TOWN COUNCIL MEETING
JUNE 14, 1999
NationsBank, Council Chambers
2523 Estero Boulevard
FORT MYERS BEACH, FLORIDA

I. CALL TO ORDER

Vice Mayor John Mulholland opened the meeting on Monday, June 14, 1999, at 9:00 P.M.

Present at the meeting were: Vice-Mayor John Mulholland; Council members Daniel Hughes, Garr Reynolds and Anita Cereceda. Town Staff present were Town Manager Marsha Segal-George and Town Attorney Richard Roosa. Also present were: Bill Spikowski and Special Counsel David LaCroix.

Excused absences from the meeting: Mayor Ray Murphy..

II. PLEDGE OF ALLEGIANCE

All assembled at the meeting recited the Pledge of Allegiance.

Vice Mayor Mulholland read a letter from Mayor Murphy expressing his regret at not being able to attend today's meeting because of prior commitments and wishing everyone in attendance well in the matters before us. He looks forward to reviewing today's proceedings upon his return to town.

Vice Mayor Mulholland stated that since today is Flag Day he would encourage everyone to fly the flag to honor America.

Announced was that this is a special meeting of the Council to hear a request for an interpretation of the Town's zoning regulations. The applicant is the Town of Fort Myers Beach. As Chair, Vice Mayor Mulholland requests the following format: Staff presentation with questions from the Council at the end of the presentation; public comment will be open giving any member of the public a chance to speak. There will be no questioning by the Council of the public coming forward. At the end of the public hearing, the Town Council will publicly discuss the four questions which have been framed for today's meeting, which are the following:

1. Have the Lee County Commission's 1972 and 1974 zoning actions on Bay Beach been properly and lawfully modified by later actions?
2. Is the Bay Beach site plan that was approved on June 23, 1987, a valid master concept plan as described in Section 34-378 of the Fort Myers Beach Land Development Code, and if not, to what extent was the proposed development shown on the master concept plan properly and lawfully determined to have been vested?
3. Are the building height restrictions in the Fort Myers Beach Ordinance 97.9 applicable within Bay Beach?
4. Are retail stores or restaurants allowed in Bay Beach at the intersection of Bay Beach Lane and Estero Boulevard?

III. PUBLIC HEARING: TOWN OF FORT MYERS BEACH, in reference to Bay Beach 99-05-085.075.

A request for an interpretation of the Town's zoning regulations, as they apply to the Bay Beach development, pursuant to Section 34-208 of the Land Development Code. Staff reports available at Town Hall.

William "Bill" Spikowski of Spikowski Planning Associates of Fort Myers advised that he had prepared the staff report and that copies of the aforementioned four questions were available at the door for everyone. He noted that Special Counsel David LaCroix will be filling us in today right after Bill Spikowski's presentation on the litigation that's ongoing between Star Dial and the Town of Fort Myers Beach, and he will be proposing that at the end of today's hearing it would probably be best to give counsel for the affected parties, including the Town, Star Dial and any of the residents who have legal counsel, a chance to prepare a proposed finding of facts and conclusions of law. At that point we would continue this hearing to allow those to be prepared and circulated among all the parties. At a reconvened hearing, probably over the next couple of weeks, we would then have those documents to look at before the hearing and will make our decision at that point.

Referring to question #1, Mr. Spikowski asked how do you properly and lawfully modify a zoning

action? You can rezone the property or a zoning action can be modified by a court order, and there have been no court orders on this property. Also, a comprehensive plan can overrule some parts of an existing zoning, and there is something along those lines in this case.

Mr. Spikowski proceeded to talk about rezonings that have taken place on the property that was rezoned in 1972 for Bay Beach. He first referred to parcels 2 and 3, the least controversial parcels of the property, and he advised that the more difficult part had to do with the residential portions of Bay Beach. When the Lee County Commission made their decision in 1972, they approved this zoning "for site location only," which meant that they approved the location of the development, the location of the site, but they reserved the right and insisted that the developer come back with very detailed plans of how they were going to build. Once those plans were approved by the County Commission, they had to be followed. Now, many years later, the original zoning approvals generally don't have that level of detail that the County has, and the Town by inheritance has detailed development regulations where the detail plans actually are approved by the Staff as long as they comply with the rules. Back then there weren't any such rules. It wasn't a very good system but it was what was in use. Bill Spikowski explained what they were trying to do at that time, how they did it and what the effects of that were.

At the time that Bay Beach was getting started, the State process had a provision where a developer who was already well into his project could argue that he was vested to go ahead with the project without going through the DRI review. However, he had to have a very specific plan of development that had been approved. There is a very clear record in the file from that 1975 vesting decision for Bay Beach. The State wanted to know more details about how specific this approval was for Bay Beach and the staff report concludes with "any alteration in the site location only plan must be considered and approved by the Commission."

In our packets we have the plan that was approved by Lee County in 1974 and submitted to the State in 1975. Two other plans were also pointed out by Bill Spikowski. One plan has basically the same content as the 1974 plan but is in color. The second plan has the same scale and color scheme as the first and shows what in fact has been built to date and what is clearly approved and can be built by the developers whenever they want.

The request for the Bay Beach zoning requested something called the community unit plan. Bill Spikowski advised that we are left without any evidence of what exactly that meant, although in talking with people who worked with it we have a pretty good idea. That was something that the County Commission was thinking about adopting and was a forerunner of what we now call a PUD or planned unit development. They never did adopt the ordinance until 1978. There is really not a lot of difference between what was meant by CUP and what was meant by the site location only site plan. Under standard zoning law you're allowed to have one zoning district on each property and no property can have two zoning districts. The residential part of Bay Beach originally had residential use 4 converted to RM-2 and the commercial part had business use 4 converted to CT. Bill Spikowski said he could not find any evidence that somehow the CUP discussion put two zones onto one property and would therefore allow commercial use in residential districts.
In 1981 the developers wanted to build two 10-story buildings in the Harbour Pointe condominiums and that was approved.

