



MINUTES

**FORT MYERS BEACH TOWN COUNCIL
TOWN HALL – COUNCIL CHAMBERS
2523 ESTERO BOULEVARD
FORT MYERS BEACH, FLORIDA 33931**

November 3, 2008

9:00 AM

I. CALL TO ORDER

Meeting called to order by Mayor Kiker at 9:03 AM. Present with Mayor Kiker was Vice Mayor Acken, Councilmember Babcock, Councilmember Raymond, Town Manager Scott Janke and Town Attorney Anne Dalton. Councilmember List was not present; Town Clerk Michelle Mayher was not present.

II. ANNOUNCEMENT OF COMMENCEMENT OF EXECUTIVE SESSION

EXECUTIVE SESSION CLOSED TO THE PUBLIC

A. BJH 2007-0001, Fred Paine v. Town of Fort Myers Beach

B. BJH 2007-0002, James Purtell v. Town of Fort Myers Beach

**ANNOUNCEMENT OF TERMINATION OF EXECUTIVE SESSION-
SESSION NOT NEEDED AND CANCELLED**

III. INVOCATION

Led by Reverend Jean Davis, Beach United Methodist Church

IV. PLEDGE OF ALLEGIANCE

Also led by Reverend Davis

V. LOCAL ACHIEVEMENTS AND RECOGNITIONS

Mr. Janke advised the audience of the passing of Town Clerk Michelle Mayher's mother and asked for patience from everyone as the council attempts "to fill pretty big shoes."

Mayor Kiker also acknowledged the absence of Ms. List, who will be joining the meeting via telephone.

Mr. Raymond reported that he attended the Laguna Shores Annual meeting.

Vice Mayor Acken reported that the annual Town tree sale starts this month and gave some examples of what will be available.

Councilman Babcock recognized Town staff for jobs well done with the events like the Volunteer Dinner, specifically Rick and Michelle. He also recognized the Mayor for an outstanding job as an emissary for the Town and publicly thanked him.

The Mayor commented that photos from Town events will be posted more quickly on the Town website in the future.

Mayor Kiker reported that he and Mr. Janke attended a meeting, along with Mr. Stillwell, Mr. Judah and Mr. Hammond in regards to TDC funding and the Red Sox issue with the county. He felt that the meeting was beneficial to the Town.

VI. PUBLIC COMMENT

Opened Public Comment:

Public Comment was heard:

- Margurite Burns, Mgr. of the Beach Observer, addressed the meeting and gave basic information about the paper and pitched the paper for advertising for Town bids.

Closed Public Comment.

VII. CONSENT AGENDA

A. North Estero FEMA Sub-Grant Agreement: The agreement has not come in, therefore the item was pulled from the agenda.

B. Resolution 08-47, Re-apportionment Plan for the MPO:
Mayor Kiker asked for a motion to accept the resolution.

MOTION: Councilmember Babcock moved to accept the resolution and Councilmember Raymond seconded the motion.

VOTE: Motion passed 4-0, with Councilmember List still not present via telephone.

VIII. PROCLAMATIONS

A. Alzheimer's Awareness Month

Vice Mayor Acken read the proclamation into the record, recognizing November as Alzheimer's Awareness Month and recognizing the Alvin A. Dubin Alzheimer's Resource Center for the work and support it provides to county citizens suffering from this ailment.

XI. INTERGOVERNMENTAL REPORTS

A. Fort Myers Beach Fire Department Chief Mike Becker (no back up material)

Asst. Chief Larry Evans addressed the council on behalf of the Fire Chief, thanking the Town for the new fire stations and their support.

Short break to address the telephone connection.

IX. ADMINISTRATIVE AGENDA

A. Legislative Lobbying Services, Presentation by Carole Green, Capital Strategies Consultants

Mr. Janke introduced Carol Green from Capital Strategies Consulting to give a presentation of lobbying services for the Town in Tallahassee.

Ms. Green gave a brief introduction about her services and explained that she and her company have served in the legislature, specifically for the Town, for several years. She explained how her services would help the Town in lobbying for issues like the water problems and others of the beach.

Councilmember Babcock asked if Ms. Green's company's intent was to help the council with capital strategic planning so that they are educated enough to acquire a new water system before actually attempting to lobby for the capital to initiate the system. Ms. Green stated that her company gives the strategy and consults about how to move the issue ahead from the Town to Tallahassee as a partnership with the Town. Councilmember Babcock mentioned that Ms. Green's company does work with Bonita Springs also and asked if there was a possibility that Ft. Myers Beach could join in with that relationship to have a stronger voice. Ms. Green agreed that there are strong possibilities for that.

Vice Mayor Acken asked if Ms. Green's experience extended passed Tallahassee to Washington DC. Ms. Green said that she has expertise in Florida but has had some experience federally, as well as many connections to help her step into the federal level. Vice Mayor Acken also asked for references of high profile legislation for which Ms. Green has lobbied. Ms. Green gave examples of Bonita Springs and her lobbying for the silt removal on the Imperial River, getting that funded about 50%. She also gave an example of legislation that she was instrumental in having "killed," namely dealing with changing the manner in which continuing care retirement communities are governed. Vice Mayor Acken asked how many other clients the company has and she answered that currently there are five clients and feels that there should never be more than ten at any given time, explaining that some are very short-term clients and easy to service. At Vice Mayor Acken's request, Ms. Green gave the names of her other clients: Bonita Springs, Bentley Village, Ponce de Leon Risk Retention Group, FL Psychologists' Association and Lee Mental Health.

Councilmember Raymond asked how Ms. Green would handle any conflict between what is the best interest of Ft. Myers Beach as opposed to what may be in the best interests of Bonita Springs. Ms. Green said first, they would disclose the facts and then meet with all parties to come to a conclusion. Ms. Green welcomed Councilmember Raymond's request to allow some council members to possibly accompany Ms. Green to lobby if they wanted to attend.

Mayor Kiker asked if Ms. Green was familiar with a project by the county regarding the grasslands in the bay area and what her interaction is with the county as opposed to just state level. He also asked how her company would change its structure in terms of who and how they would bill in issues where she represents the beach and Bonita Springs on the same issue. Ms. Green explained that there would not be any conflict or problems because the billing is handled by contract, with a six-month trial period, etc.

Opened Public Comment:

Public Comment was heard:

- Carl Conley addressed the council but actually wanted to comment on a different issue. Mr. Conley was permitted to speak because the meeting agenda was changed while waiting for Councilmember List's attendance. Mr. Conley's comments were regarding return of advertising to the local papers, meaning his paper, The Sandpaper. Mr. Conley promoted his website as well as his paper.

Closed Public Comment

The six-month contract proposal with Capital Strategies Consultants is for \$24,600.00 and Mr. Janke recommended that council move forward, with a list of legislative priorities to be voted on by them that would give clarity to anyone who goes to Tallahassee to lobby in the future. He stated that council needs to decide if they require a lobbyist and what their expectations are. Attorney Dalton added that she also needed clarity as to what parts of the contract Ms. Green, Mr. Janke and Ms. Dalton are to deal with in cooperation with council.

Mayor Kiker indicated that he has not had enough time to study this issue well enough to make a decision at this time, and that they should take more time to investigate the availability of grants, etc. for this project. Mr. Janke said that his main concern is the condition of the drinking water transmission system and said that an analysis of the system had been done by an engineer estimating the cost. This is a huge project and he pointed out that going to Tallahassee to lobby for funding will take at least two legislative cycles, or two full years, to get it under way. He added emphasis that this is a critical issue and it will take multiple sessions to get it to the point where it needs to be, so it is imminent.

Councilmember Babcock commented that there needs to be more things looked at before there can be a setting up of a contract.

Councilmember Raymond brought up his experience in dealing with this type of thing and agreed that the Town needs to have someone who can help the Town with future large projects that are on the agenda, especially in view of obvious problems for next year's budget.

Mayor Kiker again opined that before making this decision, there should be a workshop of sorts to thoroughly investigate the issue and identify all of the points to be addressed.

Mr. Janke agreed and suggested that Ms. Green do this with the Town to clarify all the legislative issues.

Ms. Dalton suggested that the council meet to discuss the synergy of Ms. Green's office with the Town before a contract. Discussion ensued about how to handle the work and the type of contract agreement.

