

**FORT MYERS BEACH  
TOWN COUNCIL**

**Town Hall- Council Chambers  
2523 Estero Boulevard  
Fort Myers Beach, Fl 33931  
February 20, 2007**

---

<b>AGENDA</b>	<b>Regular Town Council Meeting</b>	<b>4:30 PM</b>
---------------	-------------------------------------	----------------

---

**I. CALL TO ORDER**

**Members Present:** Mayor Dennis Boback, Vice Mayor Don Massucco, Councilman Garr Reynolds, Councilman Charles Meador, Jr., Councilman Bill Shenko, Jr.

**Absent:**

**Town Staff Present:** Town Attorney Anne Dalton, Town Manager Gary Parker, Community Development Director Jerry Murphy, Public Works Director Jack Green, Finance Director Evelyn Wicks, Town Clerk Michelle Mayher.

**II. INVOCATION**

**III. PLEDGE OF ALLEGIANCE**

All present stood for the recitation of the Pledge of Allegiance.

**IV. PUBLIC COMMENT:** Please note that public comment will be heard at the time the agenda item is discussed

**V. APPEALS: DEPARTMENT OF COMMUNITY DEVELOPMENT**

**A. Case #FMBADM2007-00001, Barking Shark Appeal**

Mayor Boback declared the public hearing open, and asked if any Council members had any ex-parte communication with the property owners or any other person regarding this case.

Councilman Reynolds had spoken briefly to the gentleman regarding delivering mail to the Post Office, but did not directly speak about the property in question.

Vice Mayor Massucco referred to a letter which Council members received, and confirmed that Ms. Dalton suggested using the letter as a part of ex-parte.

Councilman Meador pointed out that he has had countless ex-parte communications with the owner of the Barking Shark regarding the matter and states that he has been aware of the situation for many years. Mr. Meador added that he does not represent the Barking Shark, and has no financial interest in its outcome.

Councilman Shenko reports he has been on the premises on several occasions, and has met with the owner at his office and has discussed the matter in question prior to being elected and after being elected. Mr. Shenko reports he is familiar with the property, but reports that the owner or prior owners are not his clients and has no financial interest in the property.

Mayor Boback reported that he also received a letter when he was first elected, and states that he has spoken to the owner on several occasions. Mayor Boback also reported that he has spoken to Town staff on many occasions regarding the situation. Mayor Boback added that he has been to the property of the Barking Shark, but has no financial interest or any other interest in the property in question.

Ms. Dalton swore in those testifying.

- Richard McDole, applicant and authorized consultant of the Barking Shark. Mr. McDole referred to an administrative interpretation which they are filing in order to appeal some discrepancies in question. Mr. McDole further noted to Council that the Barking Shark was permitted to expand the front of their building in 1997. Mr. McDole reported in 2001, Code Enforcement reviewed the records and decided that it was incomplete. Code Enforcement determined a formal amendment to Resolution 95 for two COP and a variance for parking was required. Mr. McDole further presented his case stating that the addition was legally permitted in 1997. The administration was aware of Resolution 95 Stipulation for two COP's. The variance for parking did not require the owner to provide formal applications to amend. Mr. McDole noted the administration had the authority and option to informally administratively approve, or provide a formal application for a special permit to amend the two COP's previously approved for the site.

Vice Mayor Massucco questioned Mr. McDole about the prior owner voluntarily elected to submit the subject property to the optional development standards of the overlay district.

- Mr. McDole referred to the overlay as the only avenue to get relief from parking.

Councilman Reynolds reported that he was on Council at the time, and reports that Council did not have those documents at that time. Councilman Reynolds expressed that as a representative of Council, he is hoping that they will be able to clarify those discrepancies the previous Council was unable to do.

Councilman Meador reiterated that County would not have granted the permit until the parking issue had already been taking care of. Asking Mr. McDole to clarify the liquor license after the expansion of the seating.

- Mr. McDole responded that it was the County who signed off for the Town as an agreement, as it was the County who reviewed and honored the permitting.

Councilman Meador inquired as to the past years' operations. Mr. McDole responded there was a complaint, the Barking Shark was cited, and subsequently shut down.

Councilman Shenko pointed out the distinction between the building permit and a liquor license. During the hearing with the County, there were conditions imposed related to alcohol which may have been addressed in the front of the building different from the rear of the building, but agreed that this was signed off by the County. Councilman Shenko questioned Mr. McDole as to his interpretation for Special Events.