In 1984 Lee County adopted its first comprehensive plan, and as to Fort Myers Beach it said that from now on residential densities are limited to six dwelling units per acre while Bay Beach had been approved at roughly 9.6 units per acre. Like the DRI statute, the Lee County Plan said that if you assert hat you had a previously approved plan of development and that you are so far along that it would be unfair and probably illegal to make the new density requirement apply, you had six months in which to file that claim and submit your supporting evidence. Star Dial did that. They were initially turned down, but they appealed to the County Commission, who said that in fact they were vested to proceed because this specific plan existed and had a specific density shown. The County Commission's action in 1985 at a public hearing held specifically for that purpose said that Bay Beach was vested to continue the project at RM-2 and CT zoning and 9.6 units per acre with 22% building coverage and with 78% green open space to the extent originally agreed to in 1972 and 1974 by the Board of County Commissions. This 1974 site plan was also recognized by the Town Council in approving the Harbour Pointe development order.

From 1974 to date there have been no rezoning hearings other than the ones Bill Spikowski mentioned on the commercial property. The RM-2 on the residential portion does remain in effect

today. Discussed on a number of occasions has been the Town's plans to rezone Bay Beach on its own initiative later this year. Because this history is so complicated, it is very hard for the government, the developer the residents and potential purchasers to really understand what can be built on the remaining property. But because of this litigation, we are going ahead with this vesting discussion now. However, when this zoning hearing comes before us, we will be having a formal public hearing again and making a decision. At that point we will have to recognize whatever rights are legitimately vested and we also will be able to prove other details of the plan that are consistent with our new comprehensive plan.

Question B, Mr. Spikowski stated, refers to the 1987 action by the Lee County Commission purporting to clarify their 1985 vesting decision. It asks if the Bay Beach site plan that was approved on June 23, 1987, is a valid master concept plan as described in Section 34-378 of the Fort Myers Beach Land Development Code and if not, to what extent was the proposed development shown on the master concept plan properly and lawfully determined to have been vested. A small copy of this plan is in the Staff Report. This plan is not a master concept plan as defined in the Land Development Code because it was not part of a rezoning, notice was not given to the surrounding property owners and there was no public hearing although it was approved at a public meeting. The 1987 drawing does not show the proposed buildings the way the 1974 plan did. It basically divided the property into 17 residential parcels and into 17 subparcels. Bill Spikowski explained the problems with this, including the potential loss of any vested rights if a developer substantially deviated from the vested plan.

Star Dial asserts that by action of the approval of the 1974 plan, they were not allowed to put commercial uses at the entrances of the development at both corners of Bay Beach Lane. They have asserted that the height limitations of 2, 5 and 7 stories shown on the '74 plan no longer apply. They also assert that the 78% green open space requirement no longer applies. Mr. Spikowski said he doesn't believe that the 1987 drawing did any of those things, but if it did, that unquestionably is a substantial deviation from the previous plan which actually ends up hurting Star Dial by reducing the number of units. He doesn't think the '87 action is illegal but is just being misrepresented as to its effect. It did do a lot of things which are of value. Unfortunately, however, in its attempt to clarify certain actions it did anything but clarify these actions. Mr. Spikowski discussed these actions. He said that he believed that the Town can and should reasonably conclude that the '87 plan has merit as to administrative procedural purposes that did not require a public hearing and that we should continue to accept it for that purpose. But to the extent that it purports to have rezoned the property, we can't accept it because it wasn't advertised. To the extent that it purports to increase the vested rights, it wasn't advertised for that. It couldn't have done that anyway; the time period had lapsed. And to the extent that it purports to modify land development regulations that require a public hearing, it can't have done that. It wasn't legal. Bill Spikowski has listed the things that the '87 plan did do.

With respect to the question asking are the building height restrictions in the Fort Myers Beach Ordinance 97.9 applicable within Bay Beach, we should remember that in December 1998 we passed a new ordinance that said that building heights will be two stories over parking. However, the ordinance said that it shall not apply to previous land use approvals of the County Commission prior to incorporation or by the Town Council prior to the effective date. The question is, what does that mean for Bay Beach? Did Bay Beach have prior land use approvals beyond zoning that would entitle them to not have to go by the two-story limit? Bill Spikowski said that he thinks they did and gave his reasons. If a new plan comes forward to finish Bay Beach, we're going to have to decide what's reasonable for height, and it's not going to be quite so clear cut. Our new comprehensive plan does say that our land development code is going to implement the two-story height regulations and that it's going to provide certain exceptions, and it lists quite a few of those exceptions. As to the buildings that are specifically vested, our new height ordinance cannot apply.

The last question asks are retail stores or restaurants allowed in Bay Beach at the intersections of Bay Beach Lane and Estero Boulevard? Parcel 10 and parcel 17 are the numbers that they were given in the 1987 drawing. Parcel 10 is at the northeast corner of Bay Beach Lane and Estero and parcel 17 is at the southeast corner. Both of these parcels were zoned residential, RU.4, in 1974. Although the zoning has been converted to RM.2, there is very little change from the way it was in the beginning. This is a residential multi-family zoning district. Commercial uses allowed there are very limited. At one point you could build motels in that district, but you can't now. But in

1987 you could have a gift shop that's inside a residential building if it can't be seen from the outside and is no more than 10% of the area. Almost nobody has taken advantage of that although it's allowed as it's not very practical.