Mayor Kiker suggested that the issue be put on the next agenda.

C. PUBLIC HEARINGS

A. Appeal ADM 2008-0002 Lani Kai Landmark Sign

Mayor Kiker asked for a motion to allow Councilmember List to join the meeting and vote via telecommunications.

MOTION: Motion made and seconded (*no names given*);

VOTE: motion carried 4-0.

Attorney Dalton commented for the record that there is a quorum without her [Councilmember List's] presence so it is conforming to the state law.

Ms. Dalton referred council to their packages and explained the procedures of the standard of review of the Town Council. She explained that, under the Land Development Code, the LPA acts as the fact-finding and determining body regarding historic and landmark signs. The LDC governs that it is a quasi-judicial hearing, with all the due process rights and specifies that the Town Council will serve as the appeal board for signs that are denied the requested status. Ms. Dalton further explained the Council's duties as overseeing the LPA's decisions and fact-finding efforts, to be sure that they did what is required of them. The council must uphold the LPA's decisions if they determine that all was done properly. If the Council determines that the LPA failed to do their job, Town Council can modify, reverse or return it to the LPA for further consideration.

Vice Mayor Acken inquired about the necessity of Section 2 in 08-45. He wanted to state that not only is the Town Council's job to validate or invalidate the LPA's decision but also to hear an appeal. He pointed out that there may be a difference of opinion in a decision, but that does not necessarily mean that the LPA did not do its job. Ms. Dalton reiterated that council always has the option to disregard or agree with whatever is prepared. However, Section 2 addresses whether it was something the LDC advised the PA to do or was their decision outside of their jurisdiction. The other issue is whether or not the LPA gave proper public notice and if they followed the correct process, and if the LPA used the appropriate standards.

Councilmember Babcock asked if new evidence was brought up today, would that justify returning the issue to the LPA. Ms. Dalton affirmed.

Councilmember List asked if she was correct in understanding that there was still a question as to whether or not the LPA acted erroneously in the process of hearing the case. Mayor Kiker stated that new evidence is not permitted at this level but it would instead go back to the LPA. More discussion ensued regarding the procedural process for the appeal. Ms. Dalton suggested a threshold item, if the applicant's attorney would agree to it, to ask the attorney if he has any new evidence to present and then decide how to proceed based on that.

Mayor Kiker asked the applicant's attorney to come forward and asked if he was planning to present any new evidence and he stated that he was. Mr. Bob Burandt stated his name and position for the record, also as a resident and partner of a past Town attorney. Mr. Burandt stated that he disagreed with the Town attorney's explanation of the council's role in this appeal and stated that he had given her a case to review, the Palmetto West Park case v. the City of Doral. Mayor Kiker interrupted for a procedural concern and stopped the testimony to officially open the hearing.

Hearing opened.

Ms. Dalton read 08-45, with multi-sections, and stated the at the end of the day, council has the options to deny, modify or affirm the decision of the LPA and the ability inherently to return it to the LPA for further process.

Mayor Kiker polled council members for any ex-parte communications. Vice Mayor Acken spoke with the applicants at the meeting and has patronized the establishment several times.

Councilmember Raymond had none.

Councilmember Babcock said he has visited the site and has discussed the issue with some of the LPA members.

Mayor Kiker and Councilmember List had none.

Ms. Dalton swore in witnesses and again recommended that the council accept no new evidence, making the function of the witnesses only to be to testify to the propriety of what the LPA did on the lower level. Mayor Kiker asked how they will be made aware of new evidence being introduced. Dr. Shockey attended the LPA meeting so he will advise of any new items.

Mayor Kiker asked the applicant to present its case. Mr. Burandt addressed the council as attorney for the applicant, present to represent the Lani Kai in the appeal of the LPA's decision to deny them landmark or historical status. He stated that the Town Council, and not the LPA, has ultimate authority for deciding this issue and again referred to the case very similar to this case in Palmetto West Park v. the City of Doral. In that case the decision was left to a hearing officer, who approved a zoning request by an applicant. In the middle of the appeals process, the city incorporated and the burden then shifted to the city, and the issue was argued back and forth in the case. In the end, the circuit court defined what the city council's position was in an appeal situation: "In addition, at quasi-judicial zoning hearings the municipal body acts in a fact-finding capacity to decide disputed adjudicatory facts based upon evidence adduced at the hearing and ultimately determines the rights of the parties..."

The LDC and its appeal process does not state what the role of the council is. He cautioned the council against making the LPA the final decision maker and said they need to define what the next step would be when an appeal is taken to the council. Mr. Burandt also complained that the fee for appeal to the Town is "way excessive." He stated his intention to ask for a refund of the \$1000.00 fee for his client. In summary, he stated three basic issues for the council to consider, one being the constitutionality of the ordinance itself and the fact that, to be constitutional, there needs to be well defined guidelines for historical or landmark signs. The second issue is that it cannot affect a person's right to free speech under the first amendment and a sign that regulates the sign is unconstitutional if it's geared towards the content of the sign as opposed to the structure itself. He pointed out that three other business's signs have been approved: the Red Coconut, St. Peter's Church and the Holiday Inn. Mr. Burandt said that he submitted a package to the council and asked that the council consider this and make it part of the hearing record, adding that it is new evidence and asked council to look at the pictures (in the packet). Ms. Dalton objected on two grounds: first, the Town Council has a procedure of not accepting documents in a quasi-judicial hearing for the first time and, second, that the evidence is outside the boundaries of this proceeding.

She also stated that she does not agree with Mr. Barandt's analysis of the case he has quoted.

Vice Mayor Acken (*based on town manager's assistant's notes as no names were stated*) interjects that if the Town does not allow the new evidence, there is a great advantage for the applicant to have an appeal. Mr. Burandt pointed out that the new photograph only shows the new Holiday Inn sign, which was recently approved as an historic or landmark sign, and said that they have asked the Town for the Holiday Inn package so that they could review it and understand why that was approved and their sign was not.

Mayor Kiker asked for clarification on who and how the request was made to the Town. Mr. Burandt asked the applicant's son to step forward as being the one who requested the information. Mr. Ken Conadaris stated that he called and left messages with Dr. Shockey and personally appeared at the Town building.

Mr. Janke asked Dr. Shockey how long these requests normally take and Dr. Shockey explained that Mr. Conadaris had asked for minutes of the meeting which have not been approved yet, therefore they are not considered legally accepted. An argument ensued regarding the Town's refusal to supply the applicant with minutes of electronic record of the LPA minutes.

Mayor Kiker brought the argument to an end and restated the problem of accepting new evidence, which Mr. Burandt insisted is only the addition of the new Holiday Inn sign, in conflict with the process. Mr. Burandt stated that the photograph was not available to his client at the time of the application and asked how the LPA members distinguish the Holiday Inn sign from the Lani Kai sign. Mayor Kiker opined that this is not an issue for this hearing and Mr. Burandt argued that he believed it is because the guidelines need to uniform and be applied uniform.

Mayor Kiker agreed that the council will be addressing the guidelines but that they cannot address why the LPA would make decisions one way or another and that it wouldn't be appropriate since they are only to deal with the facts of the issue at hand and if the LPA followed the process. Once again, Mr. Burandt stated that he did not believe that this is the standard because the council has the ultimate decision to approve or disapprove the sign as an historical or landmark sign and doesn't feel that the process taken by the LPA is actually relevant as to the decision.

Mayor Kiker expressed his eagerness to get to the bottom of this issue and hear all evidence to make a decision, but also does not want to put the council in a bad legal position for appeal processes in the future for this case. He insisted that the council be given the time necessary to investigate this issue further and learn the guidelines within which they must act to make the proper decision. He added that he prepared for this hearing using the guidelines with which he and the council were familiar and not the different set of rules suggested by the applicant today. The applicant stated that the guidelines were not brought up by him but rather the court, and Mayor Kiker said he's never seen those before or heard of them so he wants to read the legal guidelines himself before making the decision then. Mayor Kiker also expressed disappointment that the applicant felt that they were not getting the cooperation or results they wanted from the Town and said that the problem needs to be addressed. He gave the applicant

the opportunity to continue the hearing to allow for council to research the proper process guidelines and for him to get the necessary information he needs to be prepared. Mr. Burandt stated that, based on what is being discussed, he felt that he needed to brief his constitutional arguments, which he felt will invalidate the ordinance because it violates free speech for the beach businesses by controlling content. Mayor Kiker asked if the applicant is permitted to present his brief, would he be satisfied if the council then made a decision to continue to understand all of the arguments he makes. Mr. Burandt agreed that that would be acceptable and pointed out that Ms. Dalton is the attorney for both the Town Council and the LPA and thought that she may be in a precarious position due to that; he also pointed out that three of the five council members have sat on the LPA and that three of the five of council present approved one of the exceptions. He added that he was sure that the council was just as confused as he was when he read the ordinance.

