

**FORT MYERS BEACH  
TOWN COUNCIL MEETING  
DECEMBER 6, 1999  
NationsBank, Council Chambers  
2523 Estero Boulevard  
FORT MYERS BEACH, FLORIDA**

**I. CALL TO ORDER**

Mayor Ray Murphy opened the meeting on Monday, November 1, 1999, at 6:33 P.M.  
Council members present at the meeting: Mayor Ray Murphy, Vice-Mayor John Mulholland, Anita Cereceda, Daniel Hughes and Garr Reynolds.  
**Town Staff present:** Town Manager Marsha Segal-George, Deputy Town Manager John Gucciardo and Attorney Richard Roosa.

**II. PLEDGE OF ALLEGIANCE**

All assembled recited the Pledge of Allegiance.

**III. INVOCATION**

The invocation was given by the Reverend Dick Tafel of the New Church.

**IV. PUBLIC COMMENT ON AGENDA ITEMS**

**A. DANIEL CURRAN**

Mr. Curran expressed his concerns regarding bringing commercialization to a residential neighborhood to support the Mound House.

**B. PAUL ABRAHAM**

Mr. Abraham also advised that he was dead set against any commercial uses of the Mound House.

**C. VLADO SUCTLAK**

Mr. Suctlak suggested using the Mound House as the Town Hall.

**D. LEE CONGER**

Mrs. Conger remarked she had attended the last CELCAB meeting and she felt that a lot of great work is coming out of those meetings and that its members should be commended. They are looking to the Council for direction on how the Mound House should be funded.

The Mound House, she stated, is a home in the middle of homes. The work that has been done to keep it a lovely historical museum is worthwhile. She is against commercialization of the Mound House site or renting it out for events. She would ask that we keep it as a museum.

**E. MARY ANN DEMARS**

Like the others, Mrs. DeMars is also against commercialization of the Mound House site. She feels it would set a bad precedent to have commercial property in a residential area.

**VI. CONSENT AGENDA**

**A. Review of Financial Reports: October**

Councilman Reynolds asked for an explanation of the tourist development grant that was mentioned on page 1 of the report. Deputy Town Manager John Gucciardo stated that this was a grant that had been received a little over two and a half years ago. The total amount was \$200,000, of which we have spent very little. The balance is sitting in a separate account, as these funds have to be isolated.

Councilman Reynolds also referred to a second tourist grant, which Mr. Gucciardo explained as something that the auditors have them set out. It is set in brackets and shown as a negative figure because it is allocated funds. From an accounting point of view it shows as a deficit because those monies are accounted for already. It doesn't detract from the first figure.

Mr. Reynolds wished to know what period the road and park impact fees cover. Explained was that these fees have been accumulating since the Town's beginnings but we actually collected the money about two years ago.

**MOTION:** Made by Anita Cereceda and seconded by Dan Hughes to approve the October financial reports. Passed unanimously.

#### **B. Local Mitigation Strategy Resolution**

**MOTION:** Made by Dan Hughes and seconded by John Mulholland to approve the resolution to adopt the local mitigation strategy as part of our formal guide for the Town of Fort Myers Beach hazard mitigation activities. Passed unanimously.

### **VII. ADMINISTRATIVE AGENDA**

Councilwoman Cereceda asked that the report on the CELCAB meeting of 11/29/99 be moved from Item J. on the agenda to Item C.

#### **A. Final Public Hearing: Paragliding/Ultralight Prohibition Ordinance**

This ordinance was read into the record by Mayor Murphy.

##### **Public Comments:**

##### **A. Bobby Benn**

Mr. Benn remarked that he has been flying for 20 years and he knows most of the people who are flying in the area. He stated that the ultralights got off to a bad start a couple of years ago when powered paragliders came into the area. They ended up spending too much time on the beach and creating a nuisance. There are only about 5 or 6 flyers in the area and this last year there hasn't been a lot of flying going on. When you take the back pack units and put a paragliding wing on it, that's called a powered paraglider. Under FAA, that's considered to be a regular ultralight, because it's less than 254 lbs.

There are no good open areas on the Beach for ultralights to take off and land on.

Mr. Benn flies an inflatable boat and said that training for these is strictly over water.

This ordinance says that no ultralights can be near Fort Myers Beach, but there are many different types of ultralights. Mr. Benn said he doesn't see how this prohibition is going to work for any type of ultralight. When an ultralight is in the air and out over the water and not flying in a congested area, at that point it becomes legal. But we're trying to pass an ordinance that goes against the whole country's guidelines as far as flying in an area. It's not an ordinance that he sees as workable. More workable is to go after the flyers who are creating problems. He is willing to work with the Council to make sure that we don't have any people flying in this area.

##### **B. Arnold Lufi**

Mr. Lufi said that there are already existing laws that prevent flyers from flying over people in a congested area. The backpack paraglider can come a little closer to the beach than an inflatable boat because it's not as heavy and weighs only about 25-40 lbs. If the engine quits, it becomes a parachute. It is very safe.

Councilman Hughes asked Mr. Lufi if the laws he was referring to were the FAA regulations and was told yes and that paragliders are bound by them. He then asked for the FAA definition of what paragliders are prohibited from flying over and was told they couldn't fly over people in the water or on the beach.

##### **C. Dennis Labbe**

Mr. Labbe identified himself as the president of Local Chapter 66 of the Experimental Aviation Association. He noted that air space is governed by the FAA. Once an aircraft becomes

airborne, it is allowed to fly to 1200 feet. There is no need for an ordinance here. Any ordinance that is written would have to be in conjunction with the FAA's. He would ask us to get Part 103.

The FAA registers aircraft, Mr. Labbe said, they do not license them. A pilot flying an ultralight does not have to be licensed pilot.

