

**FORT MYERS BEACH
TOWN COUNCIL MEETING
DECEMBER 14, 1998**
NationsBank Building, Council Chambers
2523 Estero Boulevard
FORT MYERS BEACH, FLORIDA

I CALL TO ORDER

Mayor Anita T. Cereceda opened the meeting on Monday, December 14, 1998 at 9:15 A.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.

Mr. Ebellini objected that it is not proper to have public input in a quasi-judicial hearing for an appeal of an administrative decision. The public, as a third party, does not have standing in this proceeding. On advice of town counsel, the council made note his objection. Mayor Cereceda noted that those people could speak about Waterside during the public comment, so it makes little difference.

Mr. Roosa pointed out that public comment now is not under oath, but during the public hearing, it will be under oath and will be part of the hearing record.

III PUBLIC COMMENT ON AGENDA ITEMS

A REYNOLD FINNEGAN

Mr. Finnegan lives at Hibiscus Pointe year round. He is not so much against the third building at Waterside, but there are proposals we do not know about for 5 or 6 other buildings as well as the land that abuts Estero. He requested that there be some sort of impact study with respect to the rest of Bay Beach. He asked that they not approve buildings piecemeal. There is only one road going in and out, and one set of utilities.

B HARRY GOTTLIEB

Mr. Gottlieb suggested that all matters of Bay Beach should be considered in the context of traffic problems and traffic evacuation routes. Bay Beach is too dense and it is a threat to the health, safety and well being of the citizens. It should be reduced to 6 units per acre as in the Lee Plan. This developer has acted against the public interest by building docks that overcrowd the canals, terminating the tennis club, reducing the length and challenge of the golf course, and discharging into the bay. The council has the opportunity to exercise their vision of what the rest of the town should be. He speaks for himself and Responsible Growth Management, who authorized him to speak.

Mayor Cereceda reminded the public that the council can only consider the height of Waterside and the parking variance for Hibiscus Point. She asked the public to please keep their comments to those two issues.

C JAMES HARVEY

Mr. Harvey lives at Hibiscus Pointe. Even though the issue is isolated to height, it is hard to separate the package. He was given a key to a tennis facility that does not exist anymore. We need a comprehensive plan that water will be taken care of, that fire safety is not overstressed, etc.

D HAROLD HUBER

Mr. Huber lives at Harbor Pointe. The council is being asked to approve a 10-story building at Waterside. He asked them to put a condition on it if it is granted, that they not put 10-story buildings in other locations. He also said that the total number of units planned or built is 1731 units, but Santa Maria is paying \$7 per month to the Estero Bay Improvement Association and they are not included in the 1731. What was included in the development of the 182 acres to come up with the number 1731?

E BETTY CRAWFIS

Mrs. Crawfis lives at Bay Beach. She said there are issues that the council needs to consider that will impact the health, safety and welfare of the residents. There are 1487 units planned on Bay Beach Lane. How can a narrow lane handle that much traffic? The average number of trips is 1022. She gave the council copies of her information.

IV PUBLIC HEARINGS:

A STARDIAL IN REF TO WATERSIDE AT BAY BEACH PHASE III 98-03-010.07S

Each council member disclosed their ex parte communications individually.

Mr. Roosa spoke about his memo to the council. He said the concept of vesting is where the courts have treated the right to do something as if it has already been done. The vesting concept may generate pre-existing non-conforming structures. The court says that because of reliance, the property owner is treated as if they had already completed construction. He said that the memo reports on the history of Bay Beach's development rights. The county decided they were not permitted to build this 10-story building because the council had passed an ordinance to limit buildings to 2 stories. He cited the case of Largo Imperial Homes where the court decided they were acting in reliance and were subsequently deprived because of an ordinance that amended their rights. The court said they were vested when they were granted their permit and they acted in accordance. Had we not had a provision in our ordinance that addressed this, we would have been in violation. Our provision says it will not affect prior approvals by the county commission before we became a town. If that were the only basis for the denial, that would have been an error. The second reason for denial is that if you look at the 1987 drawing, there are planned approval references, which refer to actions of the county commission. One of those references approves two 10-story structures that were not on the original 1984 plan. When this application was made, it was represented that that notation was the basis for the 10-story structure. If it were true that, because they had approved 10-story buildings, that that had approved 10-story buildings throughout the development, that would have been without regard for setback requirements. In 1987 they changed all the height limitation of the 1974 drawing to no more than 10 stories. Another problem is that that would have been a right that did not exist prior to 1987 and would have been approved under procedural circumstances where they would not have had the authority to make that approval without public hearings and therefore would have been void. The town feels that the notation refers to past action and only refers to two buildings. The staff agrees with the county that they are not vested in the 10-story building.