Ms. Dalton objected to the applicant's comment to the possibility that she was in a "precarious position" and avoided explanation of her service in both capacities, saying that Mr. Burandt is aware that her position is appropriate. Ms. Dalton also opined that there is a threshold issue here, mainly what is the process of the council today? Is it to just hear the lower the lower proceedings and determine if there was an error or it is truly to consider the applicant's argument and the case that he has presented to consider new evidence? She added that on that basis alone, the matter should be continued to allow for consideration of the threshold matter, and if applicant has new evidence to present, it should be considered by council with proper knowledge of the process and not just "on the fly." Mr. Burandt agreed with Ms. Dalton and cited Section 30-56 of the LDC "the Town Council will serve as the appeal board for signs that are denied historic and/or landmark status..." and said again that the central question still remains unanswered regarding appropriate guidelines being in place and if they were available at the time of the application. He continued that the matter could move forward today if a broad perspective is permitted to allow the applicant to present all that they feel is pertinent and allow some of the LPA members present to explain the status of the Holiday Inn sign. Once again, Vice Mayor Acken reminded the meeting that the LPA minutes have not yet been approved and therefore not available to contest or accept. Further argument ensued regarding the minutes being available for the LPA.

Mr. Weimer, of the LPA, addressed the council and stated that he is ready today to address the questions as to whether appropriate guidelines and appropriate process were used to make the LPA's decision, but not to address the constitutionality or validity of the Town's LDC, nor did he believe that this is an matter at all for this body, at this time. Mr. Burandt agreed to a point but restated his opinion that the Town Council and the LPA must deal with verifying that this ordinance is constitutional and suggested that the Town attorney be given time to review the document and make proper recommendation as to its constitutionality. He continued that if the Town attorney finds it unconstitutional, the Town Council has a duty to strike the ordinance down or modify it to comply.

Mayor Kiker suggested that constitutionality should be a question for a later appeal and that this matter should proceed under the current guidelines which are in place.

Ms. Dalton stated that she is prepared to advise council on the appeal of this issue scheduled for today but that she was not given any advanced notice that a whole section

of the LDC would be challenged at this proceeding so she was not prepared to address that. She also noted that the applicant's attorney, Mr. Burandt, and his office were responsible for crafting the sign code he is now citing as unconstitutional.

Mr. Burandt admitted that was a fact but said that a 2006 case from the 11th Circuit (SWFL included), which was had not been decided at the time his firm drafted the ordinance, which has changed that and he summarized the case law saying "if you have an exemption for flags for non-profit organizations, that makes the ordinance unconstitutional." He pointed out that the Town's ordinance specifically states that and that by letting a non-profit fly a flag, the LDC is now regulation content and not location. According to the stated ordinance, its purpose is for beauty and traffic, and the 11th Circuit decided that that was not enough.

Mayor Kiker stated that he was 100% uncomfortable with this matter, considering that the council had not been apprised of all of the information that has been brought up and feels that there is definitely more time needed for proper researching and instruction on the proper course of action. He asked that the matter be continued for that purpose, asking for the applicant's permission. Mayor Kiker wants to have plenty of education for the council to do this and is not sure that this body is the correct one to even address the unconstitutionality of the ordinance.

Councilmember List commented that she agrees with the Mayor and suggested continuance. She also commented that the ordinance is confusing and difficult to work with, as it doesn't make clear the process and the function of the council at this level.

Councilmember Babcock was adamant about moving forward, stating that accusations are being made that the Town does not have any process and there are no guidelines in place, and he feels it necessary to move ahead to show the public that this is not true.

Mayor Kiker wants to continue to clear up the "new evidence" points and other issues so that they can make an informed decision. But again, Councilmember Babcock stated that the actual issue is should the new evidence be submitted; if it is accepted, then they council could choose to continue or send it back to the LPA, if they feel the evidence is significant.

Councilmember said that he feels the case should go back to the LPA with any new evidence and return after their review. Vice Mayor Acken is not interested in overturning the whole ordinance but rather in making the existing ordinance fair for all so that there are no possibilities to overturn or appeal the law later.

Mayor Kiker pulled the focus back to getting to the point of making a decision to continue or proceed today, without shedding responsibility to act.

Ms. Dalton wanted to make two points before that decision is made. She stated that Mr. Burandt advised that there is an expert witness present to address the structure that the LPA used in determining the procedures, a Mr. McDole. She advised the council that they may decide that, based on this testimony, the case should go back to the LPA. The other thought that she had was exemplifying the district court's process for appeal: in that arena, if a case went to the lower court and an appeal was filed from that case, between the time the appeal was filed and the time the court hears it, if new case law comes up, those cases CAN be considered by the appeals court in some instances. She pointed out that the resolution and passing of the approval for the Holiday Inn sign

could be considered, in this court, to be the equivalent of the new “case law” in a district court. So, the findings of fact that lead to the new resolution, and the resolution itself, would be relevant to this situation and the LPA does not have approved minutes so it is not possible to have that today. Her recommendation is to continue this matter, sending this back to the LPA to allow them to hear Mr. McDole’s comments on the process for additional information. Mr. Burandt still held that the Town should hire a constitutional attorney to review the ordinance before sending it back to the LPA, because he feels strongly that he is right and an independent lawyer will agree, so there would then be no need to go further. He emphasized that, although Ms. Dalton is an excellent attorney, she is not able to act freely in this matter due to her dual position.

The Mayor polled the members as to returning the issue to the LPA or continuing the matter to another date to return to the Town Council level.

Councilmember Babcock dissented but the other members decided to continue with the council with new evidence. Ms. Dalton cautioned that the applicant not produce any additional new evidence at the next hearing but he said he couldn’t agree because he doesn’t know if the LPA has any new sign requests before it. Discussion ensued regarding dates and any applications pending with the LPA. The second meeting in January was decided for an evening meeting.

Mayor Kiker asked for a motion to continue the hearing until January (with Ms. Dalton adding the deadline of submitting materials by Nov. 30th and Ms. Dalton’s by Dec. 31st) so that they can be reviewed in a timely manner without having to postpone).

MOTION: Vice Mayor made the motion and it was seconded by ????

Councilmember Babcock is still not satisfied with a continuance because he feels that the Holiday Inn decision was made after the Lani Kai, and that there were written guidelines in place prior to any of the decisions being made. He said that he is ready today to determine whether the Lani Kai process was done appropriately by the LPA and does not feel that any new evidence will have bearing on the decision of proper process. Mr. Burandt cautioned that if he is right in his argument, then the Town Council will have violated the applicant’s rights because they have used the wrong standard, so the Town Council needs to be sure that the standard they use is appropriate or it will be another avenue for appeal. Again, he suggested review of the evidence and the signs and determine whether or not they both qualify. The guidelines must be clearly defined and uniformly and fairly applied.

Mayor Kiker pulled the focus back again and stated that there are two things going on: the applicant would like to discuss the resolution and the minutes from the LPA and they are presently not available for review; also, the case law that the applicant refers to has also not been made available to the council. As a side note, the applicant is suggesting that Town Council look at the constitutionality of the code, although it will not be part of the hearings.

VOTE: motion passed 4-1, with Councilmember Babcock dissenting.

Public comment closed.

Vice Mayor Acken attempted to make a motion regarding the fee since the applicant was prepared to proceed and would incur expenses due to the continuance. There was no second to the motion, therefore it failed. There was brief discussion regarding the entire fee schedule and it may be addressed in the future.

BREAK FOR LUNCH.

RECONVENE AT 12:15 PM.