In fine print at the bottom of the 1987 drawing it says that on parcels 10 and 17 you can put in retail, restaurants, banks, offices and a number of other commercial uses that are not allowed by the zoning. In order to make that kind of language have legal meaning, the property would have to be rezoned under today's zoning. Important is that a rezoning can be requested, and Bill Spikowski suggests that we request the rezoning for all of Bay Beach. Under our new comprehensive plan we could if we want to allow offices or motels on that property.

Bill Spikowski explained how he had researched the County files for this report and he gave his resume. He advised what exhibits were available.

Questions from the Council:

From Dan Hughes:

Q. How many acres are there presently in the remaining property?

A. Exhibits N and O attempt to determine the exact acreage of the property as it remains today, and it's in the 100+ range. What was sold off is all of parcel 3, the Santa Maria, which was developed separately and not later shown in these drawings. The southerly part of the Fish Tale Marina is now Eckerd, Capp Plaza, the water tank and part of the tennis courts. There is a lake on the north side of Lenell and nothing north of that lake was ever part of this proposal.

From Garr Reynolds:

Q. How many acres are there presently in the remaining property?

A. The original figure of 180 was stated on the record and referenced in the application, but there wasn't a legal description that I can show you in any of the files that created that number. The legal description for the multi-family parcel "to the borders of Estero Bay" and it wasn't clear whether that included the canal or not. Exhibits N and O attempt to determine the exact acreage of the property as it remains today, and it is in the 160+ range. But there is a small chart on each of those which shows the number of acres. Now what was sold off is all of parcel 3, which is the Santa Maria that was developed separately and not later shown on these drawings; the southerly part of Fish Tale Marina, which is now Eckerd, Capp Plaza, the water tank and part of the tennis courts. Nothing north of the lake on the north side of Lenell was ever part of this proposal.

Q. What is the density of the property?

A. The number of dwelling units is 1731 as shown on the 1974 plan. The plan also shows the Riviera Club, which was not part of the rezoning. But the 1731 do not count the Riviera. You can also look on this plan and tell each building and the number of units, which do not include the Riviera. Bill Spikowski said he doesn't feel that the Riviera should be deducted from the total.

Q. So you're still saying that it computes out to be about 9.6 units per acre?

A. That is the number of units shown divided by 180, and that's the number that was referred to. But we had to back into that number. The zoning resolution didn't say that the density is 9.6. That was just a way of describing the 1731.

Q. Well, if I have 180 acres and I sell off approximately 19 acres and I have requested 1731 units,

do I still keep my 1731 units even though I have sold 19 acres?

A. You would not normally, but in this case the 1731 first appeared on this plan in 1974. Parcels 2 and 3 were not shown as part of this. That's why I don't believe that having sold off that 20 acres really should cause a loss of the 1731.

From Anita Cereceda:

Q. As far as not being able to have two different types of zoning on any particular parcel, you made an exception to that, and that was if there was a zoning overlay.

A. Some people might consider that a zone over a zone, and in order to do that your regulations have to be real clear that in fact it is a zone over a zone and it relates to a zone in a certain way. But at a zoning hearing you can't say that you want this property to be zoned CT and RM.2. It can't be both.

Q. A master concept plan is a very specific legal definition. Is the 1974 site plan a master concept plan?

A. Not exactly, but it has always been treated the same way and in some ways you're bound to

recognize it as the vesting decision did because that was the way it was done and developers relied on it. So although there was no such thing as a master concept plan in 1974, the effect of it is very much the same.

Q. So when the County Commission in 1985 vested Bay Beach with the '74 plan, were they giving it master concept plan status?

A. They didn't advertise it as a zoning hearing and give it that status, but the effect of what they did was more or less the same. Some might argue that we shouldn't be paying attention to the '74 plan because it wasn't in the zoning regulations. In 1985 at a public hearing the County Commission said to continue to develop this property, we are going to disregard our attorney's opinion. Continue to develop in accordance with what happened in '72 and '74. So at that point they gave it a much greater legal status although it was one of a kind, and you can't easily ignore that. If the developer had walked away from the property in 1985 and then come back some years later, we wouldn't have to continue to honor it, but they've been in continuous operation.

From Dan Hughes:

Q. Is it correct to say that throughout the entire history of this thing and prior to incorporation the the only time there was a zoning hearing was in 1972 when resolution Z72-243 was adopted?

A. That was the only properly noticed zoning hearing, but I would point out that the 1985 hearing that gave this kind of permanent life to the '74 plan also wasn't a zoning hearing but was a Lee Plan vesting hearing that basically protected previous zoning rights.

Q. On the 1987 master concept plan where there were some footnotes indicating that they were modifying in particular parcels 10 and 17 at the intersection of Estero and Bay Beach Lane, is there any precedence or case law that would support the position that a zoning ordinance can be modified by approval of a master concept plan?

A. I can't talk about the case law. The state law, though, is very clear. It tells local governments how they change uses on land. They can do it through a properly advertised comprehensive plan. They can do it through a properly advertised notice of rezoning hearing. The State law is very clear how you advertise a hearing, how you advertise a rezoning hearing. You must do it either by those ways or by actually amending a land development code to say anywhere you have RM.2 zoning you are not allowed to have commercial. But those notices adopting a land development code are also very strict: who gets notified and what kind of newspaper ads, what kind of public hearing you have to hold. There is no way to do that without a public hearing.

Q. So lacking a public hearing one must conclude that just putting some notations on a plan is of no legal effect?

A. That's my opinion, yes.

Q. Now on that same Bay Beach master concept plan there is Schedule A, Plan Approval References and Schedule C, Development Conditions. This was a subject of a great deal of discussion at the hearing on Waterside, Phase III, as to what this meant. Could you for the record tell us as a planner what is the effect of notations on a master concept plan called plan approval references and development conditions?

