

**FORT MYERS BEACH
TOWN COUNCIL MEETING
MAY 8, 2000
NationsBank, Council Chambers
2523 Estero Boulevard
FORT MYERS BEACH, FLORIDA**

I. CALL TO ORDER

The meeting of May 8, 2000, was opened by Mayor Daniel Hughes at 9:00 a.m.

Council members present at the meeting: Anita Cereceda, Daniel Hughes, Ray Murphy and Terry Cain.

Member absent from meeting: Garr Reynolds.

Town Staff present: Town Manager Marsha Segal-George and Town Attorney Richard Roosa.

II. PLEDGE OF ALLEGIANCE

All assembled recited the Pledge of Allegiance.

Mayor Hughes announced there was somewhat of an emergency matter that he'd like to add to the agenda, which is a proposed resolution prepared by our Town Attorney relating to the Lee County litigation for review of the South Florida Water Management District's release of lake water in the Caloosahatchee.

III. PUBLIC COMMENT ON AGENDA ITEMS

None.

IV. CASE -- VAR2000-00010 MOORE VARIANCE -- A variance in the RS-1 single-family residential district from LDC Section 34-2194c(3)c which requires a 10-floor setback from an artificial body of water to permit a water body setback of 7 feet 6 inches for a roofed accessory structure. The property is located at 5445 Avenida Pescadora.

Applicant Input:

Mr. Moore advised they have been paying taxes on the building since 1988. They would like to put in a hot tub for medical reasons. The Spanish-style house was set far back from the road at the time it was built because of the kind of septic system and drain field in use in 1973. There was no local sewer system at that time. The house did not lend itself to an addition on the front. He has photographs showing the hurricane straps that have been added to bring this building up to code. He also has with him the plans that were approved last week by engineer Ian Stewart as being in compliance with 1997 Standard Building Code, including Section 1606 whereby the building can withstand winds up to 110 miles an hour. He would ask that we grant the variance.

Mayor Hughes confirmed with Mr. Moore that he was out of town when the gazebo was built but had authorized it being constructed, and he assumed that the renter had obtained a building permit for it.

County Input:

Dan Faulk with the Lee County Department of Community Development said he had prepared the staff report that is included in our packet. The request is for a variance for an accessory structure that currently stands 7 ft. 6 in. from the rear canal body of water. Staff has recommended denial of this

request, and that recommendation is based on the findings and conclusions which staff must consider for all variances.

To the north of the subject property zoned RS-1 is the canal. To the east are single family residences zoned RS-1. To the south is Avenida Pescadora. On the other side of that street are residential properties zoned TFC-2. To the west are single family residences zoned RS-1.

Subject property is located in the low density future land use category, and staff has found that the use and the request are consistent with the uses in this category.

The single family residence was built in 1973. The gazebo was built on the property in 1985.

The basis for staff's recommendation of denial is because of the required finding that states that there are no exceptional or extraordinary conditions or circumstances inherent in the property in question. Obviously, this is kind of a difficult situation because the gazebo has been there for essentially 15 years. However, in order to be consistent, staff must consider this as if it were a new structure. Subject property is 9800 sq. ft., which exceeds the minimum lot size required in the RS-1 district. The single family residence complies with the required 25 ft. water body setback, and staff has found that there is sufficient space between the home and the canal where the gazebo could have been placed to meet the required setback.

At the LPA hearing there were some questions about another accessory structure, a shed, which is located on the property. A memo in our packets explains that that structure, which was built at the time the home was built, was not cited as part of the code enforcement action because it was permitted by the regulations in place in 1973 when there were waivers for accessory structures located on bulkheads.