B. DCI 2007-0002 Edison Beach House

Attorney Dalton referred to Resolution #08-48, adds that this is a regular quasi-judicial hearing at which LPA makes a recommendation and Town Council makes a decision. Ms. Grady was not present for the LPA hearing but is present today to share a picture with Town Council. It was also noted that Mr. Yerkes was present to represent the LPA.

Hearing opened at 12:45 and Mayor asked if there was any ex-parte communications. There were none. Ms. Dalton swore in witnesses.

The Mayor called on the applicant to address the meeting. Beverly Grady, represented Larry Yax for Central Investment Corp. She stated that the applicant and his architect filed an application, heard by the LPA and approved by Town Council in 1997. At that time, the applicant wished to develop a new, code-compliant hotel with a caretakers residence, 24 guest rooms, one dwelling. He owned The Pink Porpoise 815 Estero Blvd. and 830 Estero, which is now the site of the Estero Beach House. At the time #815 contained 8 apts. and #830 contained four duplex (8 units), six town houses and three other units, for a total of 25 units on the three sites. The applicant filed for an application to rezone for multi-family RM2 and C1-2 CPD. In that, all of the density was placed on #830 Estero Blvd., in one structure, five story, upper parking and on April 7, 1997 the Town Council of Ft. Myers Beach approved the CPD for the five story over-parking hotel with the caretaker's residence. One of the conditions limited the guest units to a total of 3,200 sf, limited the height to 70 ft., it stipulated that #815 Estero Blvd., parcel B, was approved for a park. The staff recommended approval of the hotel, the caretaker's unit and that 815 Estero would be appropriate for government agency to include a Town Hall. The LPA also recommended approval of that original request but the council limited parcel B to a park at that time. Ms. Grady then presented a long Power Point presentation, with charts, etc. to support their position and referred to the Comprehensive Plan, Chapter 15, wherein it addresses issues she highlighted, #4 and #5 (see Comp. Plan). In view of these, Ms. Grady submitted for the applicant that the plan development approved by the Town Council of Ft. Myers Beach is deemed consistent with the plan and respect that the Council wanted to protect the private property rights. The over-parking hotel, with the 24 guest units on four floors (#2,3 and 4), and the one caretaker's unit (two levels-fifth floor and a loft), were built. It was built with guest rooms with sq. ft. of 11, 212; the approval was for 13,200 sf for the 24 guest units and what was built was 11,219 sf, leaving 1,098 sf of the approval by Town Council that has not been used. Ms. Grady pointed out that the applicant is requesting a total of 13, 378 sf , 178 sf more than what was approved in 1997. The applicant could live with just recognizing the square footage that was approved in 1997 and reduce the total by 178 sf.

The applicant is also requesting an increase in the loft section of the caretaker's unit to add an additional 1,259 sf. This would make the square footage requested for the guest units what was originally approved by the Town and the last issue raised by staff was the height. Ms. Grady stated that the height does not related to the guest units but to the increase in size of the loft, which would require changes to the roof line, an increase of nine feet, within the height approved by Council in 1997. On March 13, 2000, the Town granted consumption on the premises for the Edison Beach House and on June 4, 2001 the Town approved a master concept plan change for the parcel B 815 Estero Blvd., to revise that master concept plan. On Dec. 20, 2001, parcel B was sold and on Sept. 17, 2002, a zoning verification letter was issued finding all in order on the whole parcel and is asking to complete what has already been approved and to expand the caretaker's unit, which is the residence for the owners. Ms. Grady continued to give a long history of the plans and application process, which started in 2006, to support the applicant's complaint that this process takes considerable time, effort and money. For example, in Feb. of 2007, applicant's architect presented plans to Dr. Shockey and in April 2007 the county requested an Application for Waiver of the Transportation Submittal Requirements, which was denied. The applicant then hired a transportation expert who did a traffic impact statement (included in packet) at a cost of \$4000. Ms. Grady then showed the Power Point presentation which illustrated the information she already presented. In summary, Ms. Grady again stated the three basic requests of the applicant: expansion of the pool deck, an addition to the loft area of the caretaker's unit and raising the roof by approximately 9 ft., still staying within the height limit at the time of the original approval.

Ms. Grady referred to a copy of the staff recommendations and made points to the council comparing the schedule of uses of what was approved in 1997 to the new list, it has been reduced. For example, consumption on the premises approved as part of mini-bars in the rooms in 1997 and a special exception granted in 2001, it is not in the approved list of uses. Food and beverage service, which was also in the original approval, is also no longer in the current list. The site development regulations are also different from the approval, for instance the minimum Floor Area Ratio did not exist in 1997. Ms. Grady pointed out other conflicting points and went through the conditions, mainly conditions 6 and 7. She stated that the applicant feels that he is consistent with the 1997 approval, being a lawful use, they have lawful density, lawful intensity, and they do not understand numbers 6 and 7.

Short break.

Reconvened.

Dr. Shockey addressed the council for staff and reviewed the property again, stating that this case is more complicated than typically mainly because there was another parcel involved at the time of approval in 1997. That parcel is not owned by the applicant anymore and the request is for rezoning of the existing parcel, not any parcel owned by another party, and to adopt a new master concept plan with additional development on it. The staff recommends approval of the rezoning to the new CPD, with the staff recommended conditions, but denial of the two deviations that address the request as a rezoning request under the current Comp Plan that applies everywhere in the Town of Ft. Myers Beach, as these would be deviations

from the current LDC to allow increases in things that are currently non-conforming with regard to what applies today. Dr. Shockey pointed out that plan development rezoning does not grant unlimited development rights in perpetuity, as there is a period of time either specified in the LDC or other, if it was stipulated at the time in the resolution. There is a time limit during which the project must be constructed. After that time, that portion of the MCP is deemed “vacated” and further construction is done by re-application or rezoning of the property. Since this full parcel is no longer owned by the original applicant, the property must be rezoned at Mr. Yax’s sole request for him to continue any construction. Dr. Shockey stated that since this is a rezoning issue, the request is evaluated under the requirements of the current Comp Plan, specifically Section 15 of the Comp Plan which suggests that “*plan development zoning approval is granted by the Town Council since incorporation are deemed to be consistent with the Plan.*” It does say that the categories of approval are consistent with the Plan, subject to the “applicable conditions set forth below,” one is that they are specifically approved and the other is that the activity is not deemed consistent if there has been a substantial deviation from the approval granted. He pointed out that the applicant was granted certain rights in 1997 and in 2001 but the applicant constructed a project that didn’t exactly match those rights. Since that time, the rights are vacated because of the specific time periods in the LDC being expired. In view of this, staff’s position is that the master concept plan is vacated and additional development would require reinstatement or rezoning of the property.

Mayor Kiker asked for any questions. Vice Mayor Acken asked what timeframe specified in the LDC would apply here. Dr. Shockey believed it is five years for completion of the initial phase and eight years for all phases from the most recent MCP, this period ending in 2006.

Councilmember Raymond asked how this new request would have been different if there was not a new owner to part of the property. Ms. Dalton clarified the question: If the parcel that is gone now was gone then, would the applicant have gotten the approvals that they got? Mr. Shockey said that there was development on parcel B which was used as the basis for what is there today, so they would not have gotten the same approval, according to the Comp Plan.

Mayor Kiker then called Mr. Yerkes for the LPA. Mr. Yerkes explained that the LPA did not look at this as being very complicated. The original approvals had expired so the LPA was basically faced with an application that was non-conforming building which would be further non-conforming if the height and density deviations would be approved. The LPA was clear in having to deal with the current LDC and the rules as they stand today, which dictate that the building is too high and going higher would result in a further non-conforming situation, and the same is true with total square footage. There are many other issues, including parking, and the LPA wanted to be sensitive to the applicant and the impact on the Town, the LPA stayed on task to use the rules and regulations of the LDC to make their decision. Mr. Yerkes said that the LPA was diligent in their review and unanimous in its decision to deny, based on the process and reports involved.

Dr. Shockey added that staff would not object to adding the approved items from the previous master plan to clarify that uses on the property that were approved can continue and the applicant’s concerns about the floor area ratio, etc., were explained

that they were added to specify that the building is non-conforming, but not required to be cut down or modified in any way.

Opened Public Comment

Public Comment was heard:

- Mr. Yax, the applicant, addressed the meeting. He gave a brief history of his ownership of the Edison House and the good service they have provided to the Town. The applicant again appealed to the Council for the approval to expand his residence to accommodate himself and his wife and future possible medical assistance needed.

