

**FORT MYERS BEACH
TOWN COUNCIL WORKSHOP ON THE POOL
APRIL 23, 1998**

NationsBank Building, Council Chambers
2523 Estero Boulevard
FORT MYERS BEACH, FLORIDA

I CALL TO ORDER

Mayor Anita T. Cereceda opened the meeting on Thursday, April 23, 1998 at 5:30 P.M. Present at the meeting were: Mayor Cereceda; Vice-Mayor Ted FitzSimons; Council Members Ray Murphy, Garr Reynolds, and John Mulholland; Town Manager Marsha Segal-George; Deputy Town Manager John Gucciardo; and Town Attorney Richard Roosa.

II PLEDGE OF ALLEGIANCE

All assembled recited the Pledge of Allegiance to the flag.

III PUBLIC COMMENT ON AGENDA ITEMS

There was no public comment.

IV OPEN DISCUSSION WITH MEMBERS OF THE FORT MYERS BEACH BUILD-A-POOL FOUNDATION BOARD

Kitty Taylor stated that the Foundation board members were here to update the council and to give information to the public.

A LAND ACQUISITION STATUS

Jennifer Kaestner reported on land acquisition for the county. She handed out a site plan that showed the seven parcels that have been purchased. (There are 6 houses on 7 parcels.) No condemnation was needed, and they are all owned free and clear. The parcels cost \$900,000, and they have all been vacated except one. The vacated houses have been boarded up today. The Bay Oaks staff is keeping an eye on property. Vicky Massey went with a representative from the sheriff's department to see when the last person will leave. The county was planning to do the demolition soon. But currently it is being negotiated to give the houses to the town, then the town will be able to auction them. The proceeds would go toward operation and maintenance or toward the equipment fund. (The pool will need concessions in order to generate revenues, so the funds could be used for refrigerators, ice machines, etc.) Mr. FitzSimons asked where the houses would go. John Gucciardo said the donation only has been confirmed today, so the details have not been finalized. Flynt and Doyle (home movers) are looking at the houses and to see which ones are appropriate for being moved. The County would convey the property to the town and the town would advertise the auction. The bidder would be responsible for the cost of moving, insurance, and returning the land to an acceptable condition, etc. This would also save the county the cost they were planning to spend for demolition. The County attorney has agreed to the plan and Mr. Roosa will look to see if there are any legal impediments.

B PLAN AND DESIGN

Curt McIntyre spoke about plan and design. He said they have had one meeting and have come up with a wish list. It is contingent on how much money is left over and how much property is available, so it may be a grandiose list. Items on the wish list include having a multipurpose swim area, multiple depths, 8 lanes, slides, deck and underwater lighting, handicap access, continuous-flow gutter, starting blocks, ionization purification system (more expensive up front than a chlorine system but will save money in the long run), geothermal heating system (solar heating doesn't stay warm in the winter and gas is expensive, plus a geothermal system will also cool the pool in the summer), dressing rooms, showers, and lockers, office area, storage rooms, picnic area, bicycle stands, landscaping, and an adequate parking area. If there is money left over, they would like an underwater sound system, heated decks, pool covers, and a covered spectator area. They would like 6 to 8 competition lanes at a 5' depth, then an area off to the side that graduates to very shallow. If we have diving boards, that area would have to be 13' and insurance would be very expensive. They plan to offer instructional swimming in the shallow end, and they would like to offer Red Cross instruction, CPR, small craft training, water safety instruction, scuba diving lessons, water aerobics, lap swimming, Special Olympics, competitive swimming, high school swim meets, masters swimming, water polo, volleyball, and synchronized swimming. During winter breaks college teams from up north come down and rent pools for training, which would be a good source of revenue at Christmas

break in off-hours. International swim teams also come here. They would like to see the pool used for recreational events, private group rental, community gatherings, summer day camp, school parties, and splash days.