However it was brought out at the LPA hearing, that if you look under the conditions of the development, not the references, it refers to the application of RM-2 zoning (condition 7). In 1974 they had BU4 and RU4 zoning – which are the same as CT and RM2. It was not a rezoning, just an acknowledgement of transition from one zoning procedure to another. The condition says they are required to develop under those zonings. No developer voluntarily goes to the commission if they have built under the current zoning. If they could have built under their present zoning they would have. They received the right to build 5-, 7- and 2-story buildings without regard to setback requirements. Otherwise the 7-story building could not have been built. They didn't need variances from the other zonings. The 1974 drawings have no notations on it, just a statement as to the number of units and location of the buildings. In 1987 the commission wanted to clarify what they believed to be the vested rights of Bay Beach so they adopted the 1987 master plan which is now vested in terms of what would be allowed without regard to setback requirements. The regulations for RM2 deal with five areas: minimum lot area, maximum density, minimum setbacks, maximum lot coverage and maximum height. The 1974 drawing which identified buildings according to the number of stories, did not say those were maximum heights; it said they would be allowed without regard to setback requirements. Most of those 7-story structures could not have been constructed if not for that zoning. In RM2 regulations the issue of lot size is not relevant, because all are substantially larger than the minimum. The maximum density is established in the 1987 drawing (same as in 1974). The maximum lot coverage is addressed in 1987, which was not addressed in 1974 and it is substantially less than would be allowed under RM2. The maximum height and setbacks are not addressed on the drawing. So you have to go to the regulations which say that once you determine the 35' level, you can go up 1' for each ½' setback around the building. That is for the benefit of increasing open space. It is his opinion, that Bay Beach is vested: the 1974 drawing describes the height that would be allowed without setback requirements and the 1987 drawing incorporates the 1987 RM2 regulations. So you must look at all three documents to see what Bay Beach can do as far as height. If the issue is not addressed in those three documents, then you have to go to the existing code.

The other question is about vested rights. In 1984 there was a provision in the then Lee Plan, that if a developer wanted to establish vested rights they could go through a procedure. They were denied at the administrative level and they appealed to the county commission, and that is part of the 1987 drawing. The legal issue is that they were vested in 1984, but now we have the Lee Plan of 1985 which we incorporated, which says that all developments approved by the county commission as being vested are carried forward and deemed consistent with the new comprehensive plan. We are bound by that plan when we became a

town. We can't look at every parcel and reconsider everything. The charter accepted the Lee Plan and has the status of being part of our charter and general law. They are vested and that is where we start from.

Mr. Mulholland said he understands they are vested, but to what? Mr. Roosa said they are vested to what shows on the two drawings and the RM2 regulations. They are vested in the 10-story building, but they are vested with the regulations, so if they can meet the setback requirements, they can build the 10-story building. It has been represented to him that the lots are sufficient in size to meet those setback requirements. Mr. Mulholland asked about infrastructure. Mr. Roosa said that there can be adjustments made but that must be under extraordinary circumstances. For instance, if the county said there could be no more sewer connections or water connections, their vesting would be subject to that. The likelihood is remote because we have the obligation as a town to provide those services.

Mr. Hughes said it appears that Mr. Roosa is saying that 10-story buildings would be allowed on the balance of Bay Beach. Mr. Roosa said yes. Mr. Hughes asked some general questions about vesting. Ordinance 97-9 makes provision for previous land use approvals. Does that assume that the previous approvals were made in compliance with applicable state and local ordinances? Mr. Roosa said yes. Mr. Hughes said that would mean you would have to go back and look at the validity of the original vesting. Mr. Roosa agreed. Mr. Hughes asked if there is a statutory definition of vesting. Mayor Cereceda said there is a definition in the Lee Plan. Mr. Hughes asked what about where there has been a transfer of title? Mr. Roosa said case law says vesting is a right that goes with the land. Vesting treats the structure as if it has been completed. Mr. Hughes asked if it is common that development conditions are established just on a plat? Mr. Roosa said have a different procedure now. We now have deviations. In 1974 there was no comprehensive plan and no fixed rules. A lot of the development was whatever the developer asked for. Now we are restricted by the Comprehensive Plan. Deviations are not vested. He also said there has to be a continuity of development for those vested rights to go on. If we acknowledge they have a vested right and they do nothing, they could lose it. We cannot adopt anything in our LDC that restricts anything vested. Mr. Hughes said the vesting in the Lee Plan talks about reliance on existing or pending regulations. If we have a public hearing and we amend the LDC, that now becomes the pending regulation. How can they rely on something previous that has been amended? Mr. Roosa said that we have a Smith vs. Clearwater resolution that we adopted and stated that we are new town and are reviewing our LDC. If someone says they have been working under the Lee Plan and now they can't build, they can't raise the issue of estoppel because we were on record that we are in the process. If you bought a piece of property and relied on then-existing development regulation and they changed before you got your permit, that is not a vesting issue. Mr. Hughes said that the height restriction did change before they pulled their permit here. Mr. Roosa said that does not apply to them because of Largo vs. Imperial Homes.

