



# MINUTES

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

**May 4, 2009**

**9:00 AM**

## **I. CALL TO ORDER**

Mayor Kiker called to order the meeting of the town council at 9:05 AM. Present with Mayor Kiker was Vice Mayor Acken, Councilmember Babcock, Councilmember List, Town Manager Janke, Town Attorney Anne Dalton and Town Clerk Michelle Mayher. Councilmember Raymond was absent with excuse. Special guests were members of the fifth grade from Beach Elementary School, as the Youth Council.

## **II. PLEDGE OF ALLEGIANCE**

Jose Sigala led the pledge.

## **III. INVOCATION**

Councilmember List led the invocation.

**YOUTH COUNCIL**-Councilmember List advised the meeting that the class had a tour of Town Hall and then she turned the meeting over to students Kimberly Fischer and Jose Sigala. Youth Mayor Jose Sigala and Youth Vice Mayor Fischer reported several achievements and events of their PTO and class.

*Short recess for Youth Council to exit.*

## **IV. LOCAL ACHIEVEMENTS AND RECOGNITIONS**

Councilmember Babcock recognized Michelle Mayher for her work in getting Channel 98 working better than it has in many months.

**V. ADVISORY COMMITTEES ITEMS AND REPORTS**

No reports.

Mayor Kiker reported that several committee members have asked if they can meet via the conference phone over the summer months and asked for the attorney’s opinion. Attorney Dalton answered that this is acceptable, legally, as long as the member attending via phone has a medical issue that prevents them from attending in person, or they must ask and be granted permission by the body. Mayor Kiker requested that a memo be sent to committees to advise them. Web meetings were discussed and Ms. Dalton volunteered to research the Attorney General’s opinion regarding these meetings.

**PUBLIC COMMENT**

Mayor Kiker explained the general guidelines and Attorney Dalton reminded the public that, since there is a quasi-judicial hearing scheduled for this meeting, anyone who comments outside the hearing should understand that their comments cannot be considered for the hearing.

**Opened Public Comment**

**Public Comment was heard:**

- Ms. Marsha Gardner stated that she was present to represent the citizens of Third Street, who have concerns about the possible traffic hazards which would be created by “Big M” traffic re-routing plans, including the huge parking garage, and asked the Council to consider changing 3<sup>rd</sup> St. back to a one-way street.

**Closed Public Comment**

**VI. CONSENT AGENDA**

- A. Approval of Minutes: April 6, 2009
- B. Special Event Permit Application: Surf Club Closing Event

Councilmember List requested pulling item “C” because she had a question for the applicant.

**MOTION:** Councilmember List moved approval of the Consent Agenda. Vice Mayor Acken seconded the motion.

**VOTE:** Motion passed 4-0.

Councilmember List questioned the expense for the July 4<sup>th</sup> celebration, specifically the \$400.00 paid to a musician, pointing out that this is very high and needs explanation. Councilmember Babcock agreed that this issue be questioned, especially considering the economic situation, and only approve \$18, 390.00. Vice Mayor Acken was in favor of

approving the full amount. It was suggested that this item be moved to the meeting of 5/18/09 and soliciting other agencies for contributions to the July 4<sup>th</sup> celebration. The Mayor's concern is the total cost of this event for the Town and exploring the possibility of getting Sheriff's department and others to donate some time.

**MOTION:** Mayor Kiker moved to approve funding not to exceed \$18,390.00, including the additional direct cost to the Town. Councilmember List seconded the motion.

Councilmember Babcock expressed his belief that the fireworks presenters are not making money from this and that he believes they have tried to keep costs down.

Mayor Kiker pointed out that, in spending this money for July 4<sup>th</sup>, there would be nothing left for events for the rest of the year. Councilmember Babcock asked if the motion could be revised. Much discussion ensued regarding the amount of the cost in the past and what is being spent now.