- Mr. McDole responded that the interpretation would be as it is written, beer can be served outside and addresses it specifically as parties or special groups without entertainment after 10:00 pm.

Mayor Boback referred to number 3, where it states outside entertainment and/or service to outside seats for group parties or special events shall not extend 10:00 pm.

- Mr. McDole responded that was stated in the Resolution back in 1995.

Mayor Boback referred to the number of chairs and how it would affect the front area.

- Mr. McDole reported that there is an increase in the seating.

Mayor Boback questioned Mr. McDole about the amount of seating for the outside expansion.

- Mr. McDole responded that they have to maintain 3-foot aisle width between the tables and chairs, and that would dictate the amount of

tables that would be used, adding that he did not make those calculations.

Mayor Boback directed staff to enter their staff report.

Mr. Murphy announced that he is entering the staff report into the record as staff's testimony, and is available for any questioning.

Councilman Reynolds pointed out that he has previously spoken with Mr. Murphy regarding this matter, and expressed that Mr. Murphy is on target with his direction but believes that he may be missing some material which he does not have.

Councilman Meador reports he has no questions for staff.

Councilman Shenko referred to Attachment B to Exhibit A as the commercial building permit, but pointed out that in the package that he received Attachment B to Exhibit A is a site plan which does not include the commercial application.

Mr. Murphy responded that was correct, adding that they only submitted the site plan to reference the subject parking agreement which was stamped on that site plan. Mr. Murphy expressed that for the most part everything evolves around a parking agreement, but there is no parking agreement discovered. He added that they do not know where the parking is supposed to be offsite.

Councilman Shenko added that the COP approval was not included in the staff report, stating that it has been provided to them by Mr. McDole.

Mr. Murphy reported that the approval was based on the representation that there was a parking agreement during 1997, 1998 and 2001. Mr. Murphy pointed out if there were a parking agreement that it dissipated, which, in absence caused the 2001 code enforcement case to be carried forward.

Mr. Murphy noted that there were a few parking agreements which were recorded in the past.

Mayor Boback made comments that while Ms. Lambert was Town Manager; she began a project for a central filing system in order to have documentations of these agreements and approvals.

Mr. Murphy pointed as the County was the custodian for the Town, they should have recoded it in the official records.

Vice Mayor Massucco questioned whether or not they had resolved the requirement of having to be 500-feet from a residential unit, asking if the one on Crescent Street was resolved.

Mr. Murphy responded according to him, there still is a 500-foot requirement from a residential unit.

Councilman Meador referred to a copy of a survey which was stamped *subject to parking agreement*. Mr. Meador pointed out that the same survey from the Lee County Public Records did not have stamp and asked where did this stamp come from, and when was the stamp added.

Mr. Murphy responded that this was provided by Mr. McDole which would have originated from the Lee County Development Services file, stating that they have that stamp.

- Mr. McDole reported that the original survey which shows the front addition was submitted with application for permit. Mr. McDole reports that it would have been prior to inner local agreement.

*Mayor Boback opens public comment:*

- Chris Patton property owner spoke in favor of the Barking Shark.

*Mayor Boback closes public comment:*

Ms. Dalton announced that she had provided a copy of a Resolution 07-13 for their consideration.

**MOTION:** Councilman Meador made a motion to grant the appeal. Councilman Reynolds 2<sup>nd</sup> the motion.

**AMENDED MOTION:** Councilman Meador amended his motion to grant the appeal with additional seating based on permissible square footage as of 1996 when permit was granted as may be restricted by current fire code. Councilman Reynolds 2<sup>nd</sup> his motion.

Discussion:

Councilman Shenko responded that it would be the only thing for them to do as they cannot impose new restrictions, based on what was already approved in 1996. Councilman Shenko expressed being in favor of the motion.

Vice Mayor Massucco responded that he was stumped as to the location of any off-site parking.

Councilman Reynolds had no further comments.

Councilman Meador expressed that there had to have been a parking agreement in order to have the parking permits. Councilman Meador expressed that they had a choice to do right; they needed to approve the appeal.

**VOTE:** The motion passes 5-0.

Mayor Boback declared the public hearing closed.

## **VI. CONSENT AGENDA**

- A. *Special Event Permit Application: Shrimp Festival***
- B. *Monthly Financial Statements***

Councilman Meador pulled Special Events Permit Applications.

**MOTION:** Councilman Shenko made a motion to approve the Monthly Financial Statements.

Councilman Shenko withdrew his motion.

