

**FORT MYERS BEACH
TOWN COUNCIL WORKSHOP
October 15, 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, October 15, 1998 at 6:35 P.M. Present at the meeting were: Mayor Cereceda; Vice-Mayor Ray Murphy; Council Members Daniel Hughes, Garr Reynolds, and John Mulholland; Town Manager Marsha Segal-George; and Town Attorney Richard Roosa.

II PLEDGE OF ALLEGIANCE

All assembled recited the Pledge of Allegiance to the flag.

III COUNCIL DISCUSSION ON MOSS MARINE/SNUG HARBOR TRAFFIC PATTERNS

Mr. Roosa recapped the issue regarding the traffic. He said that there is a business surrounded by residential property. The town's concern was potential traffic on a residential area. The town wanted all ingress and egress to use the commercial easement rather than the residential street. But there was a petition to the council because of the potential danger in the commercial area, and the council temporarily transferred the ingress through the residential area and the egress through the commercial area. The council made that unilateral change because of an emergency life-threatening concern. The judgement states that they have to ingress and egress through the commercial area, so if that change should be put into permanent effect, the town needs to go back to court and modify the order. The council has the authority to address the safety issue, but they do need to modify the order.

Michael Ketchmark, manager of Marina Village at Snug Harbor, said that the condominium straddles the easement. There are 25 residential condos, a play area, a swimming pool, a recreation room and a picnic area. They are a time-share, so they have many people who are unfamiliar with the easement situation who are crossing from one area to the other through the parking lot. They are crossing through something that looks like a parking area, not a street. They are exiting the building in a blind situation. They are not used to looking for traffic in that place. They have small children, though more in the summer than in season. He does not have a solution. The Board of Directors is not opposed to the boat, just the safety of their residents.

Mayor Cereceda said that the temporary solution took half the traffic away. Did that help? He said that he and the board do not believe there is a solution. But they believe they have the best possible answer now with ingress on Third Street and the exit through the easement. Exiting traffic is more controlled, slower and not as unsafe. What they really want is no traffic, but he doesn't believe that is going to happen. Mr. Reynolds asked if he would encourage the residents to turn their children loose in the parking lot. Mr. Ketchmark said of course not, but the little children, even when they are with their parents, are exiting into an unnatural area. They have not posted any signs because he is afraid of the liability issue. They have not retained an attorney. Mr. Ketchmark clarified that on one side is the building, the picnic area, and the swing set. On other side of the parking lot is the health club and recreation area. The easement is in between and they cross it every day. Mr. Reynolds asked if there is any place to put a fence so that the children couldn't cross. Mr. Ketchmark said he has cut back the vegetation severely, but the building itself makes it blind and he can't move the building. Mr. Hughes said that young people can go anywhere that their parents let them. When he was over there, he saw a sign that says the clubhouse is restricted to 18 and older except when accompanied by an adult. The club house is not basically a place for unattended children.

Ed Cusick said that he and a partner own Snug Harbor. He said this is private property and no one can tell them what to do with their property. In the settlement, the town gave away some things they had no right to give away. Not even governments can negotiate private rights. The council knew nothing of this issue before he brought it before them so he is not blaming them. The order is illegal and the town attorney has agreed to that on the record. If they choose, they can totally shut down that use because it

clearly overburdens the easement. But they will allow it as an exit for the Big M. The residents of the adjoining residential streets are not happy because the traffic is significant. The owner of the boat was not required to do a traffic study, but now the point is moot. Those residential streets have been the primary use for Moss Marine for years. It is a public road. But they are willing to take half of the traffic as long as it is exit only. They do not have to, but they will give it a try. If it does not work, they will all have to go through the public road. There is no good solution, and no one will be 100% happy. They are trying to be good neighbors. The difference in the traffic is that when customers arrive, they arrive by ones and twos and there is no immediate flow of traffic. When you enter through the easement, what happens is they see the big Moss Marine sign and they step on it because it is so wide. It is extremely dangerous. Third Street is a lot narrower and people tend to drive slower in a neighborhood. On the way out, they all leave at the same time, so the cars back up. So twice a day at a predictable times, they know that Moss Marine's patrons will be exiting across the easement somewhat slowly. Legally the town had no right to give away their private property rights. They will not make an issue of it as long as the compromise is accepted. They will watch it and see what happens.

