FORT MYERS BEACH
TOWN COUNCIL
APRIL 4, 2005
Town Hall-Council Chambers
2523 Estero Boulevard
FORT MYERS BEACH, FLORIDA

I CALL TO ORDER: A regular meeting was called to order at 6:30 p.m. by Mayor Bill Van Duzer.

Members present at the meeting: Mayor Bill Van Duzer, Vice Mayor Howard Rynearson, Councilman Don Massucco, Councilman Garr Reynolds, Councilman Bill Thomas

Staff present at the meeting: Town Manager Marsha Segal-George, Deputy Town Manager John Gucciardo, Town Attorney Richard Roosa

II. PLEDGE OF ALLEGIANCE: All those present assembled and recited the Pledge of Allegiance.

III. INVOCATION: Rev. Jeanne Davis of Beach United Methodist Church gave the invocation.

IV. PUBLIC COMMENT:

Mayor Van Duzer indicated that he had two requests to speak from the public, who had indicated wanting to address the Glitch Ordinance issue. For that reason, Mayor Van Duzer assumed they would want to speak during the public hearing about it.

He then asked if anyone else wished to address the council at that time. There was a comment made that the microphone for the mayor did not seem to be on and that he couldn't be heard. Mayor Van Duzer joked that very seldom did anyone complain about not being able to hear him. This drew chuckles from those present. No one came forward for this portion of public comment.

V. CONSENT AGENDA:

A. Minutes of March 7, 2005

MOTION: A motion was made and seconded to approve the minutes of March 7, 2005.

Councilman Reynolds said that he had called Ms. Lambert regarding Page 2, and indicated that at the bottom of Page 2, he believed it was Howard Rynearson who made the motion, and not Bill Van Duzer. Mayor Van Duzer said it could be checked because it was a bit confusing.

Mayor Van Duzer noted that on Page 5, under Council Member Items and Reports, there was what he believed was an error in the sentence where Councilman Massucco asked if anyone had contacted the family, and not the little boy himself, as was written in the minutes.

VOTE: Motion passed unanimously.

B. Resolution Declaring the Month of April – Water Conservation Month

Mayor Van Duzer read the Water Conservation Resolution out loud.

VI. ADMINISTRATIVE AGENDA:

A. Continuation of Royal Pelican – Appeal

Mayor Van Duzer re-opened the public hearing on this item, by calling on Beverly Grady, who legally represents the Royal Pelican Condo Association.

Beverly Grady came forward and stated that she and her clients had requested on November 1, 2004 an interpretation be done by the Town Council of the Town of Ft. Myers Beach Land Development Code. She explained that a request for Limited Town Development Order had caused great concern to the Royal Pelican property owners. She explained that the request was for permission to build docks over a parcel that is completely submerged in water that surrounds the tip of Royal Pelican peninsula, which has no uplands. She stated further that the applicant, OBD, obtained the parcel through foreclosure and has no connection to Royal Pelican Condo Association. She said the existing boat docks attached to the aforementioned uplands are all limited in that they are all connected to ownership of a unit at Royal Pelican.

Ms. Grady said that in 2002, when the Limited Development Order application was filed, the project name listed on the application was "Royal Pelican Boat Docks" and the explanation located the proposed docks next to Royal Pelican, "an existing condominium". She said this made it sound like it was part of Royal Pelican, but that it was no part of the condominium and the name on the application was not changed until October of 2004, just days before the Limited Development Order was issued. She further stated that the proposal had originally included submerged land that wasn't a part of the parcel owned by the applicant.

She said that her clients believed that the Town's adoption of its own Development Code on March 3, 2003 would provide the needed protection for the Royal Pelican owners, because she and her clients understand it to clearly preclude docks being built over water with no connection to the upland owners, and that stand-alone docks as a principle use are not a permitted use according to the adopted code.

Ms. Grady continued to explain her clients' concerns regarding the zoning interpretation that allows for the building of those docks, including the following issues: no parking provided for the docks – Staff said it was not required and Royal Pelican disagrees with that interpretation; slip owners are not Royal Pelican owners; no controls are in place regarding noise levels, hours of operation, boat

repair activities or lighting levels. She expressed her clients' having no understanding of the "Staff's rush" to approve the project, and that they believed the Staff's interpretation of the zoning regulations in this instance was to the detriment of the Town's residents.

Ms. Grady explained that there had been a lot of communication back and forth, and that the request for the Town Council to make an official interpretation had been filed on November 1, 2004. She indicated the request in the Council members' packets, and cited Section 34-90 that gives Council authority to hear and decide applications requesting interpretations of the code. She said contrary to that, 5 ½ weeks later they had received a Staff-issued interpretation on December 10, 2004. She said that on that same day, Town Staff authorized issuance of the Limited Development Order to OBD, Inc. for 33 slips surrounding the tip of the Royal Pelican Condominium peninsula. She pointed out that it was issued before it came to Town Council for a hearing.

Ms. Grady said she filed the request on behalf of her clients – Royal Pelican Condo Association – on November 1, 2001 to become before Town Council, the hearing was scheduled for March of 2005.

Ms. Grady asked what uses were permitted in Bay Beach. She said on behalf of her clients that they do not permit docks as a principle use that are unrelated to the adjacent contiguous upland owner. She cited Section 34-351 where she said it set forth all the permitted uses for Bay Beach, and that she had included that the packet given to Council for this hearing. She felt it was important to review, and pointed out that the land uses in the Bay Beach Zoning District had to conform to all requirements of the stipulated Settlement Agreement between StarDial Investments Company and the Town of Ft. Myers Beach, dated November 23, 2001. She read that allowable land uses in this document included those uses in lawful existence as of February 23, 2001 and the additional uses that were set forth in the stipulated agreement she cited above.

Ms.Grady said on behalf of her clients that they believe the lawful use that existed at the time, locked in by the Town of Ft. Myers Beach code, made those docks accessory docks, and that only a Royal Pelican owner could have a boat slip. She went on to say that the current code does not permit principle docks, and must qualify as accessory docks. She said the Staff Report mentioned earlier relies upon a regional impact development order issued by the Lee County Board of Commissioners, December 5, 1994. She submitted that they believe that development order was expired and terminated by January 2005. She pointed out that there is now a pending code amendment to add that DRI Development Order to the Town's code. She that since that was the basis for Town Staff's interpretation, she included a copy of the order for the Council to see. She said that this Development Order is not part of the Town's Land Development Code, and therefore she didn't think it was consistent with the zoning to apply it in this case. She cited Page 1 of 14 where the project build-out was proposed within 5 years of the adoption date of the Development Order. She also cited Page 10 of 14, where the paragraph quoted in the Town Staff Report appears, wherein it states that the developer is responsible for incorporating the restriction – only limited to persons in Bay Beach and to the Homeowners documents in the

restrictive covenants within the Bay Beach development. She stressed that that was a requirement set forth in the DRI Development Order which is now expired and terminated.

Ms. Grady said legal analysis showed that any documents and amendments to be incorporated into the Bay Beach development needed to be recorded prior to issuance of any permits. She said that, to her knowledge, that had not been done, and had not been reviewed by Town Staff or Lee County Staff, and was required by the Town's own legal analysis in Attachment B.

Ms. Grady said she did not see any basis in the Zoning Regulations for finding any interpretation that docks as a stand-alone principle use are permitted, and said she believed the Town's regulations would require compliance with the Zoning Requirements, which would be to provide parking spaces for the slips as there is no additional parking available in the Royal Pelican condominium, and therefore there is no parking available.

Ms. Grady noted that she had enclosed the Request for Interpretion by Town Council in the packets she had given to the Council members. She requested that the Council find that the Bay Beach Zoning District does not permit docks that are not connected to the adjacent unit ownership; that the docks described in the Request for Interpretation are a principle use and therefore not permitted by the Town's code; and that where docks are a principle use then each must provide the parking requirements of the Town's Code Section 34-2020D3b.

Ms. Grady pointed out the definition of "accessory use" in the Town's Code. She said that it is not believed by her clients that docks owned by someone other than Royal Pelican owners do not meet the test of the Town's zoning regulations. She thought that no one involved in this process had ever seen the situation where docks are being created over the water and being sold to people not connected with the adjacent multi-family property. She requested that the Town Council issue a resolution that would uphold the appeal and would find that the docks as proposed are not permitted. She noted that she had provided some sample draft language for the resolution she was requesting of the Council.

Ms. Grady then asked if some of the people from Royal Pelican would be allowed to speak at that time, and Mayor Van Duzer said he believed they should make their presentations after Staff had given theirs.

1. Staff Report

Jerry Murphy came forward to give the Staff Report. He said that Bay Beach was probably the most complicated area on the Beach in terms of Land Use Regulations, and that was why the Land Development Code basically says, regarding Bay Beach, the regulations are what was agreed to in the stipulated settlement. He said that when the Land Development Code (LDC) was revised in 2003 to compile all the changes that Ft. Myers Beach had made since it incorporated which departed from Lee County's Land Development Code, it was a massive undertaking. During that time, he said there were a number of things overlooked, including the DRI Development Order for the docks at Bay Beach. He said the order was approved by Lee County and that the order states there will be a certain number of docks in Bay Beach, and the approvals for

the docks were to be obtained within a certain amount of time. Mr. Murphy's understanding was that the time was not expired. He went on to say that because of all the appeals that were going on, that the expiration date had been moved forward. He said that the order does stipulate that the docks can only be used by the residents of Bay Beach, and that there was no other restriction. He said there was no requirement that the docks be used by people owning abutting property, and that the developer of Bay Beach will put restrictive covenants into the homeowners' documents.

Mr. Murphy said the law in Florida, as he understood it, was that once a DRI Development Order has been approved, the rights are vested, and so the right to build the docks is a vested right. He found no way that the Town could challenge the construction of the docks that would be successful.

Councilman Reynolds commented that the interpretation as given by Mr. Murphy seemed like a different interpretation than the one they had heard before. Mr. Murphy recalled that he hadn't said much at the last meeting because the hearing had been continued. Councilman Reynolds asked if it was because he hadn't found the DRI up to that point. Mr. Murphy said his interpretation had been consistent throughout the process. He said the Staff Report that was prepared as a response to the Administrative Interpretation Request lays out that same interpretation.

Councilman Massucco asked if the stipulation that says the docks can only be used by Bay Beach residents was meant to be all inclusive of Waterside and everything else. Mr. Murphy said that it was inclusive of the entire Bay Beach Zoning District. Mr. Massucco asked if that was how the Development Order reads, and Mr. Murphy said that it was.

Councilman Reynolds asked where the owners of the new docks would park, and how they would board their docks. Mr. Murphy said the developer would have to work those issues out. This drew a strong response from the public at the hearing, with an overriding tone of disbelief. Mayor Van Duzer cited the rules of civility and asked everyone to observe them, and to please be kind. Councilman Reynolds stated he was confused because while there is a right to build, if there is no property available to use, he didn't understand how would the dock owners access the docks. Mr. Murphy said that how Mr. Clausen gains access so that the people who buy the slips can get to them is something Mr. Clausen will have to resolve himself. Mr. Murphy said the developer could buy an easement from Royal Pelican, or he could ferry people from another location. Mr. Murphy stated that there has been no approval for access across Royal Pelican's property, and the Town is not condoning that at all. However, Mr. Murphy said he cannot forbid Mr. Clausen from building the docks just because he has not addressed the access issue.

Ms. Montgomery, representing Mr. Clausen, came forward and indicated the documents she had handed out to the Council prior to the hearing. She felt that Town Staff had done a good job analyzing the issue and she was in agreement with their position.

Ms. Montgomery cited the DRI Development Order and said that on Pages 1, 3 and 4 was stated that the authorization for the filing of the DRI was given

from several property associations, including Royal Pelican. She said that because of this, Royal Pelican Condo Association could not claim they had no knowledge of it being filed, nor did they ever challenge it when it was filed. She said the DRI was approved, including 530 docks, and applied to all the privately owned land within the eight parcels, including the Royal Pelican parcel. She indicated that on Page 12, Paragraph K, there was language regarding time that was very important, and it also appears on the face of the DRI Development Order as well.