**MOTION:** Councilman Meador made a motion to grant the application and additionally as it is a 100% charitable event, that they refund the Fort Myers Beach Lions Club for the event. Councilman Shenko 2<sup>nd</sup> the motion.

Mr. Murphy responded that this is one of their major events.

Vice Mayor Massucco expressed that there has never been a problem with this event.

Councilman Reynolds agreed.

**VOTE:** The motion passes 5-0.

## **VII. PUBLIC HEARING OF THE FOLLOWING ORDINANCE**

- A. *Ordinance 07-02, Town Hall Search Committee Ethics***

Mayor Boback declared the public hearing open.

Ms. Dalton read Ordinance 07-12; Town Hall Search Committee Ethics.

*Mayor Boback opens public comment:*

- No public comment was given.

*Mayor Boback closes public comment:*

**MOTION:** Vice Mayor Massucco made a motion to move forward to public hearing Ordinance 07-02. Councilman Reynolds 2<sup>nd</sup> the motion to approve Ordinance 07-12.

Councilman Meador expressed consideration for those who may be a realtor or a family member of a realtor to not get involved with this committee.

Councilman Shenko pointed out that he is in favor of the Ordinance, but believes that they will run into problems enforcing it.

Mr. Parker pointed out that by doing things with good intentions, they may restrict themselves to ineffective action. Mr. Parker expressed that they are a small Town with limitations, which may require them to take such action.

Vice Mayor Massucco asked how would they rectify this unless by taking it out.

Councilman Reynolds was not in favor of denying a certain profession stating that they cannot take part of the sale.

Councilman Shenko reiterated what the Ordinance indicates that no commission can be paid.

Councilman Reynolds suggested filing a conflict of interest.

Councilman Reynolds withdrew his second.

**MOTION:** Councilman Meador made a motion to approve the Ordinance as written.

Michelle Mayher called for Roll Call regarding the Council members vote.

Vice Mayor Massucco	Aye
Councilman Reynolds	Nay
Councilman Meador	Aye
Councilman Shenko	Nay
Mayor Boback	Aye

**VOTE:** The motion passes 3-2; with Councilman Reynolds and Councilman Shenko dissenting.

## **VIII. MAYOR AND COUNCIL MEMBER ITEMS AND REPORTS**

Vice Mayor Massucco announced that he attended the Friends of the Mound House Love Light Luminaries, and reports that it was a successful event. Vice Mayor Massucco also announced a Peel and Eat Shrimp dinner on Saturday February 24<sup>th</sup>. Vice Mayor Massucco expressed that he will not be able to attend the Appreciation dinner for their Committees.

Councilman Reynolds announced that there will be three Council members attending the Ribbon cutting of the Delta Lady; the paddle boat at Salty Sam's. Councilman Reynolds also announced that he attended the Historic Society talk and took the Matanzas Pass tour.

Councilman Meador announced that he has sent in a memorandum regarding the referendum on advertising.

Mayor Boback reported attending a meeting at the Fort Myers Beach Condo Association, where they asked about the long-term financing stating that they were not clear.

Councilman Shenko reports he attended the MPO on Friday, and brought up again the transit authority. Councilman Shenko reports that they want Council to give opinion to the Transit Authority.

Councilman Reynolds expressed that the letter he wrote was declined and suggested to Councilman Shenko to do so for the Oversight committee. Councilman Reynolds added that he will withdraw from the committee.

## **IX. TOWN ATTORNEY'S REPORT**

### ***A. Consolidated Realty Holding Demolition Status Update***

Ms. Dalton announced she has provided a memo on February 9<sup>th</sup> regarding some aspects on this case.

Ms. Dalton announced that Mayor Boback requested having the transcripts of one or both in the litigation of Shenko versus Werner. Ms. Dalton reported the cost of the transcripts for the second hearing of 70 pages in the amount of \$370.00 one day expedited \$720.00 and then it goes to four days.

Mayor Boback reports that Mr. Werner's comments stated that he began the recall petition because he was not appointed to the committee.

Councilman Meador suggested getting excerpts of the transcripts.

Ms. Dalton requested an executive session regarding Shenko versus Werner; to discuss litigation strategies on March 5<sup>th</sup> at 4:30 through 5:00 pm. Ms. Dalton requested Council approval for payment of additional attorney's fees of approximate \$1,100.00.