C FUNDRAISING

Lee Conger said their committee has concluded that they need to be thinking on a much grander scale. So far they have had such fundraisers as the Virtual Swim-a-Thon, Taste of Town, Shrimp Festival, etc. They need volunteers, particularly those with some experience in fundraising. They have met with some professional fundraisers, but if anyone knows of someone who could give them aid, let them know. Their strategy is: 1. Annual gala event 2. Corporate appeal for annual donations 3. Brick sales 4. Grant research 5. Grass roots projects like the Holiday House, Shrimp Parade, etc. Mr. Mulholland asked about their goals. She said they are reevaluating. They originally said they will need \$80,000 per year, but it may make more sense to go for a major fundraising event to bring it all in at once. Fran Myers said they realize they are going to have to have a bigger fundraiser than they thought. In 1986, the Chamber raised \$250,00 in two months. We need to look not at the first \$80,000, but go for the whole thing. We may only have one shot at people. They have talked to a fundraising firm who critiqued them and gave them some good ideas. Another firm told them they need a small pamphlet when they go out to fundraise. They are working on a list of people to contact now. In addition, one of the cruise lines is now giving money to the Chamber Foundations for Kids, and half of that is going to the pool. It should bring in about \$50 to \$75 per day, which could bring in as much as \$25,000 per year. Sunstream has been a large matching donor also. They also plan to contact groups, such as the hotels, the restaurants, the jet ski operators, etc. and set a fund raising goal for them as a group. Mr. Mulholland asked what they would like the council do. Ms. Myers said they would like the council's support when they go out to solicit.

Mr. FitzSimons asked Mr. McIntyre if eight lanes were the minimum requirement. He replied that that is the ideal. Six would be OK, but it won't attract the swim teams. Mr. FitzSimons asked if there is a great demand for a diving facility. Mr. McIntyre said that some people say there is, but he doesn't see it. Debbie McIntyre said she spoke to the manager of the Golden Gate facility which features diving. They have a number of teams which come down, and that made a difference in which teams come here. Helen Caldwell spoke about grant money. She said it should be an ongoing effort and she would be glad to work with the grant writing committee. The committee should also use the expertise of Lee County school system, county personnel, Bay Oaks staff and city staff in pursuing grants.

Ellie Bunting introduced the members of the foundation. The newly elected officers are: Kitty Taylor, president; Eleanor Pearson, vice-president; Ellie Bunting, recording secretary; Judy Pizzano, corresponding secretary; and Debra McIntyre, treasurer. Other board members are Lee Conger, Bruce Fassett, Father Goggin, Rusty Isler, Gretchen Johnson, Ray Judah, Jennifer Kaestner, Michael Lund, Vicky Massey, Curt McIntyre, Maryann Monsrud, Fran Myers, Andy Priem, Roxie Smith and Sue Vayo. They have formed committees for fundraising, design, public relations, events, finance, and program. The committees are not limited to board members, and they are looking for community members to join the committees. They became incorporated in 1996, and the paperwork has been completed for not-for-profit status and should be finalized by mid-May. They have insurance for their officers and directors. They have adopted bylaws.

Mr. Murphy asked where we stand on the timeline. Mr. McIntyre said design is next, and they are looking for completion perhaps Labor Day 1999. Vicky Massey said an architect has been selected, and the county is finalizing his contract. They have selected a contractor, and hope to clear the land and begin construction in late summer. Lee Conger said they won't be able to do anything until three public input meetings, which will be in the summer. Fran Myers thanked the Council for saving the project, and thanked them for being courageous after the straw vote.

Note: during the following discussion, Mayor Cereceda excused herself from the remainder of the meeting due to illness.

V LEGAL DISCUSSION

Mr. FitzSimons said that he wanted to discuss the town's legal defense system. He said that several small townships have their legal people handle routine in-house matters, but when going to court, they bring in an outside firm, depending on the type of case it is. He has been getting letters and questions from some people who are frustrated with the town's inability to win its cases in this county. This county is known for its developmental permissiveness. Once this council has made a decision, he feels that we must be able to back it up. The question is how strongly we believe in the future and preservation, and how

willing we are to underwrite the expense of achieving it. He would like the new budget to reflect the necessity of beefing up our legal defense. Mr. Mulholland asked Mr. FitzSimons if he is talking about \$25,000 or \$200,000? Before he was on the council, there was at least one case that he thinks even F. Lee Bailey could not have won. He's not negative on the idea, but he wants more information. Mr. FitzSimons asked when we hear a case, what degree do we have to take possible litigation into account. He thinks we are paid to do what is best for the community regardless of whether it has any impact on whether we will be in litigation. He has never modified his thinking because of the possibility of litigation, but maybe he is wrong. Anita said she has never made a decision based on this. The applicant can threaten to sue, but it shouldn't sway them. But we must make decisions within current existing laws. If we choose something just because we want to see it, then we are going to be sued and we are going to lose. Mr. Murphy said you must decide what is best for the town, even though it may not be best but you. But if you know that the landowner is entitled to the use and you vote against it anyhow, is that best for the town? If it is legally indefensible, you are exposing the town to litigation.