Mark Ebelini of Humphrey and Knott, said they are appealing on behalf of Stardial of a denial of Waterside III. It was to use part of the vested density in the 1987 plan. The town has taken the position that Ordinance 97-9 restricting building height applies to future development on the undeveloped portions of Bay Beach. Bay Beach's position is that the rights to build the 10-story buildings in Waterside III are vested under the terms of the master concept plan paragraph C7, and under Ordinance 97-9 which states that previous approvals do not apply. The 1987 plan vested Stardial to continue to develop under the regulations that existed at the time of approval (1987). They contend the town is estopped from applying 97-9, because they have relied on the master concept plan. Stardial has incurred such obligations on reliance that it would be inequitable to deny them the right to complete the Waterside project. The council's duty is to listen to the facts and make a ruling solely on the facts, not preference

Paul Bangs, a civil engineer with Agnoli Barber and Brundage, was sworn in. He said he has worked on Bay Beach for over a year and also when he worked with Lee County. He spoke about the 1987 master concept plan. He said Waterside I and II were approved at 10-stories. They made application for Waterside III in March 1998 and the development order was denied by the county. They made some changes and resubmitted. They were denied again in May. They resubmitted plans then the county staff said in June 1998 that the proposed height exceeds the town's height ordinance. That was the first time the ordinance was mentioned. He wrote a letter saying they were misapplying the ordinance. They received a letter in July that talks about research by Bill Spikowski and includes his memorandum. He read the second paragraph that says the note on the master concept plan has been misinterpreted in the past and that only two 10-story buildings have been approved. He sent another letter arguing the same issue and received a reply from Mr. McCarthy saying they are subject to the 1987 concept plan and it does not provide for increasing height with increased setbacks and that only two 10-story buildings are approved. He feels that is a significant conflict. Waterside is part of a larger development, and they are also working

on Parcel 15 and 16. Mr. Ebelini showed a plan for parcel 16 that shows six 10-story buildings including the existing two buildings. He believes the height on these buildings meet the setback requirements. They have planned 348 units for the 6 buildings on parcel 15 and 16. They did a study based on Ordinance 97-9 to see how many units they can get on the property using the villa concept plan of 2 stories over parking that would comply with that ordinance. They could only get 28 villas with 224 dwelling units. The ordinance would also affect the density of parcels 10 and 17. So Bay Beach cannot build its vested right of 1731 vested units under the 2-story rule. There would be a total loss of 251 units. He said Waterside III complies with the utilities and road and infrastructures. Mr. Mulholland said some of the buildings will take over some of the lakes. Does that have any environmental affect? Mr. Bangs the property had excess lakes areas that they had always planned to fill in. Mr. Reynolds asked how they determine that the road is sufficient. Mr. Bangs said there are formulas established by the Institute of Traffic Engineers. Also the county looks at that carefully. Mr. Reynolds asked if he does not believe that 464 units will impact the road. Mr. Bangs said it will not according to the standards. Besides Bay Beach is mostly seasonal. Mr. Reynolds asked if the golf course will remain an 18-hole course. Mr. Bangs said he understands it will.

Mr. Hughes asked if they are using the argument that height is determined by the regulations in effect at the time (that allows increased setback), or are they using the argument that the 1987 plan was amended to allow 10-story buildings. Mr. Ebelini said they are addressing paragraph C7. A5 may apply also but they have conceded that issue with regard to Waterside III and that C7 is what applies. Mr. Hughes asked if his position is that if they could meet setback requirements on the other parcels, that they could build 12 stories? Mr. Ebelini said yes, but he does not think that is the plan. Mr. Murphy asked Mr. Bangs if you build straight up instead of straight out, which uses more green space? Mr. Bangs said that low-rise construction uses up more green space than mid rise or high rise. Mr. Hughes asked at what point will they establish the location for all the buildings of parcel 16 and what role does the town have in establishing this plan? Mr. Bangs said have been submitting plans to the county as the town's agents. The chart on the master concept plan gets updated every time a plan is developed. Mr. Hughes asked if there is a conceptual layout that goes before the LPA or the town council. Mr. Bangs said no. They are just executing a plan that is already in place and they are only approving pods. Mr. Hughes asked if there shouldn't be a procedure for the town to review. Mr. Bangs said that the guidelines are there even if there is not a graphic of where the buildings are going. Mr. Hughes said a master concept plan is usually just a concept. But when you seek a development order, you come out with a layout of that parcel. Mr. Reynolds asked what connection Santa Maria has to Bay Beach. Mr. Bangs said it is not part of the Bay Beach master concept plan. Mr. Reynolds asked why they are paying for the road then. Mr. Bangs said he did not know.