A. Really none. In a typical master concept plan that's part of a Lee County planned development zoning, a Fort Myers Beach planned development rezoning, you are allowed to show on a master concept plan deviations from existing rules. And you'll see a note on the master concept plan that says this plan includes deviations from the normal requirement of 10-foot setbacks from all buildings to instead allow 5-foot setbacks. It is very clear that the Council can approve deviations like that through a public hearing and they have to be notated on the master concept plan.

Q. Page 3 of the staff report refers to the letter that had been written in 1974 by Don Malloy to the State. The '74 drawing has the wording on it that it is a preliminary master plan, and it wouldn't be a final development plan under that language would it?

A. In Mr. Malloy's letter it is clear that he considered that a final development plan.

Q. Why is Don Malloy saying that density will be established at some later date?

A. He was explaining to the state how the Lee County system works: Yes, it applies to Bay Beach but this is the way we do things now.

Q. So it is your opinion then that that would be deemed a final development plan and the final density was established at that point for whatever legal effect that may have at that time in 1974.

A. Yes.

Further questions were asked and answered regarding the 78% green open space; height

restrictions, land use approval, the validity of the 1987 decision.
Special Counsel David LaCroix said that the opportunity for the public to question a witness should follow his testimony.

Questions for Bill Spikowski from the public:

A. Malcolm Redding

Mr. Redding of Waterside II at Bay Beach and President of the Owners Association for Waterside II asked if common areas fell into the 78% open space or the 22% open space. He was told that that was a question that was not clear and the different impervious areas have been computed separately. They never come out to more than 1% of the whole property.
Mr. Redding also asked if we could assume that any proposed retail development should have been shown in the current and proposed brochures put out by the developers. Dan Hughes said that he would say that those brochures are not relevant and not binding. If he were sold his property based on this, he may have some remedy, but it's not within the jurisdiction of this hearing nor the government to enforce that sort of thing. It's a matter of a private cause of action, if any, between the property owner and the seller of the property.

B. Betty Crawfis

Mrs. Crawfis lives at Royal Pelican in Bay Beach. She stated that all the documents in regards to EBIA reflect that Santa Maria is still part of Bay Beach and show payments of $750 per month towards EBIA for 24 residential units. She complimented Bill Spikowski on his staff report but said she found that County Attorney Jim Yeager's interpretation of the vesting was not included and there seems to be a lot of questions with regards to the vesting issue. At this point in time we should concentrate not on who's right but what's right. Bill Spikowski responded that he did not include Jim Yeager's initial vesting determination because it was overruled by the County Commission. As to the Santa Maria units, they are part of Bay Beach in a number of ways.

C. Chuck Bohanon

Mr. Bohanon asked about the status of parcels 10 and 17. Bill Spikowski advised that they are both covered by lakes. If, in fact other development is allowed on that site and the lakes were to be filled, the Water Management District and the County as agent for the Town would have to review and approve the plan and be satisfied that the function of the ponds in the new drainage plan is adequate without those lakes.

D. Mr. Ebelini

Mr. Ebelini advised that they did not plan to make a presentation. He asked Bill Spikowski many questions regarding his statements in his presentation, as well as additional questions. Vice Mayor Mulholland told Mr. Ebelini that he said he didn't want time for a presentation but that this cross examination which took about 25 minutes seemed like a presentation.

E. Mr. Millings(?)

With respect to height restrictions, Mr. Millings told Bill Spikowski he had mentioned 7 floors and later on 10 floors and we know now that the two buildings are 10 floors high. What happened to change 7 to 10? Mr. Spikowski explained that in 1981 the County Commission said that the Harbour Pointe buildings could be 10 stories instead of 7 in exchange for a density reduction. The later things that happened had to do with Waterside only. The County staff approved Waterside I and II in 1995. Waterside III was the subject of a long public hearing before the Town where Star Dial said we've got I and II and have reason to believe that we've got III and therefore we want to increase all of them. And the Council, based on the argument of having presold them said, okay, you can go ahead and build III to 10 stories. Mr. Spikowski was asked if this then set a precedent. His reply was that there is no precedent set that 10 story buildings have to be built everywhere. Those actions basically stand by themselves. And those questions will come up at a rezoning hearing unless a judge tells the Town that they don't have the authority to have that hearing. Asked if in his opinion the Town has the authority to say, no, we don't do any more 10-story buildings, Mr. Spikowski replied that the problem that the Town Council is going to face on that question is that there are two requirements, one having to do with height and one having to do with open space, and they work against each other. He doesn't know how they are going to resolve that tension. But there is a possibility that 10 stories won't be built in all the rest of Bay Beach. Dan Hughes also gave an opinion.

F. Ray McKenna

Mr. McKenna advised he had served for 26 years as a mayor and a councilman and for 26 years also as a member of the planning board in a New Jersey town. He wished to know if there was a statute of limitations on a subdivision. He was told that if there was continuous development, there was no statute of limitations. Mr. McKenna said that he felt that it was incumbent upon the Mayor and the Council here that they thoroughly review the 12 or 13 years of the subdivision.

G. Jane Cunningham

Mrs. Cunningham stated that she lived at Harbour Pointe. She had heard that units were already being sold for Waterside IV and wondered what would prevent Waterside IV from going to 10 stories. Bill Spikowski reiterated that 10 stories wouldn't apply to future buildings.

Anita Cereceda expressed her regret that there would be no presentation forthcoming from Star Dial as this hinders us from the opportunity of asking them questions. Dan Hughes pointed out that Star Dial is an interested party but is not the applicant here.