Mayor Hughes confirmed with Mr. Faulk that in Finding 4 it was determined that the structure would not be injurious or detrimental to the neighborhood, but that in his opinion the first three findings cannot be met. He noted that the LPA made contrary findings as to 1 and 2, and in accord with Mr. Faulk's report, he said he doesn't see anything in the record that would indicate that there are extraordinary or exceptional circumstances. Mr. Faulk said he had tried to explain what he felt his role was as a reviewer, which was to make a recommendation based on the Land Development Code, and he thinks the LPA had some questions as to their ability to use discretion on recommendations. Mayor Hughes stated that as a matter of law we are required to make these findings in order to grant a variation and Town Attorney Roosa concurred with this statement. While this doesn't seem to be a problem in the neighborhood, Mayor Hughes stated, he really has difficulty making those findings.

Mrs. Moore stated that they have been paying taxes on the gazebo since 1988 and she would hate to have to pull the building down. It will take the taxes off the roll. It was quite a shock last June when Dave Crabtree phoned them in Wisconsin to say that he had searched the records and couldn't find a building permit. She searched all their boxes up north and couldn't find any building permits even though they did have one for the air conditioner. They have tried to be law abiding in every way and she is sorry that this had to be an issue before the Council. She would hope we could see our way clear to allowing them to keep the gazebo for medical reasons. It is a nice looking building and not detrimental to the neighbors and the neighbors would have agreed with this were they still here.

MOTION: Moved by Ray Murphy and seconded by Anita Cereceda to grant approval of the resolution thereby granting the requested variance today, striking the word "not" in paragraphs A and C, striking the words "disapproved" in the Therefore clause and at the end, if necessary, striking the word "denied" where it says "application duly denied."

Discussion:

Terry Cain confirmed that Attorney Roosa said the building was "as is" and that the LPA had said that it would not be rebuildable. Ray Murphy said we could incorporate these statements into the motion.

MOTION: Moved by Ray Murphy and seconded by Anita Cereceda to adopt the resolution in the form in which it is prepared, but to add in the appropriate place the two conditions set forth in the LPA recommendation, to wit, the variance is limited to the existing gazebo as shown on the plat plan and the existing gazebo, if it's destroyed for any reason natural or man, made may not be rebuilt. Motion passes unanimously.

Mayor Hughes said he would like to say, however, that he feels the staff report was correct and that staff properly assesses it from a technical standpoint.

V. CASE -- VAR2000-00011 CORCELLI VARIANCE -- A variance in the RS-1 single-family residential district from LDC Section 34-695 which requires a minimum lot width (street frontage) of 75 feet to permit 25 feet of street frontage for an existing single-family residence. The property is located at 290 Ibis Street.

Applicant's Representative:

James M. Costello is the attorney representing Donald and Mary Corcelli, owners of the subject property. Applicants applied for a variance from LDC Sections 34-695 and 34-2221, subparagraph 4, establishing minimum road frontage or lot width specifications for their two-lot home site. This property is currently zoned RS-1.

During the LPA proceedings, questions were raised concerning the accuracy of the Lee County's map prepared by the property appraiser. We have been given updated maps showing the current location of the property and how it is situated as to the road right-of-way.

Circumstances of this case are unusual. The problem was created in 1952 when the county commission vacated the northeast 135 feet of Ibis Street, which was actually platted in two different subdivisions. The borders of the subdivisions ran out the center line of the road. The NE 135 feet of the entire roadway was vacated by the county commission by resolution dated December 3, 1952. The resolution itself was not recorded in the public records miscellaneous book until 1958 when it is found in Miscellaneous Book 50, page 37, and we have a copy of this in front of us today.

The road was not built at the time of this vacation, but when it was built sometime after 1953 it did not extend all the way to the applicant's properties. The roadway stopped in front of Lot 3, which is south of the next property southwest of the subject parcel. A previous landowner built the driveway over the right-of-way to get to the roadway in 1953, so this problem has been existing for upwards of almost 47 years.

