MINUTES

Tuesday, January 21, 2014

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

I. CALL TO ORDER

Mayor Mandel called to order the January 21, 2014 Regular Meeting of the Town Council at 6:30 p.m. Present along with Mayor Mandel: Vice Mayor Kosinski and Council Members Andre, List, and Raymond. Also Present: Acting Town Manager Wicks, Town Attorneys Miller, Humphrey and Potter, Public Works Director Lewis, Community Development Director Fluegel, Environmental Services Coordinator Laakkonen, and Town Clerk Mayher.

II. INVOCATION – Rev. Alice Marcrum

III. PLEDGE OF ALLEGIANCE – Fort Myers Beach Elementary School Youth Council

IV. YOUTH COUNCIL – Fort Myers Beach Elementary School

Willow Hunt, Fort Myers Beach Elementary School Youth Council, reported the students participated in a special celebration after Winter Break to honor Mrs. Pat on her 80th birthday. She noted Dairy Queen donated 150 ice cream treats for the occasion.

Casey Chandler, Fort Myers Beach Elementary School Youth Council, reported tomorrow was the 100th day of school and Arbor Day; and added the fourth graders would receive a tree to plant in honor of Arbor Day. He noted that on January 31st the kindergarten, first, and second grade students would celebrate the Chinese New Year with a parade and a lunch donated by Lyn's Garden Restaurant.

V. APPROVAL OF FINAL AGENDA

Council Member Andre noted the discussion at the Work Session earlier to add a discussion concerning the extension of the fee waiver for outdoor displays.

Mayor Mandel requested to add a discussion regarding an Interim Town Manager; a request received via mail from Kimber Phillips concerning a proclamation; a letter from Roetzel and Andress; a letter from an outside attorney about litigation; FEMA control risk mapping; a request concerning a hazardous materials proclamation; a County Commissioner's request for the Mayor to join him in Washington D.C. regarding FEMA insurance; and a letter regarding water flows for Town estuaries. He noted these issues were recently received and were time-sensitive.

Council Member List questioned if there was any background information for any of the proposed additional discussion topics that Council needed in order to make a decision.

Discussion ensued regarding the proposed discussion items and the time-sensitive nature of the items.

Consensus approved the amended Agenda to include the discussion items as requested.

VI. PUBLIC COMMENT

Mayor Mandel noted Public Comment was a time for the public to discuss Consent Agenda Items and issues currently not on the agenda.

Public Comment opened.

John Heim, resident, suggested the Town work with Bay Oaks to create a program called "Back Bay Kids" which he believed could be implemented into a program already in existence in Fort Myers and Cape Coral called "River Kids". He noted the organization was an "eco/art organization" that would help to educate children to become good stewards of the environment. He stated he was hoping to schedule a meeting with Council to work with Bay Oaks to create a summer camp program.

Gail Manner, resident, discussed her views on the departure of the former Town Manager and a former Town employee; and problems associated with elevated pools.

Garr Reynolds, resident, discussed his views on the departure of the former Town Manager, and a current Town employee as it related to the problems associated with elevated pools.

Tracey Gore, resident, reminded everyone that the 56th Annual Shrimp Festival Parade was approaching and organizers were looking for princesses for the parade.

Public Comment closed.

VII. LOCAL ACHIEVEMENTS AND RECOGNITIONS

Council Member Andre thanked Ms. Gore for the photograph she forwarded to him of a rainbow and a shrimp boat in the Gulf of Mexico. He congratulated the Putt and Pub Crawl event (organizers, Little League, and volunteers). He reminded everyone that this Saturday was casino night at the Moose Lodge to benefit the Matanzas Pass Preserve.

Mayor Mandel echoed congratulations to the Putt and Pub Crawl event.

VIII. ADVISORY COMMITTEES ITEMS AND REPORTS

No speakers.

IX. PROCLAMATION

A. Human Trafficking Awareness Month

Town Clerk Mayher reported there was no representative present to accept the proclamation and she would forward the proclamation to the requestor.

X. ADMINISTRATIVE AGENDA

A. Separation Agreement and General Release
This agreement is between the Town and Terrance E. Stewart, former Town Manager.