Mr. Mulholland asked how long they will try it. Mr. Cusick said they will try it through season. During season last year it wasn't really a problem with this arrangement. Then they went to the negotiated settlement and it was a disaster. They would like to study it in season. Mr. Reynolds asked why they are here since he says we have no rights. Mr. Cusick said the council didn't know about the issue in June. It was only after someone faxed him a copy that he knew it was in there. The Council voted in good faith for the settlement agreement, but it just wasn't legal.

John Teal stated that he lives across the canal on Matanzas Court, so the traffic problem does not really affect them. His main concerns are that the big busses leave their diesel engines running for hours, and that the boat blocks their view of the back bay. He knows that is not the issue tonight, and they have called about the busses and they have shut off the diesel engines. What he sees about the traffic is that people are speeding when they are late.

Mr. Hughes asked if some of the corollary issues can be raised now that Mr. Freeland has applied for a DRI. Mr. Roosa said that the development of the property as approved by the order has been approved by the council. The town's position with regard to the DRI is that that development as proposed is in compliance. There is no further need for any action by the town. There is a statutory requirement in the DRI where the town may have to hold a hearing. We may have to petition the court for declaratory relief. If they hold a hearing, the council would have to make a finding, and they have already made one. If they can make a finding different from the order, it might place them in contempt. As it stands tonight, the town's planning and involvement is complete. We have accepted it as it is. Mr. Hughes asked if that would necessarily preclude the residents from raising these issues. Mr. Roosa replied no. Mr. Hughes said that in paragraph one of the agreement, the parties agree that the project is not a development of regional impact. On the other hand, paragraph two states that if Freeland applies for a DRI, we will not oppose it. Mr. Roosa said that in order for the regional planning council to determine that it is not a DRI, they have to file an application. Mr. Hughes said there is a judicial ruling that it is not a DRI. Mr. Roosa said the state of Florida was not a party, so they are not involved. It is not a DRI only as far as the town is concerned.

Mr. Mulholland asked for a reminder of the chronological events. Mr. Roosa said that one morning a ship appeared. When confronted, it was Moss Marine's position that they were entitled and no permits would be required. Based on that, the town filed for an injunction in November 1997. One of the complaints was the overburdening of the easement. At that time Moss Marine was two parcels although it is now one. One of the parcels gives an easement across the 30' access to Mr. Freeland. The other parcel clearly had access through public streets. When we filed the lawsuit, it was our position was that the change of the use of the Marina would be an overburdening to that easement. That would be a taking and could be enjoined. We did not pursue that because of the issue of standing. There may have been a cause of action because of the overburdening, but there was a question of whether the town was the proper party because it is private easement. Mr. Roosa said he has always taken the position that it was overburdening, but there is some question as to that second parcel's right to use that easement, because the easement went to a person and not to the parcel. The other counts in the complaint were that it should be a DRI, it was a nuisance based on traffic, it was a violation of fire code because of parking in a building where there are boats, etc. When it went to trial, the judge was not persuaded to issue an injunction. An injunction is an extraordinary writ and the burden for an injunction is not the same as the burden for damages. We failed to establish the burden that there was sufficient need for the injunction. It was clear that the judge was not going to give anything that we asked for. Afterwards the two attorneys (Roosa and Lennick) drafted a

stipulation consistent with what the judge ruled but trying to work out something that would be meaningful for both parties. After the order was signed, then Mr. Freeland appealed it. There was a letter order that denied the injunction. As a result, they worked out the stipulations, it was submitted to the judge and signed on June 7, 1998. Then the appeal was dismissed. Also there was a code enforcement action that we had filed and we dismissed it. Everything was resolved with this one order. Since then Moss Marine has filed for a DRI and it is their position, as far as the town is concerned, that the stipulations in the development order that was approved by the court order have solved this issue for the town and we would have no involvement in the DRI. But we are now told that we may have to hold a public hearing. The only reason to do that is to make some conclusion, but the conclusion is already in the order. If there is a conclusion that can be made that would differ from the court order, then he needs to petition the court. If we can't hold a hearing, it may stop the DRI process.