There is currently a petition to vacate a 25x60 ft. portion in front of the applicant's lot, Lot 2, and that is set for hearing for Monday, June 5, 2000. In the process of preparing that petition for vacation, both county and Town staff felt it was appropriate that this applicant also apply for this variance because the resulting road width or lot frontage that would normally result after vacation would make this a nonconforming lot. There is a question as to whether it is currently conforming given the type of vacation accomplished by the county 47 years prior. In proceedings before the LPA, the LPA recommended approval of the variance with two conditions:

1. That the variance be conditioned on the applicant not subdividing two lots.
2. That the variance be conditioned on the granting of the vacation.

Mr. Costello said his client is in full agreement with both of these conditions.

The LPA additionally made findings that there are exceptional and extraordinary conditions and circumstances inherent in the property in question and that they are not the result of actions by the applicant taken subsequent to the adoption of the ordinance; and that the granting of the variance would not be injurious to the neighborhood or otherwise detrimental to the public welfare. It was found in the LPA's adoption dated April 11, 2000, that granting the relief will allow the Town to have one last nonconforming lot on the books. The vacation allows the Corcellis to end up paying taxes on the property that they and their predecessors are entitled to but have not been fined for for 47 years. It will also resolve any future permitting uncertainty which might come about as a result of having a nonconforming lot.

Mayor Hughes asked what the purpose was of vacating the roadway. Mr. Costello advised that there is no improved roadway across 75 feet of that property regardless of whether the vacation or variance is granted or not. This lot really fronts only 25 feet of improved roadway, so there is an existing nonconformity. Accomplishing the vacation as a separate issue allows the Corcellis to take title to property that has been occupied by their predecessors in title and not used by the public for 47 years.

County Input:

Dan Faulk with the Lee County Department of Community Development said staff has recommended approval of the request with two conditions:

1. That the variance is contingent upon the vacation of the 25 feet of public right-of-way, as proposed on the site plan, Attachment B, to the staff report.
2. The subject property as shown on the boundary survey/site plan, Attachment B to this report, may not be subdivided and is limited to one single-family residence.

As far as existing uses and zoning around the subject property, to the north and east is Estero Bay; to the south and west are existing single-family residences. The subject property as well as surrounding properties are zoned RS-1.

The subject property is located in the low density future land use category. Staff has found that the existing use is consistent with the uses and intensities intended in the low density future land use category.

In the portion of the right-of-way that they're seeking to vacate and for which they're asking the variance is an existing driveway. As applicant's representative has stated, the paved existing roadway is not in that portion of the right-of-way.

Staff has found that there are extraordinary conditions to this property. If the variance is approved, the property owner can seek the vacation of the right-of-way and thus legitimize it's current use, which is as their driveway.

The right-of-way in front of Lot 1 was vacated in 1952 and a petition to vacate the right-of-way in front of Lot 2 has been filed. If vacated, the lot will be similar to what is permitted on a cul-de-sac, which is to have less than the required frontage as long as the side lot lines are radiated to the center of the cul-de-sac.

The portion of the right-of-way which is being considered provides access to the subject property only and not to the water.

Staff has found that granting the variance will not be injurious to the neighborhood, cause harm to any surrounding properties or otherwise be detrimental to the public welfare.

Mayor Hughes felt that the most appropriate way to deal with the condition that the lot not be subdivided and is limited to one single residence would be a requirement that they consolidate the lots. Attorney Roosa said that our current code does not allow for two residences although this is allowed under the county code and that it is appropriate to put in that restriction if we grant

the variance. Mayor Hughes asked if that was the best way to ensure that it doesn't happen, because if it's only in this variance and 15 or 30 years from now that house is torn down or destroyed or removed and somebody comes in to build two houses, these variances are not recorded. Attorney Roosa said they're a matter of public record. The first problem they are going to have is that they only have a 25-foot frontage, and so when they go for a permit they will have to explain why this frontage is only 25 feet. If we require them to consolidate, Mayor Hughes said, then it would only be one lot. He asked if it couldn't be a requirement of the condition.

MOTION: Moved by Anita Cereceda and seconded by Terry Cain to continue this hearing until June 5 so that it's tied with the vacation hearing.