**Opened Public Comment**

None

**Closed Public Comment**

**VOTE:** Motion passed 4-0.

**VII. ADMINISTRATIVE AGENDA**

A. Introduction of Ordinance 09-01 ROW Vacation

Attorney Dalton read the title:

**AN ORDINANCE OF THE TOWN OF FORT MYERS BEACH, FLORIDA, AMENDING THE TOWN OF FORT MYERS BEACH LAND DEVELOPMENT CODE; PROVIDING AUTHORITY ; FINDING OF NECESSITY; PURPOSE AND INTENT;ADOPTING AMENDMENTS TO CHAPTER 10 OF THE LAND DEVELOPMENT CODE WHICH IS TITLED "DEVELOPMENT ORDERS AND ENGINEERING STANDARDS"; ESTABLISHING APPLICATION REQUIREMENTS AND LEGAL PROCEDURES FOR VACATING TOWN-OWNED PUBLIC INTERESTS IN REAL PROPERTY SEVERALABILITY; AMENDING DIVISION 5 "PLATS AND VACATIONS; AMENDING SUBDIVISION II "VACATION OF TOWN INTEREST IN REAL PROPERTY"; AMENDING SECTION 10-218 "PURPOSE AND INTENT"; AMENDING SECTION 10-219 "APPLICATIONS"; AMENDING SECTION10-220 "PROCEDURE"; PROVIDING SEVERABILITY; EFFECT OF ORDINANCE; AND EFFECTIVE DATE.**

**Opened Public Comment.**

**Public Comment was heard:**

- Mr. Joe Kosinski, 135 Gulfview Ave., stated that he has a request to vacate a ROW at his property and has been approved by the LPA for a variance. He requested that his vacation be exempt from this ordinance.

**Closed Public Comment.**

**MOTION:** Councilmember List moved to send Ordinance 09-01 to its first of two hearings on May 18, 2009 at 6:30 PM. Motion seconded by Councilmember Babcock.

Rochelle Kay, representing the LPA, addressed the meeting and stated that the Town council directed the LPA to get a consistent process. She said that the current process has a long Lee county history but specifics to Fort Myers Beach are inept. One of those issues is the matter of needing two independent appraisals, due to the small size of the Town, to be careful about vacating any of its property.

**VOTE:** Motion passed 4-0

**PUBLIC HEARINGS**

A. Case Number FMBDCI2007-0005-Snug Harbor CPD (continuation)

Attorney Dalton introduced the subject of a zoning approval regarding the Snug Harbor Development, referring to Resolution 09-10; included in the council packets with the ordinance was a memorandum from Dr. Shockey, with legal review, that discusses a preliminary issue, being that the representative of the developer, Mr. McHarris, advised Town staff that there was a third party who was to appear on this matter and that party is present for the meeting. There was comment that the third party would be raising "obscure objections" regarding a lot split that happened in the past which affected this property. Ms. Dalton seconded the concerns of the staff that the Town will get involved in private litigation over this, if the Town was not clear that the applicant has all of the rights necessary to bring forward the application at this time. Ms. Dalton further stated that, after many conversations with the applicant, his attorney indicated he would provide the Town with a legal opinion that the applicant's application contained all owners, etc. as required by the LDC; however the Town has not received that document and Ms. Dalton feared that without it, the Town could be entangled in a civil legal dispute. She cited the authority allowing the Town to require the applicant to bring forward more information and, in doing so, the hearing would need to be continued until such time as the applicant could gather and produce that information as to the proper ownership of the property.

Mayor Kiker polled members as to any ex-parte communications. Vice Mayor Acken spoke with the applicant, viewed the site; was employed there in past. Councilmember Babcock had discussions with the applicant and viewed the site. Councilmember List had conversations with applicant and neighbors of the site and she lives in the neighborhood. Mayor Kiker had conversations with applicant as well and viewed the site. Ms. Dalton swore in witnesses intending to testify.