Town Manager Marsha Segal-George said that when we asked the FAA for assistance, we did not get it and we would not have gone to the lengths we have gone to if we had. Mr. Labbe said that violations could be reported to him as president of the local chapter.

Councilwoman Anita Cereceda told Mr. Labbe that he was telling us that people know these rules and that we're telling him that it doesn't seem to matter to them.

#### **D. Mark Twombly**

Mr. Twombly said he flies conventional aircraft and not ultralights. His interest is in any kind of ordinance that might restrict aviation. Air space is regulated by the FAA, and local municipalities and governing authorities don't have jurisdiction over air space issues. Take offs and landings would be properly governed by local authority. We have to separate those two.

Back in the 70s and 80s the FAA determined that ultralights do not pose a significant danger to the public and, therefore, they decided against regulating ultralights and instead created a self-regulatory structure where pilots are trained, registered, etc. This is Part 103 and works extremely well. He would urge us to work with Mr. Benn, because he thinks the best results we will get on attempting to control take offs and landings on the beach is from local operators who do not want to see any sort of restrictions on their legitimate activities. They will know who is doing the flying and will help us out.

Vice Mayor John Mulholland said that the fact remains that we have about 40,000 people on this 6-mile island for three or four months, yet Mr. Twombly says that if something is up there it should be safe. Last year he witnessed the back pack paragliders buzzing people in several locations and they were not any higher than 15-20 feet off the beach. They're going about 20, 30, 40 miles an hour. What is being proposed here he thinks is bordering on the ludicrous.

Mr. Twombly said that he guesses what he is saying is that we're not going to be able to regulate the air space activities of these people. If we try and somebody fights it in court, we will most likely lose. We really don't have any jurisdiction there. But we can be effective by working with the local people.

Councilman Hughes said that if, in fact, we are preempted by federal statute or regulation, then, of course, any ordinance that we would adopt would be of no effect. On the other hand Mr. Twombly is saying that Regulation 103 is voluntary. So he wonders whether preemption applies to something that is only voluntary on the part of the pilot versus preemption on something that is, in fact, regulated by the FAA.

Mr. Twombly advised that it is not totally voluntary. There are operating rules and restrictions that apply to pilots of ultralight vehicles whether they're paragliders or fixed wing aircraft that are ultralights. And one of them states that no person shall operate a vehicle over any congested area of a city, town or settlement or any open air assembly of persons. So it's not that they can do it at will. The Federal Aviation Administration prohibits that. The issue is how do you get people to abide by that, and that's where the problem of getting the FAA's attention comes in. Working with the local people is more effective.

#### **E. Bobby Benn**

Mr. Benn offered a closing statement. He noted that last season there were violations and there were people who were not flying properly. He asked if we have seen anyone flying improperly this season so far. There are only about five or six flyers in the area and there is not a problem at all in making sure we have a season this year where we don't have the violations. It is very easy for flyers to understand that the city has a right to feel that don't want somebody buzzing them with a lawn mower that's going to land on them at any minute. He thinks we have all the violations straightened out and he doesn't see any chance of reoccurrence this year. If the Council will just work with him, he is willing to do whatever it takes to make sure that the fliers

in the area do not violate FAA 103. We can all work together instead of working against each other.

John Mulholland made a motion to approve the ordinance amending the Town of Fort Myers Beach Land Development Code.

**Discussion:**

Dan Hughes said we need to adopt some sort of ordinance and he's not sure that what we have before us will address our problem regarding what we can legally adopt. He was advised by Attorney Roosa that one change we would want to make in the ordinance is in the last line where it says "unless the aircraft is licensed by the Federal Aviation Administration." This should read "unless the aircraft is registered with the Federal Aviation Administration," because, as it was pointed out, they do not license any aircraft.

Attorney Roosa stated in addition that he was quite comfortable with our jurisdiction with regards to taking off and landing, because that has to do with zoning matters that are clearly local and clearly municipal and within our jurisdiction. The issue comes with flying over. And even in that area the issue has to do with height. Because certainly we have jurisdiction over the first 35 feet, but the question then is at what level above the ground. If you go below 800 feet you would be violating FAA. Addressing our concern for the safety of the public, it would seem that one way of resolving this would be for the Council to, absent anything else, adopt the ordinance and then find out if it has to be modified or changed in order to bring it into compliance with federal law.

Mr. Roosa further stated that apparently the aviation consider privately owned the same as individually owned, and he knows that what was intended in our identification was to exclude governmental aircraft because those are not registered aircraft. And so another change we might want to make is "land or fly any governmental aircraft" rather than "privately owned." Or we could put "privately owned or non governmental aircraft."

**MOTION:** Made by John Mulholland and seconded by Garr Reynolds to approve the ordinance amending the Town of Fort Myers Beach Land Development Code, Chapter 34 Zoning Division 4.

A motion was made to table the ordinance and it was explained that this motion would take precedence over the first motion.

**Discussion:**

Councilwoman Cereceda stated that her reason for supporting the motion to table is because our goal is to provide safety for the community. That may not take a law that may or may not be effective. We have a group of people here willing to work with us and they are on notice that there is concern. She would like to see what becomes of their self-regulating. She cannot support the first motion as it stands.

**MOTION:** Made by Dan Hughes and seconded by Anita Cereceda that we table this ordinance in light of the Town Council having suggested several other changes in the language and the fact that this ordinance has not been drafted in final form. Motion failed 3-2.

John Mulholland said that as the Town Attorney has pointed out, if we pass the motion we can modify it and we can also modify the wording. So he thinks it behooves us to pass the motion and modify it.

