MINUTES

Monday, January 10, 2014

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

I. CALL TO ORDER

Mayor Mandel called to order the January 10, 2014 Special Meeting of the Town Council at 10:00 a.m. Present along with Mayor Mandel: Vice Mayor Kosinski and Council Members Andre, List, and Raymond. Also Present: Town Manager Stewart, Town Attorneys Miller and Rooney, Community Development Director Fluegel, and Town Clerk Mayher.

II. PLEDGE OF ALLEGIANCE – Town Clerk Mayher

Mayor Mandel offered a brief outline of the topic of accessory structures to be discussed at the meeting today; and the scheduling of an upcoming Work Session(s) to discuss the review process for the Town Manager and develop a review process for the Town Attorney.

III. PUBLIC COMMENT

Public Comment opened.

Gerry Trantina, resident, commented about a letter from the Town Manager to Mr. Dickinson concerning the retaining of his law firm to investigate a personnel matter; and how the law firm interpreted certain Town codes. He recounted his brief conversation with Attorney Dickinson; then the inability of Attorney Dickinson to respond to his questions; and the conclusions he drew from the document he exhibited regarding Attorney Dickinson's background, experience, and conclusions. He pointed out that Attorney Dickinson had noted the County's restrictions regarding pool and deck heights which were similar to the Town code. He suggested the Council re-affirm that the Town's code existed, and the height limitation on accessory structures was 42 inches.

Dave Ennis, resident, explained his views on "*if it ain't broke, don't fix it*"; and explained that many more people had opinions that the code was different from the outside counsel's interpretation. He

stated he thought the code should be left alone and requested Council to vote unanimously to leave the code alone.

Gail Mannor, resident, discussed her views on the discussion held on the land development code related to accessory structures and setbacks at the January 6, 2014 Council Meeting. She reported she would take the information she had concerning the January 6, 2014 Council Meeting to the Clerk of Courts to request an audit of Fort Myers Beach staff and Council; and added she would also give the same information to the Lee County Commissioners, News-Press newspaper, television channels, and the State Attorney General. She explained that if the subject property owner does not lower the accessory structure to 42 inches that she and her neighbor intended to sue the Town.

Joe Stockton Robinson, resident, commended Council for their vote at the last meeting [1/6/14]. He noted his fear was that any decision today may allow the elevated structures to proceed during the time period between now and until such time as Council either amended the code or interpreted the code as to what the people wanted for the Town. He discussed his views on not giving the subject property owner a 'hardship' variance for the subject accessory structure; how to stop similar accessory structures from progressing; and potential financial obligations and lawsuits for the Town. He asked the Council to consider what they decided today and the possible implications it could mean for the Town in the future.

Tracey Gore, resident, reported she sent emails to the Council about her issues. She reviewed the basis for her belief that the outside counsel interpretation should be held 'null and void'.

Annie Babcock for Tom Babcock, residents, read a letter to the Council from Mr. Babcock concerning elevated pools which outlined the basis for his opinion that the Town staff and attorney made a mistake when they interpreted the code to allow an elevated solid accessory structure housing a pool, attached to a house, even if not structurally 5' from a seawall. The letter also included but was not limited to a request to clarify the vote regarding elevated pools and accessory structures, but not to change the intent of previous Town staff, attorneys, LPAs, and Councils.

Annie Babcock, resident, attached a handwritten chart to the podium concerning acreage and land measurements; and noted the importance of the accessory structures to the entire island. She discussed her opinion that staff made a mistake in interpreting the code; and commented on the chart attached to the podium as it related to house sizes and lot sizes in the Town. She requested the Council do what was right for the entire island.

Jane Plummer, resident, distributed a document to the Town Council regarding a personnel matter; questioned the cost of the investigation; her view of the events as a 'bullying' tactic; and questioned what the Council would do about the matter and how would the residents regain trust in Town employees. She requested a public apology and asked to learn the identity of two contractors mentioned in the report.

Julie Brown, resident, requested the Council not change the building code which seemed clear to her.

Garr Reynolds, resident, stated he especially supported the comments made in Mr. Babcock's letter, Mrs. Babcock's comments, and Ms. Plummer's comments. He hoped that Council would not re-write the subject code since he believed it was clear as written.