Pam Houck, principal planner with the Lee County Department of Community Development, Division of Development Review, was sworn in. She said the purpose of the 1987 plan was to clarify the vesting and provide a guideline of the future development of Bay Beach. She said that administrative approvals of Waterside I and II allowed increased height and decreased the required setbacks. Mr. Ebelini read a paragraph from a letter by Mary Gibbs that says the approvals will not cause adverse impacts. Mr. Ebelini asked if she believes that the March 26 and May 18 letters to Mr. Bangs are incorrect. She said yes because she believes 97-9 applies to this project. She read paragraph C7 from the development conditions, which says that land uses are consistent with uses allowed with the original BU4 and RU4 zoning but that future approvals will be required to comply with the regulations under the present CT and RM2 requirement and that the more restrictive will apply. Mr. Ebelini said parcels 15 and 16 where Waterside III will be located are RM2. Section 4-51 refers to section 202.18 and C2 which gives residential use. Ms. Hauck read that section that refers to 437.01 which provides a maximum height of 35'. He spoke about section 202-18A subsection 4, which talks about the increase in height with setbacks. Section C7 of the 1987 plan states that future approvals must comply with present CT and RM2 zoning requirement. He talked about Ordinance 97-9, section 5, which says that does not apply to previous approvals. He asked if she did not consider the master concept plan a previous approval. She said she did not consider it applicable. He asked if "present rules" means the 1987 rules or present today? She said present applies to 1998 today.

Mr. Hughes asked what the difference is between a development condition and a plan approval reference. Ms. Houck said this plan is not typical of what they see today. The terminology under the plan approval is for reference only, and does not mean that it applies to 10-stories throughout the development. The 1974 plan had specific heights. This 1987 plan appears to supercede the 1974 but it was at a regular meeting and there was no public notice or resolution of adoption of the plan. Mr. Hughes said Harbor Pointe is shown at 10 stories. When was that approved? Ms. Houck said they were approved under

reference #5 in 1981. Mr. Mulholland asked how setbacks are calculated. Ms. Houck said you have to determine property lines. If a property line can follow a natural body of water, it can be meandering or straight. You must measure from the closest point to the building. Mayor Cereceda asked the difference between Community Unit Plan, Planned Unit Development and Commercial Planned Development. This is called a Community Unit Plan. Ms. Houck said in 1972 the commissioners adopted this plan with BU4 and RU4 zoning which converted to today's RM2 and CT with the condition that it was under a CUP plan. The CUP ordinance was in draft form at the time but it was never adopted. In 1978 they adopted a PUD ordinance and in 1986 they adopted the CPD ordinance. Under the CUP concept there was a condition that before any portion of the property could be developed, the plan had to go back to the commissioners for approval after review by county staff. Mr. Hughes asked if this site location only wouldn't require the town to approve it now rather than the county. Ms. Houck said the commissioners have changed their policy now that they have a comprehensive plan, so that it is now turned over to staff. It is a policy of the county, not the town and is not part of the comp plan. Mayor Cereceda asked if they could not achieve the setback line, would they seek a variance from the town? Ms. Houck said they would need a variance. Mayor Cereceda said that in the 1987 site plan, it says two 10-story buildings. If there could be 20 there, why would it have been stipulated that there were two? One of the comments made are that the two 10-stories were deviations from the original plan. Ms. Houck said you have two 10-story buildings approved by the 1974 master plan approved in 1981. Then you have two 10-story buildings that were approved for setback deviations in 1995. Mayor Cereceda asked if there was no need for approval of 10-story buildings, why was it stipulated? Ms. Houck said she believes it was necessary. Mr. Ebelini asked Ms. Houck if it was common practice back then to seek commission clarification of previous decisions without mailouts to adjoining property owners. She said yes but not to the extent that it would affect the land use of that property. Mr. Mulholland asked Ms. Houck if the plan that was approved at the regular meeting of the commissioners was for clarification, or if it was greater in scope. She said it was greater in scope and had much more detail than usual.

Mr. Ebelini said that Mr. Clawson and Mr. Johnson testified in the LPA hearing. Their arguments were based on \$700,000 of reliance upon approvals and \$10 million of pre-sales. He would like to submit the transcript of the LPA hearing as exhibit 17 dated Nov. 10, 1998. All council members stated that they had received that in advance of the meeting.

Dave DePew, president of Morris Depew, land planners in Fort Myers, was sworn in. Mr. Depew said that he has worked on the Bay Beach plan when he worked for Lee County and also with his own firm. He stated that the master concept plan allows the application of 202-18 allowing increased height for setbacks. He believes the approval by the commission at that time allows the town to implement RM2 height restrictions under the 1987 regulations that were in place at the time. He does not agree that the language "present" means today's regulations. The plan serves as an agreement between the developer and the commissioners that the regulations that were in effect at the time, would guide. Regarding clarification items coming before the board, he said he was director from 1982 to 1984 in the county. The regulations were not as specific as they would like. If they had difficulty with something as unclear, they would take it back to the commissioners. The project was undergoing the vesting procedure. This was brought back to the board for further clarification twice. The Commission wanted to take a snapshot so the staff wouldn't keep coming back for clarification. Section C7 is controlling. If Waterside can meet the criteria of 1987, the council has no option other than to approve. They cannot hold this property hostage in the middle of that development process. Mr. Hughes asked how they decided whether to lock in current regulations or subject someone to future regulations? Mr. DePew said he thinks they looked at the amount of development that had taken place prior to that time and the amount of development left and then they would make a balance call. Mr. Hughes asked whether it was legal and valid to lock in future zoning regulations that would still apply 10 years later. Mr. DePew said the vesting process provides for it, so it is valid. A tradeoff was being made. They could not go back to the 1974 regulations, but were granted the 1987 regulations. Mr. Hughes asked if he agreed with Ms. Houck that approval 5 is only applicable to the Harbor Point buildings. Mr. Depew said he does not agree. He believes that the maximum height is 10 stories on all units. Mr. Hughes asked if it is good land planning to restrict a zoning authority to regulations at a given point in history that still has a long way to go and is still developing 10 years later? Mr. Depew said it can be good planning. Mr. Hughes asked about Mr. Johnson's testimony in the transcript, if some of that expense occurred after the denial in June 1998. Mr. Ebelini said that the expenses were as of June. Mr. Clawson said most of the pre-sales (all but about \$1 million) occurred prior to June. Mr. Hughes asked if he would agree that any acts and expenditures after the first denial would not