Closed Public comment..

Mayor Kiker then asked the Town Council for any questions or comments. Vice Mayor Acken asked staff how this will affect of 815 Estero; Mr. Shockey and Ms. Dalton stated that there is no impact. Understanding that that property is not effected at all, why has the applicant's rights have changed? He didn't understand why the density transfer would be an issue at this point, changing the applicant's rights. Ms. Dalton replied that there are two different issues, one being the status of the parcel across the street in that there was a covenant of unified control, which was broken at the time the parcel was severed. The other issue is that Ms. Grady is insinuating that there is some type of "grandfathering in" of rights in question and that is not the case, and a separate issue than unified control. Basically, the Vice Mayor was concerned about the timeframe within which the applicant approached the Town to make his application. Ms. Dalton stated that this didn't matter since there was no formal actual application made and, therefore the applicant had two roads to choose, and he chose the rezoning road, and did not request to extend the MCP as it existed at that time. The issue in front of the Council today is a filing for rezoning.

Ms. Grady responded that the applicant came to the Town with his architect in 2006, and discussed it in Aug. 2006 with Brad Case (no longer with the Town). Ms. Grady asked her client if he had known about the time constraints and he stated that he had no idea there was a time limit. Ms. Grady went on to lay out what transpired next, as far as traffic impact studies, expenses, plans, etc. to show that the applicant had continued with all of this as though he was going to get it all done and in place, again not realizing there were any time constraints.

Mayor Kiker asked would the application still have been within the five year timeframe from when the applicant was before the council, questioning the traffic study, and had this not been held up due to the study or did the request for the study hold the issue up long enough to expire the time limit. Ms. Grady answered that she has the dates and looked for them. Mr. Shockey read the LDC, Chapter 34, section 34-220, which addresses the time limits *"time frames may be governed by a phasing plan, in the absence of a specific plan the resolutions subsequent phasing plan must proceed as follows: within five years of the date of approval by the Town Council, the first phase must have been completed and a development order must have been obtained for the second phase; within eight years of the date of approval, the second phase must have been completed and a dev order must have been obtained for the entire project. Any phase for which a development order has not been obtained, or for which development has not been completed by the time specified in the resolution, shall be deemed vacated along with all subsequent phases."*

Ms. Dalton added that you cannot apply for an extension if all of the owners are not in the application and the breaking of the covenant of unified control made it legally impossible to consider an extension.

Ms. Grady reported that the applicant submitted an Application for Waiver of Submittal Requirements for Ft. Myers Beach was filed on April 25, 2007 and denied in May 2007, and then hired the expert in transportation to do the study, including a count in Dec. 2007, to capture peak traffic. Council wondered if the applicant was not given incorrect direction by having them get the study instead of just being denied at the time.

Dr. Shockey stated that they had the option to apply for rezoning regardless of the traffic study that they were outside the time limits to amend the existing zoning or extend the master plan.

Mayor Kiker pointed out though that if it was actually six years and six months when the applicant asked for the last process to begin, and it was outside of the five years, and it didn't matter anymore, instead of sending them for a study, the applicant should have been advised of that. Ms. Dalton interceded that the applicant had choices, one being the extension of the plan, which was within the timeframe. The applicant chose to pursue rezoning, which is timely. The Mayor asked where the traffic study comes in and Dr. Shockey replied that it was a standard for this process and unrelated to the timeframe.

Ms. Grady disagreed with the Town attorney's statement regarding the code and asked what is the status if you have a planned development and you sell off some property? She said that there is a processing requirement that you should file a substitute unified control but it doesn't state the consequences for not doing so. Without that section it is clear under the code 34-218 wherein it says "it's binding upon the applicant, any successor entitled to interest to any or all of the planned development; departure from the approved plan or failure to comply with the conditions..." that's a problem. Dr. Shockey stated that there was no phasing plan specified in that matter. The Council discussed how long the application went on and what the start date was. Ms. Dalton stated that the filing of the application is what stops the clock. She cautioned that stopping the clock at an earlier time, it will affect many other beach issues. The Mayor can not understand how the Town can request someone to go get a study and then when they do so, a year later the Town explains why it was needed. Ms. Dalton pointed out that this is an interesting point but it does not go to the issue of the extension of the master concept plan or not, or to the issue of should there be a tolling of the five year period or not. The traffic study was a requirement for the rezoning, a different concept than the MCP. Dr. Shockey pointed out that the traffic study actually helps the applicant's case in that there is no impact to overall traffic. The applicant added that he had paid a \$5000. fee for this hearing not knowing that there were any problems in the process.

Short break-5 minutes.

Mayor Kiker noticed that Councilmember List was no longer in attendance via phone and took a few minutes to reconnect.

Reconvened.

The Mayor suggested a conversational type session and stated the facts, as he understands them: you have a piece of property and the application limitations, under the five year limit, ran out. He asked how the Town asked for a traffic study and \$5000. from the applicant, then explained that it was because that, outside of that application, the applicant began another separate process, for rezoning, the cost being \$5,000. In order to accomplish that, the applicant was asked to put together a traffic study to supply zoning information to the Town. The fee is still in tact and the applicant can still complete the new process, which is not why they are present today. He added that there is no way to be able to mix the two issues and make a decision. The statute of limitations ran out in 2006 and that process is done. He asked if that was a correct assumption. Ms. Grady said her client was not clear about the process at the time and he and his architect were under the impression that they had met with staff and were following the path and direction of the Town. The Mayor asked if there was no clear understanding that the five year limit was over, why then have they paid the \$5000. and started a whole new process. Mr. Yax said he thought this was all the same process for obtaining a building permit. Dr. Shockey recalled a conversation with the architect during which he asked about amending the development order under which the original hotel was built in order to build onto the hotel; he did not know what the whole conversation entailed between Mr. Case and the architect. In the spring of 2007, when the Town was receiving application for public hearings, they received the applicant's \$5000. and an unclear application. The staff continued to counsel the applicant and architect over the course of about a year on what the process would be to get approval of what they were asking for. Dr. Shockey explained that with the application, there were drawings and information regarding what was being requested but stated that there was never any discussion about extending the prior MCP because that was out of the question, since the five years were expired. Mr. Yax said "I knew nothing about that at all." He added that he would not have had the architect continue to keep drawing if he had realized it was out of the question.

Mayor Kiker announced that the council is now at a decision block and will now just deal with the decision that is before them at the moment. Ms. Grady added that the her biggest concern is the conditions as written have now put her client in a worse position as they were when they started out so she asked that that be considered and trying to work together, with no new set of conditions on this piece of property. To clarify, the Mayor asked "If you are knowledgeable that we are ready to make a decision based upon this information, you would rather us not?"

Ms. Grady said that they wanted to hear some indication as to whether they Town council was going to approve their request, in part or whole, but if not they would be concerned that they would move to the next level, which is adopt those conditions contained in the staff report as written and that's what we want to get on the record. Ms. Grady's feeling is that even if the council decided to grant pieces they would still end up saying that some work needs to be done on the conditions. Ms. Dalton stated that she does have the 1997 resolution and offered to draft it. Councilmember Babcock said that council will discuss all of the issues put on the table. The one that was brought out today, and actually suggested by staff, is that the council may also consider amending the uses that are in the current resolution to include uses that the

applicant was entitled to in 2001 or 1997, is that correct? Ms. Grady agreed that was accurate.

Dr. Shockey again referred to the LDC in effect at the time and said that the uses approved at the time were based on those out-dated uses in the older code. For example, in 1997, there were restrictions on fences and walls and now those are not necessary anymore for this property because the same restrictions now apply to all property on the island. He mentioned that if there are specific uses the applicant is worried about, the Town could discuss and consider reinstating those.

Mr. Yerkes again commented on behalf of the LPA that by the resolution approving the CPD but denying the two deviations, they are approving all of the existing uses. There is no danger of those uses being lost within their resolution. Ms. Grady gave an example of consumption on the premises and asked if that would be approved. Dr. Shockey replied that it was already covered by a separate resolution. Ms. Grady argued that this is rezoning the schedule of uses and this would be part of the problem, especially the language added to both numbers 6 and 7, which says that the applicant is non-conforming, which she feels is not accurate. She said that what the applicant has today does conform with the existing CPD. Her concern is numbers 6 and 7, the deviations and the uses are different in the staff report then they are even from 1997.