Mayor Kiker summarized the reason for this hearing and referred to the information before the members regarding Attorney Dalton's information to the members. Ms. Dalton suggested that the hearing be continued because the applicant's attorney did not present the information he agreed to bring to satisfy the inquiry as to clear title to the property. Councilmember List expressed her concern with this issue as well and suggested that, in view of all the people present for the applicant, perhaps some can be heard before the postponement of the hearing. Ms. Dalton explained the options as how to proceed.

Councilmember Babcock opined to continue because no one has had the opportunity to review any information. The Vice Mayor opined that the hearing proceed at this point, but the others worried that the applicant may not legally own the property and therefore not be entitled to move forward on this request. Ms. Dalton stated her concern that the applicant requested that she communicate with their attorney directly, which she did, and that the attorney offered to prepare a document showing the Town that there is no cognizable issue. The document has never been received by the Town, even though Ms. Dalton has sent a follow up communication to the attorney. Councilmember Babcock continued to express his opinion that the applicant must have proper title since they've had the property for so long, have gotten funding for it many times, etc. He pointed out that this action could appear to be a delay tactic and asked if there was a way in which the Town could expedite the matter of getting this confirmation of clear title. Ms. Dalton said the hearing could be started, presenting other information to the Council and then continue the remainder of the meeting until the proper documentation is received.

Mr. Janke pointed out that, in most situations, the Town acts on the word of the applicant that they legally own a property; however, in this case, the question was brought up by a third party so it is especially necessary that the applicant and the Town act in a responsible, documentable manner for the good of all concerned.

**MOTION:** Councilmember Babcock moved that the hearing move forward but with the discussion only focus on the issue of the lot split. Councilmember List seconded the motion.

**VOTE:** Motion passed 4-0

**Opened Public Comment**

Public Comment was heard:

- Robert Pritt, attorney for the applicant Snug Harbor Condo Association, addressed the Council. He also introduced Allan Mayo, manager, and Dick McDole, Land Use Consultant with him. Mr. Pritt described the logistics of the properties, the buildings being separated and having a unique configuration, and with a view of the bay at the east. He said he has several documents to produce and wants his comments to become part of the record. He added that this is an “illegal subdivision” and there are several of them throughout the county. He stated that this information being presented for consideration is from the Lee County property appraiser and publicly available information. He continued to say that the parcel that the Town is dealing with, under their own and the county rules, is a larger parcel that includes the marina club, two parcels, as well as the parcels that are before the Council. He said that under the Town’s own rules there is a requirement to show unified control of the “parcel for development,” which under the Town’s rules is the larger parcel, not the part that is currently owned by the applicant. They have never apprised the Town of the illegal sub-division or the situation. He reported that this is a problem throughout the county and not unique to the Town. He added that when someone does an “illegal subdivision” the Town does not have to recognize that and, in fact, the Town rules do not recognize it. Mayor Kiker stopped Mr. Pritt and reminded him that the Council was not hearing that testimony at this time and that there is a motion to continue and this information resides with the staff. Mr. Pritt added that the applicant has been trying to seek out ways that the Condo Association join in the application rather than have the loss of the parking area and a further jury-rig situation for the parking deck. He summarized that he remains that this is an avoidable situation and that they are very willing to work with the Town and the applicant to develop a better plan. He concurs with the staff report concerning the dock area and they request that it be denied.
  
- Richard “Dick” McDole, building consultant for the Snug Harbor Condo Association, addressed the Council. He referred to his experience and what led him to immediately see the “lot-split” regulation violation. He said that there are many properties in the county that have this problem and these were done a long time ago. In those days, most people did not go through the proper procedures and when new owners come to the governing body for improvement permits, they are denied because they hadn’t gone through the correct process. He said this is exactly what happened in this situation. He also added that when Snug Harbor was built, he remembers being slightly involved, a realtor recommended that the condo documents provide for a

minimum lot area for that condo; the problems started when the first unit was then sold off and created a fee simple deed for the condo association, making the first illegal lot split. So, approval of this development will continue this problem.