B R E A K

IV. PUBLIC COMMENT

A. MARK EBELINI

Mr. Ebelini said that as he stated previously, they are here in recognition of an order by Judge Rosman in a lawsuit that's pending stating that enjoining the defendant's plan to public hearing would be a violation of the separation of powers doctrine and would deprive the defendant Town Council of its right to determine and communicate to counsel its position on the matters raised in the complaint. He would like to limit his presentation to some numbered exhibits, which would be the order denying plaintiff's motion for injunction as #1; #2 is the transcript of the proceedings before the Local Planning Agency which was on November 10, 1998; #3 is the Fort Myers Beach Town Council proceedings taken on December 14, 1998. Since he did refer to a memorandum from Mr. Spikowski dated February 7, 1990, he will include that as #4. And at the request of Mr. Roosa, he is including the document that he referred to as the RU.4 zoning district regulations as #5.

Mr. Roosa stated that Mr. Ebelini referred to his first exhibit as a motion for injunction, and his statement was corrected to show that it was an order in response to the motion for injunction. Councilwoman Cereceda advised Mr. Ebelini that the reason she had made her comments was because of the fact that she does not have an opportunity to ask him questions and so his comments cannot be made part of the record. Clearly he was making comments for the public record for the proceeding lawsuit or whatever is going to happen and it is unfortunate that the Town Council will not have an opportunity to put his comments on record in response to our questions.

B. BETTY CRAWFIS

Mrs. Crawfis asked what if the golf course is going to be sold. At the time, permits were already transferred to an investment company in Texas. If the golf course were to be sold off the present property of 161 acres, 182 acres, what would happen to the vesting? How would this affect the vesting?

She feels that the health, safety and welfare issue should be addressed again. She doesn't know if we're in compliance with Bay Beach Lane. We're having some 1500 residential units, and that includes pedestrians, bikes, cars, golf courses, roller blades, emergency vehicles -- you name it.

When she looks at the 1972 zoning action, and if we take that as our guideline that we live by, the deviations that have been made from that are almost unbelievable. First of all, we had as an amenity a road to the fishing pier and that's gone totally. We're talking about parcel 17 and the tennis courts are gone. If that was a document that was recorded, how can all that be changed? The water storage tank was sold to Florida Cities Water. All these discrepancies don't make sense to her, and she will say again it's not who's right but what's right.

C. CEEL SPUHLER

Mrs. Spuhler lives across from Santini Plaza. Her main concern, she stated, is with the multiple amount of buildings to be built at Bay Beach. Is there written proof with facts and figures that the

existing sewage disposal is adequate for the ensuing years? Now that the condos from Black Island will tie into our sewer system, it seems we cannot assume all will be well. She hopes this concern can be brought out to the citizens of Fort Myers Beach, telling us of the capacity now, how much more capacity is available and if this system is an up-to-date system. Vested rights in 1972 and 1974 would not have taken into account the growth and drain on this Town's infrastructure.

D. SCOTT BARKER

Mr. Barker stated that he practiced law in Fort Myers and he represents the Estero Beach Improvement Association, which is the master association for Bay Beach. He said that he assumes that the staff report that was presented by Mr. Spikowski is also part of the record. He believes that the Estero Beach Improvement Association is a proper and interested party in what happens at Bay Beach, and he needs to tell us that his clients are concerned about these issues and what happens down there. It's their position that to the extent that the 1987 action that was referred to this morning by the Board of County Commissioners constitutes an extension or expansion of any vested rights to the developer; or to the extent that it constitutes a rezoning or any addition or expansion to the uses and things that could be done on that property, is opposed by his client who intends to intervene in the existing lawsuit to assert that position.

E. STEVE HARTSELL

Mr. Hartsell said that he represents the owners of the Fish Tail Marina, the Villa Santini Plaza, and one of the partners in the Palm Harbor project. Their purpose in participating this morning is simply to make sure that they are part of the proceedings and that they have an opportunity to continue to monitor what the impacts of any ultimate decisions are going to be. At this stage he doesn't know enough to take a position one way or the other and wouldn't try to confuse the proceedings by doing so. But he knows that his clients have properties down there and development rights and they just want to be sure that whatever ultimately takes place there is positive with regards to that entire neighborhood and that entire community. His understanding is that the actions that are being considered wouldn't have any negative impacts on the marina or Villa Santini or the Palm Harbor project. But to the extent that that's a possibility, they wanted to get on the record so that they are part of the proceedings.

Discussion by Special Counsel David LaCroix

David LaCroix advised that he had been retained by the city to assist Mr. Roosa in representing the city in the pending litigation against Star Dial.

In explaining vested rights, Mr. LaCroix said that whenever land development regulations change, they obviously don't affect what's already on the ground except to give it a nonconforming status. But new regulations do apply to anything that's constructed or approved after they're adopted. When regulations are changed there are often some developments that are caught in the middle. They've been approved to some extent but they're not completely built, and where a landowner or developer has relied in good faith on a local government's approval of his project, to his detriment. The courts say that the local government is estopped to apply new regulations so as to prohibit that approved development. That's a given. We have to live with that. None of that means that your legislative power is in any way interfered with. You can still always enact new regulations as long as they're based on some reasonable relationship to the protection of the public health, welfare and safety. But where you have a development that has a vested right, the courts will prohibit you from enforcing those regulations with regards to that development in such a way as to prevent development of the vested right.

The courts also often say that a landowner cannot lock in a particular set of development regulations or obtain a vested right in a particular zoning district in its current regulations. In other words, if you had some property rezoned multi-family and then bought it counting on always being able to develop it multi-family, always being able to use the regulations that were in place at that time, you do not get a vested right in those regulations. So typically a vested right is for a particular building for which a permit has already been obtained, or a particular set of buildings and amenities for which a site plan has been approved, or for a particular intended use which was disclosed to a rezoning authority and based on that disclosure and representation they rezoned it for that property and then you relied on that decision.