Councilman Shenko filed Form 8B, Voting Conflict for Municipal Officers, as he is the plaintiff in the case.

**MOTION:** Councilman Meador made a motion to write a check in the amount of \$1,100.00, Seconded by Councilman Reynolds.

**VOTE:** the motion passes 3-1; with Vice Mayor Massucco dissenting, and Councilman Shenko abstaining.

Ms. Dalton referred to a memo regarding vacating right-of-ways and easements and if Council will give her direction to move forward.

Council members all agreed for Ms. Dalton to investigate further.

Ms. Dalton referred to a memo she sent out regarding having Ken Small come down from the Florida League of Cities to conduct a financing seminar.

Councilman Shenko expressed that his presentation would be of great interest, but that they should wait until after the results of their balloting regarding the water utility.

Councilman Meador also agreed with Councilman Shenko.

Ms. Dalton referred to the Wilker matter and reports receiving a letter from Mr. Moran which requests that the Town not proceed with the foreclosure proceedings, and to vacate the lean and is requesting to be given a certain amount of time to pursue the permits and fix the issues which caused the code problem. Ms. Dalton asked for Council's direction regarding stopping any procedures.

Councilman Shenko responded that they should file a Notice of Hearing, and if it is corrected before the hearing then it will be brought back to Council.

Vice Mayor Massucco also agreed that they needed to push forward in this matter.

Councilman Reynolds agreed with Councilman Shenko's suggestions.

*Mayor Boback opens public comment:*

- No public comment was given.

*Mayor Boback closes public comment:*

Councilman Meador responded that he did not see any harm in giving the extended months.

Councilman Shenko stated that the building has not been occupied for 921 days ago is a danger to the public and believes that Council should take a stand regarding that situation and is in favor of moving forward.

Vice Mayor Massucco expressed that he would like to see it held off until the slower season comes in, and is in favor of giving them the extension.

Councilman Reynolds suggested May the 1<sup>st</sup>, and would prefer going with May 1<sup>st</sup>.

Mayor Boback reported that Mr. Myers has been in violation of their code when this all began. Having taken two building down and leaving a mess not being cooperative and not acting in good faith. Mayor Boback expressed that on March 1<sup>st</sup> the building needs to come down.

**MOTION:** Councilman Shenko made a motion that no further extension will be granted, and that the Town pursue the removal of the Days Inn structure and the clean-up of the other two structures.

**AMENDED MOTION:** Councilman Shenko amended his motion to indicate they will ask the building official to grant no further extensions. Councilman Reynolds 2<sup>nd</sup> the motion.

**VOTE:** The motion passes 5-0.

*Mayor Boback opens public comment:*

- Bill Slavich reports that Mr. Myers is not directly involved with the extension that is before them, that he is the one asking for the extension.

Councilman Reynolds suggested amending the motion to the March 15<sup>th</sup> in order to have additional time.

Councilman Meador had no further questions.

Councilman Shenko had no further questions.

Mayor Boback asked Mr. Slavich if they grant the extension will he close down Jimmy B's on March 1<sup>st</sup>.

Vice Mayor Massucco commented that by granting an extension, we would then be out of season.

Councilman Meador suggested granting the extension until March 1<sup>st</sup>.

Councilman Reynolds asked for the motion maker to consider March 30<sup>th</sup> instead of March to avoid heavy traffic during the Shrimp Festival.

Councilman Shenko stood to his motion, stating that they need to move forward.

*Mayor Boback closes public comment:*

**VOTE:** The motion passes 4-1; with Vice Mayor Massucco dissenting.

## **X. TOWN MANAGER'S REPORT:**

### **A. CCNA Selection Approvals**

Mr. Parker announced the CCNA Selection Approvals is to authorize staff to enter into negotiations based on the selection committees and that this would allow staff to secure the services.

Councilman Shenko asked if they were entering competitive negotiations with three different firms.

Mr. Parker responded that was correct.

Mr. Green responded that they wanted a small pool of engineering firms available at any time to engage in their type of work.

Ms. Dalton pointed out that by having this pool it would be less expensive.

Mr. Green pointed out that he would like to see how it works to engage tasks with these firms.

Councilman Meador pointed out that this would put them in a position where they don't have to go out every time they need expertise on a job.

**MOTION:** Councilman Shenko made a motion that they go forward with the final ranking table with the disciplines put out for bid on the ongoing miscellaneous professional services, and authorize Town staff to negotiate with the top three ranked firms in all categories. Vice Mayor Massucco 2<sup>nd</sup> the motion.