Councilmember Babcock decided that everyone will agree that this is a new application and suggested moving forward. He asked her for specific use concerns she want the council to consider. Ms. Grady said food and beverage service and the COP that was in the guestroom bars in 1997, and the COP that was approved in 2001. More discussion ensued regarding Ms. Grady's concern about zoning and rezoning, issues that she has already argued, and her disliking of the term conforming and non-conforming. Councilmember Babcock moved to closed testimony and Councilmember Raymond seconded the motion. The motion was carried to 4-1, with Vice Mayor Acken dissenting.

Council discussion opened. Councilmember Babcock expressed his sympathy in the applicant's plight and certainly his frustration in having to deal unemotionally in his decision. He stated that he is forced to only look at the evidence as it applies and that in doing so, there is no question that this property is non-conforming as it exists, for density, intensity and for height. He added that all of the requests for deviation are for things that will further its status as non-conforming. The reason that he supports the decision of the LPA is because it is non-conforming for the stated reasons.

Vice Mayor Acken said that he feels that the applicant has operated in good faith for years and invested their time, energy and money in the Town for its better good. He stated that, no matter what, this applicant tried to work through this process and through no fault of any one person or entity, was not able to get his application to be approved. He feels that the applicant is not asking for anything that is unfair and that the Town should not be burdened by the process and do the right thing and give him what he's asked; if nothing else, and keep the rights he already has.

Councilmember Raymond restated that the applicant has had choices as to which route to pursue and made those choices. He does not advocate for taking away any

already approved uses and added that he stands by a statement he made last spring, that he will not agree to add height...anywhere. He agrees with the LPA as far as height and adding the extra space.

Councilmember List agrees with the height and spacing issues. She added that the attorneys are the ones who we look to for advice and direction in issues such as this and that the applicant had access to legal consultation. Having said that, she agreed with the LPA's recommendations in all regards.

Mayor Kiker commented that processes should be in place to help people and should be adhered to, as well as that there are professionals that are involved in the processes to guide and direct the applicants. He questioned how any of those people could go along with a recommendation to pay a fee of \$5000. to start a process not knowing that the original process was gone. He ultimately agreed with the general consensus in denying the application and not taking away any of the rights already given to the applicant.

Councilmember Babcock wanted to make a motion but the Vice Mayor asked if the applicant could have a chance to comment. The Mayor started to agree and Councilmember Babcock interrupted that "testimony is done here." The Vice Mayor pointed out that they had agreed to give the applicant a chance to decide, after hearing the opinions, whether or not to proceed. Councilmember Babcock again interrupted and said that there is a process to follow and it should be followed. He added that he would be willing to entertain a discussion of continuance but felt that it be between the attorneys and not the Town Council. Ms. Grady took a minute to confer with her client.

While waiting, Mr. Pohland sang a very condensed version of "God Bless America" as his penalty for a ringing cellphone, followed by a rather unusual version of a Beatle song performed by Town Manager Mr. Janke, "I'm sorry, Mr. Council..." for the same violation. The penalty phase was wrapped up by the Vice Mayor, also in violation of the cellphone rule, who recited (in a baritone) "M-I-C-K-E-Y..." The variety show continued with a question by the Mayor who asked "how many attorneys does it take to screw in a lightbulb", which Ms. Dalton did not find amusing.

Ms. Grady could not make a decision and discussion ensued. The Council made clear that once a motion is made, and voted on the hearing will be closed and the process is done. The applicant attempted to make a deal with the council and was denied. Again, Ms. Grady conferred with her client and asked that the matter not be continued.

MOTION: Councilmember Babcock moved that Resolution 08-48 be approved with the following: on page 1, that it says "*Town Council approves the applicant's request to rezone its CPD to a new CPD subject to the five conditions and no deviations set forth for the specificity.*" On page 2, additional uses, one for consumption, the COP for the guestroom bars and the COP pursuant to the 2001 resolution, and the food and beverage service. On page 3, under Deviation 1, "*the Town Council denies the request for Deviation 1;*" under Deviation 2, "*the Town Council denies the request for Deviation 2*". Under Findings and Conclusions, "*is consistent with and complies with all specific requirements;*" under 2, "*there is error or ambiguity which must be corrected;*" under 3, "*there exists changed or changing*

conditions;” under 4 “the proposed use or mix of uses as conditioned is appropriate;” under 5 “sufficient safeguards to the public interest are provided;” under 6, “all conditions are reasonably related;” under 7, the proposed use or mix of uses as conditioned meets all performance and location standards;” under 8a, “each deviation does not enhance the achievement of the objectives;” under 8b, “through each deviationwill not be preserved and promoted;” under c, “each deviation does not operate to the benefit and may operate to the detriment of the public interest;” under d, “each deviation is inconsistent with the Ft. Myers Beach Comp Plan.” The second was by Councilmember Raymond.

The Mayor asked for any comments from Council. Councilmember List asked what the applicant will and will not be able to do. The mayor stated that he would not support the motion and feels that adding a little height would not be a bad thing. Councilmember List asked if the motion is passed, would the applicant have any other avenue to pursue. Ms. Dalton replied that this would be the end except for applying for amendments, etc. The Vice Mayor added that the other options would be cost prohibitive and suggested resolving the issue today. Councilmember Babcock feels obliged to support the Town’s Comp Plan and LDC, and he does not agree with approving any request that is outside minimal variances. Discussion ensued regarding what constitutes a “minimal variance” and how the decisions are made. The argument was interrupted by the Mayor.

VOTE: The vote was taken with 2 yes and 3 no votes (Councilmembers Raymond and Babcock-yes; Mayor and Vice Mayor voted no, as did Councilmember List). The motion was not carried.

MOTION: The Vice Mayor made another motion to approve Resolution 08-48 with the following language: *“the Town Council approves the applicant’s request to rezone its CPD to a new CPD subject to the five conditions and no deviations set forth with specificity below.”* Regarding the schedule of uses, included should be the three conditions that were requested by the applicant be added to the schedule of uses; on page 3, #1, *“the Town Council approves the request for Deviation 1”* and the *“Town Council approves the request for Deviation 2;”* *“Findings and Conclusions: the requested CPD...is consistent with and complies with all specific requirements, etc...;”* under 2, *“there is not an error or ambiguity which must be corrected;”* under 3, *“there exists changed or changing conditions which make approval appropriate;”* under 4 *“the proposed use or mix of uses as conditioned is appropriate;”* under 5 *“sufficient safeguards to the public interest are provided;”* under 6, *“all conditions are reasonably related;”* under 7, *the proposed use or mix of uses as conditioned meets all performance and location standards;”* under 8a, *“each deviation does not enhance the achievement of the objectives;”* under 8b, *“through each deviationwill not be preserved and promoted;”* under c, *“each deviation does operate to the benefit and may not operate to the detriment of the public interest;”* under d, *“each deviation is consistent with the Ft. Myers Beach Comp Plan.”* The motion was seconded by Councilmember List.

Councilmember List commented that she appreciates Councilmember Babcock’s comments about the code but that they need to remember the human factor in their overall decisions. The Vice Mayor once again stated his feelings that their obligation to the community and the Comp Plan is to do what they can to protect the lodging

industry and to approve reason requests of the residents. Councilmember Babcock restated his opinion why this is not a minor change. If the applicant was permitted to build from scratch, they would be allowed six units and they now have the equivalent of 27.78 units, or four times; and now the Council has increased the density greater than five times what they are entitled to have. In addition, he said if they were to build, they would be allowed to have two stories over flood and the currently have over five, with Council now approving six. If they were to build from scratch, they would be permitted to have 30 ft.; the Council is approving 45 ft. He said that there is no way he could support this approval as a "minor deviation." Councilmember Raymond agrees with Mr. Babcock and wonders what happens next time.

VOTE: Mayor Kiker called the order and the vote was taken; the motion was carried 3-2, with Councilmembers Babcock and Raymond dissenting. The hearing was closed at 3:34 PM.