Doris Grant, resident, reported she read the LDC related to the subject elevated structure and still believed the code was correct as written. She stated she respectfully disagreed with the opinion of the Town Attorney and the outside counsel. She explained her opinion that if the subject elevated structure had included artist renderings and architectural drawings with their application that the request would have never gotten past the LPA and should not have been approved by staff without referral to the LPA. She asked Council to follow the language in the LDC.

Jessica Titus, resident, noted she had been upset with Council's 3-2 vote on the subject of elevated accessory structures at the January 6, 2014 Council Meeting.

Public Comment closed.

Council Member Raymond explained the basis for voting 'nay' on the subject of elevated accessory structures at the January 6, 2014 Council Meeting was because there were one or two other buildings constructed that 'were pretty much permitted and well on their way'; and the reason why he voted the way he did was because he did not think all five should be stopped. He explained that the other three structures he had no problem stopping, but if they were already on their way or mostly done, and at that time were permitted, that was the reason why he voted the way he did, and it "*had nothing to do with the oddball out there*".

Council Member List explained her observation was that from the public input received that there was "*something they had to tighten*" so that what the residents wanted was not subject to someone else's legal interpretation and that there was no "*wiggle room*".

Council Member Andre explained he was steadfast since the beginning of the subject issue that the code did not need to be changed and the current problem was due to the interpretation.

Vice Mayor Kosinski noted that he could see both sides of the issue and that he would like to see what the LPA had to say about the issue. He discussed his views on having a structure legally permitted and then be told that the structure was not allowed.

Council Member Raymond distributed a document to Council and stated he would like to see the following placed in the code:

> "*The new parts in the code should have line-of-site; setbacks from both canals/bays for main buildings, garages, accessory structure, storage buildings, fences, boat houses, height of vegetation, and anything else that would block views.*
> *Main buildings and attached structures ...25' setback from seawall or front lot line.*
> *Un-attached Accessory structures ...20' from seawall or lot line.*
> *Un-attached Accessory structures with see-thru-walls 10' from seawall or lot line.*
> *Garages, storage buildings and other independent buildings .... 20' from seawall or lot line.*

Garages, storage buildings and other independent buildings ... 20' from seawall or lot line.
In-ground pools ... 5' setback from seawall or lot lines.
Fences: Wood, plastic, chain or vegetation.
Located on a canal or any waterfront, a height of 6'.
Located on a non-water front lot line 8'.
Boat houses and boat lifts:
Can have a roof but no enclosed sides."

Mayor Mandel asked staff what they believed the process would be for the Council to hear everything in order so as to be able to consider everything to then make a recommendation.

Town Attorney Miller explained how staff provided Council with everything that existed so far; and specifically, she provided all of the provisions in the LDC dealing with accessory structures. She suggested the Council should:

1. Decide if Council agreed with the residents that they do not want to do anything; if the LDC was clear and the legal opinion was incorrect then the Council would do nothing. She added there was some risk of a lawsuit. She pointed out that she was provided with a copy Mr. Bannon's findings and made no changes to it and had no discussion with Mr. Bannon other than to say she read it, and made no attempt to influence his opinion.
2. If Council felt the Town would be in a better legal position to place a height limitation on certain types of accessory structures [she noted there were no height limitations on garages, and totally detached accessory structures] to maintain a view corridor; then they needed to deal with the other types of accessory structures which could be tasked to the LPA.

Discussion ensued as to what sections of the code to send to the LPA and the need for clear direction/guidance to the LPA concerning relevant code sections.

Town Attorney Miller discussed the information she had provided to Council about all of the provisions in the LDC dealing with accessory structures, and noted sections that she believed needed to be tightened such as but not limited to Administrative Setback Variances, #4, and questioned what was considered a "*minor error in construction*". She stated she disagreed that the code was fine, and that the Town did not need to do anything to it.