**VOTE:** The motion passes 5-0.

Mr. Parker referred to office space for staff. Mr. Parker suggested moving forward in acquiring a new Town Hall, and asked for consensus from Council.

Discussion ensued considering the use of the space which has been made available by Mayor Boback. Councilman Reynolds was not in favor.

Mr. Parker updated Council regarding the Red Drift Algae and reported that some of it has been removed.

Vice Mayor Massucco responded that they needed to do something about it now.

Councilman Reynolds agreed with the Emergency movement allowing the Town Manager to act.

Councilman Shenko reports that he has the proposed Resolution, and pointed out that it did not address who is going to do it.

Councilman Meador expressed that there is no real emergency that needs to be handled right away.

Mayor Boback reiterated that the authority was given to the Town Manager at their previous meeting.

Mr. Parker asked about spending TDC funds for the use of raking on the beach.

Mr. Green responded that he did not have a problem with the concept of using TDC funds, but noted that the Town would have to expend Town funds first. Mr. Green did have a problem with raking on property which belongs to the State of Florida without a permit from DEP. Mr. Green reported that their DEP permit expires at the end of the month.

Councilman Shenko referred to paragraph one stating that he understands a larger than normal wrack line resulting from extraordinary circumstances may be raked at the wrack line as it leads 10-feed landward of the normal high tide line. Mr. Shenko further read on paragraph two

stating that if health or safety issues are present such as a large fish kill, or red tide event, the wrack line may be raked up to 10 feet landward of the normal high tide line, and subject to DEP permitting. Mr. Shenko also added that he felt uncomfortable expending Town's funds without knowing if they will be reimbursed.

Mayor Boback noted that once they begin the raking process, it will be expected to be raked by the Town on a continuous basis. Mayor Boback pointed out that they would have to put this on as Budget item in order to maintain it, as the TDC will not be reimbursing the Town all of the expenses.

Vice Mayor Massucco pointed out that there is an economic loss to this matter and is an important side.

Councilman Reynolds suggested consulting with DEP before making any changes on the existing language.

Ms. Dalton referred to Section 34-265 of the Land Development Code involves request of interpretation of the code, and pointed out in order to discuss the interpretation of the Land Development Code it has to be put on the agenda.

Mr. Parker suggested putting it on the next meeting having it as an agenda item. Mr. Parker also added that they are referring to the symptom and not the cause of the problem, pointing out working towards finding a solution to the cause of this problem.

*Mayor Boback opens public comment:*

- Herb Acken spoke about the shutting down in March 1<sup>st</sup>.
- Dennis Kovach referred to the language that is written that it is from the land to the 10-feet from the wrack line instead of the water the other way.

*Mayor Boback closes public comment:*

Mr. Parker announced the April 16<sup>th</sup> Council meeting conflicting with the planning conference. Mr. Parker requested Council to push back the April 16<sup>th</sup> meeting to April 23<sup>rd</sup>.

Council members agreed.

Mr. Parker also referred to the item on the referendum and if Council was agreeable to what was written.

Mr. Parker referred to the demolition of the two structures stating that the properties already have a demolition permit in place which is valid through February 25, 2007.

Ms. Dalton announced that there is already a vote on the issue.

Mr. Murphy announced that if they commence the demolition immediately from this day until the 25, that would make the permit good until he is done or up to six months.

**XI. FINAL PUBLIC COMMENT: Public comment at this time is heard on any item and/or issue of concern.**

*Mayor Boback opens public comment:*

- Herb Acken requested Council to reopen the matter for discussion regarding tearing down Jimmy B's.

*Mayor Boback closes public comment:*

**XII. ADJOURNMENT**

**MOTION:** Councilman Meador made motion to adjourn. Councilman Shenko 2<sup>nd</sup> the motion.

**VOTE:** The motion passes 5-0.

Mayor Boback adjourned the meeting at 9:08 PM

*If a person decides to appeal a decision made by the Council in any matter considered at this meeting/hearing, such people may need to ensure that a verbatim record of the proceeding is made, to include the testimony and evidence upon which any such appeal is to be based. Please note: Agendas will be available on the Friday prior to this meeting at [www.fmbeach.org](http://www.fmbeach.org).*

Respectfully submitted,

Debbie Cardoso

3-12-07 Approved MOTION: Massucco/Shenko  
VOTE: 5-0.

*Melanie Aghee*