Mr. Roosa said explained the difference between judicial and legislative action. Traditionally, the duties of the council are legislative. You can talk to who you choose, and you could vote for whatever. Legislators can be very pro a certain issue because that is their job--to make law. But a justice's job is to apply the facts of the case to law. A justice doesn't run for office and doesn't come with pre-conceived ideas, but a legislator can. When we have land use hearings, one of the main issues is the impartiality of the panel. Impartiality is not an issue when you are looking at an ordinance like the curfew issue, because that is legislative. But in a zoning case, you become a judge; that's why it is called quasi judicial. Because we live in the same community where you judge your peers, we can't help but have occasions for people to discuss the case and visit the site. But that is required to be reported. Even though that can be burdensome, it is serious and important. The council should take down the name and date for everyone who talks to them, and whether they are for or against. When it comes time to hear the case, they can divest themselves of all prejudice by disclosing it. But they must state that they can make a decision based on the facts as presented here.

The first issue is consistency with the Comp Plan, which is the Lee Plan. There are many things we don't want, but we are stuck with them. We have hired the county staff to say whether an application is in conformance or not. We must show consistency, then the burden shifts upon the opposition to establish facts which justify denial. In the case we lost (Mid Island Marina), the staff said the case was consistent. That shifted the burden over to us, and if we deny, we must have evidence that justifies it. There was no evidence that justified it. The council should do what is best for the community, but when acting as a judge, they must apply the facts presented at the hearing to the law. It may not be a decision you like, but you have to rule the law. In the resolutions that he presents to the council, he has paragraphs of findings, and he thinks it would be helpful to lead them with the law. If you find this set of facts, then you must find this decision. You don't have a choice in law. If the council would take the time to address the issues in the resolution and vote on them, the answer will fall into place and there won't be appeals to the court.

We are in the process of a new comp plan now, and then new land use regulations. Then there will be a big change because we will have fine-tuned this to our application. The regulations that are burdensome to Fort Myers Beach can be eliminated. As to the question of whether or not we want to hire a dream team, there is nothing wrong with that. But if we use a local law firm, we could run into a conflict of interest problem. Some of the best people he can name have appeared before us representing property owners. We could jump around picking a different attorney each time, but that is not good. It is better to have consistency. We are going to need some high-powered legal advise in writing our land use regulations, because the Plan is an outline and it is not self-implementing. If we get a law firm, perhaps from Naples, to help us in establishing our LDC, then they would be in a position to defend it. We spent a lot of money to get the Comp Plan, but it will be wasted if don't have useable and enforceable regulations to go with it. Give the same amount of thought to preparing the regulations in support of The Plan. The least expensive way would be to take the current plan and go through it paragraph by paragraph and adapt it to our code, but that is probably not the best way. We could have done that with Lee Plan, but we didn't--we came up with our own. He was impressed with the idea of making ours a more graphic presentation rather than a written form. But we are talking about major funds, perhaps \$100,000. Mr. Roosa said he is not a trial lawyer, but he knows a lot of governmental law, which he has been practicing for 25 years, and he has a quick understanding of the issues, if not a lot of experience in trials. Right now we have a square peg in a round hole, but that will get better.

Mr. FitzSimons would like to make the budget equal for planning and legal. Mr. Murphy said he is for backing winners. But when you have a loser, get out, and he sees a lot of losers coming up. If you base your decision on political pressure instead of legal, you have a loser and are throwing money away. Mr. Reynolds said he disagrees with that approach. He thinks that makes the council act as attorneys. He said Mr. Roosa represents us and guides us and the County staff brings the facts. We rule according to our experts and we just approve what is strongly recommended to us. If Mr. Roosa says we must not go in that direction because it is a losing cause, we should listen. But if a council member says that, it doesn't mean anything. He believes any case can be lost and any case can be won. In certain areas we need expertise. Even before incorporation they even talked about hiring a corporation, not an attorney. That firm would make a decision which attorney to put on a case. He thinks we need to rethink that because our win/loss record is embarrassing. He doesn't think it is because the council has made bad decisions. Don't vote based on whether we have a case, vote on the facts presented to them. Mr. Mulholland said if we have a hearing, he doesn't decide until he comes and sits and hears. You can't come in with preconceived ideas. Our Comp Plan is not in force and we are stuck for the time being. On occasion, the staff from the county has been wrong and overstepped their bounds. He feels that he knows as much about the Comp Plan as anyone, and it is a good one. What Mr. FitzSimons is proposing has a lot of merit, but he would like to see how much it would cost the town, and he wants to see how it would benefit the town. Mr. FitzSimons asked if the council objected to public comment.