Discussion:

Mayor Hughes said he didn't have a problem with granting the variance. He agrees with the staff report and with the representations of the applicant. The applicant may want to be present at the June 5 hearing but he needs not represent his evidence in terms of the variation per se. Ray Murphy said he agreed with Mayor Hughes' comments.

This matter will be continued to June 5, at which time the Council will act upon the corollary issue of vacating that portion of Ibis Street.

Motion carries unanimously.

VI. CONSENT AGENDA

A. South Florida Water District matter

Attorney Roosa told the Council he had met with the county attorney's office after having attended the meeting with the county commission in which it was determined that the county was going to pursue a temporary restraining order and then whatever legal action is necessary subject only to a meeting that was supposed to take place with the Water Management District that Friday. As we are aware, nobody showed up at the Water Management District except our local representative and that meeting wasn't all that productive. There was no opportunity to resolve that issue at that hearing. So he is quite comfortable with the fact that the county will file a petition for a restraining order with the circuit court. There is some question as to venue, whether it should be here in Lee County or in Brevard County. He is personally inclined to go along with Lee County.

Attorney Roosa said he also had occasion to meet with Chip Miriam, who is the director of the Fort Myers Service Center of the Southwest Florida Water Management District and supported the decision of the board. He felt that what we were being exposed to was no different from what we had been exposed to some five years ago, and we've completely recovered from that and, therefore, there was no problem. That may or may not be the case, because when you deal with environment, there are so many factors that have to be considered, not the least of which is the time of year and the moon cycles and so many other things that are involved. It's not a simple A+B=C type of equation. When you try to make it simplistic, you run the risk of a real threat and danger to the environment.

What he did, Attorney Roosa said, is that he went through our comprehensive plan, particularly to identify those concerns that he felt that we had addressed. The comprehensive plan adopted by Fort Myers Beach has the stature of a Florida statute. There is a provision in 163 that says that once it's adopted, it's the same as a statute statewide. And there's a provision in that for interlocal agreements so that we don't have this type of problem that the various governmental agencies coordinate their comprehensive plans and therefore should be consistent. Assuming for a point of argument that the Water Management District is in compliance with this comprehensive plan, it would seem to him that there's an inconsistency. But he has not reviewed

their comprehensive plan and doesn't know for sure that they're complying with their plan.

The problem has generated over two or three years, but nonetheless it is a problem that is not an annual situation. Mr. Roosa cited a 1978 case, *Platt v. The South Florida Water Management District*. The Water Management District was enjoined from draining that district. Another issue here is the magnitude of the area involved. There was no government involved in *Platt v. The South Florida Water Management District* but private property owners versus *v. The South Florida Water Management District*. In the current proposal it would be *Lee County v. Platt v. The South Florida Water Management District*. He thinks that the size of the area is something that needs to be considered as well as the time factor that generated the problem.

What we have here is the result of poor management of the lake and a sudden solution to a problem that takes the problem from the lake and distributes it not only through Southwest Florida, but also to the east and to the Everglades. Mr. Miriam testified at the county commission hearing that everybody was getting their proportionate share. If we assume that this means that substantial quantities of water are being distributed through all the available systems, then everybody is going to suffer an adverse environmental impact. You don't just introduce great quantities of fresh water into salt water estuaries without adverse impact.

Attorney Roosa said he talked with Tom Wright, the attorney for the county. He was unable to talk to Bob Pritt, the attorney for Sanibel, but Tom Wright told him that Sanibel had decided not to pursue litigation in resolving this issue. That being the case he thinks if Sanibel would join the county in their lawsuit, then he thinks the Town should also join the county in their lawsuit. But he does not see any advantage to the Town joining as the only municipality. Also, he thinks that there is going to be an adverse environmental impact in Cape Coral, too, and he thinks that Cape Coral should seriously consider joining. But in any event that decision can still be made if that happens. Absent those other municipalities, his recommendation at this time would be not to become a party to this litigation but rather to support the county's position, including whatever expert technical advice we may be able to provide to further establish the adverse impact.