**Discussion:**

Councilman Hughes asked if Mr. Mulholland's motion is to adopt the ordinance as presented to the Town Council in writing or with the changes suggested by Mr. Roosa. He was told with the changes suggested by Mr. Roosa. Mr. Hughes said that then he would want a clarification of just what those changes are. He finds it extremely dangerous to be adopting an ordinance that we don't have the wording for.

Attorney Roosa pointed to the second line of the ordinance where it should state "a person shall not take off, land or fly any non governmental aircraft that is propelled by an engine over land or water within the limits of the Town of Fort Myers Beach unless the aircraft is registered with the Federal Aviation Association." Mayor Murphy asked if these were the only changes or additions and was told yes.

Councilwoman Cereceda said she simply could not support this. The bottom line is that we are going to pass an ordinance that is going to give us nothing that we don't have today. Now we have a law saying you can't do this but we still have no way of enforcing it. So now if somebody has broken our law we still have to call Orlando. She thinks we'd be better off working with people who are local and willing to help us out in this particular situation.

Mayor Murphy asked if we couldn't tell people that they couldn't take off or land here. Councilwoman Cereceda indicated that this wasn't the problem. What we don't want them doing is flying over us and she doesn't believe we can tell them that they can't.

Councilman Hughes stated that if in fact we adopt this, we are then obligated as a municipality to enforce the ordinances that we adopt and we have absolutely no personnel to enforce this. Aren't we opening a whole area of liability? Attorney Roosa advised that the Florida Supreme Court has ruled that the enforcement of an ordinance does not establish liability on a municipality. So that wouldn't increase our liability. But certainly the Council ought to consider the enforcement aspect of an ordinance, because merely adopting an ordinance without provisions for enforcement won't solve much.

Town Manager Segal-George advised that we have a parasail ordinance that limits the length of line. While parasailers are out in the water and flying their length of line she cannot necessarily do anything about it, but she can do something when they come back to shore. All the complaints that she has received have to do with paragliders and they go up and they go down. So based on this ordinance, she could have a code officer deal with this situation if they try to go up or try to come down. She does not have anybody in the air who could intercept them.

Councilman Reynolds said that what has been indicated here is that there has been a problem in this area. The Town Manager just told us that she needs backup support.

Mayor Murphy felt that everyone was in agreement that it's the taking off and landing that can be enforced and the flying over and landing that cannot be enforced. He suggested striking that from the ordinance and regulating the landing and taking off and then we'll have something to hang our hat on. If someone flies over the Beach from Sanibel, however, he said he didn't know what we could do about that.

Vice Mayor Mulholland stated that if we don't do something tonight, we'll fall back to what we had last year, which was nothing, and he doesn't think that's acceptable.

Councilman Reynolds stated he found difficulty in saying we cannot control flight over this island. There is a definite minimum that any kind of aircraft can fly over our island that we can control. He advised that he didn't know what the limit was, but that we could find it out. A couple of years ago we had a lot of trouble with ultralights flying over people's homes. A fuss was raised about this at Council and the message got across and they stopped. He thinks there is a way to enforce that if we have to go to that extent, but he doesn't believe we have to. He believes that most of these gentlemen here tonight are responsible individuals and he doesn't believe they're going to go over people's homes and over the island. He doesn't think that's their intent. But there might be somebody who might not be as responsible.

**MOTION:** Made by John Mulholland and seconded by Garr Reynolds that we approve the ordinance and include the changes pointed out by the Town Attorney.

Attorney Roosa stated that apparently the Federal Government recognizes that a municipality might have jurisdiction over some air space. So whatever height that might be, whether it's 800 feet or less than that, if we could continue this ordinance to our next meeting, he would be able to find out the highest we can go or the lowest regulated by the FAA and then even add that distance into the ordinance itself. That also would address the concern of the wording of the ordinance because it would be provided to us at the next meeting.

John Mulholland made a motion to continue approval of the ordinance.

Attorney Roosa stated that we could continue the public hearing along with continuing the ordinance to December 20.

**MOTION:** Made by John Mulholland and seconded by Garr Reynolds to continue approval of the ordinance and include the changes pointed out by the Town Attorney. All in favor.

### **B. First Public Hearing: Open Container Ordinance**

Mayor Murphy read the open alcoholic beverage container ordinance, amendment to Chapter 2, Section 5, into the record.

There were no public comments.

Councilwoman Cereceda said the corrections were made to the concerns that were raised at the previous meeting and she moves for approval of the ordinance.

**MOTION:** Made by Anita Cereceda and seconded by Dan Hughes to approve the open alcoholic beverage container ordinance. Passed unanimously.

### **C. Report on CELCAB meeting of 11/29/99**

Councilwoman Cereceda said she had asked that this be put on the agenda because of concerns she'd had after the last CELCAB meeting. As the CELCAB members continued to debate and make additions and deletions from the management plan, one of the issues that arose was funding for the project. She stated she is a little concerned to hear the word commercialization being thrown around this evening, and she had several calls about it as well. It no doubt resulted from a conversation she'd had with Mrs. Conger. Commercialization is certainly far from what she was speaking of in that conversation and is certainly not something that she would ever recommend to the Council, nor does she believe that the CELCAB would recommend it.

The question from CELCAB is how does the Town Council see the Mound House being funded. Would it be strictly funded from general revenues of the Town? Would it be funded primarily from the Town, supplemented by events that might be sponsored by the Town at the Mound House? Would it be funded, as was thrown out several times, by a wedding being held and fees being charged to private parties who might want to lease space at the Mound House? It's kind of a Catch 22. We're looking for direction from CELCAB and they're looking for direction from us. If it takes the Town Council taking some position on this, she thinks that's what we need to do.

Ms. Cereceda further stated you don't need to spend much time at the Mound House to see how satisfied people are, how proud they are and what a tremendous sense of community the Mound House is building in this community. You hear more voices of consent than of discontent. The work Ceel Spuhler and the docents have done on that property is magnificent.