Ms. Montgomery provided a timeline in the packet to the Council, that shows when the DRI DO was adopted, when the Town was incorporated, when the Comp Plan was adopted, and when the LDC was adopted. After citing that, she cited a state statute wherein it says nothing in the statute can limit or modify the rights of any person to develop any development that has been authorized as a Development of Regional Impact. She clarified that this meant that no after-the-fact Comp Plan or LDC can take away the rights that were granted by a DRI Development Order. She acknowledged Mr. Murphy's earlier statement that the rights to develop the docks in question are vested rights.

Ms. Montgomery addressed the question as to whether the docks would be principle or accessory. She pointed out that the DRI DO clearly says they are accessory uses. She went on to say the docks did not require parking because they are accessory docks, and simply limited it to the residents of Bay Beach.

Ms. Montgomery then cited the original stipulated settlement agreement, and pointed out Paragraph 11 on Page 9 wherein it describes the open space for the entire Bay Beach and how it was determined using the submerged lands as part of it. She added that the people got their land to build on by including the submerged land, and now did not want the owner of the submerged land to use his. She commented that she was sure the condo owners would not give up the open space of their units, and that it was too late to try to "divorce" themselves from the Bay Beach development.

Ms. Montgomery next addressed the issue of access, and said her client Mr. Clausen had won the suit and that the court said he does have access. Ms. Montgomery also answered Ms. Grady's claim that there had been a rush to issue the development order for the docks, and countered that 26 months was not a rush, and felt that it actually took longer than normal because of the various actions taken by Ms. Grady on behalf of her Royal Pelican clients, listing them out and stating that they were attempts to keep Ms. Montgomery's client from using his property rights. She characterized the actions of the Royal Pelican as being a concerted effort to try to take away the rights Ms. Montgomery's client acquired and were provided by the DRI DO.

Ms. Montgomery said that while Ms. Grady tried to make the issue complicated, that it was very clear. Ms. Montgomery went on to say that her client has a DRI DO that has stood up to all the challenges which is still in effect, the state statute says the rights are vested, and the Staff issued the LDO in accordance with the rules of the Town. Ms. Montgomery stated that what Ms. Grady was really trying to do was to challenge the LDO which has already been issued, and that Ms. Grady was not looking for an interpretation to determine

what happens in the future, but to make a specific interpretation that takes Mr. Clausen's rights away.

Ms. Montgomery concluded by asking the Council to rely on development order, rely on state statute, rely on Town Staff and deny the appeal. She indicated that a Mr. Tripp, who had participated in the court appeal process she had mentioned as having been won by her client, as being available to answer any questions they might have about that. Mayor Van Duzer felt that it was important to hear what Mr. Tripp had to say because access was granted in that court action and it was a very important issue with the Royal Pelican people.

Ted Tripp came forward and introduced himself as being Litigation Counsel for OBD, Inc. and that he had represented OBD in litigation that was lately pending before the Hon. R. Thomas Corbin. He said the case challenged the right of OBD to construct the docks in question on the theory that OBD had no access to them for the purpose of effecting the construction. He said they filed a counter suit and asked the judge to determine that in fact, OBD did have a lawful and legally enforceable right of access to allow the docks to be constructed and utilized on the submerged parcel. He went on to say Judge Corbin entered a ruling in favor of OBD, Inc. and against Royal Pelican Condominium Association and has held that every property owner has a right to obtain access from his or her parcel or property to a roadway, which he felt was in accordance with Florida law. He said it was fundamental law in Florida that it is not allowed that properties be cut off from a major roadway. He stated that in this case, the access from the OBD parcel to the roadway is over the common elements of the Royal Pelican Condo Assoc. He pointed out that the ruling has not yet been part of a final judgement because Judge Corbin asked that counsel for the Royal Pelican Condo Association (RPC) and counsel for OBD get together to try to agree upon the shape and content of the easement. He reported that no agreement had been reached with RPC as yet, and so another hearing had been scheduled before Judge Corbin at which he will determine the exact parameters of the easement. Mr. Tripp added the right of OBD to have access to the parcel has been litigated and been determined and established by a Circuit Judge, and so there was already access to the parcel. He reiterated what Ms. Montgomery had said earlier about the issue before Council being simple. He said the RPC Association signed an application before the Town existed and said that there should be 333 boat slips constructed in the perimeter around RPC and other condominiums in the Bay Beach community, and then RPC was populated by people who bought their units knowing that there would be up to 333 boat docks built on the submerged lands because there was a development order entered that their condo association had joined in and supported. He concluded by saying his client has a lawful right to build the docks, the Town Staff has issued a building permit, the development order has been issued, the limited development order has been issued, and so his client has a vested right to construct the docks on the property he owns. He added he was certain that the Council would find no reason to second guess the Staff. He thought the Council should ask Ms. Grady, counsel for RPC if she would support her resolution if it only had prospective effect, if it only applies to people who currently do not have a valid and binding permit, because he felt if the

concern was for the citizens of Ft. Myers Beach, he was sure the Council would not want to get into the situation with the Bert Harris Act, which provides that an action of government which deprives a landowner of the right to develop property in accordance with their reasonable investment backed expectations, exposes the government to that loss of value. He said that no action of the Town Council would appropriately interfere with his client's investment-backed expectation.

Councilman Massucco referred to Mr. Tripp's mentioning that OBD had the right to gain access to the docks, and asked about the rights of the RPC owners. Mr. Tripp said that unfortunately it is the case all over Florida in which an owner is landlocked by another property owner. He said that no owner wants an easement over their property, but the law is to the contrary in Florida and has been for hundreds of years. He said every land owner whose property stands between another parcel and a major roadway has an obligation to provide what is called a prescriptive easement. He said he recognized that every property owner likes to think they own their property free and clear of any obligations, but it is not the law in Florida. He said that the RPC had their day in court on that issue.

Councilman Reynolds pointed out that in a situation he experienced, a property owner who needed an easement was not allowed to build until he purchased enough of the parcel to use as such. He thought that although the law is usually not common sense, but common sense would say if you buy a piece of property you do not have to cut off a piece of your property and give it to someone for an easement. Mr. Tripp responded that he understood what Councilman Reynolds had said, and referred to a copy of Judge Corbin's ruling on this point that he had provided to the Town. He said he could not speak specifically about the situation Councilman Reynolds had discussed, but he could speak about the situation between OBD and Royal Pelican that it was important to know what was in place in the public record when the people bought their units at Royal Pelican. He said there was a "Declaration of Condominium" in the public record when they bought their units, which stated there would be boat docks built on the submerged parcels in the months and years to come. He said the documents stated that there will be an easement to allow construction vehicles, maintenance vehicles and vehicles owned by the dock owners so that they can use the docks. He said it was not a new thing, but rather in the public record when the Royal Pelican people bought their condos. He said his client is not doing anything beyond the rights that were reserved at the time the "Declaration of Condominium" was filed. He said that whether the people who bought the condos read and understood the documents was not something he could address. But he felt that the Town's Attorney would tell the Council that when those kind of reservations in the public record when a person buys a piece of property, that person is deemed to accept the property subject to the burdens in place. He said that is what happened in the case before them, in that it is a development of boat docks that was part of the condominium development from day one, with the associated rights of easement clearly set forth in the Declaration of Condominium.

Councilman Reynolds asked why the people who own the condos were not given the opportunity to purchase the docks in question before they went up for general sale to some developer. He thought that would have been a logical and fair thing to do because they thought they had rights to their property. Mr. Tripp replied that he was restrained by ethics from disclosing settlement discussions unless the counsel for the RPC owners agreed that it could be discussed. He went on to say that when the boat docks are built, and he stressed that they will be built, he said the developer would be happy to offer them for sale to the people who own condominiums in the building adjacent to the docks in question. He said those condo owners are the natural customers, but if they do not wish to buy, they don't have to. He added that the use and sale of the docks will be restricted to owners within Bay Beach, which is part of the development order. He said they would also be happy to discuss with the RPC either a right of first refusal or a pre-emptive period during which would give them as many docks as they wanted. He said the developer was not trying to sell the docks to people far away, but rather just wanted to build the docks as was their right to do.

Mayor Van Duzer asked Ms. Grady if she wanted to say anything with regards to the testimony of the counsel for OBD, Inc. Ms. Grady came forward and made several points in response. She pointed out that RPC submitted the request for an interpretation by Council of Town's regulations on November 1, 2004, and that 5 ½ weeks later they received Staff's interpretation and not scheduled before the Town Council as they had asked. She said the Staff's interpretation was issued on December 10th, the same day as the LDO was issued. She cited Attachment B in the pack she had supplied to the Council, which was a legal analysis done by Town Staff from 2002, in which was stated that no permit should be issued unless all the covenants, restrictions, articles of incorporation had all been submitted, reviewed and recorded. She said they were not included, but the permit had been issued anyway. She pointed out that the legal analysis was issued in 2002, and the Town LDC was issued in 2003. In response to the vested rights referred to in the DRI DO, she said that issue is resolved in the DRI document itself, on Page 12 of 14 in Section M, where it protected the Development Order from a change in the Town's regulations for 5 years. She said it was perfectly legitimate for the Town Council to adopt the LDC and to establish the permitted uses for Bay Beach on March 3, 2003, which no longer permitted docks to be stand-alone use, owner related to the development. She pointed out that the people who reside at Royal Pelican amended all the internal documents so that at their condominium the existing adjacent docks are connected with a unit owner at Royal Pelican, and she thought the condo owners on the other peninsula did the same thing.

Ms. Grady said the specter of a Bert-Harris claim had been raised by the counsel for OBD, Inc. She referred to the DRI DO, which she said was the only reason she heard from Staff that they went ahead and issued an approval even though they didn't have all the documents, and said that the DRI DO only had a protection from changes in the Town's code for 5 years from its issuance, and it is now well past that date. She asked the Council to honor the code as it exists, and

recognize that only accessory docks, meaning docks that are connected with the adjacent unit owner, be permitted in Bay Beach and continue to be so.

Jerry Murphy responded to Ms. Grady's remarks by citing Section 34-265, which the section of the LDC that regulates any administrative LDC interpretations, and authorizes the Community Development Director to do the interpretation, and if it is felt that the requested interpretation involves an issue of legislative intent or policy it can be deferred to Town Council. As the CDD, Mr. Murphy did not feel that was the case regarding this issue, and so he did the interpretation. He said the applicant is allowed to appeal and that was the situation at hand. He wanted it to be understood procedurally. With regard to the LDC changing and de-vesting the DRI DO, Mr. Murphy thought there was a statutory provision of the Florida Statutes (163.3167 sub 8) that would not allow that to occur. He said that section authorizes the Town to adopt LDC's, and says that nothing in the act of adopting the LDC can limit or modify the rights of any person to complete any development that has been authorized as a Development of Regional Impact pursuant to Chapter 380. Mr. Murphy said this was the case with DRI DO for the Bay Beach docks. He said this showed that while the Town has the authority to adopt LDC's, they are not allowed to do it in a way that would divest the developer on the DRI in question of his right to develop.

Mayor Van Duzer then opened the hearing up to public comment, and asked everyone to please be considerate of a time element so that everyone has the opportunity to speak as willfully as they wish. But, he said if they agree with a prior speaker, not to belabor the point but just note that they agree with it. Those wishing to come forward were then sworn in.

Mike Flannigan, an owner at Royal Pelican, came forward and said he was glad he made it to this meeting because he had no idea about the DRI DO before this hearing. He mentioned that he is a licensed contractor in the state of Florida and that he also held a brokers license in the state of Florida. He said he knew a few things about the laws. He said he understood that the way OBD, Inc. originally got as far as they did in the permitting process was because they used the Royal Pelican Boating Association as the name on the application. He then addressed the issue of the DRI permitting 380 docks for 1200 condos, and thought it was meant that the docks would be apportioned out among all the condos in Bay Beach, such as Hibiscus, Waterside, Royal Pelican, etc. He opined that maybe an interpretation needed to be done on the DRI itself, in regards to putting all the docks behind the Royal Pelican only.