Town Manager Stewart reported that staff examined the code, made a decision that the way the code was written enabled certain things to happen, and moved forward with that decision; and staff accepted responsibility for that decision. He reviewed the timeline on how he believed the Town got to the point it was at today with the subject matter. He stated that he never advocated the code to be changed to allow the elevated structures to continue to happen. He reflected on the comments of outside independent counsel [Mr. Bannon] regarding ambiguity in a code. He noted that staff had not tried to compel Council to change the code to allow the type of subject elevated structures to continue in the Town. He explained his involvement with retaining the outside counsel; and had nothing to do with the request for interpretation. He added that if the Council had lost faith in him, they could ask him to leave.

Mayor Mandel noted in light of the Town Manager's comments he revealed highlights from a conversation he had with the Town Manager yesterday regarding how Council was currently in a difficult spot; and that there had been many surprise matters given to Council during the year. He added that today he was attempting to determine three processes: 1) how would the Council go about looking at the code; 2) how would the Council review staff and Council's relationship; and 3) how would the Council review the Town Attorney and Council's relationship.

Vice Mayor Kosinski discussed the importance of the view corridor and noted it was not mentioned in the code; and since it was that important that the code go back to the LPA to tighten it up.

Council Member Andre agreed that the code could be "*cleaned-up a little bit*"; and noted his belief that there was no ambiguity in the code regarding accessory structures and to leave that part of the code alone.

Discussion ensued regarding interpretations of the code; and what direction to send to LPA.

Mayor Mandel requested Town Attorney Miller delineate the sections of the code she was recommending to be tightened to protect the Town; and make them available for the public and ready for the next meeting.

Town Attorney Miller expressed her belief that the Council needed to decide if they were all in favor of a view corridor being protected, and if so, what was the dimension (i.e. 25', 20', etc.). She asked to be able to go through the pertinent section of the code with Attorney Rooney and Town staff to determine sections for possible amendment as it pertained to view corridors (i.e. detached garage, carport that were now 10').

Council Member Raymond requested the recommendations from the Town Attorney be discussed first at a Work Session instead of a Regular Meeting.

Discussion was held concerning the requested recommendations from the Town Attorney.

Town Manager Stewart recommended that if Council decided the view corridor was the issue that needed to be resolved, then there were four elements that should exist within the LDC to establish, validate, and insure how it was handled:

1. Name it.
2. Define it once named.
3. Go through code and make sure nothing conflicts with it.
4. Enforcement must be consistent and be firm.

Mayor Mandel noted the moratorium remained in place. He asked if Council wanted to change the intent of what was in the code presently.

No comment regarding if Council wanted to change the intent of what was in the code presently.

Town Attorney Miller stated she would have the requested recommendations ready for discussion at the January 21, 2014 Work Session.

Discussion was held regarding the date for the Work Session and the deadline to have the back-up submitted for the meeting.

Consensus of Council changed the date to have a single-item discussion for this topic at the Work Session from January 21, 2014 to February 3, 2014.

Discussion was held concerning the Town Manager review process discussion for the January 21, 2014 Work Session; and Town Clerk to forward the Town Manager review forms to Council.

IV. ADMINISTRATIVE AGENDA

A. Discussion of Possible Amendments to the Land Development Code related to Accessory Structures Set-Backs

- **Exhibit A**
- **Exhibit B**
- **Exhibit C**
- **Exhibit D**
- **Exhibit E**
- **Exhibit F**

V. TOWN MANAGER ITEMS

Town Manager Stewart – no items.

VI. TOWN ATTORNEY ITEMS

Town Attorney Miller – no items.

Town Attorney Rooney – no items.

VII. COUNCIL MEMBER ITEMS AND REPORTS

Council Member Andre – addressed Council Member Raymond's comments regarding his vote at the last Council meeting; and noted how the Town could revoke a permit for a structure not built according to plans; false statement or misrepresentation in the applications or plans based upon which the permit or approval was based. He stated he agreed with Ms. Plummer that she was owed an apology.

Council Member List – reported yesterday Bruch Cermak was honored by the Chamber of Commerce and won the PETRO Award.

Council Member Raymond – noted that construction had to pass a final inspection which meant it had to be built to code.

Mayor Mandel asked the Town Attorney for comment.