She has been shown what a tremendous prize the Mound House will be for the future of this community if we can move past the controversy, if we can take some direction, and if we have the guts to just stand up to the political pressure that this project is going to continue to rain down upon us.

Anita Cereceda compared Mr. Abraham's estimate of what it would cost to maintain the Mound House to the figures we are spending on other projects.

We've made about 60% progress in the management plan and there have been dramatic changes made to that plan. After the next meeting CELCAB will put together a draft of the changes for the Council's review and copies will be made for people who participate in the meeting.

Mayor Murphy thanked Ms. Cereceda for her comments and he also noted that he was not prepared this evening to discuss funding of the Mound House.

Councilman Mulholland advised that he can understand in the face of the good and bad publicity that we've had that our advisory group might be seeking some direction. He applauds the fact that the revision of the management plan is being worked on. He approaches this matter by considering how he might feel if the Mound House were located on his street. He has trouble talking about funding when we haven't determined what the house will be used for. But he is against commercializing the house and having weddings, banquets and meetings there. He is very much in favor of a museum store. He would hope that the church on the corner of Estero would change their minds so that we could use their parking lot and tram people up and down the street and not upset the neighborhood.

Mr. Mulholland said he is more and more convinced that the Town is going to have to foot the bill for the Mound House. Any income that comes from a museum shop is going to be small.

Councilman Hughes said he is in support of both Councilwoman Cereceda's and Vice Mayor Mulholland's remarks. Some of the comments made earlier were unjustified and he is not aware of any enthusiasm on the part of CELCAB or this Council for any rampant commercialization of this property. He personally doesn't feel that the property needs to be a profit center. He wouldn't object to subsidizing it and doesn't feel it would be a major number in the budget. He wouldn't be opposed to a museum gift shop there and other cultural and educational activities, because this is what he believes was contemplated all along.

Councilman Reynolds advised he was at the Mound House yesterday and enjoyed the Luminaries. His concern was the number of people going through the House at one time with basically one exit out. People were unaware that there was another exit at the back of the house. He finally opened that second door and got people to go through there.

Mr. Reynolds remarked that as one councilman has stated, we have to look at that community as if we lived there, and if he lived in that area he would not want to see it commercialized. He thinks that the Town can afford the Mound House and we're in it whether we like it or not. He thinks we need an intellectual center. We cannot do this commercially unless we open it up as a real business and make real money. We should accept the fact that this is a treasure and accept the fact that the Town and the people at large will have to support it.

Mayor Murphy stated that he was at the Mound House last night and was very impressed with the logistics, the way things were happening with the parking of cars. He found it to be low impact, and if that's an indication of how things are going to be run, he doesn't see how there can be anything objectionable about that.

The house itself and the grounds, Mr. Murphy remarked, are absolutely beautiful.

Mr. Murphy told Anita Cereceda that we appreciate all her efforts as liaison to the CELCAB group and reporting back to us.

Councilwoman Cereceda said it appears that the consensus would be that the Town would subsidize/fund the Mound House and that commercialization would not be something that would be advisable or desirable to pursue in order to maintain that property. Ray Murphy told her that in very broad terms he would agree with her at this point, but he thinks he would like to see that

defined.

Councilman Hughes said he, too, thinks that in broad terms she's correct. But there are two aspects to that. One is what is the deficit? He wants to look carefully if suddenly we're told that it's going to cost a couple of \$100,000 yearly to maintain it. And the other thing is what is the definition of commercialization. He would have a very limited view of what commercial activity would be acceptable.

Anita Cereceda said she will have a transcript prepared of this portion of the meeting for the CELCAB members so that they won't lose anything in translation.

**BREAK -- 8:15 P.M. - 8:28 P.M.**

**D. Draft: Community Resource Advisory Board**

Councilwoman Cereceda asked Attorney Roosa questions regarding Section VI, Item B, and said that under C she would like something to be added about Town-sanctioned special events. He could strike out B completely because there wouldn't be anything for them to have a proposed operating budget for. She also felt that they could make recommendations for special events in the Town, such as the expenditure of \$15,000 for fireworks this year. That may have come as a recommendation from CRAB to the Council as opposed to a direct request from somebody.

Vice Mayor Mulholland said that with all due respect to Councilwoman Cereceda, he believes it's unnecessary to have an advisory board. Most of the things in here could go through the LPA.

Councilman Reynolds said he had trouble relating to this too and didn't see a need for it. He thinks we're going to mire ourselves in so many committees that we won't know where we're going. He feels that Vice Mayor Mulholland's idea is a good one.

Councilman Hughes said he's not convinced that it's essential either. The question that he has is that in question 5 it says "acquisition and management of public areas but not limited to pools and parks." He asked if that would include County-owned facilities, for example, Bowditch, Matanzas and Bay Oaks. If it does, what jurisdiction do we have? Town Manager Segal-George told him that Sanibel took over the operation of the County's regional parks on Sanibel, and then Sanibel, of course, imposed their own rules and regulations with regards to the operation of those regional parks. With regards to the beach accesses, which is another issue, she believes the Town owns the beach accesses. It is just not an issue that has been pushed by the Town. But there are questions with regards to those beach accesses as to metering and how all of these recreational areas operate. And as the County's population grows and as the university population grows all of these regional facilities become more and more attractive, and there is the question of how best the Town can handle what's happening out there and maintain the quality of life for our residents. And she doesn't think that's a question that's being addressed by any other group at this point.

Councilwoman Cereceda said she appreciated those comments because they are certainly at the heart of her proposal in having this group. Perhaps the LPA could in essence deal with everything that's being dealt with by some other group, but they're not. Nor does she think that it's their duty to. This particular committee may not be needed today, but is absolutely essential, she believes, to the future of the Town. She is going to move forward with this, even though lacking support.