apply toward the act of reliance. Mr. Ebelini said he would not agree because some expenses are already set in motion.

Mr. Spikowski of Spikowski Planning Associates was sworn in. He said that Bay Beach was purchased from four separate owners. It was almost all RM2. CT was the area of Santa Maria and Cap Plaza and Eckerds. A developer needs certain assurances in order to do such a large project with such amenities. A site plan is an integral part of the development and becomes binding. It gives rights and responsibilities. The 1974 site plan is specific about building location and height. It has been accepted as if it were a PUD plan. In 1981 the Commission approved the two 10-story buildings at Harbor Pointe. When the Lee Plan was adopted it would have restricted density to lower than on this plan, so Bay Beach filed for the vesting procedure, which validated the 1974 zoning plan that was in effect. It was a problem administering the old plans so they came back with clarifications the next year. It numbered the parcels, showed what was already built and already approved, how many units there were, allowed latitude to move density around on the site, and specified that RM2 and CT regulations would apply. The staff memo that went to the commissioners when they voted on this said that "in addition to these conditions, Bay Beach must comply with all other county regulations." In his opinion that does not mean that RM2 and CT applies in cases that weren't specifically addressed. So Bay Beach is allowed to have less open space and that is vested. The same on density. So the technical result of the 1987 vesting plan is that they could go higher than the density allowed by the Lee Plan. It was not a public hearing, and no one was notified. That is his basis for believing it was not a rezoning hearing and could not have expanded the rights beyond those already approved. The vesting procedure is not a zoning procedure but protects previous approvals. There is a sentence that says: "Any substantial deviation from a prior approval which has received vested rights status shall cause the development involved to be subject to the policies and implementing decisions and regulations set forth in this plan." It doesn't say a development can never change, but future changes will have to comply with the rules. He disagrees with Mr. Depew about note A5 on the site plan. It recognized the two high rises and could not possibly be interpreted as rezoning to allow 10-story buildings everywhere. He believes the two Watersides were allowed in error. Today we are dealing with Waterside III only. The rest of Bay Beach still needs to be resolved. In the new Comp Plan they will have to bring a site plan that will resolve the other issues as amicably as possible in a public hearing with notice to property owners, but we don't need to deal with those today. Mr. Ebelini asked Mr. Spikowski if he agreed with Mr. Bangs that Ordinance 97-9 would reduce the number of units available to Bay Beach. Mr. Spikowski said he has not reviewed it, but it is possible it could keep a project from reaching its vested density. He said he does not know what was meant by "present development regulations," but Ms. Houck's and Mr. Depew's explanations are both plausible. He agrees with Mr. Roosa that 97-9 does not apply here.

Mr. Mulholland said that Mr. Spikowski made a statement before that he thought that the county was in error in 1995 when it approved Waterside I and II. Mr. Spikowski said he believes that addressing it as a PUD was correct, but not the decision. The site plan showed no buildings over 7 stories. If the developer has decided that the plan is obsolete, he needs to go back for rezoning, and should not ask for administrative approvals. He believes the 1987 plan is a clarification of the 1974 plan that just validated what had really happened. He does not believe it repeals the 1974 plan or expands development rights. Mr. Hughes said Ms. Houck testified that there is a policy that PUDs and CPDs require, if it says site location only, that a new site plan to be reviewed by the commissioners. He feels this is important. What can the town do to consider a different policy? Mr. Spikowski said we need to address that when we adopt our new LDC and not just accept the status quo which has too much uncertainty for the town and the developers. He recommends we assign a zoning category to the property (RPD or CPD probably) and recognize legitimate vested rights and resolve these issues. If the developers are unhappy with the resolution, they will take it to court, but at least it will have a clear resolution of the remaining development. Everyone needs to know what the rights are. Mr. Ebelini reiterated that the zoning regulations that applied in June 1987 permitted additional height above 35' in RM2 by additional setbacks.