Town Attorney Miller explained an applicant submits plans and at final inspection if it did not comply they are either made to make it comply or part of it could be torn down in order to comply; however, the applicant had the right to continue with construction until they called for a final inspection.

Town Manager Stewart reviewed what Council's decision to deny the appeal at the January 6, 2014 entailed; and actions that the builder could undertake.

Town Attorney Miller reviewed some of the options or scenarios the applicant could pursue such as but not limited to the Declaratory Judgment Action about the moratorium as described by the Attorney Grady.

Discussion was held concerning the timeline for the draft ordinance which had been tabled; and it was noted Public Comment had been opened and public comment had been taken at that December meeting.

Town Attorney Miller recommended Draft Ordinance 13-10 be removed from the table.

Town Manager Stewart asked if the changes to the draft ordinance would be considered substantive.

Town Attorney Miller responded in the negative.

Discussion continued regarding Draft Ordinance 13-10 and advertising requirements.

Town Attorney Rooney explained there was a *de facto* moratorium in place.

Mayor Mandel recapped that the Town would work on the due diligence to tighten up the code; and Council would have the second hearing on Draft Ordinance 13-10.

Town Attorney Miller indicated staff would work to get the advertising done for the Draft Ordinance to be on the January 21st meeting; or there could be a special meeting held.

Mayor Mandel recommended a special meeting.

Town Attorney Miller concurred with the Mayor.

Discussion was held concerning advertising requirements, newspaper advertising deadlines, and a meeting date for Draft Ordinance 13-10; it was determined there was sufficient time to advertise the draft ordinance for the January 21, 2014 meeting.

MOTION: Council Member Raymond moved to remove Draft Ordinance 13-10 from the table and schedule it for the second Public Hearing; second by Council Member Andre.

Public Comment opened.

No speakers.

Public Comment closed.

VOTE: Motion carried, 5-0.

Vice Mayor Kosinski – no items or report.

Mayor Mandel – no items or report.

VIII. PUBLIC COMMENT

Public Comment opened.

Sonya Barnes, resident, questioned if the code was amended, would the construction continue. She reported she was now experiencing flooding due to the elevated accessory structure and large house adjacent to her property; and questioned if this would impact her flood insurance.

Town Manager Stewart requested Ms. Barnes to stay after the meeting so staff could obtain her contact information.

Joanne Shamp, resident and LPA member, noted she was not speaking on behalf of the LPA rather with the experience of an LPA member. She stated she was glad the subject issue would come before the LPA; however, she felt there was work that the LPA could be doing for Council. She reviewed the function of the LPA which included but was not limited to making recommendations to Council for policy.

Tracey Gore, resident, discussed the hiring of the outside independent counsel and the involvement by the Town Manager. She explained her opinion that if the code was changed then it appeared to her that it would validate what was said to Mr. Orlandini that the code was unclear. She stated she did not want the codes touched since they were clear.

Town Manager Stewart explained that he never denied he had retained the independent counsel; and he noted he did not ask the independent counsel to review the LDC.

Town Attorney Rooney explained what would happen if existing permits were 'grandfathered'; and how amending the code would limit the pool of potential liability to only the permits that may have existed.

Gerry Trantina, resident, discussed his earlier quotation regarding the Town Manager as it related to the hiring of the outside independent counsel. He mentioned he sent to Council an email about four issues at 301 Palermo and added the wall was off by 12" and was 4' from the canal. He questioned who would

do the final inspection; and suggested the Town utilize an outside independent engineer or Lee County to do the final inspection.

Town Attorney Miller noted the Town could request the applicant to submit a survey if they believed the setback was not 5'.

Community Development Director Fluegel reported he already informed Mr. Orlandini that the Town would be requesting a survey of the subject property.

Gerry Trantina, resident, reported there was a problem with the Council meeting audio on television.

Mayor Mandel noted that there was a problem with Comcast.

Town Clerk Mayher explained the re-broadcast would have sound.

Gerry Trantina, resident, explained he was not doing anything for personal gain.

Joe Stockton Robinson, resident, appreciated that he heard staff had acknowledged they made a mistake. He discussed his views on allowing public comment at Town Council workshops.