John Mulholland said that Marine Resources right now is working on something called an anchorage, and this will go to the LPA. He agrees with Councilwoman Cereceda that these items should be addressed, but maybe the Council should be addressing these things. And it's being assumed that this is going to be an effective group, and that's a big assumption. Councilwoman Cereceda advised that she is assuming it will be an effective group because she will have the same passion for it that he has for Marine Resources.

Town Manager Segal-George asked the Mayor if he wanted to schedule this for a first public hearing on December 20. He said we would schedule it with whatever required changes are needed to date.

**E. Appeal of Town Manager's denial of a request for a waiver on Noise Ordinance**

Town Manager Segal-George said that this is the first situation like this that has come in front of the Council. She said that a request was made of her with regards to the ordinance, and after reviewing it, she felt that she could not approve a waiver under the circumstances. We have a memo that outlines the reasons why. The person who requested the waiver has the right of appeal of her decision to the Town Council. Other people who are affected may also wish to speak.

Mayor Murphy asked if there was anyone besides Mr. O'Gilvie who would care to speak to this memo.

**Public Comment:**

**A. Jim Algood**

Mr. Algood stated he has been a resident of Fort Myers Beach for approximately five and a half months. He lives above the place in question and it hasn't bothered him at all. On Sunday afternoons a lot of people come by who hear the music, want to check it out, and have a good time there. In the last few weeks when they haven't had any entertainment there, business has dropped off. He can't see any harm in having a band there from 1:00 p.m. to 5:00 p.m. on Sundays.

Eric O'Gilvie said that in reviewing the ordinance that came about as a result of one particular neighbor, they uncovered a section that gave them the option to pursue a waiver from the Council to allow them to continue with the Sunday concerts, the main factor of their location on the Beach. They are probably the only location on the Beach that has been in operation conducting business as such for the number of years that this location has been active. They have people who come to the Beach just to enjoy sitting on the beach and listening to a live band perform for them. In the last three months a particular individual has made it his obsession to try and terminate this activity. However, one particular point in the ordinance says it is in order to minimize any adverse effects on the community. They have done several things to ensure this. They have purchased specialized equipment that can monitor sound levels around their facility. They have purchased directional speakers for all the other operating periods to ensure that they stay below the 72 decibels requirement at all other times. The ordinance also indicates that they can operate at 72 decibels from 7:00 a.m. until 10:00 p.m. and they operate from 10:00 a.m. until 10:00 p.m.

They are not requesting to conduct their concerts every day of the week or even three days a week. They merely wish to continue to conduct their concerts from noon until 6:00 p.m. on Sunday afternoons and on holiday weekends. They feel that continuing in this fashion would not only satisfy the existing population and visitors that come to Fort Myers Beach for this particular event, but would also allow them to continue to conduct their business in a reasonable fashion without any undue discomforts to anyone in the local area.

Councilwoman Cereceda asked if they were exceeding their decibel level. He advised that all it would take would be the crash of a cymbal or the slam of a drum. They never had this problem in the past. Ms. Cereceda established that he needed the waiver because he was exceeding the noise level on every occasion. He agreed and said they were requesting the waiver during the particular periods when they would have bands.

John Mulholland asked if this ordinance was being applied uniformly up and down the Beach, particularly in Times Square where we have a lot of outdoor music. Town Manager Segal-George said that just like any of our ordinances, they are complaint driven.

Mrs. Segal-George stated that there are two different places in the ordinance where there

are waiver provisions. One is very clear that it's a waiver in some kind of specific event of extreme importance. The other one is for a business that's already in existence and talks about looking at a business in terms of the area. She interprets this one to mean that the ordinance has an injurious effect on a business of a continuing nature. She didn't believe that there were sufficient grounds that rose to the level of allowing the waiver. It was a situational kind of thing and she also felt that the neighborhood had the right to rely on the decibel levels of the noise ordinance as stated in a commercial area. And this is what she based her denial on.

Mr. O'Gilvie read this section of the ordinance aloud and explained why based on it, he had requested his waiver. He stated that the means by which the ordinance has been enforced by a particular individual has been over and above what he considers to be reasonable. It's basically playing the letter of the law to the benefit of one individual. No one else in the surrounding area has complained. If you stand in the back lane you can't get a 72 decibel reading, only along that property line. Tourists and residents alike enjoy these concerts, and in one afternoon they were able to collect 140 signatures from people who wish for the concerts to continue. They canceled the bands the last two weeks and saw a 30% drop in population the first week and a drop of 50% the second week along with phone calls inquiring as to whether they would be having a live band. This is not something new or unusual to this area.

Councilman Reynolds did not feel that the waiver would be appropriate no matter how many or how few complaints were received. The law he feels should be followed.

Dan Hughes made a motion to request the waiver for Sunday afternoons for 90 days. He said he shared with the Mayor an ambiguity on what is meant by holidays and holiday weekends and there's no reference to any hours there. Mr. O'Gilvie said that holidays are generally observed on the weekends and they have no problem with making the operating periods from 12:00 p.m. to 6:00 p.m. as they do for Sundays. The only exception he would make to this would be the millennium celebration, which he is sure is going to be across the Beach. In that case they were planning to have a dinner and dance at the location and the band as well. He is sure there are going to be many locations having a dinner, dance and band at that time.

**Discussion:**

Anita Cereceda said that it would be in Mr. O'Gilvie's best interest to resolve any conflicts over this waiver as amicably as possible. She hopes he will take this provision and do everything he can to buffer that sound and still have his successful Sunday afternoons. This will set an example for other people.