Mr. Flannigan stated that he had heard of eminent domain, which the government can exercise if it would be for the good of the general public, not for fifty boat owners. He said being a developer himself, he understood the developer on this issue paid a lot of money for the land, and said he should go ahead and build the docks and then ferry the dock owners out to them like the people are ferried to Matanzas Pass and the Town docks. He said they could build the docks off of barges and wouldn't need the access over the land. He also thought the developer should put up a fence along the sea wall so that people getting off their docks don't walk along the sea wall to avoid lawsuits due to injury.

George Vicovich of 4531 Bay Beach, Unit #131, came forward and said his family owns Dock #36. He said he was not a lawyer, but had heard a lot of legal talk at this hearing. He said that when his family bought their condo unit, they bought it from Royal Pelican Development Corporation, John Walker, President. He did not understand where StarDial came into the picture because it was an ancient thing. He objected to the grandfathered rights and asked where were the citizens' rights. He said the RPC had spent 50 million dollars developing the condos property, and he had heard the developer had paid $100 for the submerged land. He felt the issue they were addressing had "more tentacles than a 50 pound octopus". He said if StarDial wanted to own that submerged land for the docks, they should have never let John Walker erect Building #5 on Royal Pelican property, then they could have had their access because they would have owned that land. He believed that OBD does not actually own that submerged parcel because under state statutes that govern condominiums. He said when Mr. Walker finished his project, Phases 1 – 9, the owners assumed all the rights in the world because they had paid their money up front. He added that he didn't give StarDial five cents, he said he paid John Walker for the condominium. He didn't think Mr. Walker would have build any boat docks unless someone was willing to buy it. He said he bought a condominium because he wanted privacy, and that buying the condo unit gave him property rights there. He didn't want strangers coming through that would cause him to worry about his car, his bicycle or whatever he has outside. He said the people who live there all trust each other, and they don't want outsiders. He said the Royal Pelican people should be the owners of the submerged land in question and paying taxes on it. He said there were no delinquent taxes on it, because there was no owner of it. He didn't understand how, if the RPC owners had bought the property from John Walker, and had been paying taxes on the property they bought, an outsider could come in claim it. He said that property actually belongs to Royal Pelican Condominium Inc. He said they were the owners because they assumed the Royal Pelican Boating Association, and all of Royal Pelican Condo Association. He understood if you buy property on a canal, you have 25% rights from the sea wall. He felt the only solution to the problem was to call in the State Attorney and the FBI, because Mr. Vicovich saw many things wrong with the legalities of the case. He felt that when they bought the property, they should have begun paying taxes on it. He said that he wasn't a lawyer, but he had tried to give the best opinion he could as an ordinary person.

Ed Woike, President of the RPC Association came forward and referred to Mr. Tripp's remarks wherein he stated his client's willingness to sell the property in question to RPC owners, but Mr. Woike said Mr. Tripp failed to tell Council that his docks compared to the existing Royal Pelican docks are an additional $50 to $60 thousand each. He said that where the docks for RPC owners are around $20 thousand, Mr. Tripp's client's docks start at around $75 to $85 thousand each. He said that OBD, Inc. is the same developer that built Waterside, and has gated that community, which stops people from going into the Waterside area 24 hours a day, seven days a week. He said OBD has landlocked the fishing docks which

is common property to all the condo owners at Bay Beach. He said OBD has eliminated the parking area which was always part of Bay Beach for the fishing docks. He said OBD had constructed a cyclone fence which eliminated access to Waterside docks. He said all of OBD's area is private, and people are not permitted to open access, yet he wants to sell the docks that he plans to construct on Royal Pelican property, which is not gated, to the people in his private, gated community. He said the RCP people have been told they must leave their property opened to all the people of the Bay Beach area, as opposed to Waterside, which is gated, guarded and closed to all but Waterside owners, and that if anyone else in Bay Beach wants access to the fishing docks, they have to buy a $15 tag in order to gain access to a dock that has been owned in common by all Bay Beach residents for fifteen years.

Mr. Woike said the people to whom OBD plans to sell the docks in question are a minimum of ¼ mile away from RPC property. He said OBD was not community-minded, and is not a friendly neighbor, and only interested in profit at the cost of the other residents in Bay Beach. He felt many errors were made in the issuing of the permits to build the docks. He hoped for the sake of the private rights of the RPC owners, that Town Council would correct what he called a travesty.

Ian Dow, the Secretary-Treasurer of RPC Association, came forward and said he objected to the fact that Mr. Tripp was not sworn in before giving his statement. He said he had owned property at the Royal Pelican for 15 years. He said a large number of the 144 property owners at RPC were present at the hearing. He said they were angry and frustrated because their property rights were being taken away and no one seemed to care about it. He stated that a private developer is scheduled to build 33 boat docks at the extreme north end of the Royal Pelican property. He said the only land access to the proposed boat docks is through and across Royal Pelican property. He said the developer plans to sell the docks to non-Royal Pelican residents. He said the RPC statutes state that one must be an owner of an RPC unit in order to have a boat dock adjacent to the property. He referred to Mr. Murphy's earlier remarks that this was a unique situation, but Mr. Dow said if you live in the Royal Pelican, you know how unique it is. He said potential owners of the proposed boat docks must cross private property to access them. He noted that there is no consideration for parking, and the owners of the RP have no control over persons trespassing on their private property, and no control over who would use their facilities or who may abuse their property. He said the RP had always been a safe and secure place to reside, and that the owners began practicing Neighborhood Watch long before it became a catchphrase. He said they knew each other and respected each other's private property rights. He said they were now about to encounter a set of thirty-three new families and their guests, who have no right to be on RP property, and the RP owners no longer feel secure. He said the proposed docks could bring about a 25% or more increase in traffic and people who they do not know and who do not have any interest in the RP owner's private property. He said his investment in a safe, secure condominium is in jeopardy. He said they must now disclose to potential buyers that 33 boat owners who do not live in RP condos

have access to the RP property and that the RPC Association has no control over them. He said they have an obligation to protect their private property, and the developer and the buyers of the boat docks have none. He asked the Council to consider the private property rights of 144 owners of the Royal Pelican. He asked how they were to explain to the owners and potential owners in Royal Pelican why outside people and their guests can cross their property without permission and use their facilities without any obligation. He asked the Council to support the RPC Association premise that owners of the boat docks at the Royal Pelican must be owners of Royal Pelican condominiums.

Gerhard Pheit, President of RC Boating Cooperative, came forward and said there were multiple reasons for the cooperative to oppose the boat docks, among those being that it is stipulated in their by-laws that only owners of Royal Pelican condos can own adjacent docks, which he said conformed with a Town ordinance that says one must own part of the adjacent land. He said there are no additional parking spaces available, and are in no position to police their parking area 24/7.

Mr. Pheit said they have strict rules that are enforced at RP. He guessed that 50% of boat owners purchase their gas at gas stations rather than at marina docks, and RP does not permit storing gas on the docks, which would mean people using the proposed docks would be carrying gas over RP property, and proposes a safety hazard and would be a liability to the property owners should any accident should occur.

Mayor Van Duzer, seeing no other people come forward to speak, closed the public comment at this point. He then noted that Mr. Tripp had not been sworn in as Mr. Dow had mentioned in his remarks during public comment. Attorney Roosa stated that none of the attorneys are sworn in because they are presenting the law, and were not testifying as to facts. This drew a loud response from the public present, and Mayor Van Duzer asked everyone to be courteous. At this point, the discussion was brought back to Council.

Vice Mayor Rynearson asked Town Attorney Roosa asked if the right of way applied to private roads. Attorney Roosa did not understand the question. Vice Mayor Rynearson then referred to a remark Mr. Tripp had made regarding a law that grants the right of way to a parcel of land through another person's parcel in order to give access to any road. Mr. Tripp indicated that it was not what he said. Vice Mayor Rynearson said he was confused as to where the right of way was automatically granted. Mr. Roosa explained that the court found that the parcel in question was landlocked, and had no access to the property, and that under Florida law they are required to have access and the intervening property must provide an easement. Mr. Roosa stressed that that was the ruling of the court, and that resolved the issue of access, but that the specific access had not been identified as yet, as to whether it will be a blanket easement across the entire property or something else. He said those issues were still to be worked out between the two parties involved.

Councilman Massucco asked to have Mr. Tripp back up to the podium. Mr. Tripp came forward. Councilman Massucco said he could almost insert himself into the situation at hand because he lives at Bay Beach, at Harbor Pointe.

He felt he was fortunate because all the docks at his condo were sold only to Harbor Pointe residents. Councilman Massucco said he took a ride to the Royal Pelican area after the last hearing, and as he looked around at the area where the proposed docks would be built, he wondered to himself where the non-resident dock owners would park. He observed that the residents probably had trouble with parking already due to lack of space. He considered maybe that parking could be designated at the golf course. He then drove to the golf course, and measured .3 miles from the golf course back to where the Royal Pelican property was, which was how far someone would have to walk to get to the docks if they parked at the golf course. He thought that was ridiculous to present to a prospective buyer of the dock, that they would have to do all that walking back and forth between the docks and the golf course parking area. Councilman Massucco pointed out that the location of the proposed docks is directly across from the Fish Tale Marina gas facility, and he had observed heavy boats going in there for service. He was certain the proposed docks would protrude into the canal, which he felt would present a powerfully dangerous situation, as the proposed docks would be right up against the gas facility. He said the most important point he wanted to make, being a boat owner and a dock owner, was that if there is no water or electricity at the dock, he would be in trouble. He asked where OBD intended to get those utilities.

Mr. Tripp said that nothing by the Staff recommendation, and nothing before the Council will impact the presence or absence of parking. He said the building permit and the development order had been issued, and under the existing permit and the existing rights as Judge Corbin had found them, OBD has the right to build the docks. He said OBD said they were not asking the Council to afford any right to park. He said Royal Pelican could have had Mr. Massucco's car towed while he was surveying the situation as is their right. He said they were not asking for the proposed dock owners to have any greater rights of access than Mr. Massucco exercised when he drove down to look at what was there. Mr. Tripp said the parking issue was a red herring in the sense that parking is not required in order for the docks to be built, and that issue had already been determined and the permits had already been issued. He said nothing that happened at this hearing would expand or contract any parking rights.

Mr. Tripp said that with regard to the navigational issues, the Army Corps of Engineers (ACE) had dealt with those issues and that the ACE was the agency that is responsible for dealing with navigable waterways. He said that despite the protestations of the Royal Pelican owners who made the same arguments to the ACE that one couldn't have a dock without adjacent property and that it would be dangerous to bring fuel to the vessels, the ACE granted the permit for the construction of the docks in question. He pointed out to the Council that the docks in question were going to be built in the exact footprint that was on the sketch that was attached to every Declaration of Condominium that each of the Royal Pelican owners received and signed for when they bought their condominiums. He said the owners knew that the proposed docks, in the location and configuration as described were intended to be put there in the future. He

said therefore the issue of location and suitability of the docks had been determined and was not before the Council.

Mr. Tripp said the issue concerning utilities remains to be determined. He added that what was before the Council was not whether or not there will be electric or water service to the docks, but rather the Council needs to determine if the Town Staff had inappropriately made a determination that the limited development order was consistent with the vested rights of OBD. He pointed out that he recognized they were in a public forum, and that people are encouraged to speak their opinions, but that he was representing OBD, Inc. He said OBD, Inc. was not the developer of Waterside and that OBD, Inc. did not erect any gates, nor did it restrict any access to any location in Bay Beach. He said that if, in fact, some action has been taken to deprive the Royal Pelican owners of the fishing pier, rights to park, or any other similar right, he was sure their attorney, Ms. Grady, could enforce those rights against whoever was responsible for that restriction. He reiterated that OBD, Inc. had nothing to do with it, and said they should focus on the issue before them and that it was a very limited issue. He restated that the issue before them was whether the Council was going to uphold the Staff's analysis, and listen to the advice of the Town Attorney, or were they going to allow for this sort of public input to expose the coffers of Ft. Myers Beach to an exposure that it should not undertake.