Mayor Mandel explained how and when Council permitted public comment at workshops.

Joe Stockton Robinson, resident, questioned 'decisions' at a workshop.

Mayor Mandel explained that Council was not permitted to make 'decisions' at a workshop.

Gail Mannor, resident, discussed a copy of an email from the Community Development Director to Mr. Ken Miller regarding Mr. Orlandini's elevated pools being attached to the principal structure. She noted, therefore, the pools should be 25' back from the seawall.

Garr Reynolds, resident, complimented Ms. Gore and the work she had done on the subject topic. He discussed his views on code interpretations; how the LPA were advisors for the Council; and the hard work prior Councils had done in the past. He requested the ordinance not be re-written.

Mayor Mandel clarified that the Town was not re-writing the essence of the ordinance; rather they were tightening up the code to better protect the Town which would be done at a meeting with public comment time before anything was considered to be changed.

Doris Grant, resident, stated she attended the Work Session on noise and code enforcement last week and wanted to offer comment/suggestions; and she questioned how to go about submitting her suggestions (i.e. looking at Sanibel and Cape Coral that had enforceable noise ordinances).

Town Attorney Miller recommended Ms. Grant forward her comments/suggestions to herself or to the Community Development Director. She noted there was public comment time at the LPA meetings.

Summer Stockton, resident, requested someone look into 561 Palermo Circle and the permit approved on October 31st, issued November 6th which was during the moratorium (October 21st).

Community Development Director Fluegel reported 561 Palermo Circle was the site where staff forced them to go back and cut the deck from the principal structure; and explained the circumstances why the applicant needed to re-do the structural permit.

Town Manager Stewart noted the permit had already been issued; and the permit Ms. Stockton was referring to was to make structural corrections in support of the original pool permit.

Council Member Andre asked if the entire permit could have been revoked at that time since it was not built according to plans.

Town Manager Stewart explained it was required to allow someone to make corrections to an appropriately approved permit; which was in the Building Code.

Town Attorney Rooney noted that the Building Code took precedent over the LDC.

Bill Shenko, Jr., attorney and resident, commented on the timeline for the permit at 561 Palermo Circle as it pertained to having a building permit pulled which was not followed, the Council adopting a moratorium, and the issuance of a permit for major structural changes after the moratorium was adopted.

Garry Reynolds, resident, clarified to Attorney Shenko one of his previous comments.

Annie Babcock, resident, thanked Council for what they did today and their time and service. She questioned a problem at a condominium across from the Newton House that was in the middle of construction when it had been required to be restructured by the Town. She questioned who did ask the outside counsel for an interpretation of the code. She also asked why Council was not addressing, today, the process that the staff should take which was that Council interpreted policy and the Town Manager, staff, and Town Attorney implement the policy. She questioned why Council did not address Ms. Plummer's concerns and noted only Council Member Andre acknowledged it. She reported she would find out from an attorney if the code was amended, would it open up lawsuits for 301 Palermo from Palermo residents, the subject property owner and contractor, or from any Fort Myers Beach residents.

Mayor Mandel clarified the timeline as it pertained to the outside independent counsel which included but was not limited to how and when he heard the accusations about a staff member; when he spoke with the Town Manager; and then immediately contacted Town Attorney Humphrey who contacted the law firm that was engaged and asked outside counsel if the interpretation was correct and were there any ambiguities. He explained the one communication he received two days prior to a Council meeting on his home computer was because the outside counsel had tried to send it through the Town's email service which did not work.

Public Comment closed.

MOTION: Council Member Andre moved that the Town staff to formally apologize to Ms. Jane

Plummer for releasing her name to the press; second by Mayor Mandel.

Discussion was held regarding the motion and the report.

VOTE: Motion carried, 5-0.

Mayor Mandel stated the Town Council apologized to Ms. Plummer for her name being released to the press.

XIX. ADJOURNMENT

Motion by Council Member Andre; second by Council Member List. Meeting adjourned at 12:42 p.m.

Adopted 2/3/14 With/~~Without~~ changes. Motion by Andre / Kosinski

Vote: 5-0

Michelle D. Mayher, Town Clerk

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