Town Attorney Potter reported he drafted the Separation Agreement for Mr. Stewart; and updated Council that since they received the draft last Friday he had been in contact with Mr. Stewart's counsel (Attorney Wheeler) and provided Council with a red-lined updated agreement. He reviewed the proposed Separation Agreement as it pertained to:

- Severance (i.e. State law changed since 2011 and placed a cap on the number of weeks for severance to public employees; Mr. Stewart's contract dated 2011 that called for 26 weeks of severance;
- Discussions with Mr. Stewart's counsel regarding the original severance;
- General release of claims;
- Revised Paragraphs 3 and 4;
- Potential litigation regarding the severance;
- Paragraphs 2 and 3;
- Auditor General Findings regarding severance, potential risk associated with payments in excess; and how the proposed Separation Agreement was consistent with Florida law and Mr. Stewart's Employment Agreement;
- New Paragraph 4 – Vacation and Sick Time;
- Paragraph 6 – broad general release;
- Paragraph 7 – release by the Town against Mr. Stewart;
- Paragraph 9 – Non-Disparagement provision; and,
- Paragraph 10 – regarding neutral employment reference.

He recommended Council ultimately approve the revised Agreement presented; and noted that Attorney Wheeler indicated to him that if the revised Agreement was approved tonight, that Mr. Stewart would sign the Agreement.

Public Comment opened.

Jessica Titus, resident, asked if Mr. Stewart's attorney worked for the same company representing Mr. Orlandini.

Town Attorney Humphrey responded in the affirmative; and noted it was a different lawyer(s) from those representing the builder, but it was the same firm. He added that his firm was recommending support of the Agenda Item and that it was a workable solution with a broader release provision for the Town.

Public Comment closed.

MOTION: Vice Mayor Kosinski moved to approve and authorize the amended Separation Agreement and General Release between the Town of Fort Myers Beach and Terrance E. Stewart and authorize the Mayor to execute the required documents; second Council Member Andre.

VOTE: Motion approved, 4-1; Council Member Raymond dissenting.

Town Attorney Miller reported she had several copies of the Agreement ready for the Mayor's signature.

B. Century Link Installation on North Estero
A request by Century Link to extend fiber optic service to 684 North Estero Boulevard.

Public Works Director Lewis explained that Century Link had requested to install fiber optic cable for 684 North Estero Boulevard. She did not anticipate any issues with the work and noted she received, in writing from Century Link, their commitment to properly restoring the area and maintain it during work activity. She added Century Link may need to take up 2-4 sections of sidewalk at the joints.

Public Comment opened.

No speakers.

Public Comment closed.

Mayor Mandel asked if the Town had an inventory of what would need to be replaced.

Public Works Director Lewis reported the Town would have an inventory once Century Link's right-of-way application was processed.

MOTION: Council Member Andre moved to authorize Century Link to perform work on North Estero Boulevard; second Vice Mayor Kosinski.

VOTE: Motion approved, 5-0.

Mayor Mandel reported there was a meeting next week and another in early February dealing with releases from Lake Okeechobee, and noted he wanted to send a letter from Council similar to Sanibel regarding additional water releases.

Consensus approved Mayor Mandel's request.

Mayor Mandel made Council aware he received a letter today requesting the Town participate in a hazardous materials proclamation in early February. He reported the Town received a letter from FEMA regarding meetings to be held about mapping.

Community Development Director Fluegel indicated there would be a teleconference in February that staff had already registered for concerning the forthcoming mapping effort.

Council Member Andre noted that there may be a 4-year delay with the implementation of the Biggert-Waters Act regarding flood insurance reform; however, the delay was only for primary residences and properties purchased after June 6, 2012, and businesses and secondary residences were not covered by the 4-year delay.

Mayor Mandel reported that Commissioner Kiker had asked all the mayors in the County to join him in Washington DC regarding the FEMA flood insurance issue.

Consensus approved the Mayor join Commissioner Kiker in Washington DC regarding the FEMA flood insurance issue.

Mayor Mandel announced receipt of a letter from Roetzel and Andress indicating a potential lawsuit.

Town Attorney Miller reported she received correspondence late this afternoon that the lawsuit was filed.

Mayor Mandel noted that Town Attorney Rooney had advised previously that the lawsuit issue should not be discussed by Council and staff.