**MOTION:** Made by Dan Hughes and seconded by Anita Cereceda that we grant the request for the waiver for a period of 90 days with the condition that it be limited to Sunday afternoons from 12:00 p.m. to 6:00 p.m. with whatever typical holiday weekends that would be on the calendar and New Year's Eve from 8:00 p.m. to 1:00 a.m. Passed with one dissenting vote from Garr Reynolds.

**F. Discussion of Proposed Taxi Ordinance**

Deputy Town Manager John Gucciardo said he is looking for direction from the Council regarding whether we want him to proceed with a variation of or the exact same ordinance that the County is proposing to regulate the taxi industry. The County could include the Town in its jurisdiction or we could adopt a separate ordinance for the Town and just by interlocal agreement have the County administer it for us. If we have a separate ordinance, we will be able to modify it ourselves and also include in it the language changes that the Public Safety Task Force has recommended.

Dan Hughes said he liked the idea of adopting our own ordinance. We can then amend or terminate it ourselves. He wondered, however, if the sheriffs are making a lot of arrests if this

would have an effect on the cost of services being provided by the sheriff. John Gucciardo said that initial discussions with our representative from the sheriff's office, who is our liaison with Public Safety, indicated that it would not, because the sheriff would also be enforcing this on a county-wide level.

Also, Dan Hughes noted, in the Task Force amendment there was reference to taxi drivers having a Florida license. Mr. Gucciardo advised that the County language just talks about having a valid driver's license. Mr. Hughes referred him to page 8 where it says that every driver must hold a current driver's license issued by the State of Florida or any other state of the United States if he operates a vehicle for more than one state. Mr. Hughes said he thinks this language is okay because he doesn't think we could bar an interstate driver from coming into our community.

Mr. Gucciardo said the changes that are suggested by the Public Safety Task Force may pose some problems and he's not suggesting that we just adopt those. What he thought we could do is show the County's language and then show the changes the PSTF suggests. For example, they are also suggesting a requirement for a vehicle inspection and he doesn't think that anyone is physically set up for that kind of administration. He will get together with Dick Roosa and bring the ordinance to us in draft form.

#### **G. Discussion of Times Square garbage removal**

Town Manager Segal-George advised that this is a good memo. We were able to come to a reasonable solution, at least to get us through this season. Mr. Frieden brought forth a compactor that we hadn't really seen before, and it seems like it will work for us during the season. She is asking the Council to authorize her to go to sealed quotes on a lease for two compactors with three different options. She would also need us to reject the bids on the service pavilion.

**MOTION:** Made by Ray Murphy and seconded by Anita Cereceda to authorize Town Manager Marsha Segal-George to go to sealed quotes on a lease for two compactors with three different options. She would also need us to reject the bids on the service pavilion. Passed unanimously.

#### **H. Coastal Engineering Contract addendum**

Town Manager Segal-George explained that this was the next phase of the Matanzas Harbor management. Dick Roosa is working on the implementing or enabling ordinance right now and he is getting some input from the Regional Harbor Board.

This is in regards to Phase I of Coastal Engineering. The MRTF first looked at this and unanimously approved that this be recommended to the Council for approval. She advised that Michael Stevens from Coastal Engineering was in the audience if anyone has questions. Phase II and Phase III, she noted, will come to us as separate supplemental agreements.

**MOTION:** Made by John Mulholland and seconded by Dan Hughes to approve Phase I. Passed unanimously.

#### **I. Discussion of maintenance contract for the pool**

Deputy Town Manager John Gucciardo stated that at our last meeting it was suggested that we readvertise both the maintenance contract and the food and beverage vendor contract for the pool. We, therefore, advertised in the local paper, the News-Press and he believes also in the Naples paper as well. We received two proposals for the maintenance contract, but we're still recommending the one submitted by Ed Lawler based on both comfort with his ability to do the job and also price. We received four proposals on the vendor contract but we're still recommending the original one, again based on comfort and the ability to do the job at price.

John Gucciardo said that the changes suggested by Councilman Hughes on Section VI.

were made eliminating purchase orders and making reference to Exhibit A.

Councilman Reynolds ascertained that the general awareness statement that had been marked out had been deleted. John Gucciardo said yes, that it required daily visits which they thought was probably unnecessary since they have staff there.

Anita Cereceda thanked the Council for readvertising the position.

**MOTION:** Made by Anita Cereceda and seconded by John Mulholland that we approve the maintenance contract with Ed Lawler. Passed unanimously.

#### **J. Discussion of vendor contract for the pool**

Councilman Hughes asked John Gucciardo asked if the costs were pretty much in line on the four proposals. Mr. Gucciardo said that one proposal was substantially different in that they were looking to get paid rather than to pay. The other three were all reasonably close.

**MOTION:** Made by Anita Cereceda and seconded by Ray Murphy that we approve the vendor contract. Passed unanimously.

### **VII. COUNCIL MEMBER ITEMS AND REPORTS**

Councilwoman Cereceda said she will bring the list for New Year's Eve to us at our next meeting.

She noted that the Fireworks Committee is now in the process of getting permits for the pier where the fireworks will be shot off. It will not be necessary now to use the additional \$5,000 that was allocated for a barge.

She passed along a letter from the two brothers who had built a large sand castle last year in Lynn Hall Park and had been told that they would have to tear it down and grade the sand on the beach. She and some volunteers went to Parks & Rec and asked them to let the castle stand and they would smooth the sand over if there was a problem. The very next day it poured and stormed and the sand was redistributed. In their letter the brothers said that they had contacted Parks & Rec to tell them that they were coming and they understand that they have to get a permit to build their sand castle. Ms. Cereceda said she thinks this is absolutely ludicrous and she will be telling this to Parks & Rec.