ADMINISTRATIVE AGENDA

B. Wages & Classification Plan, Presentation by Nicholas Pellegrino, Cody & Associates

Mr. Janke stated that this plan study was done prior to his employment but that the results are now ready for council's review, he turned the meeting over to Mr. Nick Pellegrino. He referred to the copy of his report, given to the Council, and summarized classification review of the Town staff, basically comparing the job titles and duties as compared to pay scales and benefits of other similar positions throughout the area. Mr. Pellegrino recommended minimum and maximum pay scales for employees based on the market value and other factors of the human resources field. Mr. Janke added that it does not include what is considered "longevity" or step increases.

Councilmember Babcock asked if there were any questions asked regarding years of experience, etc. Mr. Pellegrino answered, again referring to his report, and explained the market value and skill set of the members polled. He further discussed his firm's approach and methods of study and continued to field Mr. Babcock's and council's queries. Council wanted to know what tool is in place for future advancements, etc. Further discussion ensued regarding the subject.

Mr. Janke added comments helpful to the council's concerns, based on performance. Merit increases were discussed and explained, as well as how all the comparisons were made.

Mr. Raymond commented that this report gives good parameters and that he would like to see this issue come before the council on a quarterly basis, a review from the Town manager, on a performance based program.

Mayor Kiker stated that the Town Manager requested permission to bring the five employees who are below the minimum, up to the standard. In addition, the report stated that almost 70% of the staff was exempt and the Mayor asked if any of those should be non-exempt instead, to be fair.

MOTION: Councilmember Babcock moved to accept the study and authorize its implementation and was seconded by Vice Mayor Acken.

Attorney Dalton added that the next meeting will feature a resolution to adopt the new personnel plan and there may be pieces of the discussion that may not be in tune with the personnel manual, so there may be wordage added to stipulate that the manual will supersede this resolution, etc.

VOTE: Motion carried 5-0.

Direction Regarding Advisory Committees' Loyalty Oath

Opened Public Comment

None

Closed Public Comment

Discussion ensued regarding the lack of interest to pursue this. Some members wanted this and some didn't. The Mayor said that the tie goes to inaction.

C. Discussion Regarding Local Newspaper Advertising

Councilmember Babcock addressed this issue and feels strongly about communication. He proposed that the Town needs to advertise, at the very least, the hearings so that the public is aware when and where to attend, if they would like to be involved. Mr. Janke added that the statutes require certain public notice but wanted to go further with newspaper notices, without just regarding these as legal notices, because of the legal language. Council discussed using both island newspapers for additional town announcements, and agree on a fixed fee, perhaps \$50.00 per notification and allow the paper the option of publishing or not, using this fee schedule. All members agreed that there should be much more exposure for volunteers to serve on committees, etc.

Opened Public Comment:

Public Comment was heard:

- Ceel Spuhler addressed the meeting and supports this idea and that both papers be utilized. She suggested that the Town include publication of the TV broadcasting times and stations.
- Mr. Carl Conley returned to address the meeting again and promoted the Island Sand Paper's advantages, especially as the ONLY island newspaper.

Closed Public Comment

MOTION: Councilmember Babcock moved that the Town manager be permitted to negotiate with both Town newspapers to allow supplemental notifications. All members agreed that cost is a major issue. Motion seconded by Mayor Kiker.

Councilmember List abstained from the vote due to conflict issues but did comment as to the importance of the island papers.

VOTE: The vote was taken and passed 4-0, with Ms. List abstaining. (*Clerk's Note: Councilmember List has filed a Form 8B MEMORANDUM OF VOTING CONFLICT*)

D. Select Date for Joint Meeting with Lee County BOCC

Tentatively scheduled for January 7, 2009. Mr. Janke will check for availability of the date and January 21 would be the second choice but Councilmember Babcock will not be available for the second choice.

E. Select Regular Monthly Workshop Date

Council discussed trying to pick a specific day and time to consistently to have workshop meeting so that these would be always on the calendar as a pre-scheduled meeting for any month. After much discussion, council decided that it should be the Wednesday after the second monthly Town Council meeting and decided that the first meeting will be Nov. 19, 2008 from 9:00 AM to noon and will setup the format for all future meetings. These will be named the "M&P Workshops" and will focus on items like CIP and budget processes, project reviews, and discuss strategies, etc.

X. ADVISORY COMMITTEES ITEMS AND REPORTS

A. Appointments to the Advisory Committees

1) Anchorage Advisory Committee

Councilmember Babcock reported that Jim Rodwell decided to remove himself from the committee. Also, Roger Johnson put his name in for Public Safety has requested that he be considered for the Marine Resource Task Force. Discussion ensued to combine the Public Safety Task Force and the Traffic Mitigation Agency, and combining other committees.

2) Bay Oaks Advisory Committee

3) Cultural and Environmental Learning Center Advisory Board

4) Local Planning Agency

5) Marine Resources Task Force-may combine this with #6

6) Public Safety Task Force

7) Traffic Mitigation Agency

8) Lee County Metropolitan Planning Organization

a) Citizen Advisory Committee-to date, no members

b) Bicycle Pedestrian Coordinating Committee-so far, only Carrie.

c) Technical Advisory Committee—this is a standing committee with a staff member needed on this one; no one so far. Mr. Janke stated he would appoint a staff person.

Mayor Kiker asked Mr. Raymond to set up a meeting with all of the chairs of the committees and the Town Council. He also asked about "CRAB"-Community Rehabilitation Action Committee and what the function and status was. Mrs. Spuhler gave her knowledge of the committee and stated that it fell apart when the gentleman who ran it went to prison.

Charlie Loucks commented on the CRAB and possible resurrection of that committee. Attorney Dalton stated that this was covered by Ord. 00-07 the objectives are to further the welfare of the citizens of the Town in the implementation of our community as a living park as to finding a comp plan....etc.” It was decided that the committees would come back with recommendations as to who is in service for one year and who for two.

MOTION: Councilmember Raymond moved to appoint the three LPA members for two year terms. Motion was seconded by Councilmember Babcock.

VOTE: Motion passed 5-0.

Councilmember List requested permission to leave the meeting due to a prior engagement.

XI. TOWN MANAGER’S ITEMS

A. Update on TDC Funding

Mr. Janke reported that he had a request to change the trolleys changed over to buses that look like trolleys on the outside. He asked if the Council had some input into this issue, keeping or changing the trolleys. Discussion ensued regarding the upkeep and prices, etc. about the trolleys. Mayor Kiker was not in agreement with this since the new ones should be bigger and heavier and detrimental to the island ambience and roads, etc. The Council agreed that they would prefer not to change and do not want to be serviced by buses.

XII. TOWN ATTORNEY’S ITEMS

a. Update on San Carlos Project Timeline

Attorney Dalton referred to the council packet’s wherein the information is included.

b. BJH 2007-0001, Paine v. Town of Fort Myers Beach

c. BJH 2007-0002, Purtell v. Town of Fort Myers Beach

These two items have nothing to report on.

XIII. COUNCILMEMBERS ITEMS AND REPORTS

A. Goals and Objectives (no back up material)

Councilmember Raymond reported that there should be an amendment to the sign ordinance taking out the part that says the only way to appeal is if you are denied so it can be appealed whether denied or approved. In addition, he suggested making the final decision at the Town Council level and not the LPA. The Mayor asked Mr. Janke to put this matter on the next agenda as a discussion topic.

Councilmember Babcock advised that he and Mr. Janke have a meeting tomorrow with the Port Authority to discuss redesign of airspace around the beach and he asked that this also be put on the next agenda for update. He also handed out a letter from the Island Arts Foundation requesting the opportunity to use the Purple Heart Theatre for their use, to serve beer and wine. The application for that requires \$4000. Mr. Babcock would waive that fee so that this non-profit can do this without the fee. He suggested that there be a resolution in the future to be able to

waiver that fee in certain instances. Discussion ensued regarding fee waiver for special exceptions.

The Mayor had a question regarding a vicious dog, stating that this issue keeps coming back. He asked for the Council's opinion as to whether they should get together and work this pit bull issue out. Mr. Janke added that he also has been dealing with the same complaint and the importance of dealing with the problem now. Attorney Dalton added that this does need to be addressed as soon as possible and all agreed that something must be done with their contractor before it gets out of hand. The Mayor added one last point. He stated that he is uncomfortable with the fact that the Town is getting ready to spend about \$50,000 for Ms. Green's company, without first shopping around. Mr. Janke corrected that the contract is actually \$24,600, but the Mayor just requested that the Town at least talked to a few other companies. Ms. Dalton agreed that this is acceptable. The Mayor is not comfortable with not hearing what other lobbyists do. Further discussion ensued.