Ms. Houck clarified that under the plan development regulations in effect you are allowed administrative amendment. But this does not have planned development zoning. It is zoned RM2.

The public hearing was opened.

A HARRY GOTTLIEB

Mr. Gottlieb was sworn in. He said that if the developer could not complete his development units without building high rises, that is a desirable result for this community. He asked if the town approves Waterside III, would that be a step for approval for the other five? He said that in 1985 Lee County stated that vested rights may be revoked if it is shown that they are against the public health, safety

and welfare that is unknown at the time of approval. He doesn't think they knew at the time what the development of Fort Myers Beach would be.

B HEATHER WHITEMAN

Ms. Whiteman was sworn in. She said she is a 4th generation native Floridian, and if she does not object to more development here, then no one should. She has worked for Mr. Clawson who has sold many of the units and has helped the development of the whole area. Appreciation values have gone up drastically because of the development in Bay Beach. She has never had to wait on Bay Beach Lane because of traffic problems. This development has already planned for the water needs of the future.

C SCOTT BARKER

Mr. Barker was sworn in. He said that he represents the Estero Beach Improvement Association, the master association at Bay Beach that is responsible for the maintenance. He urged the council to consider all the general issues that are impacted by the height issue. His clients are in a similar position to the one that created the town of Fort Myers Beach. They are living there yet they can't find out what is going on. They are governed and affected by a buildout that is being run by something that happened in 1974. He urged them to take Ms. Houck's and Mr. Spikowski's advice—they work for the town and have its best interests at heart.

D BETTY CRAWFIS

Mrs. Crawford was sworn in. She said that things are not being addressed in the proper manner and they have not been able to get the whole picture. The traffic impact looks like too many people will be using the lane plus service vehicles, emergency vehicles, etc. In addition there is no construction entrance so those vehicles must use the lane. There are golf carts and pedestrians using it too. There is also a gated community within the development. In addition Santa Maria is a dues-paying member. They are worried about their polluted ponds--the e coli counts were all above the ambient count. They are looking to their elected officials to help them figure out what is going on.

E BARBARA MCCONNELL

Ms. McConnell was sworn in. She said that the construction trucks block the traffic, so they are down to one lane most of the time.

F HAROLD HOMAN

Mr. Homan was sworn in. He said he is resident of Waterside I and president of the homeowners association. He bought there because it is a phenomenal nature preserve. The building plan has tremendous space between the high rise buildings. The high rise concept is better and more environmentally friendly. If the buildings are low-rise, the view is always blocked whether people are there or not. Low rise will work against the town.

The public hearing was closed.

Mr. Murphy said the issue is the height of the building. People talk about traffic, the number of units, impacts, etc. but they are not the issue today. He too lives in a high rise condo. When it was completed, the people at Marina Towers asked how it could have been permitted. He used to be able to look to the east and see the sun come up, but now someone else is putting up their vested building. He used to be able to see the Bay, but Waterside I and II diminished his view. This is a fact of life and he accepts that. He thinks it is clear that so many units will be built, so the question is what type of building is best for the town. How do we preserve the space that is in there now?

Mayor Cereceda asked Mr. Roosa if any decision regarding Waterside III would condone or facilitate any other development at Bay Beach. Mr. Roosa said that it is before the council because an administrative decision that refused to issue a development order. The question is if that decision should be sustained or should the development order be issued. That has no precedent-setting qualities whatsoever. Mr. Hughes said he disagrees. If the rationale is that we are not to apply Ordinance 97-9 because of the language in there that says it does not apply to previously-approved development orders, then we are required to approve everything in the future as long as it meets the requirements of 1987. Mr. Roosa said that is true, but the only consideration today is whether the development order should be issued today. It was declined because of the 10-story issue. This is a very narrow decision today. This is not a hearing to determine vested rights although they may feel they have to make that decision in order to decide the question today. They do not have a resolution before them that talks about findings of fact. Mr. Hughes said he believes we have to decide it on a basis of law. They argue that 97-9 is not applicable and they also argue the equitable estoppel argument. Both are legal issues with a difference of opinion. If the council approves this today, it seems they are approving it on the basis that the ordinance is inapplicable or they are estopped and the 1987 regulations are the standards to which we must apply all future

development orders at Bay Beach. He believes it is a broader issue than height and that it establishes a precedent. He said that Mr. Murphy suggested at the last meeting that this be referred to a land use attorney that has no connection with this case and doesn't live in Lee County. He believes that is an appropriate thing to do. In the long run, this issue will be repeated unless resolved up front. He is not comfortable that he just received a memo from our attorney on vesting that he has not even had a chance to read. He is not persuaded from the testimony who is legally right. He believes that if this is decided on the basis of equitable estoppel, it would not set a precedent. He thinks we have to state our rationale when we make a decision. Mr. Reynolds said he doesn't believe we need to go out of town to get an attorney. We are informed as much as we can be. We need to make a decision on our own. We are talking about the height of buildings according to our ordinance. Mr. Murphy said his suggestion was made to have someone from outside the area because it is hard to find someone here who has not dealt with Bay Beach before. He wanted them to look at the facts cold, but he wanted the opinion before today. He's heard all he needs to hear today. He is prepared to move forward with a vote.