Even if a local government wanted to try and give someone a vested right in a particular set of zoning regulations and you wanted to give them an approval for anything they ever might want to do in the future as long as it complied with today's regulations, you couldn't do that because you'd be delegating your legislative authority to the property owner. A vested right has to be based on something that has already been specifically approved.

With regards to Bay Beach and its prior approvals, you're really dealing with two different things.

Mr. LaCroix went into detail to explain what these were. In part he said that the comprehensive plan in 1984 said that if you had a vested right, any substantial deviation from what you had approved as a vested right meant you lost your vested status. For Star Dial, in that case, it would have been a severe reduction in density. So whatever you do in interpreting that 1987 action, you cannot interpret it as having approved a substantial deviation to this site plan.

There is a lot of case law, Mr. LaCroix stated, that a vested right cannot be based on some unlawful permit or approval. One of the problems with that, however, is that there is also some case law that says that a local government cannot in a judicial proceeding raise the invalidity of its own actions as a defense. In this case we are the successor local government and have inherited all the actions and acts of Lee County as it relates to this development. So perhaps in a court case we would be estopped from claiming that that action is invalid to the extent that it might have expanded the vested rights. But that doesn't mean that somebody else can't raise it. Anybody else who has standing can raise that issue. Also, Mr. LaCroix said, as far as he knows there is no case law that says if you do something unlawful you can't at a later time go back yourselves and undo it. When you look at the '87 decision, you ought to interpret it in some way as to be lawful, in other words, not having expanded vested rights and not having approved a substantial deviation to this project.

Mr. LaCroix told us that we could right now approve additional amendments to that site plan, and to some extent he thinks we probably have to in order to allow the vested right that was given to Star Dial. Star Dial has a vested right to build 1731 units, and Mr. LaCroix said he thinks there are some inequitable circumstances that have arisen with regard to permitting by the County of things that now in retrospect appear to take up most of the 22% coverage by building a parking, but he doesn't think we can attribute that entirely to Star Dial. He doesn't think that we can apply our development regulations now to deprive them of the 1731 units. On the other hand, whatever we do approve for Star Dial can't amount to a substantial deviation of the original vested right, and that's a wide-open question. Mr. LaCroix gave examples of what might and might not be considered substantial deviations.

Mr. LaCroix further explained how we should interpret the 1974 site plan.

As far as answering the questions in front of us today, Mr. LaCroix advised that his suggestion is to answer them only in a way that interprets the 1987 action of the Board of County Commissioners as being lawful. In other words, it didn't rezone any property, it didn't extend the vested rights, and to the extent that it approved changes to the site plan those were not substantial deviations.

Discussion of the four questions by the Council:

Vice Mayor Mulholland asked if there were any ex parte disclosures to make.

Councilman Reynolds had talked talked to Betty Crawfis in generalities.

Councilwoman Cereceda said she had only spoken with Mr. Spikowski to clarify some questions she had had about the case.

Vice Mayor Mulholland said he had a conversation this morning with Betty Crawfis.

Dan Hughes stated that we're going to have to adopt proposed findings of fact and conclusions of law in written form. He would like to make a motion that the hearing in this case be continued to July 1, 1999, at 3:30 p.m.

Discussion:

Dan Hughes said his motion doesn't preclude a resident submitting something for the record either in writing or by attending the hearing on July 1.

Garr Reynolds asked why Dan Hughes was making the motion before the questions were discussed. Mr. Hughes said it was because it is recommended by the staff that we offer legal

counsel to the affected parties the right to draft proposed findings of fact and conclusions of law and also because he personally does not feel that he is in a position with the complexities of the issues here to give a very long oral recitation of all the things that have to be found and concluded as a final matter here.

Vice Mayor Mulholland stated he agreed with Councilman Hughes that we do need the guidance of legal experts that we have working with us. We want to hear all the facts and want to be fair to everyone concerned.

Anita Cereceda asked Mr. Hughes if he thought that further discussion by the Council today would prejudice the situation in any way and was told no. Vice Mayor Mulholland felt that our discussion of the questions might give some guidance to the people who are going to frame something as Councilman Hughes is requesting.

Ms. Cereceda addressed a question to Attorney Roosa and Special Counsel LaCroix. Supposing there was a unanimous consensus on each issue. Would that lead the community and the attorneys to conclude at the July 1 hearing that there was going to be some action taken because of our unanimous consensus? She does not want to jeopardize the July 1 hearing nor does she want to jeopardize our position in a court of law by discussing and coming to some consensus on the issues at this point if the case is going to be continued. Attorney Roosa replied that the finding of facts won't be anything new to us. We could make a decision today regarding the general presentation and that would be of value. He feels that it would be helpful to get an indication of the direction in which the Council is going on these issues.

MOTION: Made by Dan Hughes and seconded by Anita Cereceda that the hearing in this case be continued to July 1, 1999, at 3:30 p.m.; and that the affected parties, including the Town, Star Dial if they so choose, and perhaps Mr. Barker on behalf of the Estero Beach Improvement Association if he so chooses, and even Steve Hartsell, the counsel who was present today on behalf of Fish Tale Marina and Santini Plaza, may submit proposed findings of fact and conclusions of law to the Town Clerk with copies to the other affected parties, and the filings should be no later than 3:00 p.m. on Friday, June 25. Passed unanimously.

