

**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. There are at least two small children in residence now. 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. Exit 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 egress 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. Reynolds said he has been told this is a 40' easement. Estero Boulevard is 50 feet. Isn't there some area that is not needed for traffic? Mr. Ketchmark said the parking lot has been there 16 years. Mr. Roosa said the easement is 30 feet. Mr. Hughes said 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, but they should have been consulted. The order is illegal and the town attorney has agreed to that on the record. He read from the minutes. 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. The applicant feels they were not required to apply. The judge said that this is how he was going to rule so we might as well agree to it.

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 ingress and egress 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 some question as to that second parcel's right to use that easement, but the easement went to a person and not... But not the same position of the circuit judge. 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. The burden for an injunction is not the same as the burden for damages. We failed to establish the burden that there was need for the injunction. It was clear that the judge was not going to give anything. Afterwards the two attorney (Roosa and Lennick) drafted a stipulation consistent with what the judge ruled. The order was signed, then Mr. Freeland appealed it. During the appeal, we also filed. There was a letter order that denied the injunction. They worked out the stipulations. It was submitted and signed on June 7, 1998. Then the appeal was dismissed. Also there was a code enforcement action and we dismissed it. Everything was resolved with this one order. Since then Moss has filed for a DRI and their position is 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 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 said the only issues addressed were local.

Mr. Roosa said we are here to discuss the traffic issue and 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 the problems are with the ingress. There are people who are speeding. Seems that there are enforcement issues to enforce laws we already have. We have a situation on Estero every day in the school zone of 15 mph. We have a sheriff's deputy there to enforce. When deputy there, there is compliance. Also they are adamant a out it and people are cited at that location. Seems that this is something that works. If that could be part of the solution, he would be willing to support it. Another option is flashing lights or signage. He wants to hear the speciac problems.

D SKOOP KIESEL

Live here for 40 years. Live near Moss Marina. He sees no great amount of traffic flow influencing him. He lives on Bonita. Perhaps more traffic goes staright forwar d and turn on Harbor but he is not sure. His son feels that the present system seems to be working out fairly well. Seems like a viable compromise. In future deliberation. Hurricane Donna, there used to be a fish house and another one where restaurant. Both wer destroyed. Lee said no heavy industry could be buildt o nthe estero side. There was an ice loading and fueling on Del mar and that closed too. Mr. Reynods asked if goes by. He said probably 90% goes down by his house and turns on harbor court. Traffic moves at 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 on Third Street. In fact they have beena better neighbor than he thought they would be.

E BILL CRETIEN

He lives on Bonita next to Moss Marine. He agress. Since boat has been there, the neighborhood has cleanedup, more oversight of the parking lot. It is a nice neighborhood and he gets along with the employees there. They line the cars up 25 feet from his bedrrom window and it is a first-class operation.

F sandy teal

Ms Teal said she lives across the canal on Matanzas. She observes people arriving late to work. His rpblem has been turned over to the neighborhood. There are a lot of residents who are back yet. Are we premature. Mayor Cereceda said we have even sent letters to everyone. We can't leave people in limbo forever. The key people are not in sight. There were not letters or voice mail. 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 disapointed to hear 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 said 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 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 for the letter. She mentioned noise, traffic height of the boat and water flow in the canal. He doesn't agree this is a done deal but he could be all wrong. He appreciated the comments. Please continue. Ms. Teal said she forgot to say she has live on north end for 11 years and she has to leave north end for work and church and shopping. Getting harder and harder to get off because of all the trucks parked there etc. They only have one way to get off.

DON OAKES

LIVES ACROSS THE canal. In 1997 he asked for a variance to build a deck. Sent out letters to everyone within so many feet. He assumes Moss Marine has the right to block the view. He had to have a public hearing so his neighbors could say no so block the view. But they can pull up a big boat and block his view. Mayor said there was public hearing because there was no requirement. Mr. Oakes said from where he lives 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 view is his big issues.

Joe Croker

Dr. Croker said he doesn't live in the area, but looks like from a legal view no option, so can continue way it is going and have some angry neighbors because of the ingress, or they could pull the use of the easement, and you will have people doubly mad. Seems better to have them only singly mad than doubly.

Mr. Reynolds asked Mr. Roosa on what Mr. Cusick said about closing the easement. Mr. Toos said would have to go to court. Can't put a barricade up. An easement dominant and servient tenant. Servient is the property owner of the easement. The property owner has standing to raise standing about whether overburdened and who has the right to use the easement. That has to do with the second parcel. The next question is if arrival of boat creates an overburdening. If it didn't, you don't have an easement anymore. That would put all the load on the public road. The likelihood is likelihood of lawsuit. 80% change judge would rule it is overburdened easement. If lawsuit is not filed and compromise is 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 was not the original intent 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 right issue. They are trying to be good neighbors and do not want to be known as bad business bullies. It is a lot easier to be good neighbors. He is sympathetic, but he is amazed. Either it is not that bad or they are resigned that there is nothing they can do. The compromise as an amendment is a property rights issue and to try to do what is right as a neighbor.