Motion: Mr. Murphy moved to approve the development order for Waterside III. Mayor Cereceda seconded the motion for discussion. **Discussion:** Mayor Cereceda said she thinks it is a political decision. She is not sure they can make a legal decision. She does not believe they have vested rights for 10-story buildings, but she thinks they have acted in such a way that she believes Waterside III should be approved at 10 stories. She believes that without council approval they cannot build 4-, 5- or 6-story buildings. It would be more reasonable of Bay Beach to work with the council to come up with a plan that will allow the town to know what the development will be and what we can expect. The greatest thing here is fear: for the golf course, the ponds, the view, etc. If there were a plan, then all these could be answered. She does not know how to get there so that this council has some authority. Mr. Roosa said that Mr. Spikowski has said he intends to come up with a plan with or without their input. The council will approve that. Mr. Roosa said there are three possible reasons for choosing to allow the development order: 1) estoppel for this one time only; 2) the ordinance does not apply so they can build up with increased setbacks; 3) vested rights that were granted in 1987. Mayor Cereceda said that only #1 doesn't tie us to the future. Mr. Mulholland said Mr. Spikowski and Ms. Houck have both said that there are some doubts about what vested rights they have. He doesn't believe they are legally vested but he thinks they have acted in good faith. He thinks they are entitled to consideration by the council on Waterside III, then he would shut the door and say that is it. Mr. Reynolds asked for three reasons how to vote against approving the development order. Mr. Hughes said they are the same three reasons in reverse. Mr. Reynolds said if we mean anything as a town, we should stand up for our ordinances. Mayor Cereceda asked if the resolution needs to be more specific and state why it is approved. Mr. Roosa said you can say they have established estoppel and not address the other issues. Mr. Hughes said he would like to resolve it on the estoppel issue, but what is before us is a ruling by the county on an administrative interpretation. Mayor Cereceda withdrew her second.

Motion: Mr. Murphy moved to approve Waterside III based on the equitable principle of estoppel. Mayor Cereceda seconded the motion. **Discussion:** Mr. Hughes said estoppel was not raised by county staff. They denied on the basis that it doesn't comply with the height ordinance. What do they do the next time the same issue comes up? Mr. Roosa said they will deny the next one also, because estoppel can only be decided here. Mrs. Segal-George said there is another development order in the pipeline scheduled before the LPA in January. Mr. Roosa said if we decide on estoppel, there is no precedent. Mr. Hughes said he is going to vote for this motion, but we have not resolved the issues. Mr. Reynolds pointed out that the LPA recommended that the council agree with the county staff and Mr. Spikowski. **Action:** Mr. Mulholland, no; Mr. Hughes, yes; Mr. Reynolds, no; Mr. Murphy, yes; Mayor Cereceda, yes. The motion carried.

The council took a break at 1:35 and reconvened at 2:15 PM

B HIBISCUS POINTE RECREATION BUILDING 95-02-206.05V 02.01

Mr. Roosa stated that Paul Bangs, of Agnoli, Barber & Brundage, is still under oath from the prior hearing. Mr. Bangs said that when this was heard before the LPA in October, they brought up a

couple of issues. It was said that 92 of the units are 3 bedroom. But they were planned as 2-bedroom with den. The residents are mostly seasonal with only one car. The parking regulations are based on multi-family and there is no distinction between part-time seasonal and an apartment complex with families with multiple vehicles. There has not been a parking problem at Hibiscus Pointe. The condo association built the new recreation center over an existing area where there were shuffleboard courts. They propose to put the shuffleboard courts back in by taking out 6 parking spots. Those spots haven't been used for over a year and have been painted as no parking because of the fear that people would back into the pool. They also propose to take another spot for storage. Another issue during the hearing was whether parking has to be provided for the boat slips. Most of the slips are owned by condo owners, but 14 or 15 are owned by others who reside in Bay Beach. The hearing examiner for the DRI reviewed this and said that the slips are supposed to be accessories to residents of Bay Beach and cannot be sold to others outside of the development. The hearing examiner decided they did not require more parking spaces. He showed a picture of the parking lot in March 1998 that showed there were plenty of parking spaces available. The LPA recommended approving the variance request. A large number of people appeared before the LPA for approval. It will cause no harm to approve.

Mr. Mulholland said the packet seemed to say there are some three-bedroom units, which would bring the required number of spaces up to 380 instead of 354. Mr. Bangs said that is correct, but they function as two-bedrooms with a den. They may be used for an occasional visitor, but most just have a sofa and TV. It was permitted as two-bedroom with den units. Mr. Reynolds said the boat slips require 2 parking spaces for 3 boats. That would require 10 additional. That means there are only 339 spaces for the residents. Mr. Bangs said the boat parking is included in the 32 that is allotted for guests.