VI PUBLIC COMMENT

A ANDY PRIEM

Mr. Priem said he thinks we are most vulnerable when the county recommends going with an applicant and we go against them. It does not seem as bad when the county staff recommends denial and the council votes for. Certain cases are not likely to go to litigation. But the council needs extra training when it is likely to go to litigation. The council must have the facts down cold when they make a decision. They are given many facts, and many are irrelevant. They must be prepared to know what is law and facts. The other thing is that the county staff does their homework, then the LPA makes their recommendation. If the council can rely on the LPA, the homework on the council should not be as great. He gets the feeling that the county did its work and the LPA, then the council starts from scratch again. It seems they need to rely on LPA and their facts. Mr. Mulholland said he has been on both bodies and has respect for LPA. But the LPA works for the council and may agree with the council 9 out of 10 times, but he still has to be convinced he has seen everything. Mr. Priem said he thinks the council should have ex parte forms by their telephone and write down everything just in case it might ever come before them. Mr. Roosa said the LPA is advisory, and he would be concerned if the council never overruled the LPA because that would be denying the applicant a fair and impartial hearing. Many times when an applicant goes to the LPA, they find a defect and they fix it before it gets to the council. Mrs. Segal-George said there are two models. The county's procedure is that after the hearing examiner, the case is sealed, and only evidence and witnesses that are submitted at the hearing examiner can come forward. The town did not follow that model. People who did not speak at the LPA hearing can come to the council hearing and new evidence can be admitted. She said that people didn't like being closed off from future hearings.

B JACK HENRIKSEN

Mr. Henriksen said he is not an attorney, but he disagrees that the law is readily identified and interpreted by lawyers. It is not true--it is all interpretation. That is why you see all kinds of settlements. Some attorneys just present a case better, or evaluate it in a different way. You need the best legal help you can get. Do what you think is right based on the information you are given, then go for it with the best legal help you can get. Mr. Reynolds said he has attended the LPA and it is not the same people who show up at the council hearings. Fewer people show up the second time. So the council is getting additional views, not just a replay.

Mr. Roosa spoke about the adversary aspect. An attorney has generally represented the applicant, in the cases where we have gone to court. The county staff doesn't have an attorney with them at the hearing to see to it that sufficient evidence is presented to support their case for denial. The only attorney that shows up is the one for the applicant. When the county agrees with the applicant that it is consistent, and you have the attorney putting on evidence supporting the applicant, then if the council rules against, it would take a very skillful lawyer to win that case, because the council is voting against the law. When the staff recommends denial, then the LPA recommends denial, all the council has is the applicant's expert

opinion, but we don't have the other evidence that we might need that a lawyer might put on. We can't retain an attorney to represent the town before we have made a decision. Since we don't know ahead of time how the council is going to vote, we don't know the "city's position" until after the hearing. You would be using taxpayer money to make a decision against another taxpayer. Judges have an advantage because they have two lawyers arguing equally. The applicant has a lawyer, but the next door neighbors don't usually hire a lawyer to testify to factual issues.

Mr. Mulholland asked if we are violating some rule by discussion this when it is not on the agenda. Mr. Roosa said this is workshop so it is legal. Mr. Reynolds said recently had situation where an attorney questioned one of our planners and many in the audience felt that was a little harsh. Why didn't we have someone defend or respond for her? Mr. Roosa said the town attorney represents only the council, not the county staff. It is up to the chair to say something if someone is abusive or out of line. There are many times he could have asked questions or challenged testimony or asked questions to bring forth facts, but that is not his role. He is to ascertain what the council wants and then protect them. Mrs. Segal-George said she represents the LPA members in the same way, and she will answer questions only if they ask her.

V ADJOURNMENT

The meeting adjourned at 7:28 PM.

Respectfully submitted,

Peggy Salfen
Recording secretary