Mr. Massucco said he didn't think the gas facility was in the position it is in now when the Army Corps of Engineers issued their agreements. Mr. Tripp said if that was true, then the Army Corps of Engineers took it into consideration when they allowed the fuel docks to be built. He felt that one way or the other, the Army Corps of Engineers would have had to give a permit for both of those uses. He said he couldn't speak to when the fuel docks were permitted because he didn't know, but he said the OBD docks had been permitted for quite some time.

Vice Mayor Rynearson said they were dealing with a legal matter, and that he felt badly for the Royal Pelican people, but he felt that the Council did not have the right to make a decision on it, and that they needed to take it to court. He said if they were not happy with the judge's ruling that they should file an appeal. He said the Council does not have the right to disallow the building of the docks. He felt it would subject the Town to a lawsuit, and he didn't want to do that.

2. Town Council Resolution 05-07

MOTION: Vice Mayor Rynearson moved to support Staff's recommendation. The motion was seconded by Councilman Thomas.

Councilman Massucco said that it seemed simple to him because it was a common sense thing as opposed to a legal thing. He said common sense would tell you that the docks shouldn't be built, but they have a legal right to do it, and that was the conflict. He said if the builder has a legal right to do it, then he didn't think the Council could overturn it. And referring to what Vice Mayor Rynearson had said, Councilman Massucco felt the Royal Pelican owners' best

bet was to try to appeal it through the courts. He said as much as he sympathized with the Royal Pelican owners, he felt Council's hands were tied, and there was nothing the Council could do for them.

Mayor Van Duzer, had read through Judge Corbin's order, where the judge reserved for final judgement, and while not ordering the parties to mediation, stated that if the parties cannot reach agreements on remaining issues, that it would go back to the judge for final judgement. Mayor Van Duzer said he would love to see the docks not built, and that he had been struggling with all the issues in that it all seems legal, but not right. Ms. Grady came forward and said that her clients did not bring up the issue of access to the Council because it was before the courts, but that they just brought before Council was an interpretation of the Town's zoning code. She said her clients feel that under the Town's zoning code, the proposed docks are not permitted. She said counsel for OBD pulled them onto other issues, including access, but that she had not presented access as an issue before them. She said they think it is an issue, but they only brought the interpretation of the zoning code before Council at this hearing.

Mayor Van Duzer asked Mr. Murphy to address what he felt was a valid point made by Ms. Grady, in that they should only be looking at the zoning codes and not all the other legal issues. Mr. Murphy said that one thing the Town code says is that the Bay Beach development is governed by the stipulation agreement mentioned earlier. He said that later in this meeting the Council would be considering Mr. Spikowski's Glitch package of amendments, and one of those is to include a reference to the DRI DO. He said because the Town code does not reference that DRI DO doesn't mean that it doesn't exist. He said development within Bay Beach is governed by the DRI DO as well as the stipulation agreement. He said the situation at hand was unfortunate in a number of ways, in that Lee County did the Town a great disservice when they approved the Development of Regional Impact development order with very vague language that does not address all the specifics that need to be considered. He felt the Circuit Court did the Town a disservice when they created the parcel separate from the parcel that the condos are built on. He said the court is now going back to fix what they didn't look at when they created that parcel by providing access. He said these unfortunate things were out of the Town's hands.

Mayor Van Duzer said that Council had asked for a determination from Michael Cicerone, the attorney who had done the settlement agreement with Star Dial, or Bay Beach DRI DO, and he specifically said that there are a number of conditions that must be met before the permits were issued, and that if the conditions were met, the application should be granted. He said the RPC Association could resolve these issues thought civil litigation. He said the issue before Council was whether they upheld the Staff's interpretation of the issue or not, based on the laws and codes as they exist. He expressed his desire to protect the RPC owners' rights, but pointed out that the RPC owners had a chance to buy the parcel and didn't feel it was necessary at the time, and so it was bought by an outside investor. He said the property rights of both sides of the issue had to be considered.

Mr. Murphy said he thought the Circuit Court was attempting to gradually balance out those property rights, and was why the Circuit Court had maintained jurisdiction over the case as it proceeds. He said the DO that was issued on December 10, 2004, and appeared in the packets before the Council, has conditions that require that all the covenants mentioned earlier be met prior to the final inspection to issue the certificate of compliance.

Councilman Reynolds felt there were lots of open issues in Judge Corbin's order. As an example, he cited that the court denied the plaintiff's complaints, but granted a counterclaim, which Councilman Reynolds thought left an opening. He cited section 2.4, where it states that the court reserves for further hearings, as the question of whether the easement exists generally across a common area of the plaintiff's condominium or whether it must be particularly described across the plaintiff's land, and he felt this was another opening. Councilman Reynolds went on cite section 2.5, which states that any issues regarding overburdening by the way of necessity by construction vehicles or other use by the defendant for potential damage to the plaintiff's lands and improvements on it, such as a sea wall are beyond the scope of the facts allegedly in the pleadings and are therefore speculative; the ruling on these questions would be based upon the facts of the actual controversy and would therefore be advisory. He felt these sections of the ruling were too open-ended and unresolved. He said he didn't think the Town should act as a default party in this case, but believed the community was being tread upon, and that the Council had an obligation to the residents of the Island, and should go back to Judge Corbin on behalf of these and all other residents. He proposed the Town should go with the Royal Pelican residents back to Judge Corbin and get a further ruling as there are too many open ends, and that the Town should pay 50% of the costs for doing, as it does when trees need to be replanted or canals need to be cleared, with the 144 Royal Pelican residents paying the other 50%, because he felt the residents of Royal Pelican were going to be hurt. He said he did not believe that the Council had to address the issue legally and felt there were other areas that could be gone into. He felt the situation was nonsense to force something like this on residents who bought the property in good faith and now all the faith is being thrown to the wind. He felt that no one was fighting for them. He reiterated to the other Council members that he believed it was their obligation to do so. He proposed either tabling it to a distant future, or reject it outright and let the project owners deal with Mr. Murphy again. He commented on Mr. Murphy having said there were open areas in the issue. He thought meanwhile it would give the Council a chance to study the case and get an attorney to study it to see if they have a chance to protect the citizens. He said they have to look beyond all the legalese that was thrown at them and to put a little bit of common sense and humility into it. He felt he could not go along with voting for something like this on the residents.

Attorney Roosa stated that he thought the point Councilman Reynolds brought up was valid, but not proper for consideration of the resolution of the matter. He thought there were two issues: to determine if the development order equitable and fair to the residents in the way it came about, which he thought was a valid concern; but, the actual issue before the Council for vote, was whether or

not that property owner had the vested right to build the docks. He said the Staff and every attorney who had reviewed the case has told the Council that OBD has the legal right to build the docks. He said the objections and concerns that were raised by the residents were marketing concerns that will affect the value of the properties. He said a dock with no access could have no value if no one can get to it. He said those were concerns for the property owners, not for the Town Council. He clarified that the issue before the Council was to determine if the decision of the Town Staff to issue the permit was proper. He pointed out that the decision of the Staff was based on the development order. He said that the point Councilman Reynolds brought up, regarding the situation of the development order as it is being implemented now is not fair to the residents and is being used inappropriately, was a separate issue, and if the Council wanted to direct that funds be allocated for litigation of that issue, that would be appropriate. He went on to explain that it was not an issue for the consideration of the review of the Town Staff. He said if the Council decided that the Staff analysis should be supported, then after that they could get into the question of whether or not they wanted to get into assisting in litigation any issues the Council felt should be brought to the attention of the court.

Councilman Thomas said he had seconded the motion that was made to support the Staff recommendation.

Councilman Massucco asked the Town's Attorney if the Council voted to support the Staff's recommendation in the case, would they then be able to participate in an action after that. Mr. Roosa said it was a completely different issue and their vote would have no bearing on any other action they wanted to take after.

Mayor Van Duzer felt that what he and Councilman Reynolds had said had bearing and weight, but wanted to know what kind of position they would be putting themselves in. He asked if they would then question the development order as it exists. He wanted to know what the Council had to do to be involved in the case. Attorney Roosa thought this was a unique situation of having a development order that was adopted as part of a total plan of development of a parcel of property. He said that although the docks were not restricted to the individual condo buildings, it was somewhat implied. He thought that when the decision was made, it was never envisioned this sequential development of circumstances. He said as a consequence of that, there has been an unanticipated result. He thought it was an issue that the Town might consider intervening in the current action, or the Town might decide that, because the Royal Pelican owners have been put in a financial position to support the litigation, they would go 50/50 with their legal fees. He said he didn't believe that the County Commission or the Town Council had anticipated this situation when the development orders were adopted. He said it was a very unique situation and thought it was unlikely they'd find another one like it anywhere. He said the Council and Town could say that they don't like what has been done based on the legal and binding orders adopted years ago, and maybe could make some effort to correct the Town's involvement in this issue. He said that in effect after the Town Council adopted the development order, as time went on, it was part of the problem. He thought the

Town could take the position that it does not want to be part of the problem, but part of the solution, and to determine how best to do that. He thought that could be explored either through separate litigation or by giving financial support to the Royal Pelican's current litigation. He stressed it was not appropriate as consideration of the resolution – determining if the Staff did or did not make a proper recommendation - before Council at this meeting.

Councilman Reynolds said he thought the Council should intervene. He acknowledged that Attorney Roosa had made favorable comments about the points Councilman Reynolds had made earlier, but that Attorney Roosa had not made the one good comment that Councilman Reynolds had wanted him to make, which was that Council should go ahead and do something about it. He said Mr. Roosa had built inroads into that area. He said some of the comments that Mr. Roosa made were absolutely valuable to the Council, in that they can intervene. He said the Council does not have to support Staff if they see overriding factors, and that Council has an obligation also. He said he hoped Staff would not feel insulted if Council rejected their recommendations because it should not be taken in that manner. He believed that a mistake had been made through the commissioners and that the Council needs time to go back to them as a Town Council with legal representation and have the commissioners research the issue and reconsider it. He said he didn't know about the ordinance that Ms. Grady had mentioned, but if this was contradictory to an ordinance the Town had on its books, he thought they needed to do more research to see where they would be going with it, and not be so worried about agreeing with Staff and voting to back up Staff.

Councilman Reynolds said he knew that Mr. Murphy was an open-minded man and that he has a lot of legal background and experience, so he didn't think Mr. Murphy would be broken up too much if Council did not permit this at this time so that Council has time to go back and see why the development order was issued to begin with. He thought that someone "down there" had made some mistakes and Councilman Reynolds felt that the Town Council should not be required to live by someone else's mistakes. He felt that was what was being pushed toward Council. He said they were five independent individuals on Council, and that they could make up their own minds without having to agree with everything that is brought before them. He thought if there was ever a time to be individualistic, this was the time to do it. He said it was a terrible situation facing the Royal Pelican community, not just individuals. He hoped that Council would reject this recommendation and table it to a future meeting so that they could see what chances they had of intervening.

Councilman Massucco said that he agreed with Councilman Reynolds that the Town should assist the Royal Pelican residents in their litigation, and that the Council has an obligation to do so. But he also felt that the Council had an obligation to vote on what was put before them for consideration at this meeting, and then proceed on their course of action. He felt they should act on what was before them tonight and get that part of it done.

Councilman Reynolds said he was not saying not to act on it at this meeting, but not to approve it.

VOTE: Motion passed 4 – 1 with Councilman Reynolds voting against it.