A. Have the Lee County Commission's 1972 and 1974 zoning actions on Bay Beach been

Councilwoman Cereceda noted that the later actions would be the l987 and the 1985 meetings, and Mr. LaCroix has advised us that the only position we should take on 1987 was that it was a legal action but with no implication as to whether or not it increased density or zoning uses, and that the 1985 meeting was in fact a legal proceeding that granted the vested rights for the 1974 and 1972 plans. Her position would be yes, it has been properly modified.

Councilman Hughes agreed with Councilwoman Cereceda with some modifications.

Vice Mayor Mulholland agreed with Councilman Hughes and with Councilwoman Cereceda. He referred the Council to page 6 of the staff report where there is a summary that he thinks succinctly summarizes the facts, which he read.

Anita Cereceda said that she was counting on the fact that the '74 plan was vested as an action.

B. Is the Bay Beach site plan that was approved on June 23, 1987, a valid master concept plan as described in Section 34-378 of the Fort Myers Beach Land Development Code, and if not, to what extent was the proposed development shown on the master concept plan properly and lawfully determined to have been vested?

Dan Hughes said he believed as Mr. Spikowski has pointed out somewhat of a hybrid instrument and he gave his reasons. He feels that we need to have a proposed plan for the balance of the property, and to the extent that that requires any rezoning, we have to hold a public hearing in that regard.

Garr Reynolds said that if he were an attorney, he would do just what these attorneys are doing: make it as complicated as possible, and he feels that's what we're doing here. Everything on the '87 plan is zoned RM.2, and to complicate matters, the density and the number if stories of the buildings doesn't help much because we've separated that land again. The canal behind Santini Plaza has been sold off in addition to the parcel where Eckerd is. We're not dealing with a

full deck here. He has a hard time understanding how we can keep saying that all these things are vested when we start out with 180+ acres and now we're down to 161.55 according to computations on a chart. Right now all is zoned RM.2, yet when people keep saying they can still build a restaurant, a motel, a lounge there, that's not his understanding of RM.2. The intent as spelled out in one section says that certain parts of this commercial can be done within the building itself. That to him is the original concept. He doesn't see these other commercial ventures as a part of the original concept as accepted in the '87 plan, which he thinks is the plan that we are obligated to go by at this point.

Vice Mayor Mulholland told Councilman Reynolds that he could understand his frustration in dealing with this whole issue. It's very very complex. But he thinks we're working toward a solution. It's not going to be easy and there are still many factors for us to consider, but he thinks we have a good beginning.

Anita Cereceda stated that she did not think that the June 23, 1987, site plan was a valid master concept plan. It does not fit the legal description of what a master concept plan is. It did not modify land development requirements, it did not change zoning and it did not increase vested rights. But she would agree with Councilman Hughes that it does serve administrative purposes.

John Mulholland read from page 12 of the staff report and stated that he was in agreement with that statement.

C. Are the building height restrictions in the Fort Myers Beach Ordinance 97.9 applicable within Bay Beach?

Anita Cereceda said that she does not believe that our building height requirements are applicable to the specifically vested building heights as represented in the 1974 plan, which are 2, 5 and 7-story buildings.

Garr Reynolds said he agrees with Anita Cereceda's assessment. Beyond the 2, 5 and 7 he clearly thinks that our ordinance 97.9 certainly is applicable. He feels that we have worked very hard on our ordinance and that if it doesn't apply to the whole island, then we've wasted time.

Dan Hughes stated that he was essentially in agreement with Councilwoman Cereceda and Councilman Reynolds, although he would technically answer the question yes, because our building height restrictions are applicable everywhere on the island of Fort Myers Beach. But not only Mr. Ebelini but our counsel both accept the fact that we are bound by the '74 plan and that it's legally in effect as to the 2, 5, 7. As to the 10 or any other heights that we may impose, we have the right to do so in connection with any further zoning or their attempts to come in with a planned development. And this Council he thinks should reserve the right to not limit themselves on height in that regard, because he's not totally convinced that a trade-off sometimes in height versus density might not be in the best interest of the community. It would depend on what the remainder of the plan is, where the buildings were to be located vis a vis other buildings and the effect that would have on their view, sun, light and air. We have the power under our comp plan to make modifications. We should keep an open position on that, but at the minimum we are, according to all the testimony here today, bound by the 2, 5 and 7.

John Mulholland said he would add that he is in agreement with the comments of Council and the only caveat he would mention is that if there are legitimate vested rights which allow the heights, then we would have to be bound by that. But he is in favor of 2, 5 and 7 as the height limits that may or may not be under these plans and which will be determined, hopefully, so that we will have more information and be better able to make a decision.

D. Are retail stores or restaurants allowed in Bay Beach at the intersection of Bay Beach Lane and Estero Boulevard?

Anita Cereceda asked Bill Spikowski whether or not the uses that Mr. Ebelini referred to are independent uses or ancillary uses? Mr. Spikowski said that the ancillary uses he was describing to us earlier were quoted from the 1987 County zoning regulations, which allow retail stores as ancillary in a building but only up to 10% and hidden. Mr. Ebelini showed him the l974 zoning regulations which allows a motel including restaurant and lounge as a principal use and not as ancillary. What he is saying is that because that was allowed in the RU.4 back in 1972 or 1974, that he is allowed to do it now. He would say that may be true but don't forget that the site plan

shows that as golf course and open space and we have the ability to change that site plan to allow the motel. We also have the ability to allow a motel under our own new comprehensive plan in the land use category. He would encourage us that if we want to allow the motel, that we do it preferably at the zoning hearing where we can address the loss of the lakes and whether there's a way to make that up without destroying more golf courses. And that we also at that time address the question of density, because the 1987 drawing shows motels on parcels 10 and 17 but shows them counted as no dwelling units when in fact if we're going to allow motels there, they should count as part of the 1731 dwelling units. He's cautioning us not to say you can't build a motel there ever, but to not come to the conclusion that it's an automatic given that they can. It's within our authority to do it through the rezoning process and possibly through this process. He thinks we might ask Mr. LaCroix how that would fit in with this process.