Referring to the brothers, Councilman Reynolds said he'd had a nice talk with them last year and he thought that was a pretty bad thing that happened to them. This year he saw two huge shark sculptures on the beach that must have been 12 feet long and at least 18 inches high and he bets there were no permits for them.

Councilman Reynolds referred to the welcome back to residents booklet that was circulated in a recent Observer news publication, and said he was disappointed that the welcoming was just from one council person and the Town Manager. He felt it would have been more appropriate coming from Ray Murphy and all the council members. However, it was a good informational booklet and very well presented. He is sure it will prove helpful to many of our visitors and appreciated by our long time winter residents and other guests to our town.

Councilman Hughes wished to know if any other council members had been receiving complaints about low-flying commercial aircraft. He was told yes and that it was interesting that people say there's a minimum height for commercial registered aircraft. There are helicopters that go up and down our beach that are no more than 50-100 feet off the water, and it's a regular thing.

Established was that the Bay Beach court mediation is set for the last Tuesday of this month.

Vice Mayor Mulholland said he had attended the concert at Santini. He had been asked to introduce Paul Todd, who stayed about 45 minutes and is an excellent performer.

John Mulholland was at the Mound House last night and he declared it to be a beautiful sight. He praised the decorations done by the Lion's Club of one of the rooms and the super job done by the docents.

Mayor Murphy said he was asked about security at the Mound House and he assured the person that the Council will be addressing this issue in the not so distant future.

Asked about plans to paint the Mound House, Town Manager Segal-George advised that they couldn't paint until the historical assessment is done. She said she also has bids on a security system for the property, but again, we don't own it yet. All these things are in the queue waiting for when we close on the property.

## **VIII. TOWN MANAGER'S ITEMS**

### **A. Discussion of enhanced trolley service**

Deputy Town Manager John Gucciardo said that every year they try to beef up the trolley system in season to encourage people not to rely on their cars as much. Last year the bill from Lee Tran was a little over \$20,000. They also collected about \$8,000 in voluntary contributions and the difference was picked up by the Town. This year in response to our request they have gone a little further. Lee Tran will be providing one trolley from Summerlin to Bowditch, one trolley from Bonita to Lover's Key, and three trolleys on the island. They are proposing to add a fourth trolley on the island, which could start as early as December 16. Instead of ending in mid-April as it did last year it would run until the end of April, because Easter is a little later next year. The cost will be closer to \$36,000 with that additional trolley. To make the trolley from Summerlin to Bowditch free would cost \$11,000. The total package comes to about \$47,000. Only \$45,000 has been budgeted and they would look to voluntary contributions again. It could also be funded out of contingency.

#### **Discussion:**

Councilman Reynolds asked Mr. Gucciardo why the freebies from Summerlin to Bowditch and was told that that came from discussions by the Council, whose logic was that the more you can encourage people to ride that trolley the less cars come onto the Island.

Also, Mr. Gucciardo remarked, they get a lot of comments each year that the trolley, if it doesn't ride that right hand lane coming onto the Island but stays in the flow of traffic in the left hand lane with the rest of the Beach traffic, really doesn't provide any incentive. People aren't getting there any quicker than if they stayed in their cars.

Mr. Gucciardo said that they've asked Lee Tran to look into the possibility of modifying their route a little bit, and that would be to come down San Carlos, make a right hand turn at Main Street and loop into the County-owned parking area on the San Carlos side and then pull back into traffic in coming over the bridge. They think that physically the trolley can do that near the sheltered area where people could then pick up the trolley. But the advantage for us would be that it could legally then ride that right hand lane and, therefore, hopefully encourage people to ride on it rather than sit in their cars in traffic.

Councilman Reynolds told Mr. Gucciardo that that wasn't a new idea, that people have been doing it already. He doesn't believe that we should go to freebies, though, or that anybody is going to object to paying a quarter.

On page 2, Mr. Reynolds said, the date is shown as 4/30/99. Also, he doesn't know why we would need something after April 15th. He was told that Easter was the last week in April this year but he felt that not many people come to Fort Myers Beach for Easter. He then referred to the bottom of page 2 where it says FY 99 Service Levels, 1/28/99. He said this should read 1/28/00. John Gucciardo said those were comparisons for last year to show what was paid last year.

Councilman Reynolds asked if it was six extra trolleys that he was seeing on page 3 for New Year's Eve. John Gucciardo said that was a separate issue just dealing with the New Year's

Eve trolleys. Garr Reynolds said he thinks we need to deal with that because a lot of people are asking already and it should be advertised.

**MOTION:** Made by John Mulholland and seconded by Dan Hughes to approve the recommendations of John Gucciardo. Passed unanimously.

John Gucciardo said he believed the New Year's Eve trolley has already been budgeted for. Councilman Reynolds asked if it would say in there what the 2:00 a.m. means. He explained he asked in order to know if this is when they will last depart or when they will leave the Island. Mrs. Segal-George said that the instructions will be to the drivers that the last trolley will leave Times Square at 2:00 a.m.

**B. Request by entertainer to perform in Times Square**

Town Manager Segal-George stated that it's that time of the year again and we have a performer who has requested to perform in the Square. Last year the Council approved these performers. We have a complete packet on what this performer does and he seems to be rather entertaining.

**MOTION:** Made by Ray Murphy and seconded by Dan Hughes to approve letting the performer entertain in the Square. Passed unanimously.

Town Manager Segal-George stated she'd like to remind us that we have land use cases this month and next Monday morning we have three cases: Gurik, Vela and the movie theater COP.

**IX TOWN ATTORNEY'S ITEMS**

**A. Request to file cause of action against Lee County, re: Florida Cities Utility**

Attorney Dick Roosa remarked that we're aware that we're involved in litigation, the main thrust of which is that the County should not have attempted to purchase the water system of the Town of Fort Myers Beach without the consent of the Town Council. That issue is on appeal to the Supreme Court.