Mr. Hughes said the DRI is an administrative hearing and the lawsuit is a judicial hearing. If the DRI were another judicial proceeding, the doctrine of res judicata and/or collateral estoppel might have applied. You can't re-litigate things. But are there issues that would be presented if a hearing is held that were not litigated and the public and town did not have an opportunity to have input on at the time of the compromise and settlement agreement? Mr. Roosa said public input and litigation are two separate things. He does not believe there are any issues that have not been litigated. There was no public hearing, because there is none in the judicial setting. Mrs. Segal-George said there could be regional issues that could be brought forward by the staff of the regional planning council in the hearing that would never have been discussed on a local level. Mr. Hughes said we only deal with local impact and a DRI is regional. Mr. Roosa agreed that the only issues addressed were local.

Mr. Roosa said we can only modify the agreement if all the parties are in agreement. Mr. Murphy said he had hoped that the affected residents would step up and let us know the problems to see if we could find a solution. He said it seems that the problems are with the ingress because there are people who are speeding. It seems that there are enforcement issues to enforce the laws we already have. When a deputy is there, there is compliance. If that could be part of the solution, he would be willing to support it. Another option is flashing lights or signage. But he wants to hear the specific problems.

Skoop Kiesel said he has lived here for 40 years. He lives on Bonita Street near Moss Marina and he sees no great amount of traffic flow influencing him. Perhaps there is more traffic that goes straight ahead and turn on Harbor Street, but he is not sure. His son feels that the present system seems to be working out fairly well. It seems like a viable compromise. He mentioned that before Hurricane Donna, there used to be a couple of fish houses, but both were destroyed. After that, Lee County said that no heavy industry could be built on the Estero side of the bay. There was an ice loading and fueling station on Del Mar, and that closed too. Mr. Reynolds asked if the traffic goes by Mr. Kiesel's house. He said probably 90% goes down by his house and turns on Harbor Court. The traffic moves at a mannerly pace. The traffic comes within about two lots of his property. He hasn't heard any complaints. He could see where there could be some problem on Third Street. He said that Moss Marine has actually been a better neighbor than he thought they would be.

Bill Cretien said that he lives on Bonita Street next to Moss Marine. He agrees with Mr. Kiesel. Since the boat has been there, the neighborhood has cleaned up, and there is more oversight of the parking lot. It is a nice neighborhood and he gets along with the employees there. They line the cars up about 25 feet from his bedroom window, but it is a done like a first-class operation.

Sandy Teal said that she lives across the canal on Matanzas. She observes people arriving late to work. There are a lot of residents who are not back yet, and she wondered if this meeting is premature. Mayor Cereceda said we sent letters to everyone in the neighborhood, yet the key people are not here. There were not even any letters or voice mail. We can't leave people in limbo forever. We can't shut things down when nobody is here. We have to do things and we have gone out of our way to accommodate people. Ms. Teal said it is an issue between Moss Marine and Snug Harbor and whether that easement will be used. She is disappointed to hear that it is not a resident's issue and not much they can do about it. Mr. Murphy said that is not entirely true. That is what is causing the problems, but they are here to help the residents with their problem. Ms. Teal asked why are we not using the easement. Why did poor Third Street and Harbor Court get stuck with all the traffic? Mayor Cereceda said for years if you went to Moss Marine, you went on Third Street. You didn't use the easement. You didn't even know it was there. The bottom line is that the court told us we couldn't tell them the boat can't be there. She thinks after hearing everything, this is probably the best solution, so as not to overuse any one street. Mr. Mulholland thanked Ms. Teal for her letter. She mentioned noise, traffic, the height of the boat and the water flow in the canal.