Garr Reynolds said he wishes he could have seen the aerial map before there was any development or a golf course there. He understands that in order for a piece of property to hold its elevation that it has to have a certain amount of water circulation in the ground between those different spots. Those lakes were dug out and piled up as sand and without proper connections and ground water flow, those grounds will tend to reclaim themselves. Not only that, but they serve as drainage for the present built-up land. The lakes near Estero are two good-sized drainage lakes that keep this land viable. Without those, every time we have a good rain those people are going to be driving out Bay Beach Lane with water up to their wheels, and when they step out of their condominiums they will have water up to their knees. When we keep talking about filling in lakes, he thinks we're heading toward some real problems for the people who already have vested rights there: owners who bought in good faith not realizing that somewhere down the road this golf course, which has always been called open green space, is going to be taken up by extra buildings. If Star Dial wants to keep increasing building space in here, how much green space will eventually be left? It seems to him that it's been eaten away. Owners have told him, Mr. Reynolds stated, that they had believed that green spaces had become part of the association's property. It is part of the association. It is part of the building complex. If there's talk of it being sold, can you sell common ground? If that's sold, we need to take a close hard look at this and see where we're headed. Those are some of his real concerns for the future on this.

Dan Hughes, referring to Mr. Reynolds asking if common ground can be sold, stated that that's a legal question. If the common areas are owned by the homeowners, they can't. If they're owned by the developer, they can, but they can sell it only subject to the existing zoning requirements. But if Star Dial wants us to give legitimacy to the '87 master concept plan and some of the conditions and approvals and the things that are on it, he has trouble with them trying to have it both ways because these lakes are on that plan as well. If they're saying they have these rights, then it would seem to him that the adjacent residents and the public have certain rights then too as a result of that master concept plan. But as to the retail stores and restaurants, he feels that's simply a matter of what's permitted under the RU.4 or what is now the RM.2. He is not clear, and this is one of the reasons why he feels we have to have a submittal by Council as to whether we're looking at the language of the definition of permitted uses in l972 or are we looking at the definition of permitted uses in 1987 under that category because apparently it has changed. He feels that the language in Schedule 2 of the '87 master concept plan where they make specific reference to parcels 10 and 17, hotel-related, etc., some of the things said there do go beyond even the ancillary uses. If hotels and motels are permitted, then an ancillary use such as a restaurant or lounge would be permitted. But he's not sure about the retail stores. He doesn't think so.

John Mulholland said he would have to add that in his estimation it doesn't appear that they are vested for these commercial uses and that, if anything, they would have to come to this Council for a zoning hearing or rezoning to put up anything commercial on the parcels that we have identified here. He is totally unsure of the question about common ground and he would let that go to our legal experts.

Dan Hughes stated that it is his view that the '87 drawing does not constitute a valid zoning action, so that the language on that under parcels 10 and 17 has no legally binding effect to him. But you have to look at the zoning ordinance and not the language on the concept plan as to what's permitted there.

Anita Cereceda admitted that her inclination is to answer no, but not being sure she is not going to answer the question.

Garr Reynolds stated that he agrees with Mr. Spikowski that hotels and restaurants could be allowed there under RM.2, but it's not automatic. It's something that needs to come to Council and has to be requested and zoned accordingly at this point.

A discussion ensued about the continuation of the hearing scheduled for July 1 at 3:30 p.m. Special Counsel LaCroix advised that if we continue the public hearing, that means that people still have the opportunity to put on more evidence and testimony and we would have to continue it to a date and time certain so that we didn't have to re-advertise it. If we close the public hearing, we can take our action on this request at any time. It means that the records on which those findings and conclusions are going to be based are closed as of today.

Dan Hughes said that he thought that if we wanted further input on the findings of fact and the conclusions of law that we had to continue the hearing. Mr. LaCroix stated that parties can submit those to us and anyone else can comment if we allow it, but nobody can put on additional evidence of testimony.

Dan Hughes stated that he didn't think we were going to get any more input and he would, therefore, amend his motion.

Discussion:

Garr Reynolds expressed regret that the motion had been changed because a lot of people believe right now that they will have a chance to continue this hearing on the first. Dan Hughes advised that the motion denied anything going into the record but it doesn't preclude public comment at the initial stages of that meeting prior to our decision. Attorney Roosa stated that the real decision is the record itself and we must make our decision based on the record, and so perhaps Mr. Hughes' motion could be amended to close the record, and then we could allow for public input. This will not modify the record, it would just be input on the proposed findings of facts and conclusions of law. Questions can still be asked.

Anita Cereceda said she would like to see the record closed at this hearing so that new evidence that the Council will not have been able to take into consideration will be introduced at a new public hearing.

Town Manager Segal-George advised that Bill Spikowski will not be here on July 1 and, therefore, won't be available to answer anyone's questions.

MOTION: Made by Dan Hughes and seconded by Anita Cereceda that the hearing in this case be concluded at this time, but that the matter will be brought before the Town Council at the July 1, 1999, meeting at 3:30 p.m.; and that the affected parties, if any wish to, may submit proposed findings of fact and conclusions of law to the Town Clerk with copies to the other affected parties no later than Friday, than 3:00 p.m. on Friday, June 25, 1999. Passed with 3 yea votes and 1 nay vote.

Vice Mayor Mulholland stated that as Chair he should say that the public hearing is closed as of today.

VI. ADJOURNMENT

The meeting was adjourned at 12:50 P.M.

Respectfully submitted,

Lorraine Calhoun
Transcribing Secretary