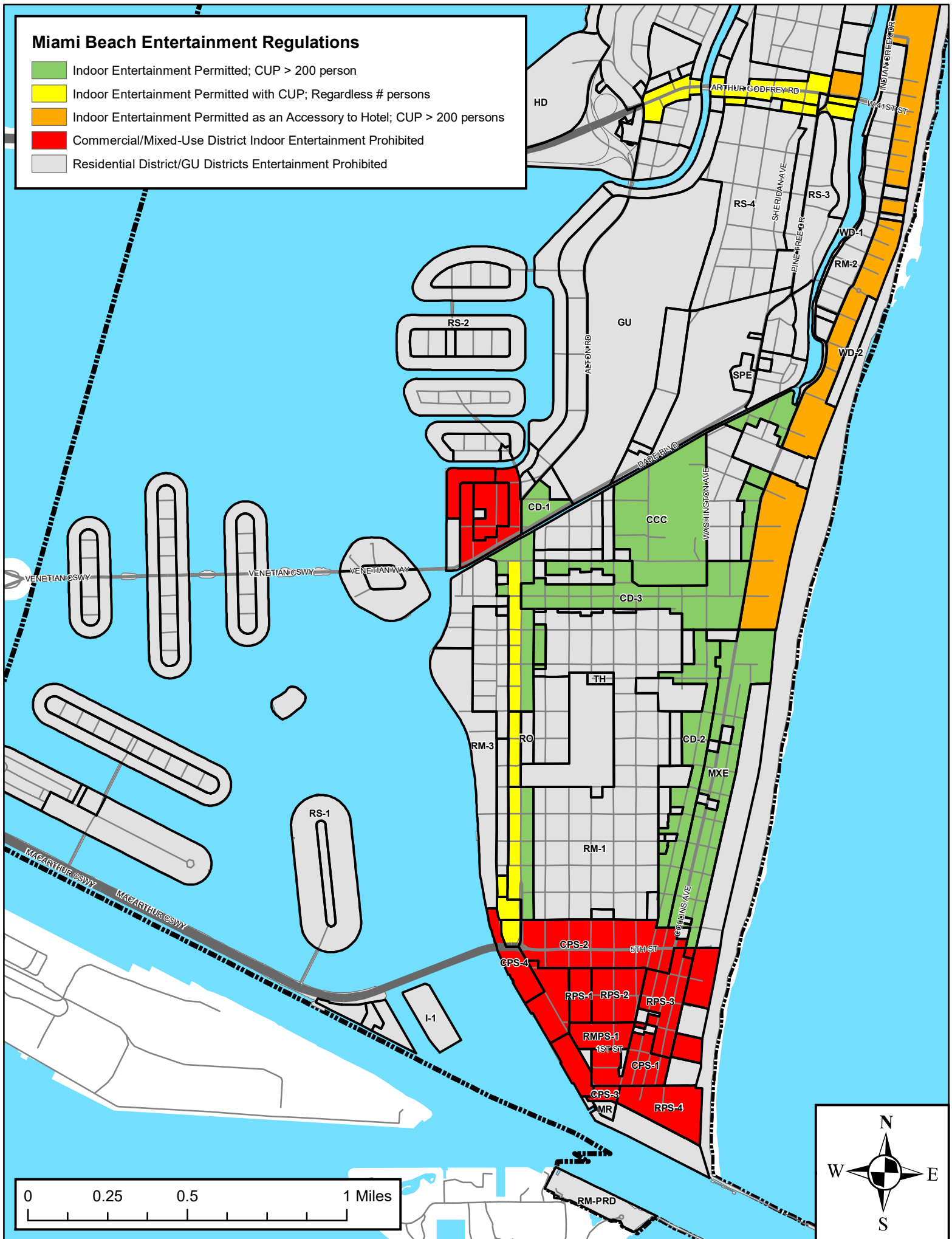
## Miami Beach Entertainment Regulations

- Indoor Entertainment Permitted; CUP > 200 person
- Indoor Entertainment Permitted with CUP; Regardless # persons
- Indoor Entertainment Permitted as an Accessory to Hotel; CUP > 200 persons
- Commercial/Mixed-Use District Indoor Entertainment Prohibited
- Residential District/GU Districts Entertainment Prohibited



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## Indoor Entertainment - Current Regulations

Indoor Entertainment Permitted As of Right (No CUP)	Indoor Entertainment Permitted with CUP	Indoor Entertainment Prohibited (Regardless of Occupant Content)
All Commercial (CD), MXE and TC Districts (except TC-3), as well as accessory uses to a hotel in the RM-3 Districts (where hotels are permitted), when a venue serving alcohol has an occupant content of less than 200 persons;	All Commercial (CD), MXE and TC Districts(except TC-3), as well as accessory uses to a hotel in the RM-3 District (where hotels are permitted), when a venue serving alcohol has an occupant content over 199 persons;	All PS districts, south of 6 <sup>th</sup> street (South of Fifth);
Any commercial use not selling or serving alcohol, regardless of occupant content.	Regardless of occupant content: CD-3 district, along and adjacent to 41st Street;	All CD-2, I-1, and RM-3 districts in the Sunset Harbour area;
	Regardless of occupant content: CD-2 district, north of 65th Street	All RS, TH, TC-3, RM-2 and RM-1 districts city wide;
	Regardless of occupant content: CD-2 district on the west side of Alton Road from 6th Street to Collins Canal and on the east side of West Avenue between Lincoln Road and 17th Street.	In RM-3 districts ground floor additions for oceanfront lots located in the architectural district relocating existing hotel units;
		Package liquor stores in the MXE district which have been grandfathered.