Attorney Roosa advised that it's not unusual for the Legislature to give super powers to governmental agencies. Tallahassee decided that water needed to be managed by districts and not county by county, and in effect they pulled away certain rights from the various counties and they delegated all that to the Water Management District and made them somewhat of a super power. That process may give them the right to override our comprehensive plan just as it would give them the right to override any other state laws.

Attorney Roosa thinks the county is going to go ahead with their litigation and he thinks that at this time we should support them through the adoption of this resolution and through whatever other background support that we can make available. In terms of cost, this would be the least expensive to the Town. It would involve he guesses around \$2,000 of his time depending on how it goes. The first thing that's going to be done is an action in the circuit court. The second thing is an appeal to the District Court of Appeal. And there may be an opportunity under Chapter 164 for some sort of reconciliation through the staff members. If we were to become a party in the litigation, his time would probably go from \$6,000 - \$10,000 because we'd have to be far more involved. And that doesn't address any of the experts that we might need. He would recommend at this time that the Town does not become a party to the TRO, that we adopt this resolution and that we continue to monitor the county's action. He would see to it that a copy of this resolution is distributed to the county commissioners. And we should continue to see if there is a need for the other municipalities to become involved. It could be that the county will carry the responsibility.

Asked by Vice Mayor Murphy if the commission is going to hear the status of the TRO tomorrow, Mr. Roosa said yes.

Mayor Hughes stated that we have a resolution prepared by Mr. Roosa directing the Town Manager and the Attorney to support Lee County in their action for review of the South Florida Water Management District's release of lake water in the Caloosahatchee effective immediately.

MOTION: Moved by Terry Cain and seconded by Anita Cereceda to support Lee County in their action for review of the South Florida Water Management District's release of lake water in the Caloosahatchee effective immediately.

Discussion:

Terry Cain reported she had been at the meeting on Friday for two hours. There was no representatives whatsoever from the board while she was there. The staff was there and they hung them out to dry. It was definitely a rough crowd of about 100. There was a base plan at one time for the lake. Then there was a plan called the Public Input Plan and most of the public there thought that this was the plan that was adopted. The actual plan that was adopted is called The Shared Adversity Plan, and Mrs. Cain explained this plan to us. We are 29% of the Adversity Plan over here on the West Coast, but she has heard from different scientists that we are more like in the 38% Shared Adversity Plan.

We are the immediate people who will be affected. They use the term "trashing the estuaries" very loosely and say that they can trash the estuaries and we can recover from it. It's our backyard that they're talking about and she finds this very distressing. We had the same thing happen in '95 and '98 and we're just recovering now. We haven't been standing up for our rights. We're letting people trash us and it needs to stop. On May 6 they let out 5,006 cfs, so they went up 5,000. In their own paperwork in their own Caloosa Water Management Plan which was supposed to have been adopted as recently as the end of March, they say that the preliminary analysis is just that a minimum inflow of 300 cfs during the dry season will not be harmful, but inflows greater than about 2,500-3,000 cfs may be detrimental to other biota any time of the year.

Also noteworthy is that when the lake is high it is managed by the Army Corps of Engineers. When it's in its interim area, it is managed by the South Florida Water District.

There is a bigger frequency of red tide when we get fresh water.

Terry Cain further reported on the Friday meeting.

Anita Cereceda was concerned that if this goes into negotiation and we're not a party then we wouldn't be able to participate or have any input. Attorney Roosa said we wouldn't be bound by those negotiations. What is important here is that it's not just a one-time deal. There needs to be a resolve for the long term as well as for the short term. However, he wouldn't have any problem with the Council becoming a co-plaintiff if they wanted to. But before we made that decision he would like to have a copy of the complaint so that he could review and discuss it with us. He also asked what about the alternative of jumping in somewhere along the line as an amicus curiae rather than an actual party plaintiff.