Nettie Richardson of Lee County Development Services was sworn in. She said that the improvements they made have created the need for the variance. They were denied because of the issue of whether the units are being used as 2- or 3-bedroom. The Property Appraiser's records indicate that half are being assessed as 3-bedroom units. There have also been advertisements in the Observer that say they are selling as 3-bedroom units. The development order was for 2 bedroom however. It was denied because the subject property is being used half and half so they are required to have 380 parking spaces. There was also a question of whether the boat docks were being used within Bay Beach or outside. The staff research of the 144 boat slips came up with same owner for all slips (Hibiscus Point Boat Coop) so they were unsure about whether they were being sold or leased outside of Bay Beach. Mr. Mulholland said that parking spaces are necessary for the boat slips even if you live in Bay Beach because you need a car to haul things to your boat. Mrs. Houck said if the dock is for residents of Hibiscus, no addition parking is required, but if it is for residents other than Hibiscus, they are required. They cannot be sold outside of Bay Beach at all. Mr. Reynolds said it would be a hardship on the residents if special spaces are not provided for the boat leasers. Mr. Bangs said that the information he has is that 14 or 15 individuals own docks who are not residents of Hibiscus Pointe. Mrs. Richardson stated that the LPA voted to approve the variance.

Mayor Cereceda disclosed that she has visited the site.

The public hearing was opened.

A FRANK FARLEY

Mr. Farley was sworn in. He said a simple situation has gotten complicated and there are a lot of misconceptions. When people sell their condo, it is better to advertise it as 3-bedroom, but in effect it isn't. The third room is rarely if ever used as a bedroom. The boat slips is also a misconception. The developer was selling the boat slips to Hibiscus people. Fortunately he did not retain the rights of ingress and egress. There are 14 available which he is trying to sell to Waterside. Hibiscus is not selling them. Their association is requiring them to pay a \$4000 one-time fee which allows them to park when they use the boat because they want to limit ingress and egress. He believes that only 2 have been sold anyway, not 14. They have an abundance of parking. The only thing they are trying to do is to put in an activity center since the developer did not do that. They want to continue the amenity of the shuffleboard.

B KATHY HILDEBRAND

Ms. Hildebrand was sworn in. She said that she lives in one of the 2-bedroom units and she has a boat slip. The shuffleboard would be in front of Building 7 where she lives so she would be one of the ones most affected. There is no parking problem there.

C CARL MANN

Mr. Mann was sworn in. He said that as far as he knows there are no children in the unit. They have two bedrooms and they use the extra room for a computer. There is no parking problem.

D ELSIE MANN

Mrs. Mann was sworn in and said that she had been the social director. There are only 2 units that have 3 people in them. Of all the boat slips, there are only 14 that have been purchased outside of Hibiscus Pointe.

E CHARLES PAUL

Mr. Paul was sworn in and said that he is a full-time resident. He is in favor of the parking modification. Parking is never an issue there. He also owns a boat slip. Parking for the boating is not an issue. They generally come in and go boating for a couple of hours and leave again.

The public hearing was closed.

Mr. Hughes asked about the Hibiscus Pointe Boat Coop. Mr. Baum said they have a 99-year lease on the slip. The coop has the fee title. Mr. Hughes asked if they have the right to sublease. Mr. Baum said he could sublet to a Bay Beach resident for 3 months, but he does not know of anyone who does.

Motion: Mr. Murphy moved approval of the variance. Mr. Hughes seconded. Mr. Mulholland, aye; Mr. Hughes, aye; Mr. Murphy, aye; Mr. Reynolds, aye; Mayor Cereceda, aye. The motion carried unanimously.

V FIRST READING: ORDINANCE ADOPTING THE FORT MYERS BEACH COMPREHENSIVE PLAN

Mayor Cereceda read the titles. The public hearing is set for December 21 at 6:30 PM. Mr. Spikowski said the council has a copy of all the changes and some more proposed changes which will be decided at the public hearing.

Mr. Spikowski said he has begun to work on the site plan for Bay Beach that will become a part of the LDC. There will be a site plan with deviations and conditions. It will recognize vested rights and there will be a formal public hearing. One or both sides may take us to court, but the council will have a chance to decide what they want to do. He has spoken with Mr. Humphrey and told him that we will do this with or without his clients' help. In the meantime, we have another case coming up, but he doesn't know of any more that are immediately in the pipeline. They have plans for more at Waterside, but he is sure they are not going to sell them until they have sold out Waterside III. Mayor Cereceda reported that at the break Mr. Humphrey said he will try to persuade his client to withdraw the pending case.

Mr. Reynolds said that the tennis courts court has closed, and people fear they may be trying to sell the golf course. Is that possible? Mr. Roosa said that the developer could sell the golf course, but they couldn't put homes on it. It would have to be kept as green space.

VI PUBLIC COMMENT

There was no public comment.

VII ADJOURNMENT

The meeting was adjourned at 3:00 PM.

Respectfully submitted,

Peggy Salfen
Recording Secretary.