George Crawford private engineer. This is a sticky issue but MSG asked her to help 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. Location of Moss Marine is that you are going to use the easement of the public streets. Prior to bringing of the Big M it wasn't much of a problem although at times they were unhappy. He is disappointed there are no neighbors from Third Street and Harbor. He would suggest that the council defer any action and see if there are some things that can be done by Big M and town to slow traffic down. If they put out brochures that tell how to get to their place or communications over the phone, they can be told to give a spiel about using these streets but reminding they are neighborhood streets and are not a thoroughfare for speeding. But if people are running late, you step on the accelerator even though we know better. Biggest violators of speed in neighborhood, are the neighbors. There are some things that can be done: speed humps. There are some liability issues if not properly placed. 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 not 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. Coming in, people come in over time, probably over about 45 minutes. Snug Harbor is also a neighborhood in a sense. Don't want to hurt that neighborhood either, even if it is a time share. Splitting is helpful. It only takes about 15 minutes to empty

the traffic so the burden is shorter. It is difficult to use a deputy because who would take the burden. When police there, everyone becomes a model citizen. Perhaps breaking the traffic has alleviated the problem or they don't think it will help. MSG said one thing she hears from Harbor Court is 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. If there are 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 obey and drive slow Mr. Mulholland said noise was mentioned. Would he suggest some shrubbery on third. Mr. Crawford said the road right of way is very narrow, and unless do a very thick vegetation it probably wouldn't help. MSG pointed out that traffic engineers don't like shrubbery. Mr Crawford said it also causes a maintenance problem. Mr. Hughes talked about the truck situation. Mr. Hughes asked if there were weight limitations on the streets. Mr. Crawford said if the town chooses, perhaps. But can't restrict the ability of Moss Marine to receive their deliveries. The egress was originally for delivery of boats, so seems that would be a logical place for truck deliveries. Mr. Crawford said he thinks the problem is that the truck drivers are not being careful enough. There are probably some things on the easement that might help, but the town can't make them because it is private. Can get some edge so roadway is defined so people will know. Not that car can't get across that line. But it would define for the pedestrians that when get to the yellow line that it is a roadway. Mr. Murphy said if they would choose that themselves it might help. Mr. Crawford said he believes that if there were some signs by the condo notifying the people of the problem, they might be better off than if there were no signs. They should consult an attorney to deal with that question. People come from all over and they are not aware. It looks like a driveway for the condominium. Mr. Murphy said there are people from all over the world who are unfamiliar with our roads.

Mr. Hughes said this a workshop. We have not agreed to the modifications. Mr. Roosa said as 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 Moss Marine or the subservient 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. He would like more info from the engineer, and then meet with Mr. Lennick to work out some traffic that Mr. Crawford can agree with and then bring back to the council. Mr. Crawford suggested that Mr. Cusick be included too. Mr. Lennick said this is a fine expert. We have \$12,000 for impact fees for road and traffic. That is enough to pay for the signs, striping, etc. The impact money should be used to relieve the impact.

Mr. Reynolds said Mr. Roosa is suggesting the town spend money on private property. Mr. Roosa said somebody else said that. 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. The use of the easement is a help because if. He would agree that was proper public purpose. He disagrees that. It is the dominant's tenant to maintain the easement. He is not sure which portion would be improvements for general public and which would be matters for maintenance which should be the. Mr. Reynolds said we would have to make a policy and do for other areas too. Mr. Roosa must take action where 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 and will continue to change. In the future we will be readdressing the traffic of Crescent and Times Square. Parking garages 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 asked Mr. Lennick, Mr. Freeland, and Mr. Cusick know some guys with money, to invite them to invite friends to explore the possibility. Moss Marine can fill it up. The whole core area will be redeveloped. There is a tremendous opportunity for someone to do something. MSG said we have a charette planned for Nov at 9 AM so all that planning is going to have an impact on those properties and that area. She encouraged everyone to attend. There will be designers here and the ability to make suggestions and communicate ideas. Mr. Hughes said no one here tonight said that the revised 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 caveat that the parties come up with something that will improve the situation, that that be added also. He feels we have done what we can do.

The meeting was adjourned at 8:23 PM.

IV Moss Marine/Snug Harbor traffic patterns (need to notify property owners)

V Public comments

VI Adjournment