- Cody Vaughn-Birch, of Henderson, Franklin, Starnes & Holt spoke on behalf of the applicant. He referred to the memorandum from Dr. Shockey, dated April 24th, and said that his office did have communication with staff and discussed an issue that was raised. He said the applicant's concern is that a third party may appear and raise an objection as to a compliance with a code provision. He said that Mr. Pritt spoke of the "real issue" being the illegal subdivision but that the actual issue up for comment now is the code provision that has been identified by staff, 34-202b-4, as far as ownership of the actual property. He distributed a diagram of the property, with three red-outlined properties and said that these are not in question in this matter. The properties in yellow are not in the rezoning request and under 34-202 does not apply. His research has failed to bring forward any issues regarding ownership questions as to the property and he stated that the rule that deals with the hearing being continued states that "if there is a question as to ownership, the hearing *may* be continued," but that no one has come forward to dispute ownership. Mr. Birch, therefore, resents continuance of this hearing on those grounds.

**Closed Public Comment.**

Mayor Kiker asked for legal opinion as to the invocation of 34-202, in continuance of the hearing. Ms. Dalton stood by her initial opinion, adding that she is more convinced, after hearing the public comment, that the hearing be continued. Mr. Janke agreed and said that the applicant should provide the Town with documentation of clear ownership of the parcels in question so that the issue can move forward.

Mayor Kiker asked for discussion. Councilmember List stated that there is clearly a question about ownership of this property and suggested continuing the hearing to give proper time and documentation for all involved to feel confident that these matters are addressed properly. Councilmember Babcock agreed and based his support for continuance on the fact that there is new evidence today and time is needed to consider it. Vice Mayor Acker referred to 34-202a3 and b4 and pointed out that these clarify "if at any time during the review process the director concludes that there is a question of ownership of property, the director may require submittal of title insurance, attorney's opinion, etc..." He asked if Dr. Shockey feels there is a question of ownership of property. Dr. Shockey stated that, since the review section is completed, the applicable section is now 34-216b1a, which states that the Town Council can request additional information and a continuance. He stated that there was no issue raised during the review process; it was raised after the LPA hearing was done and the LPA had made a recommendation. The Vice Mayor still did not agree to continue.

Ms. Dalton restated, for the record, that the discussion with the applicant's attorney occurred on March 9, wherein the Town discussed additional assurances, again reflected in the email of March 19<sup>th</sup>. She pointed out that these discussions have been ongoing for awhile and that the Town has not failed to do anything, but rather did the applicant fail to provide documents that they offered to provide.

*RECESS: 10:26 AM*

*RECONVENE: 10:40 AM*

Mayor Kiker reconvened the meeting and added that the parties have agreed to continue the hearing, and the applicant agrees to provide the Town with the proper documentation by May 15, 2009, and the hearing will be at 9:00 AM on June 1, 2009. Both parties agreed to these terms.

**MOTION:** Councilmember Babcock moved to continue **FMB DCI2007-5, Snug Harbor CPD**, to 9:00 AM June 1, 2009, with the stipulation that all documentation by applicant be submitted to staff by May 15, 2009. Seconded by Councilmember List.

**VOTE:** 4-0

Mayor Kiker closed the public hearing at 10:42 AM.

### **VIII. ADMINISTRATIVE AGENDA**

#### **IX. Introduction of Ordinance 09-04, Amendment to 00-01**

Mr. Janke requested moving forward to a hearing with this amendment to reduce the required number of meetings per year and to take storm water away from Public Works and turn over to the Town Council.

Attorney Dalton read the title:

#### **ORDINANCE 09-04**

**AN ORDINANCE AMENDING TOWN ORDINANCE 00-01 TO REDUCE THE NUMBER OF MANDATORY MEETINGS TO BE HELD BY THE TOWN OF FORT MYERS BEACH PUBLIC WORKS AGENCY; TO ALTER THE GENERAL POWERS TO BE EXERCISED BY THE TOWN OF FORTA MAYERS BEACH PUBLIC WORKS AGENCY BY REMOVING THE PROVISION OF STORM WATER DRAINAGE MATTERS; PROVIDING FOR SEVERABILITY, AUTHORITY AND EFFECTIVE DATE.**

Attorney Dalton stated that when she first advised the Council on this matter, she stated that the board could meet once a year, but clarified that there is a first meeting with the manager presenting a budget message and another meeting where the budget would be passed; the ordinance has language that the board would meet twice a year.