He appreciated the comments. Ms. Teal said she forgot to say that she has lived on the north end for 11 years and she has to leave the north end for work and church and shopping. It is getting harder and harder to get off because of all the trucks parked there, etc. They only have one way to get off the island.

Don Oakes stated that he lives across the canal. In 1997 he asked for a variance to build a deck. The county sent out letters to everyone within so many feet. He had to have a public hearing so his neighbors could say whether or not it would block the view. But they can put a big boat there and block his view with no public hearing. Mr. Oakes said that the present traffic pattern is better from where he lives because the traffic exits past Snug Harbor late at night and it cuts down on the noise because they are going the other way. The noise and the view are his big issues.

Joe Croker said that he doesn't live in the area, but it looks like from a legal view that there is no option, so the traffic will continue to go the way it is going now. We will have some angry neighbors because of the ingress, but if they pull the use of the easement, you will have people doubly mad. It seems better to have them only singly mad.

Mr. Reynolds asked Mr. Roosa about what Mr. Cusick said about closing the easement. Mr. Roosa said they would have to go to court. They can't put a barricade up. In an easement you have a dominant and servient tenant. The servient tenant is the property owner of the easement. The property owner has standing to raise the question about whether the easement is overburdened and who has the right to use the easement. That has to do with the second parcel. The next question is if the arrival of the boat created an overburdening. If it did, you don't have an easement anymore. That would put all the traffic on the public road. He felt that there was an 80% chance that the judge would rule it an overburdened easement. If the lawsuit is not filed and this compromise its reached, it would never happen.

Mr. Cusick said what he meant to say was they would take legal remedy to shut down that specific use of the easement, not the total use of the easement to bring big boats in and out. But this use was not the original intent of the easement, and it is overburdened by this use. He addressed Mrs. Teal's concerns. He is amazed that the people who complained loudest are not here. They were here when we set the workshop. He talked to many of them and told them it is a property rights issue. They are trying to be good neighbors and do not want to be known as big business bullies. It is a lot easier to be good neighbors. He is sympathetic, but he is amazed that they are not here. Either it is not that bad or they are resigned that there is nothing they can do.

George Crawford stated that he is a private engineer. He said this is a sticky issue but that Mrs. Segal-George had asked him to help her out. He is not a lawyer. The easement may be a problem if it is overburdened and someone may be able to go to court. The location of Moss Marine is such that you are either going to use the easement or the public streets. Prior to bringing in the Big M, it wasn't much of a problem, although at times the residents were unhappy. He is disappointed there are no neighbors from Third Street and Harbor Street here. He would suggest that the council defer any action and see if there are some things that can be done by Big M and by the town to slow traffic down. If they put out brochures that tell how to get to their place or if they communication with customers over the phone, their employees can be told to give a spiel about using these streets but reminding them that they are neighborhood streets and are not a thoroughfare for speeding. But if people are running late, they will step on the accelerator even though they know better. But statistics show that the biggest violators of speed in neighborhoods, are the neighbors. There are some things that can be done, such as speed bumps. But there are some liability issues if they are not properly placed, and he is not sure they will do any good. He would not do much now since the neighbors aren't here. He does not believe that putting up speed limit signs will do any good. Mayor Cereceda asked if it seemed logical and rational to split the traffic like they did. Mr. Crawford said leaving traffic is more controlled and slow and it only takes about 15 minutes to empty the parking lot. But coming in, people are spread out over time, probably over about 45 minutes. Snug Harbor is also a neighborhood in a sense, and you don't want to hurt that neighborhood either, even if it is a time share. Splitting the traffic is helpful. It is difficult to use a deputy because who would take the burden? When police are there, everyone becomes a model citizen. Mrs. Segal-George said that one thing she hears from Harbor Court is about the delivery situation, which hasn't been addressed today. Is there a way to direct the truck delivery away from the residential streets? Mr. Crawford said he doesn't know how many trucks there are. If there are only a few, maybe Mr. Cusick would agree to let them go over the easement. Possibly Mr. Freeland could direct his operation to caution the delivery trucks, they that will have to drive slowly. Mr. Mulholland said that noise was also mentioned. Would Mr. Crawford suggest some shrubbery on Third Street? Mr. Crawford said the road right of way is very narrow, and unless you do a very thick vegetation barrier, it probably wouldn't help. He said it also causes a maintenance problem. Mr. Hughes