Mr. Roosa said that in preparing for that he took the interlocal agreement that the four counties got together and signed and considered it a contract. If looked at in that light, we will see that local governments within whose jurisdiction the utility lies have the right to purchase the utility system. That is an action that is in the nature of a third party action. When two parties, in this case four parties, agree to do something that will benefit a third party, that third party has the right to go to court and enforce their rights under that contract. So he has prepared a third party complaint. This then goes to the next step which says that the Town would be willing to purchase this system and it would become a Town operated water utility.

The purchase price of the system is \$3,500,000 and the taxable value of the system is \$7,000,000. So that is certainly enough indication to him that it may be a bargain and it may be worthwhile for the Council to consider buying it. If we were to authorize him to pursue this third party complaint, then the next step would be to make demand on the County, and under Chapter 164 the County would then schedule a County Commission/Town Council joint hearing to discuss this matter. Quite frankly it is his hope that that hearing might be fruitful. One of the main issues with our purchasing the utility system has to do with the difference between what we have to pay for water and what we can sell water for. Dick Roosa explained further why this would be profitable to the Town even though it would be a break-even operation with the County.

Attorney Roosa said he thought there was good chance that we could win this lawsuit.

John Mulholland questioned our spending \$3,500,000 without having a financial analysis. Mr. Roosa explained that at a public hearing all that information would be presented to the Council before we made a decision. Town Manager Segal-George advised that the Council had

already offered to buy it from the County for that amount and the County had said no.

Councilman Reynolds said that he believes that it would be more than a good purchase, that it would be a steal. He believes, though, as he told us before, that he thinks we are beating a dead horse here. He wished to know how much this was costing us every time Mr. Roosa ran this back to the County. Mr. Roosa said he couldn't give us a total figure, but it was costing us \$125 an hour for his work. Mr. Reynolds asked for an estimate and was told around \$3,000-\$4,000. But so far it hasn't cost anything but we hadn't authorized him to file a lawsuit; and there's no charge when we meet with the County Commission to see if this can be resolved, which is the next step. We have filed one lawsuit already and this would be the second one.

Councilman Hughes remarked that we had a lawsuit and didn't file a cause of action and what may happen is that it may be consolidated with the other action. Attorney Roosa said he thinks that what the result may be is that this will be consolidated with that other action. Councilman Hughes asked additional legal questions. He said he was in favor of doing this and he made a motion to authorize Dick Roosa to file a cause of action.

**Discussion:**

Vice Mayor Mulholland said that although he had approved this in the past and thought it was a good deal and that it sounds very good to him tonight, he doesn't know if the Council made a mistake by proceeding without some detailed analysis. He's very concerned about the lack of documentation.

Mayor Murphy asked if this would compel the County Commission to sit down with us and discuss this matter, and was told yes.

**MOTION:** Made by Dan Hughes and seconded by Anita Cereceda that we authorize the Town Attorney to file this cause of action against the County. Passed 4-1 with the dissenting vote from Garr Reynolds.

Attorney Roosa said he had the original deed on the swimming pool from the County and he is going to take it to the courthouse and have it recorded.

**X. Approval of Minutes: NOVEMBER 1, 1999**

Corrections and changes to minutes:

1. Daniel Hughes stated that on the bottom of page 5, "S&E" should be "assignee." Also tenant company should have been capitalized.

In the 4th paragraph down on page 5, "pay" should read "pave."

In the paragraph beginning "Dan Hughes then asked Town Attorney Roosa," "... " should be replaced by "bind" and "Town Council" should be shown as "town councils."

2. On page 11, third paragraph from the bottom, show that Mr. Reynolds said he "studied" that document and not that he "started" it.

3. Councilmembers would like to see a recital of the motion to be discussed before the discussion begins.

**MOTION:** Made by Anita Cereceda and seconded by Ray Murphy to approve the minutes of November 1, 1999. Passed unanimously.

**XI. PUBLIC COMMENT**

**A. JOE CROKER**

Dr. Croker said he noticed that we'll be looking at an amendment to the personal water craft ordinance in the near future. After the first public hearing of the LPA, he had talked with one of the members who was under the impression that all the operators were for the change. He is here to say that all the operators are not for this change that we are going to be looking at soon.

Also at the same meeting, Marsha Segal-George had said that we don't regulate anybody else's business on this Island, but we do regulate the personal water craft industry. He said he doesn't mind a bit being regulated when it comes to safety issues and that no one in this business has more to lose financially than himself if another accident happens on this Beach. He is very interested in the safety issues, but who do we get to enforce them. He doesn't mind us wanting a safe place. He wants a safe place. On the other hand, he doesn't want to be limited in how he does his business. In the ordinance right now, he's limited as to whom he can do business with and he doesn't like that. He doesn't know how much longer he can stand by and have people dictate to him how he can run his business. He invited any of the council members to spend a day with him and see what the issues really are.

### **XIII. ADJOURNMENT**

The meeting was adjourned at 10:25 p.m.

Respectfully submitted,  
Lorraine Calhoun, Transcribing Secretary

### **Items for action from the meeting of December 6, 1999**

1. Attorney Roosa stated that we could continue the public hearing on the Paragliding/Ultralight Prohibition Ordinance along with continuing the ordinance to December 20.
2. The draft of the Community Resource Advisory Board will be scheduled for a first public hearing on December 20.
3. A waiver of the noise ordinance has been granted to the O'Gilvies for a period of 90 days allowing them to have band concerts on Sunday and holiday weekend afternoons on their property.
4. The Bay Beach court mediation is set for the last Tuesday of this month.