**MOTION:** Councilmember List moved to send Ordinance 09-04 regarding the Town of Fort Myers Beach Public Works Agency mandatory meetings and storm water duties forward to public hearing on May 18, 2009 at 6:30 PM. Seconded by Councilmember Babcock.

**VOTE:** 3-1, with Vice Mayor Acker dissenting.

**B. Payne Offer to Sell Property**

Mr. Janke pulled this item from agenda because the revenue estimates are not ready yet. Vice Mayor Acken suggested that the Town contact local parking providers to get an estimate on expected revenues. Mr. Janke replied that the staff is actually doing that.

**X. TOWN MANAGER ITEMS**

**A. Paving Status**

Mr. Janke reported that less than 1/3 of the Estero Blvd. project is completed and there is an issue with it not having been completed shoulder to shoulder. He has brought this up to the County manager for discussion and pointed out that there is some dissatisfaction with the job done so far. Mayor Kiker reminded that the Town wrote a letter to the county asking the county to finish the project and consider dedicating the rest of the money and redirect it to Estero Blvd. Some discussion ensued regarding a less than good faith effort on the part of the county to work with the Town. Mr. Janke scheduled meetings for himself and the Mayor with the county to address these concerns.

**B. Beach Nourishment Status**

The County Commission approved the inter-local agreement and Mr. Janke will aggressively pursue acquisition of easements. He said the Town has until about the end of July to get the easements. Mayor Kiker is still in the process of the position statement to the newspapers. Responding to a question about to whom the letters would be sent, Mayor Kiker replied that the letter will go to those who have not signed easements and those that have requested a rescission.

**C. Water Utility Status**

Mr. Janke reported on a Phase I-Immediate Improvement-basically valve replacement-cost approximately \$30-50,000. Phase II will include additional valves that will help cordon off the sections of the island so that problems can be addressed in the proper manner. The last water problem cost about \$20,000. and this will help stop that waste. Mayor Kiker reported that Trudie Williams is citing over \$138 million available in stimulus money and he got together with Mr. Peebles to request at least \$1 million for the Estero project; another million would be needed to recover and repair from the latest break. This looks promising.

The annual hurricane seminar is scheduled for June 11<sup>th</sup> at 6:30 PM in the Council chambers. Vice Mayor suggested that this include some information on pandemic issues and there was some discussion regarding this.

#### **XI. TOWN ATTORNEY ITEMS**

Ms. Dalton will be attending a workshop on public financing by the FL Bar Association and she will bring all of the information back to the Town for use; she added this is at no cost to the Town.

#### **XII. COUNCILMEMBERS ITEMS AND REPORTS**

##### **Bay Oaks Project:**

Vice Mayor Acken asked if the Town Council needs to start bringing some local constituent pressure to the BOCC regarding Bay Oaks since the parents are getting nervous watching staff being moved out of the place. He said they are afraid of losing the pool and after school programs. He wants to get reassurance to the residents that these things will be in place through the school year. Mr. Janke said that he asked Bill Hammond specifically if the board of County Commissioners even heard this issue. The Vice Mayor wants more aggressive discussion to get this finalized and let citizens know that they can count on this. Mr. Janke has appointments to meet with the county for this and the other items. Vice Mayor reiterated that he wants follow up on June 1 about the promise of funding for Bay Oaks programs for next year. Mr. Janke said he did ask Mr. Stillwell with a deadline date. Mayor Kiker wants to be sure that they have an answer soon to get residents in line to support and rally for funding. Mr. Janke suggested that there be a short recess to draft a resolution to the BOCC asking that they protect the Bay Oaks operation for at least another year while the Town try to make some type of transition to provide that service. Attorney Dalton added that there are economic stimulus funds through the Dept. of Human Services, some of which are CBDG monies, and some of the Bay Oaks programs are CBDG funded. She suggested asking the county if there are revenues coming into the county that the Town may be eligible for to help Bay Oaks, for elderly, poor people, etc. Evelyn will follow up on this.