talked about the truck situation. He asked if there are weight limitations on the streets. Mr. Crawford said if the town chooses, perhaps there can be. But you can't restrict the ability of Moss Marine to receive their deliveries. The easement was originally for delivery of boats, so it seems that would be a logical place for truck deliveries. He said he thinks the problem is that the truck drivers are not being careful enough. There are probably some things that can be done on the easement that might help, but the town can't make them because it is private property. They can mark some edging so that the roadway is defined so people will know to expect traffic. Not that a car couldn't cross the line, but it would define for the pedestrians that when they get to the yellow line, that it is a roadway. He said he believes that if there were some signs by the condo notifying the people of the problem, they might be better off legally than if there were no signs. They should consult an attorney to deal with that question. People come from all over the world and they are not aware of the problem.

Mr. Roosa said as it stands now, we have changed from the original order. There are a couple of unanswered questions. Are there any traffic engineering improvements for the road and also the easement, and if so, would the city be willing to pay part of the cost? Or will Moss Marine or the property owner? He thinks it would be between the town and Moss Marine. Also what can be done to improve the traffic flow through the whole area, particularly the residential area? He would like more information from the engineer, and then to have a meeting with Mr. Lennick to work out some language that Mr. Crawford can agree with, and then bring it back to the council. Mr. Crawford suggested that Mr. Cusick be included too. Mr. Lennick said that the town has \$12,000 for impact fees for road and traffic that Mr. Freeland paid. That is enough to pay for the signs, striping, etc. The impact money should be used to relieve the impact.

Mr. Reynolds said that Mr. Roosa is suggesting the town spend money on private property. Mr. Roosa said we have made a decision that affects private property. That was based on the position of Moss Marine that they were entitled to use of the easement. Without exploring it further, we signed the order. But the town has an interest because of the impact on the community. Part of that impact is relieved by the easement. If all the traffic had to go through the residential streets, it would be disastrous. He would disagree that we could not spend money on the easement. It is a proper public purpose. He disagrees with Mr. Lennick that we already have the impact money to do the work. It is the dominant tenant's responsibility to maintain an easement. He is not sure which portion would be for improvements for the general public and which would be matters for maintenance, which should be the responsibility of Moss Marine. Mr. Reynolds said we would have to make a policy and do that for other areas too. Mr. Roosa said we must take action where it is necessary to protect the public. Mr. Murphy said this problem is just one issue we will be addressing in the next few years. It is a dynamic area that is changing rapidly and will continue to change. In the future we will be re-addressing the traffic of Crescent Street and Times Square continually. There has been a lot of talk about parking garages and there seems to be a general consensus is that a parking garage will help. Someone just has to stand up to the plate and do it. He thinks it will come from the private sector. He invited Mr. Lennick, Mr. Freeland, and Mr. Cusick or any of their friends to explore the possibility. Moss Marine can fill it up. The whole core area will be redeveloped in the next few years. There is a tremendous opportunity for someone to do something. Mrs. Segal-George reminded everyone that we have a charette planned for November 7 at 9 AM. All that planning is going to have an impact on those properties in that area. She encouraged everyone to attend. There will be designers here and the ability to make suggestions and communicate ideas.

Mr. Hughes said there was no one here tonight who said that the revised ingress/ingress thing was not good, and everyone said this seems to be the lesser of evils. Therefore he asked Mr. Roosa to proceed with the amendment of the settlement agreement that addresses the ingress and egress that they can all agree to, with the additional caveat that if the parties can come up with something that will improve the situation, that that be added also. He feels we have done what we can do.

IV ADJOURNMENT

The meeting was adjourned at 8:23 PM.

Respectfully submitted,

Peggy Salfen
Recording Secretary