Attorney Roosa said he feels this resolution is appropriate at this time with the understanding and with the direction that if it's adopted by the Council, that it be distributed to the county commissioners promptly and with a cover letter offering our further assistance, or words to that effect, and that we would like to be kept abreast of the proceedings.

Councilwoman Cereceda said that if these concerns and issues are addressed in our comprehensive plan and that's the basis of our involvement, then she thinks we're responsible for moving independent of the county or anybody else. Piggybacking on the county, waiting to see what the county does, is in a sense irresponsible.

Attorney Roosa said this is not the kind of decision that courts handle very well.

Vice Mayor Murphy explained how Douglas Lake is handled.

Mayor Hughes wondered if the environmental groups were going to sue. He was told they would be doing so from Washington, D.C.

Motion passes unanimously.

VII. TOWN MANAGER'S ITEMS

Town Manager Segal-George said it appears that there is a contract to purchase Texaco on the Beach and that the purchasers want to put a Taco Bell in there so that it would be a gas station that also is a Taco Bell. They want to do a drive-through. Mrs. Segal-George said she thought that we couldn't have a drive-through on the island after the McDonald's fight, but you can have one if it's not in the overlay. We may want to do an emergency regulation with regards to this. She and Bill Spikowski do believe that they can force them into coming for a CPD, which would make them appear before the Council, but they don't really have anything that would prevent this drive-through business except in the overlay.

She has been talking with Shawn Holiday about putting in a request for TDC (Tourist Development Dollars) to do a film festival on the island. Right now they have to put an application in for 2001. She is bringing this forward to see if we have a problem with it preliminarily before applying to TDC for the money. It looks like our budget would be about \$60,000 and we probably can get half of that from TDC. The remaining \$30,000 would have to come from the Town and sponsors to put it together. It would be similar to Sarasota's film festival. We're looking to do it in June 2001. We would premier one or two movies on the Beach and also bring the theater in. We've never done anything like this before and it's something you have to build over time. Lee County has no film festival and so we could claim it as our own and offer a different look for Fort Myers Beach. If we ask for the money from TDC and then decide we don't want to do it, we just don't take the money.

Mrs. Segal-George explained that there are people you contact, movies that we can premier. But we have to bring the stars in. This is where the expense comes in. But it's very well received in Marco and Sarasota. Asked if this is something we'd like to support preliminarily, everyone agreed that it was.

The plan according to Mrs. Segal-George is to get the Texaco/Taco Bell matter in front of us before we go on vacation.

Mayor Hughes asked Mr. Roosa at what point a municipality can adopt an ordinance to become immediately effective. Dick Roosa said any time before a permit is issued.

Mayor Hughes suggested that we draft a simple amendment to the Land Development Code for an emergency ordinance so that if we do decide to act, we can act on it at any given meeting.

VIII. COUNCIL MEMBERS ITEMS AND REPORTS

Councilwoman Cereceda said that judging from her e-mails and phone calls, that Beach & Dune Ordinance is going to be a bear. She has asked Terry Cain to write something for the Observer explaining that ordinance. Everyone is arguing that their beach is going to be ruined because they are never going to be able to rake and clean it again. Ms. Cereceda says she tells them that the only thing they are not going to be able to touch is that rack line. People also comment that we're doing this when everybody leaves, which is petty and irritating.

Mayor Hughes noted that Murray Carlisle is asking us to appeal our ruling on the Beach Pub. He has written us a very lengthy letter and the clear contradiction in it is that he states that he wasn't present and there was no tape of it, and then he alleges as a matter of truth a whole series of findings that we allegedly made, including racial discrimination against Ogleby. Mr. Hughes said he finds the letter inflammatory, if not almost libelous. He asked what the procedure was when someone asks for an appeal of a denial of a waiver. Attorney Roosa said he thinks they have to file in circuit court.

IX. ADJOURNMENT

The meeting was adjourned at p.m.

Respectfully submitted,

Lorraine Calhoun
Transcribing Secretary