Vice Mayor Rynearson said he agreed wholeheartedly with what Mr. Roosa said, in that if there was anything the Council could do to help the Royal Pelican residents that it should. But he felt that, rather than shoot from the hip, it should be thought out and no big decisions about it should be made at this meeting. He hoped the Council could help the Royal Pelican people, and if there is a way to do it, he was all for it. He said that legally it had to be done this way now, and if the Town Attorney can come back to Council with a way they can help, that would be fine. But at this meeting, Vice Mayor Rynearson felt they should look at it first before deciding anything. He thought maybe by the next Town Council meeting, they could have an answer as to the strategy that the Town should take. He said he agreed wholeheartedly that the docks shouldn't be built there, but that legally they can put them there. Ms. Segal-George said Staff could bring something back for the next meeting.

Councilman Reynolds said he wanted to ask a legal question of the Town Attorney. He asked now that Council had approved construction of the docks, upon which he was met with disagreement. He asked if they had not just approved construction of the docks. Attorney Roosa said that what the Council just did was say that docks are permitted in that zoning district. He said the permit had already been issued, but what the Council just said was that the permit was validly issued. He asked if that was not the same thing as giving the developer the go-ahead. Mr. Roosa said that was correct. Councilman Reynolds went on to say that the developer had to next take care of the peripheral problems of entering the property and all that. Mr. Roosa added that from the looks of the litigation there are several issues that are yet to be resolved before construction can begin. Councilman Reynolds said that the Council had approved construction of the docks. Mr. Roosa reiterated that they had approved the issuance of the permit, and the Council's vote at this meeting said that the property was properly zoned for the development of docks.

Mayor Van Duzer interjected that the issue Councilman Reynolds had should probably be taken up at a later point to clear it up. Mayor Van Duzer said the Council had made the decision and that he did not wish to second guess the decision at that point. Councilman Reynolds said he didn't wish to second guess it either, but wanted to get it cleared up because he still didn't understand. He went on to say if the Council approved the permit then it means that if the developer can get legitimate access to the property then construction can be started. He asked if that was where they stood at this point. Mayor Van Duzer asked for clarification from the town attorney, as he understood it to be that Council had just agreed that OBD has the right to build the dock. Mr. Roosa said if Council would read Resolution 05-07, in effect it says that the docks are allowed on the Bay Beach zoning district. Councilman Reynolds said that was what he meant, but he had just stated it differently. Mr. Roosa said he would not get into the consequences of his stating it differently. Councilman Reynolds interrupted Mr. Roosa and said that since Council had approved the permitting,

then it means the Council cannot really intervene. Attorney Roosa said it did not mean that. Councilman Reynolds said that Council could go down and help the Royal Pelican residents fight against certain things, but that Council has already given permission for the docks to be built. Mr. Roosa restated that what the Council said with their vote on the resolution was that, based on the existing documentation – the development orders that were already issued – that the zoning is proper for development of docks. Mr. Roosa elaborated that Council did not speak to any of the other issues, and did not say anything about Town Council's right with regard to those development documents. He added that all Town Council said in their vote to support the resolution was that reading of the documents permit what is there. He said there was nothing to prevent the Council from taking a position which would support the condominium owners. Councilman Reynolds said they had shot their chances of going to court to fight. Ms. Segal-George and Mr. Roosa both replied no. At this point, Mayor Van Duzer said they were done with this discussion. Councilman Reynolds asked to be allowed to finish. Mayor Van Duzer said it had been discussed and finished explaining what was done, and thought it was time to move on. Councilman Reynolds said he did not agree with him but he would agree to move on.

B. First Public Hearing of the Glitch Ordinance 05-07

Mayor Van Duzer gave a few minutes to allow for the people leaving Council Chambers, then asked those who were staying to talk to clear the room so that the meeting could continue.

Attorney Roosa said there were two ordinances, and they may be renumbered so the numbers were not important. He then read the titles of both ordinances.

Bill Spikowski, Planning Consultant to the Town, said that when the ordinance was first introduced two weeks prior to this meeting, there had been a few questions that he wanted to respond to before the hearing began. First, he said there had been a question about a rule the Council had adopted about two years ago that had to do with someone who had owned two small lots and had a house built across the common property line. He said that provision was in a part of Chapter 34 not being amended by this code, so there would be no change to that rule. He said that rule only applied to very small lots that are smaller than the Comprehensive Plan would allow being created presently. He said in that situation that if a person had a house built across the common property line, they would not be allowed to split the property. He said it doesn't apply generally, but only if the lots are so small that they would be outlawed by the Comp Plan, and the County's Comp Plan going all the way back to 1984. He didn't think it would come up often, but does come up occasionally, and that no change was being proposed. He said that there was also a question about requirements for obtaining a special exception. He said the previous code required an applicant to prove entitlement to the special exception, and he had proposed changing it to require that an applicant had to demonstrate that the requested special exception complies with the standards in the LDC. He said there had been a question as to whether that was strong enough language. He thought the word "demonstrate" worked

well there because the applicant has to show compatibility and Council and Staff and applicant can argue as to whether the applicant has demonstrated that compatibility, and Council can vote either yes or no as to whether the applicant had demonstrated compatibility with the LDC. He said if Council wished to make it stricter, they could use all the language that's in the proposed code, only replacing the word "demonstrated" with the word "proved".

Mr. Spikowski said he had had several meetings with Councilman Reynolds as to what the exact meaning was to certain provisions. As a result of those meetings, Mr. Spikowski had drafted clarifications on those and would be submitting all of that in a memo in the beginning of the following week, in addition to any other clarifications or changes that result from the meeting they were having now.

Mayor Van Duzer then opened up the public hearing.

Clay Cason of 235 Tropical Shores came forward and said he was not really against the changes, as he had indicated on the green card, but rather more confused about it. He said the name 'glitch ordinance' was scary-sounding. He said his primary residence was 235 Tropical Shores, but that he owned property at 243 Palermo, 118 Lovers Lane, 124 Coconut, 241 Pearl and was representing with a partnership on the Gulf of Mexico 4960 Estero, 4502 Estero, 100 Gulfview, 3780 Estero, 3532 Estero and 3120 Estero. He said he also had large deposits on 3120 Estero and 3132 Estero. He said he had recently applied for zoning verification letters for which he expected replies within 14 days, but was told it would take longer because the ordinance amendment changes would affect the property rights on property he owned or was in the process of buying. He said he has reasonable investment expectation in those properties, and that he was concerned that a lot of things would get passed with the wave of a wand and he really didn't understand what the changes actually were. He said the general public and property owners have no idea what is going on, but that he happened to find out because it is his business. He said he had been at a workshop a few weeks ago, where people got up and said the Comp Plan was too strict, that build-back policies were too strict, and he felt that it was a unanimous opinion among those in attendance. He felt they should slow down the amendment process and explain what was in the ordinance more clearly and more broadly to the public. He thought perhaps new attorneys needed to review what was going on, and to just fall back on the original thing Comp Plan for now. He said there was a lot of money riding on a lot of different things, and if one is not living in Council Chambers and Town Hall, there could be lots of changes to things and one wouldn't even know. He said he was there to get clarification for himself and to explain it to some other people.

John Asmar of Roetzel & Andress came forward on behalf of Sea Breeze Properties, SWF LLC. He said that he had addressed the LPA in December, 2004, on what he characterized as significant changes proposed in the ordinances. He said it was his understanding that the more significant changes would be addressed in the Evaluation Appraisal Report that is forthcoming. He expressed his hope that it would get done soon so that people who are affected by the

consequences of those changes will have an opportunity to meet with the Town and address the issues uniformly.

Mr. Asmar went on to address specifically Section 34-636 in that he felt it would significantly affect his clients' (Sea Breeze Properties)interests – they own property at 71 Mango St. He cited the section regarding the conversion of existing two-family and multi-family dwelling units that the owner would want to convert to a condominium. He said the conversion process is governed by Florida statutes, specifically as the Florida Condominium Act and the Roth Act. He said that in July 2004 the property owner requested, as provided in pursuant to those Acts, from the Town the acknowledgement of his proposed creation of a residential condominium from the existing improvements already on the lot. He explained that the owner has a partial with two residential structures on it, and desires to submit his partial to a condominium form of ownership. He said that on March 17, 2005 the Town's representatives advised Mr. Asmar's client that the conversions to the condo form of ownership was not authorized by the current LDC. Mr. Asmar said that they disagree with that determination, because in the Florida Condominium Act and the Roth Act expressly provide citizens with rights of ownership and regulate those rights. He stated the opinion that an administrative interpretation that provides a general prohibition of those rights is not consistent with the Town's current LDC. He said they were in the process of appealing that interpretation and said he was not there to discuss that at this meeting. But he did respectfully request that the Town Council reevaluate the proposed Section 34-636, and delete it in its entirety, or amend the proposed section so as to exclude the owner's application, or amend it in such a way so as to not affect the rights of those individuals who petitioned the Town prior to this evening, specifically those who had already petitioned for the Request of Acknowlegdement.

Mr. Asmar offered some proposed language that stated "Partials, subject of a Request of Acknowledgement by the Town of the proposed creation of a residential condominium by a conversion of existing improvements pursuant to Florida law filed prior to April 4, 2005 pursuant to the Land Development Code at the time, are hereby expressly excepted from the provisions of this section." He explained that this would recognize that a person has a vested interest until the issues are heard.

Carl Cox of 21533 Indian Bayou Drive, came forward and recounted the Chronology of events which led him to be in a particular situation. He said that on May 7, 1998 he purchased the property through a local realtor, and that it had been advertised as a single unit, or commonly called a one-half duplex, with a common wall, and that the advertisement had said "Why buy a Condo?" He said he made an offer that was countered by the owner, and subsequently an agreement was approved by both parties. He said closing was scheduled for June 25, 1998, at which time he was given a warranty deed, and a commitment to insure title, all prepared by a local attorney. He went on to say that approximately 2 ½ years ago, when applying for a home equity loan, he was denied because according to Town records the property he had purchased was classified as a duplex and not a separate unit. He said he and his wife had been shocked and upset by this, and

felt that at some point in the purchasing process, someone should have known about that and told them. He said that on or about June 2003, he had sent a letter to the Deputy Town Manager John Gucciardo, in which he vented his frustrations with the situation, with hopes he could get help in solving the problem. He said that Mr. Gucciardo acknowledged that since Mr. & Mrs. Cox were innocent that the Town would not pursue any legal action against them. Mr. Gucciardo had also recommended in his response that they get legal counsel, which they did but to no avail. He said that on or about October 2004 Mr. Cox contacted the Department of Lee County Property Appraiser and he spoke to a Senior Abstract Specialist concerning a lot split and a separate strap number. Mr. Cox was asked for documentation of how he had bought the property, and when he presented it the people at the County Appraisers office could not understand how it could have happened. He mentioned that he had actually relocated from out of state to 21533 Indian Bayou in January 2004. He said that the Abstract Specialist explained to him that what he had to do: prepare a quit claim deed, property surveys and so forth. He said he had done those things and on January 12, 2005 he received notice from the County that it had just accomplished a parcel split to show his ownership of a one-half duplex. He then contacted the Council member of his district and the Councilman was very supportive. He said that at a March 2005 LPA meeting, the LPA approved the lot split and subsequently sent the split request to the full Council for discussion and consideration. He said he was there at that meeting to ask for approval of the lot split, and that it would ease his mind, because until they do, there is nothing he and his wife can do with the property. He said he can't sell it, or do anything with it, until this issue is resolved. He opined that the deed is probably not worth the paper it is written on until he is granted the lot split and a separate strap number.

Beverly Grady representing the Royal Pelican Condo Association came forward. She said that as part of the proposed amendments to the ordinance a change to the Bay Beach zoning district in Section 34-651 that would add the DRI development order to the Land Development Code as a reference. She thought the Council could now see how complicated the situation is and that she and her clients believed it had evolved to something very different from what was intended. She pointed out that the current Land Development Code for the Town does not list permitted use regarding the docks. She requested the Town Council do a thorough review rather than adding a 14-page document to the Code. She thought the complications that had been revealed at this meeting reflected that there are fears of and potential incompatibility with how the docks would operate with the existing condominium. She felt just adding a 14-page document (the DRI DO) to the LDC would not address the issues that had been raised before Council. She thought they would have more issues to bring before Council at the April 18th meeting, but hoped that before that meeting took place that the Staff would take that into consideration and realize that it would take more than just adding the DRI DO to the LDC.