XIV. RECAP OF ACTION ITEMS

The Council will have a discussion of Nov. 17th regarding tasks and other subjects related to lobbyists. Prior to that, the members will send their questions to Mr. Janke to be included in the agenda items. Ms. Dalton requested a copy as well. A resolution will be done to incorporate the Wage & Classification Study as an attachment to the personnel manual, with the manual being considered at the next meeting.

The Edison Beach House Resolution is done and will be ready for the Mayor's signature asap.

The Lani Kai materials are due by the end of November and the Town's materials due by the end of December and Council has scheduled the continuation of that appeal for the second meeting of January.

There was some discussion to revisit the fee schedule and it was deferred to the first workshop.

The Alzheimer's Awareness Month Proclamation will be ready to sign tomorrow.

The advisory committees are being requested to determine who will serve one and two year terms, and then it will return to Council for review and approval; except for the LPA who was approved today.

Also, the Council will review the historic landmark sign either the changing the LDC to incorporate an approval process in an appeal or the LPA would make a recommendation and Town Council would make the final decision on the issue. The Pert Authority issue will be updated by Mr. Babcock.

The Island Arts Foundation will be back for consideration of the fee waiver, after Ms. Dalton does the memo. A meeting will be set up with Lee County regarding the Vicious Dog issue. Mr. Janke will pick more potential lobbyists for consideration. The last issue was fighting the trolley change.

XV. PUBLIC COMMENT

Opened Public Comment

Public Comment was heard:

- Mr. John Pohland addressed the Council regarding the TMA. He reported that the TMA has issues with signs and trolley stops and the fact that the members are frustrated not knowing what to do and how they should do it.
- Paula Kiker addressed the meeting and said that there are many of the condo associations already restricting the types of dogs permitted. She talked about other pet restriction items. In addition, she suggested a BYOB situation for the Purple Heart Theatre. She also added that the CRAB was left off of the Action List.

Closed Public Comment

XVI. ADJOURNMENT

Meeting was adjourned at 5:24 PM.

Adopted 12-15-08 With/ Without Changes. Motion by Acker/Reynold
(Date)

Vote: 5-0

Larry Kiker
Larry Kiker, Mayor

- End of Document

FORM 8B MEMORANDUM OF VOTING CONFLICT FOR COUNTY, MUNICIPAL, AND OTHER LOCAL PUBLIC OFFICERS

LAST NAME—FIRST NAME—MIDDLE NAME LIST, JOANNE BARNARD	NAME OF BOARD, COUNCIL, COMMISSION, AUTHORITY, OR COMMITTEE FT. MYERS BEACH TOWN COUNCIL
MAILING ADDRESS P.O. BOX 2851	THE BOARD, COUNCIL, COMMISSION, AUTHORITY OR COMMITTEE ON WHICH I SERVE IS A UNIT OF: <input checked="" type="checkbox"/> CITY <input type="checkbox"/> COUNTY <input type="checkbox"/> OTHER LOCAL AGENCY
CITY COUNTY FT. MYERS BEACH, FL 33932 LEE	NAME OF POLITICAL SUBDIVISION:
DATE ON WHICH VOTE OCCURRED NOVEMBER 3, 2008	MY POSITION IS: <input checked="" type="checkbox"/> ELECTIVE <input type="checkbox"/> APPOINTIVE

WHO MUST FILE FORM 8B

This form is for use by any person serving at the county, city, or other local level of government on an appointed or elected board, council, commission, authority, or committee. It applies equally to members of advisory and non-advisory bodies who are presented with a voting conflict of interest under Section 112.3143, Florida Statutes.

Your responsibilities under the law when faced with voting on a measure in which you have a conflict of interest will vary greatly depending on whether you hold an elective or appointive position. For this reason, please pay close attention to the instructions on this form before completing the reverse side and filing the form.

INSTRUCTIONS FOR COMPLIANCE WITH SECTION 112.3143, FLORIDA STATUTES

A person holding elective or appointive county, municipal, or other local public office **MUST ABSTAIN** from voting on a measure which inures to his or her special private gain or loss. Each elected or appointed local officer also is prohibited from knowingly voting on a measure which inures to the special gain or loss of a principal (other than a government agency) by whom he or she is retained (including the parent organization or subsidiary of a corporate principal by which he or she is retained); to the special private gain or loss of a relative; or to the special private gain or loss of a business associate. Commissioners of community redevelopment agencies under Sec. 163.356 or 163.357, F.S., and officers of independent special tax districts elected on a one-acre, one-vote basis are not prohibited from voting in that capacity.

For purposes of this law, a "relative" includes only the officer's father, mother, son, daughter, husband, wife, brother, sister, father-in-law, mother-in-law, son-in-law, and daughter-in-law. A "business associate" means any person or entity engaged in or carrying on a business enterprise with the officer as a partner, joint venturer, coowner of property, or corporate shareholder (where the shares of the corporation are not listed on any national or regional stock exchange).

* * * * *

ELECTED OFFICERS:

In addition to abstaining from voting in the situations described above, you must disclose the conflict:

PRIOR TO THE VOTE BEING TAKEN by publicly stating to the assembly the nature of your interest in the measure on which you are abstaining from voting; *and*

WITHIN 15 DAYS AFTER THE VOTE OCCURS by completing and filing this form with the person responsible for recording the minutes of the meeting, who should incorporate the form in the minutes.

* * * * *

APPOINTED OFFICERS:

Although you must abstain from voting in the situations described above, you otherwise may participate in these matters. However, you must disclose the nature of the conflict before making any attempt to influence the decision, whether orally or in writing and whether made by you or at your direction.

IF YOU INTEND TO MAKE ANY ATTEMPT TO INFLUENCE THE DECISION PRIOR TO THE MEETING AT WHICH THE VOTE WILL BE TAKEN:

- You must complete and file this form (before making any attempt to influence the decision) with the person responsible for recording the minutes of the meeting, who will incorporate the form in the minutes. (Continued on other side)

APPOINTED OFFICERS (continued)

- A copy of the form must be provided immediately to the other members of the agency.
- The form must be read publicly at the next meeting after the form is filed.

IF YOU MAKE NO ATTEMPT TO INFLUENCE THE DECISION EXCEPT BY DISCUSSION AT THE MEETING:

- You must disclose orally the nature of your conflict in the measure before participating.
- You must complete the form and file it within 15 days after the vote occurs with the person responsible for recording the minutes of the meeting, who must incorporate the form in the minutes. A copy of the form must be provided immediately to the other members of the agency, and the form must be read publicly at the next meeting after the form is filed.

DISCLOSURE OF LOCAL OFFICER'S INTEREST

I, Joanne List, hereby disclose that on November 3, 20 08:

(a) A measure came or will come before my agency which (check one)

- inured to my special private gain or loss;
- inured to the special gain or loss of my business associate, _____;
- inured to the special gain or loss of my relative, Husband Mark List _____;
- inured to the special gain or loss of _____, by whom I am retained; or
- inured to the special gain or loss of _____, which is the parent organization or subsidiary of a principal which has retained me.

(b) The measure before my agency and the nature of my conflicting interest in the measure is as follows: The publisher/editor of a local weekly newspaper, The Island Sand Paper, came before our Council on 11/3/08 requesting the Town place announcements (paid) re: upcoming meetings in his publication. My husband is the Production Manager of the paper, and the revenues generated (or not) by the paper could have an impact on my husband's employment.

November 17, 2008
Date Filed

Joanne B. List
Signature

NOTICE: UNDER PROVISIONS OF FLORIDA STATUTES §112.317, A FAILURE TO MAKE ANY REQUIRED DISCLOSURE CONSTITUTES GROUNDS FOR AND MAY BE PUNISHED BY ONE OR MORE OF THE FOLLOWING: IMPEACHMENT, REMOVAL OR SUSPENSION FROM OFFICE OR EMPLOYMENT, DEMOTION, REDUCTION IN SALARY, REPRIMAND, OR A CIVIL PENALTY NOT TO EXCEED \$10,000.