Vice Mayor Acken addressed the sheriff's department response to the Town's noise complaints, saying that the Council's position was to ask the deputies to respond with compliance in mind rather than heavy-handed enforcement. This was not done by some of the spring break patrol deputies and there is a need to be sure that this be reiterated to the sheriff's department.

Vice Mayor Acken learned that the LPA may be suggesting that beach bars close down at 11:30 PM and he is absolutely not in support of that. Councilmember Babcock asked

where this came from. Councilmember List clarified that the Council actually asked the LPA to look at this but it was because of the inequity of the hours of operation by beach businesses and were looking for better options not necessarily stricter.

Councilmember Babcock said that there are many people who are asking about Bay Oaks and wanted to know if the information is on the website; Mr. Janke stated that it is. He said that if the Town cannot support Bay Oaks, it will have a huge impact on the Beach School, so he thinks even the school district needs to be involved as well.

Councilmember List requested that all residents contact the county commissioners to let them know how they feel about Bay Oaks and how much they want to keep it going. She also warned against creating fear of closing the Beach School and keep looking and working towards finding ways to keep these things afloat. She also reported having a wonderful time participating in the recent "Blues on the Green" event on the beach and said it was something that the Town needs to support and find ways to have more of.

#### **Vegetation Management Plan**

Mayor Kiker scheduled a work session for the Plan and set the date for Thursday May 7, 2009 from 9:00-11:00 AM. Beach nourishment will also be addressed.

#### **Aircraft Intrusion Relief**

Councilmember Babcock asked the members if they want a work session or a meeting. Councilmember List asked if this could just be included in the next meeting and all agreed to do this, tentatively on May 18, 2009.

### **XIII. AGENDA MANAGEMENT**

- Utility Franchising- May 20, 2009 9:00 AM
- Water Utility Financing and Referendum

### **XIV. RECAP OF ACTION ITEMS**

- Comcast Channel
- Mr. Janke – Teleconferencing
- Mr. Janke-Technology Improvements for Chambers; being done.
- July 4<sup>th</sup>-expenditure up to \$18,390.00, approved; Mr. Janke will follow up.
- ROW Ordinance Hearing set for May 18<sup>th</sup> at 7:30 PM
- Snug Harbor-June 1<sup>st</sup> at 9:00 AM
- Bay Oaks-follow up with BOCC next week-Mayor Kiker and Mr. Janke
- Noise Ordinance Enforcement-Mr. Janke will follow up with Matt Powell

- Mr. Janke will ask Larry Wood, principal, to write letter to support Bay Oaks and its programs
- FAA presentation-May 18<sup>th</sup>/workshop Thursday
- Sending a memo to the Town Clerk to distribute regarding attending meetings telephonically
- Address web-based communication-Ms. Dalton
- Resolution to send to county regarding Bay Oaks-recess for drafting of that

**XV. PUBLIC COMMENT**

No comment.

*RECESS 11:50 AM*

*RECONVENE 12:20 PM*

**Topic: Resolution 09-12-Bay Oaks**

Resolution of the Town of Fort Myers Beach requesting BOCC continue to provide funding for the Bay Oaks facility.

**MOTION:** Vice Mayor Acken moved to approval Resolution 09-12. Seconded by Councilmember Babcock.

**VOTE:** 4-0 **MOTION:** Councilmember List moved to adjourn. Seconded by Councilmember Babcock.

**VOTE:** 4-0

**XVI. ADJOURNMENT**

Adjourned at 12:22 PM.

Adopted 6-15-09 With/Without changes Motion by Acken/Babcock  
(DATE)

Vote: 5-0  
  
Michelle D. Mayher, Town Clerk

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