Ms. Montgomery counsel for OBD, Inc. came forward and said that they felt the DRI DO was a legal binding document, and wouldn't want to see any action taken that is inconsistent with the recognition of the rights that the

document provides, and requested that Council just leave it the way it is. She added that there may be other issues to discuss but asked the Council to recognize the validity of the duly adopted document, the DRI DO.

Mayor Van Duzer then closed the public hearing on this issue.

Mr. Spikowski referred to Mr. Cason's earlier remarks about how scary the changes to the Code seemed to be, and acknowledged that it was very complicated and lengthy, and has the potential to affect the whole Island. He said the proposed amendments had been in preparation since June of 2004, and the large ½ page ads in the Beach newspapers were the third or fourth time they've been run. He stated that the Town had done what it could to publicize the hearings on the proposed amendments. Mr. Spikowski said he couldn't see how he could clarify the whole thing at once, but would be happy to address specific questions. He said for him to try to clarify 120 pages would be confusing because the words are what they say and not how his narrative might try to explain them. He referred to Mr. Cason's comments about the build-back being to strict, and how it was a unanimous opinion two weeks ago. Mr. Spikowski said he was not too sure about that being the case, but the build-back rules weren't being changed by anything that was before Council at this meeting, and that it was something that was specifically reserved to the Evaluation Appraisal process that began a few weeks prior to this meeting and will be ongoing through the spring and summer of 2005. He added that if the Council decides the build-back rules are too strict or too lenient, there would be an additional set of Public Hearings to make those changes.

Mr. Spikowski then discussed Mr. Asmar's comments, and said that the reason he suggested the change to the ordinance was because of what issues were raised regarding Mr. Asmar's client's property on Mango St. Mr. Spikowski said that under the Florida Condominium Act before an existing building can be converted to condos, the person wanting to make that conversion must get a statement from the Town as to whether the structure being converted complies with zoning or not. He said that the Town's code currently was not currently explicit about when an existing building complies. He said in the case of a building like the one on Mango St., a number of the units are ground level and don't comply with the Flood Plain regulations, so the Town interpreted that to mean that the building on Mango St. does not comply with zoning. He said the reason he put the proposed changes before Council at this meeting was because he wanted to know if the Council wanted to interpret that differently, so as to allow somebody to condominiumize dwelling units that don't meet the Flood Plain regulations. He said it could be changed to say that if the Council so desired. He said ground level units had not been allowed below flood regulations since 1984, it was his interpretation and Staff's interpretation that those are non-conforming buildings, and while no one has made the owners of those buildings tear them down, there is an expectation over time as the buildings wear out or become obsolete that they will be replaced with buildings that conform with all the regulations including the Flood Plain regulations. He felt that converting a building to condominium was an improvement to property, and extends the life of the property and changes the ownership from one to several owners who all

would have their own interests and rights in that property, and doesn't seem to him to be good policy for the Town to encourage those kinds of improvements to buildings that the Town codes say should be brought into compliance, including elevation. Mr. Spikowski pointed out that Mr. Asmar's suggested language to be included in the ordinance would protect his client and anyone else who had inquired about this sort of conversion in the past year, and added that there had been quite a number of people who had done so. He said the changes in the property values at the Beach had caused a flurry of people purchasing older buildings and wanting to convert them into condominiums or to convert duplexes into individual units. He said if the Council chose to make that legal, he felt the number of people wanting to do that would intensify, and Mr. Spikowski didn't think that was what was desired. He added that the paricular section that Mr. Asmar queried was Section 34-636, and was the same provision Mr. Cox had addressed. He explained that it lists out what a person must comply with if that if a person wanted to convert an existing two-family or multi-family building into condominium ownership. He said it would not require compliance with current density rules, but it would have to meet all the other rules that would be provided for new buildings. He added that it would also require walls with not less than one hour fire resistance between each unit, and the wording came from the current building code, and that this was a basic requirement to protect the occupants should a fire begin in another unit.

Mr. Spikowski said the Council could change it to grandfather prior applicants, or existing buildings below flood plain, if they wanted to, but he said he needed to know right away because the only thing grandfathered in the current draft was the density.

Mr. Spikowski said that Mr. Cox, who had spoken earlier, was an example of what happens when someone purchases a unit that isn't properly legal on its own. He thought Mr. Cox had been misled by the way he had described his experience. Mr. Spikowski thought the regulation he had just described above might provide relief to Mr. Cox, but it would depend on the specifics of his property, in terms of whether his half meets the minimum lot size requirement, and if his building was built to code with the one-hour fire resistance wall between the units. Otherwise, he would need a variance from those particular regulations. Mr. Spikowski said the amended ordinance that he explained to Council above would provide clear standards that Staff could use to advise the public when they call about condo conversions, and would allow the opportunity for variance for someone who might have special circumstances who doesn't meet with one of the specific requirements but who generally complies.

In reference to the comments made by Beverly Grady, counsel for the Royal Pelican Condo Association, and Ms. Montgomery, counsel for OBD, Inc., Mr. Spikowski said they had both referred to a single sentence that he suggested the Council should add to the Bay Beach Zoning District. He said the Bay Beach Zoning District basically refers to the settlement agreement that the Town reached with Stardial. He suggested the new language to be added would be to refer to the Bay Beach development order but would not attempt to interpret it. He said that Ms. Grady thought it was too simple, and that it should be interpreted, but he felt

interpreting something as complicated as the DRI DO in the code was not a good idea. He said by simply referring to it, the interpretations of it are ones one would make through time based on what might be learned about the situation, and then it can be determined whether there is some relief that can or should be provided. He felt Council should not try to interpret it directly in the code. He said if Council wanted him to, he would try. He said the sentence could be left out altogether, because the action that was considered earlier in this meeting was based on the code as it was written without the new language. He said the interpretation of the Staff was that the DRI DO has legal rights whether it's mentioned or not. He said the language about the DRI DO wouldn't really add anything but would let everybody know that the DRI DO exists, and would remove the possibility that someone might think it had been repealed by not being mentioned. He said the DRI DO is not something that could be repealed through the Land Development Code, so he thought they should just leave the reference to the DRI DO in the code, in its simplicity as it appears the way he wrote it. He said if they wanted to intervene legally or interpret parts of it differently through time they would have that ability without having to amend the LDC.

Councilman Massucco asked Mr. Spikowski, with regards to Mr. Cason's request and Mr. Spikowski's response that the building in question would have to be brought up to Flood Plain regulations, if FEMA would have any involvement. Mr. Spikowski said the entire FEMA program works by making the Town adopt and enforce their rules. He said as long as the Town does that, they will leave the Town alone. He said FEMA watches carefully and every year they go through the Town's files to ensure all their rules have been strictly enforced. He said he had never read anything from FEMA that addressed condo conversions. He didn't think they needed to defer to FEMA because in all the years he had read all the FEMA materials and had never once encountered even a mention about condo conversions. Councilman Massucco said Mr. Cason's building does not meet Flood Plain regulations. Mr. Spikowski said a building that has units below current required elevations, would not meet the current regulations that have been in effect since 1984. He said the regulations allow those buildings to continue but will force their replacement, upgrading and elevating over time, which would be triggered by the owner of a building like that wanting to make improvements on the property by more than 50% of its value. He said that as the land values go up as they have been recently, the value of the older buildings becomes a smaller and smaller percentage of the value of the whole property. He said the 50% rule applies to the building and not the property, so that if one had a million dollar property, and a $200,000 structure, the owner is really limited as to how much one could put into the building. He added that at a certain point, the property is too valuable to keep it in the old use, and said that was the whole concept of the flood regulations, in that through time, every residential building will be elevated. He said it may take many years, but he said it will happen. He said the 50% rule could not be changed, but condo conversions of buildings with unit below the flood plain could be allowed, but Mr. Spikowski advised against that. He thought it would be a policy choice that he didn't think FEMA would say anything about it.

Mayor Van Duzer said he felt he understood what was in the proposed ordinance and thought that, in the case presented by Mr. Cox, if his building was built prior to 1984 it would not have to meet the flood plain requirements. He asked if, in order to condominiumize that building, it would have to meet the current flood plain requirements. Mr. Spikowski said that under the proposed language, it would have to meet the elevation requirements or it could not be converted to a condo. Mayor Van Duzer said he had a problem with that because he thought if there were existing structures on the Island that comply with the fire wall requirement, and meet the basic code requirements of a structure, exclusive of the lot size and elevation, those buildings should be allowed to be condominiumized. He said he had no idea if there was more support for that point of view, but he understood Mr. Cox's problem, and felt Mr. Cox should be allowed to own half the unit legally, and not be made to comply with the height regulation if it was built before 1984. Mayor Van Duzer asked Mr. Murphy if the building was built after 1984, and the builder had not complied with post-1984 height regulations, if this would be the fault of the builder and not the current owner. He did not get an answer, but did say he wanted more thought-work put into it and asked for a clearer understanding so that he would understand it better for the next meeting. Mayor Van Duzer referred to Section 6-14 regarding neighborhood flooding. He said he was very concerned about it. He said it talks about residential properties, and what had happened over a period of years from his observation and experience was that if one had the oldest beach property on one's street, everyone in the neighborhood would dump their water into that property. He said Lee County had a way of avoiding that for a number of years in that a person had to drain their property so that it would not flood adjoining properties and was done with a swale system. He said that the language in the Town's code says the builder has to percolate that lot on its own property. Mayor Van Duzer thought that was very difficult to do on most residential lots on the Island, especially on the limited amount of lots that are left. He said it is required on commercial properties but not residential. He said there is drainage on most of the road systems on the Island, although he thought some were inadequate. He felt that the need was for a lot to be drained properly so as not to affect adjoining properties. He didn't think it should be a requirement to percolate if they are more than 6 inches above the adjoining lot. Mr. Spikowski said the County had not had a written rule on it, but tried to get people who build a house and fill the property in such a way as to flood the adjoining property to provide swales to discharge the run-off. He said when that can be done, it is a good idea, but that the County had decided that it is inadequate. He said the County has a proposed Land Development Code change that says if an engineer will sign off on what is being done then it would be okay. Mr. Spikowski said this was easy to administer, but he thought it was inadequate. He pointed out that the County found Mr. Spikowski's proposed language on this subject to be inadequate also, in that they couldn't understand why the Town would want to get involved in the complications. He gave as an example the situation where a lot is percolated but it's not percolated enough because the soil won't absorb it. He said the language

he proposed does not require that someone percolate all of the lot. He said there is no standards or percolation tests required and that the soil on the Island was very porous as long as it hasn't been filled with a layer of non-porous material. He said the language says one needs to make a good effort to percolate, but it doesn't say one can't get a permit unless the entire lot is percolated. He thought Mayor Van Duzer was suggesting that, on a street that does have a good drainage system, swales could be used instead of using the percolation method. Mr. Spikowski thought that was an interesting question. He said that many of the streets on the Island don't have the capacity to take the extra run-off, but he would rather see attempts made to infiltrate the water on site because it would be better for water quality, in that it would provide a chance for the water to go slowly into the ground by going into sub-surface drain fields or trenches or French drains. He said running water quickly off into canals is not good for water quality. Mayor Van Duzer said he agreed with Mr. Spikowski 100% but what he was submitting was that most residential lots are not large enough, once the structure is built, to be able to percolate on the property. He said if it is going to be required, then it must clearly defined somewhere because he felt, in most cases, it would be impossible. He said on his street, the lowest property on the street is now flooded by all the other newer properties, and he had been pushing hard for water drainage from one property to another to be addressed. He said some of the subdivisions, such as Fairview Isles, each new house was built a little higher. He said it worked for a while, because Lee County had said a person may not dump their water onto adjacent property and swales were required. He thought it had been required on Ft. Myers Beach for a while.

Vice Mayor Rynearson said he had asked that the percolation language be put in about drainage. He said he had gone to a SW Florida Water Management meeting and they had made the statement that within the next few years they are going to require people to contain water on their own property. He said it was not intended for people to percolate everything so much as to run the water into flower beds or grass, rather than let it shoot into the road. He said it was an attempt to contain a portion of the water that would run off someone's property. He said SW Florida Management will give the Town credits if there is something in place like what was being proposed here.

Councilman Reynolds said, regarding water retention on your own property, why not. He said if a person claimed they didn't have enough space to do it, it was probably because too much square footage had been allowed to be built on the lot. He felt water should not be allowed to go onto another person's property.

Councilman Reynolds then referred to the condo conversion issue, and said he didn't know why they would consider putting another person in the situation Mr. Cox found himself in by dividing buildings into condos when they are beyond original use. He asked why one would cosmetically change the property and then divide certain areas into condos. He said then people would come and buy those properties, like Mr. Cox did, and that would create a universal problem. He said it was not fair to not make people stand behind their property when they sell it. He felt by doing what they were doing, they were

passing on the buck to some unsuspecting individual. He felt it was the job of the Town to not allow that type of property to be divided. Councilman Reynolds commented that he thought Mr. Spikowski had done a good job on the ordinances, and that he would hate to see it broken down by allowing something like that to happen.

Mr. Spikowski said the draft proposed a middle position, and that it could be made more strict or more lenient, and it had never been discussed before. He hoped that in two weeks, the Council would be ready to make a decision on it. He said if Council was not ready then, it could be put off, but that raised the question as what the Town should do in the interim because there were a lot of people waiting to see what the provision was actually going to be. He said if the Town is given no direction at all, the Town would continue to report that the buildings that don't comply to the Flood Plain regulations aren't consistent with zoning, unless the Council wanted a different policy. He said the build back rule allows the higher density buildings to be rebuilt, but nothing else in the code allows one to keep improving the nonconforming buildings, other than the 50% limits. Councilman Reynolds encouraged Council to let the provision stand as it appears in the draft.

Councilman Thomas thought everything should be standard. He thought making exceptions on the nonconforming buildings and percolating the land and water drainage was not right. He said what you require for one should be required for everyone. He said if the Council didn't do that, the repercussions would multiply. He gave as an example that if a neighbor down the street gets an exception, one of his neighbors may come and ask for the same exception, and that could snowball. He said the best thing to do was to keep it standard and simple. He thought the Town had a great plan in place, and asked why mess with it.

Mr. Spikowski asked if there was anything the Council wanted him to do before the next meeting. He offered to draft some alternatives on the condominium section that would either follow the suggestion of Mr. Asmar and grandfather the people who applied previously, or he could draft language that would disregard the Flood Plain rules as to condominium creation. He said he could do it in memo form which would give them an opportunity to each have the language in front of them.

Mayor Van Duzer wanted to revisit the subject one more time because he didn't think he was suggesting what he thought he was being accused of suggesting. He said there is a rule now that if a building is built prior to 1984 it doesn't have to meet the elevation rules. He said what he was suggesting was that, as in Mr. Cox's case, if his building was built after 1984 and he wants to condominiumize that structure, it has to meet the flood plain elevation. Mayor Van Duzer said all he had suggested was that if a building built after 1984 was to be condominimized, that it must meet flood plain elevation regulations. He agreed with Councilman Thomas in that if the rule is in the books now then that's got to be it. He did not want to say if one condominiumizes a structure – if a duplex is allowed to have two property owners, that's the only thing that was really being done. He felt what that said was that it was going to be allowed for

that property to be owned by two different people, and that it was going to be a townhouse unit. He didn't think it was fair not to let that happen for people. He said they still have their property rights, and he was concerned the setbacks because the units are joined in the middle, and the flood plain thing. Mr. Spikowski said the zero setback on the common line was taken care of in the ordinance. He said he understood that Mayor Van Duzer was not saying to change the rules, but rather to allow the division of the building if it was built before 1984 regardless of its height. Mayor Van Duzer said that was correct, as long as it meets all the other requirements. He said if a person owns a piece of property, and it complies with everything in the time frame in which it was built, then allow the building to be divided.

Attorney Roosa said he was familiar with condominium conversions, and when one converts to a condominium, certain structural issues have to be identified. He said one must ascertain the useful life of the various structural issues, and then the developer has to fund the portion of the useful life that has been consumed prior to conversion. He said when someone buys a converted condominium, there may be a fund to replace the air conditioning unit. His point was that future structural needs are addressed. He said there is no requirement for future compliance with flood regulations. He said there are two different types of purchasers – a purchaser of a multi-family parcel is a more sophisticated purchaser that the purchaser of a single unit condominium, who simply is a homeowner. He said a homeowner may not understand that a unit could not be improved more than 50% because it doesn't comply with flood plain regulations. He said there is no requirement under Florida statutes to bring the structure into compliance with flood regulations. He said there was therefore no reserve fund to address that issue. He said that puts the condominium owner of that type of a condo at a disadvantage. He said the intent of a conversion statute is to make them all equal, whether one is buying a brand new condo or a converted condo. He said in a converted condo, there would be funds provided by the developer to replace it. He said when discussing the zoning issue that has to do with elevations of structures which has to do with flood insurance, that there is no reserve for that. He said he was mentioning all that because he thought it was one of the considerations the Council should make in the unique situation. He said the structure is the same, whether it is a six-unit rental or a six-unit condo, but the ownership expectation is different. He said a six-unit rental has one owner/investor and in a six-unit condo, you have six owners. He said a person in a second floor condo may think they are above flood level, but it doesn't work that way.

Mayor Van Duzer quipped that he thought there was a glitch in the glitch, which drew chuckles.

Vice Mayor Rynearson remarked, if it's a conversion, and it has not been converted yet, anything could be put into the condo documents as long as the buyers agreed to it, and therefore it could be put into the documents that money will be held back for flood plain compliance. He asked Attorney Roosa if that was true. Attorney Roosa asked why a developer would do that. Vice Mayor Rynearson asked what if there was something put into the Town's ordinances that

something has to be set aside. Attorney Roosa said he didn't think that could be done. He said to remember that when the legislature has acted in the area, then the Town can't do anything with it. He said the legislature already said all they care about is the roof, the air-conditioning, the parking lot, the swimming pool, but they don't care anything about compliance with flood plain elevation. Vice Mayor Rynearson asked if that covered new and conversion condos, and Attorney Roosa said it did.

Deputy Town Manager John Gucciardo stated that there was one other addition or change to Chapter 30 that the Council might want to consider that had been being discussed at Staff level. He said that the Chamber of Commerce had recently put a welcome sign on San Carlos Island side of the Matanzas Bridge, and that there had been discussions at various times in Council about doing the same thing on the south end of the Island. He had asked Jerry Murphy look at the sign ordinance as it exists, using as an example the dimensions of the Chamber's sign, and Mr. Murphy had told him that as it exists, the Town's sign ordinance would not allow for that type of sign. He said the Council hadn't made a decision along those lines, and Staff had not presented any options, but he wanted the Council to consider putting in some language in the Glitch Ordinance, within Chapter 30, that would address specifically "Welcome" signs. He said it would be specific to the Town, and would not be authorizing or changing the regulations with regard to anything other than a Town Welcome sign. He said they had worked out with Lee DOT about putting something in the right of way. He said it was not something that had been decided by Council and that Staff would have to bring Council all the options. He said Council could decide to go along those lines or not, but as of this point, he thought it might be appropriate to put some modification language in Chapter 30 to give Council the option if they should decide to take it at some later time. Mr. Spikowski said he could draft something like that for the Council to look at in two weeks. He added that the current sign code adopted in 1999 does not allow any off-premises signs at all, and the welcome sign would be an off-premise sign. He said if the Council wanted to allow it, something specifically would need to be said in it. Vice Mayor Rynearson asked if the Council members could get the draft in memo form ahead of time and Mr. Spikowski said that he could get it to them a week ahead of the next meeting.

Councilman Reynolds said that the discussion was getting away from the conversion thing, and that he was not talking about Mr. Cox's property. He thought Mayor Van Duzer had been talking about the Sea Breeze owner earlier. Mayor Van Duzer said that Mr. Cox did not own the Sea Breeze property. Councilman Reynolds said he thought Mr. Asmar had talked about Sea Breeze, and said that was what he was talking about in his prior remarks. He thought that if condo conversions are allowed now, that it would open up a can of worms, because there are nothing but old buildings on the Island. He expressed the Council wouldn't go that way. Mr. Spikowski commented that he wasn't sure the destinction could be made between the two-unit condo and anything greater. He felt it was either going to be allowed or not. Councilman Reynolds said there was the rule of 1984, and asked why not continue togo with that. Mayor Van Duzer

said that was what he had said. Mr. Spikowski said the language he could draft for the Mayor would keep the existing rule so that if the building was built after 1984 and doesn't meet the flood regulations then the building would be completely illegal and no further improvements would be allowed. He added that the language the Mayor had asked for would say that if it was built before 1984, then the fact that the building was below flood plain level wouldn't prohibit it from becoming separately owned duplex or a condo conversion. Councilman Reynolds asked if that meant the ordinance language was not being changed with regards to 1984 and after. Mr. Spikowski said that was the case. Mayor Van Duzer said that was what he said specifically. Mr. Spikowski said it was a risky thing, and had not been aware of some of the points Mr. Roosa had made earlier which were another angle, but that he would have a new draft ready in two weeks.

Mayor Van Duzer then said he wanted to continue the hearing to April 18th, and to be sure everyone had a copy of the proposed ordinance amendments. Ms. Segal-George said there were copies available, and that if anyone wanted a copy they could come to Town Hall and get one.

C. Introduction of Ordinance 05-08: Setting Primary and Qualifying Dates for November Election

Attorney Roosa interjected that it was not an Introduction of Ordinance, but rather an Adoption of a Resolution, although the number 05-08 was correct.

Mayor Van Duzer said he had thought they would just introduce it at the current meeting and then deal with it at the next meeting. He asked, since it was advertised as such, if that would prohibit them from covering at the next meeting. Attorney Roosa said there was no urgency and there was no reason why they couldn't postpone it until the next meeting. Mayor Van Duzer said that because it was listed as an Introduction he would feel more comfortable if they at least introduced it. Ms. Segal-George and Attorney Roosa both said that was fine.

D. Introduction of Ordinances Revising Town Committee Membership

1. **Ordinance 05-09 – CELCAB (Cultural Environmental Learning Center)**

2. **Ordinance 05-10 – PSTF (Public Safety Task Force)**

3. **Ordinance 05-11 – MRTF (Marine Resources Task Force)**

4. **Ordinance 05-12 – AAC (Anchorage Advisory Committee)**

5. **Ordinance 05-13 – TSAC (Times Square Advisory Committee)**

Town Attorney Roosa read the ordinances, and pointed out a typo in the titles of the ordinances regarding the AAC and the TSAC. Councilman Reynolds

noted that Attorney Roosa had skipped reading the ordinance regarding the PSTF. He then read it, and then said they were all set for public hearing on April 18th. Mayor Van Duzer said it was an introduction and asked if anyone had anything to say or ask about it. Hearing none, he set the hearing on the proposed changes for April 18th.

E. Update on Search of a Temporary Town Attorney

Town Manager Marsha Segal-George reported that the Council had asked her at the last meeting to find an interim attorney and to put the item on the agenda and then a decision would be made with regards to Mr. Roosa's position. She said she had given Council members a memorandum in which it states what had occurred. Ms. Segal-George said she spoke with Anne Dalton, and she had said she was interested in serving as an interim attorney for the Town. She said she had attached Ms. Dalton's resume, and that Ms. Dalton was present at the meeting. Ms. Segal-George said that, subsequent to her conversation with Ms. Dalton, a letter of interest was received from Woodward, Pierce and Lombardo which was attached to the memorandum also. Ms. Segal-George said that what she had done on the interim attorney search had nothing to do with the permanent position. She said if the Council took some action at this meeting with regards to Mr. Roosa then the position would be open and Ms. Segal-George would place advertisements for the permenent position and then from that point on she would have nothing more to do with the process of selecting a permanent replacement for the position of Town Attorney, and all resumes submitted for the position would be given to the Council.

Councilman Reynolds said that Ms. Segal-George had called him on a Friday and during the discussion he had asked her if she had gotten any names. Ms.Segal-George had not, and had told him that the deadline was on Monday. Councilman Reynolds said he didn't know there was a deadline, and through the phone discussion on Friday, he came away the understanding that Monday would be the deadline, but Ms. Segal-George would accept names as late as Tuesday. Councilman Reynolds then made a call, and asked why names hadn't gotten in, and they said that there had been several problems with people changing positions in firms and that sort of thing. He went on to say that although he didn't know the two people who got their names in on Tuesday, he was disappointed that their names weren't considered. He said the way it left Council was that the Town Manager should get a temporary attorney, against his objections, and that is what she did. He felt he had let people down by not getting the word out. He said he got the word out the next day, and he felt clear on that, but he felt it worked so fast that they couldn't get their resumes in. He said that was the problem he had with the procedure that went through.

Mayor Van Duzer said that in order for the Council to take action, a motion needed to be made to move forward on it.

MOTION: Councilman Massucco moved to hire the interim attorney to work with Mr. Roosa in transition until the Town could advertise for a permanent attorney. Mayor Van Duzer and Vice Mayor Rynearson commented that that had

already been done. Mayor Van Duzer said Ms. Dalton had already had conversations with Mr. Roosa and so it had already been done. He went on to say that someone needed to make a motion to replace Mr. Roosa with a new attorney. Councilman Massucco moved to replace Mr. Roosa. Vice Mayor Rynearson seconded the motion.

Councilman Thomas asked what the motion was. Mayor Van Duzer told him what it was.

Attorney Roosa asked if the motion included the appointment of Ms. Dalton, as that would give continuity by having an interim attorney. Councilman Massucco said that she was the only one offered to the Council as the interim attorney. Councilman Massucco asked if there had been dialogue between Mr. Roosa and Ms. Dalton. Mr. Roosa said that he had spoken with her on the phone.

VOTE: Motion passed unanimously.

Mayor Van Duzer told Mr. Roosa that he respected and honored him greatly, and Mr. Roosa acknowledged him. Mr. Roosa asked if Council would like Ms. Dalton to come up so that she could be welcomed. Mayor Van Duzer said he would, and added that he had met with her briefly prior to the meeting.

Councilman Reynolds asked if the Town Manager could legally hire a Town Attorney or should the Council enter it. Mayor Van Duzer explained that Council had directed the Town Manager to hire an interim attorney and that was what she had done. Councilman Reynolds asked then if Council did not have to approve it. Mayor Van Duzer said the prior action by Council was approval, while several present agreed. Vice Mayor Rynearson said it was in the motion that they had just passed. Councilman Thomas said this action had been taken by the Council, not by the Town Manager, and wanted to be sure it was clear that the Town Manager had followed the Town Council's instructions. Mayor Van Duzer concurred.

Ms. Dalton said it was unclear if the Mayor wanted her to introduce herself at that time. Mayor Van Duzer asked her to do that.

Ms. Dalton introduced herself and said she had been residing in Ft. Myers, Lee County, Florida since 1991, and her family had been in the area much longer than that. She said she was currently a solo practitioner in private practice within Ft. Myers, and prior to that she had worked for Lee County. She said she currently represents the office of Lee County Tax Collector, and consulted with her before having a discussion with Mr. Roosa and Ms. Segal-George, to ascertain if there were any conflicts from the Tax Collector's point of view, which there were not. Ms. Dalton said she also served as interim counsel for the school district several years ago, and said because of that experience, she was familiar with the duties of an interim counsel. She thought that someone had asked Mr. Roosa at this meeting if she had had discussion with him regarding transition. She said the discussion between Mr. Roosa and her consisted of her asking him what the obligations, hours and parameters of the job were. She felt that was not a transition, in that they had not had any discussions regarding continuity or transition because she did not believe it was proper before the Council made the

decision about retaining or terminating Mr. Roosa, and whether or not to retain her services. She thought the Council members would find, as they work with her, that they would find her to be very conscious of the boundaries between Council and counsel, administrative staff and attorneys, and administrative staff and Council members.

Mayor Van Duzer said he understood what Ms. Dalton said about the conversation she had had with Mr. Roosa not being a transition, and he felt what she had said was that Council needed to retain Mr. Roosa for a certain period of time so that an orderly transition could be made. Ms. Dalton felt that was in the best interest of the Council because she had no particular knowledge of the workings of Ft. Myers Beach, and suspected that was part of the reason why her services were inquired after. She added that it was in the best interest of the Council to have the transition period because Mr.Roosa had served for so long, and in fact had been the only Town Attorney the Town ever had.

Vice Mayor Rynearson asked what length of transition time would be comfortable for Ms. Dalton. Ms. Dalton said probably less than 30 days, but more than a week, and added that it depends on how much material there was. Vice Mayor Rynearson felt she should be comfortable with the transition. Ms. Dalton said she was sorry she could not be more specific until she had an idea as to how much material there was. She added that she was assuming the search for a permanent Town Attorney would commence fairly rapidly.

Ms. Dalton indicated in the cover materials she had provided to Council that she already had prior litigation commitments she would not be able to break on the Land Use meeting days in April and May.

Councilman Massucco noted that both of the dates she had mentioned that she would not have availability were Mondays, and asked if they were in conflict. Ms. Dalton said they were, and Ms. Segal-George remarked that some things would have to be moved around.

Councilman Reynolds thanked Ms. Dalton for accepting the position. He said her resume was an interesting read, and remarked that she had been pretty busy. Ms. Dalton said she had a very interesting life. Councilman Reynolds asked Ms. Dalton what she saw as her responsibilities in the interim position. He asked if she was directly responsible to Council or directly responsible to the Town Manager. Ms. Dalton said her understanding was that, in the vote that occurred in Council regarding this matter, the Council formally hired her and that Ms. Segal-George had just brought her forward as a candidate. She said she did not view the position as a reporting to the Town Manager, and that she considered the Council as being her client. She believed the role of Town Attorney was to coordinate with administrative staff to implement what the Council decides. Mr. Reynolds said she had mentioned two meetings she could not be present for, and pointed out that there were two more meetings in March. Mayor Van Duzer pointed out it was April, not March. Councilman Reynolds asked if that would be sufficient for a transition. Ms. Dalton said she was not available for the Land Use meeting on April 11th, and did not know how that would be handled. Councilman Reynolds hoped that the meetings could be rescheduled, and Ms. Segal-George said they would be. He asked again if that would be sufficient time for the transition

period. Ms. Dalton reiterated that she could not make that determination until she discussed with Mr. Roosa the scope of the transition. She added that she is an experienced government attorney, but Mr. Roosa had valuable historical memory for any attorney. Councilman Reynolds asked if Ms.Dalton was unsure that two weeks would be enough. He said he just wanted to understand where she was going with it. Ms. Dalton thought that by the end of April would be plenty of time for the transition.

Mayor Van Duzer asked for a motion.

MOTION: Vice Mayor Rynearson moved to retain Mr. Roosa, not to exceed thirty days, until Ms. Dalton advised the Council that she was informed thoroughly enough; and, to give direction to Staff to advertise for a permanent attorney. Councilman Massucco seconded the motion.

Mayor Van Duzer said they needed to discuss the fact that, as it was set up, Ms. Dalton was going to get paid $25,000 per hour. Ms. Dalton joked that she liked that. Ms. Segal-George said a fee was never discussed. Ms. Dalton said that in her representation of other government entities she was compensated $150 per hour, and believed that was Mr. Roosa's original compensation. Councilman Reynolds said that was reasonable. Mayor Van Duzer asked that that be added into the motion, which then was:

MOTION: Vice Mayor Rynearson moved to retain Mr. Roosa, not to exceed 30 days, until Ms. Dalton advised the Council that she was informed thoroughly enough; and, to give direction to Staff to advertise for a permanent Town Attorney immediately; and, to pay Ms. Dalton at the rate of $150 per hour. Councilman Massucco agreed.

VOTE: Motion carried unanimously.

Mayor Van Duzer indicated the Town Attorney seat and asked Ms. Dalton to take it, and joked that she should keep him out of trouble for the rest of the evening. Ms. Dalton joked that she couldn't promise that, and Vice Mayor Rynearson joked that neither could anybody else.

VII. COUNCIL MEMBER ITEMS AND REPORTS

Councilman Reynolds said he had nothing to report, and quipped that he was surprised himself that he didn't. This drew laughs from the rest of the Council members.

Councilman Massucco said he was fortunate enough to have participated in the Easter Egg Hunt. He said he had spent time stuffing the eggs for the children prior to the event. He said every minute involved was well worth it, seeing the kids running around filling their little baskets and bags. He paid tribute to the Chamber of Commerce and the Fire Department, and said it was a wonderful experience.

Councilman Thomas thanked Councilman Reynolds for making his report short, because the basketball game was on that night. He said he would not be attending the next Council meeting, scheduled for April 11th. Mayor Van Duzer said he had an excused absence, and Councilman Thomas thanked him.

Vice Mayor Rynearson told Mr. Roosa he highly appreciated all the advice he had given Council, that it was a pleasure working with him, and he wanted him to know there was nothing personal in Mr. Roosa's termination.

Mayor Van Duzer reminded everyone that there was a really important meeting in Council Chambers on the following Thursday having to do with the redesign of the Town, and asked the Council to please be there. He said the Mound House had sent a request for the continuance of the Mound House rezoning application, from April 11th to May 9th because they need more time to review what's been submitted. Ms. Segal-George said that since Ms. Dalton would not be available on May 9th, and that they had two land use cases and proposed moving those cases to the 16th of May starting at 3:00 P.M., so that the land use cases would not be heard on May 9th. Mayor Van Duzer said that was fine with him. She added that, with regards to the Monday after this meeting, it was being requested that the Council convene at 10:00 A.M. to hear the report on the restoration plan for the Mound House, if that would be acceptable to Council. Ms. Segal-George said Ms. Dalton's presence wouldn't be necessary for that. Mayor Van Duzer said he had no problem with those changes.

Mayor Van Duzer wanted the Taste of the Beach request for an open-container permit to be put on the next Council meeting agenda. Vice Mayor Ryearson asked if specific areas could be designated, as they had done last year between Third St. to First St. and felt that should be put in as part of that request. Mayor Van Duzer said that could be addressed when they took it up on the agenda, and quipped he knew that the Council would want it all in glass jugs, too. The Council members all joked that they wanted that.

Councilman Reynolds made some remarks off-mike that were unclear.

VIII. TOWN MANAGER'S ITEMS

Ms. Segal-George said she had none.

IX. TOWN ATTORNEY'S ITEMS

Ms. Dalton said she had none.

X. PUBLIC COMMENT

Pat DeVincent came forward and commented on an article in the Island Sand Paper written by Jean Matthew in which was mentioned the frequent comments heard at the workshop in reference to Estero Boulevard. Mr. DeVincent asked the Council to make Estero Boulevard a primary, key item and encouraged the Council to recommend to the consultants that they bring the construction drawings that the Town has already. Ms. Segal-George said the Town did not have any construction drawings, and Mr. DeVincent said he was told that there were construction drawings.

XI. ADJOURNMENT

MOTION: Councilman Massucco moved to adjourn the meeting. The motion was seconded.

VOTE: None taken but Mayor Van Duzer commented that none was needed as all Council members prepared to leave. No time given.

Respectfully submitted,

Jo List
Transcribing Secretary