Town Attorney Miller noted that there were some closed attorney/client meetings provided for under the Sunshine Law during litigation. She added that she forwarded the Complaint to Attorney Potter in her firm who would be handling the matter.

Mayor Mandel reported he received a letter from a law firm requesting the opportunity to defend the Town; and he questioned if the Council should consider the offer since Fowler White might be included in the lawsuit.

Town Attorney Humphrey noted that it was important for the Council to make a decision about the matter; and that the Plaintiff would try to call as witnesses Town Attorney Miller and some Town staff. He added that Attorney Potter was very competent.

Mayor Mandel asked when the Council should have a law firm working on the issue.

Town Attorney Humphrey stated "*the sooner, the better*".

Discussion ensued regarding the use of an outside counsel to represent the Town in the matter; and the letter the Mayor received from outside counsel offering to represent the Town.

Town Attorney Humphrey reported that as of February 1st he would be returning to the firm who sent the Town the letter offering to represent the Town in the lawsuit. He explained that any conflict would remain with his present firm of Fowler White and would not go with him to the new law firm; and added that while at Fowler White he had not been involved in the review or issuing an opinion and did not anticipate being a witness.

Town Attorney Miller pointed out that the lawsuit was not substantively about elevated pools, rather it was challenging the Resolution that the Town relied upon to deny the permits.

Town Attorney Humphrey reported he anticipated that one thing the Town's lawyers would look at was a counter-action to remove the pool.

Public Comment opened.

No speakers.

Public Comment closed.

Discussion continued regarding the Town utilizing an independent counsel.

MOTION: Vice Mayor Kosinski moved to proceed with retaining the services of Knott, Ebelini, and Hart in defense of suit filed against the Town on behalf of Joe Orlandini by Roetzel and Andress; second Council Member Andre.

VOTE: Motion approved; 5-0.

Mayor Mandel noted the item added earlier in the Agenda regarding a discussion on an Interim Town Manager; and questioned if Council was prepared to take an action on the four resumes received.

Council Members indicated to the Mayor they were prepared to take action on the matter of an Interim Town Manager.

Town Attorney Humphrey noted the many projects going on in the Town (i.e. stormwater, potable water, Estero Boulevard improvements, etc.); and that it was appropriate for Council to move forward with selecting an Interim Town Manager. He briefly reviewed the four resumes from candidates for the selection of an Interim Town Manager – John "Jack" Green, Gary Price, Evelyn Wicks, and Donald Stilwell; and added that the candidates would take the position as interim under the same terms as the previous Town Manager.

Council Member Andre asked Town Attorney Humphrey to describe a process Council should use for selection.

Town Attorney Humphrey suggested Council rank the candidates verbally or create a signed ballot to list their ranking.

Discussion ensued regarding selection/voting processes used by Council in the past; and it was decided to utilize paper ballots.

Public Comment opened.

Tracy Gore, resident, discussed her opinion regarding Candidate Stilwell and why he would not be a good fit for the Town.

Public Comment closed.

Mayor Mandel reported that he spoke with Candidate Stilwell who informed him that he would not run for County Commission if selected.

Town Clerk Mayher read the first round of ballots as follows: 1 vote for Wicks, 2 votes for Price, and 2 votes for Stilwell.

Public Comment opened.

No speakers.

Public Comment closed.

Town Clerk Mayher read the second round of ballots as follows: 3 votes for Stilwell, and 2 votes for Price.

Discussion was held concerning a contract to offer Candidate Stilwell (i.e. salary, term length, no severance pay, car allowance, etc.).

Council Member Andre stated he voted for Gary Price.

Council Member List stated she voted for Gary Price.

Mayor Mandel stated he voted for Donald Stilwell and explained the basis for his selection.

Vice Mayor Kosinski stated he voted for Donald Stilwell and explained the basis for his selection.

Council Member Raymond stated he voted for Donald Stilwell and explained the basis for his selection.

Town Attorney Humphrey outlined the actions for Council to consider which would be to select Mr. Stilwell subject to coming to terms with an agreement and understanding that he would remove himself from the election process, that it would be basically on the same terms of the former Town Manager, and that he would remain until a permanent Town Manager was found.

Council Member List explained the basis for her voting for Gary Price and Evelyn Wicks as Interim Town Manager.

MOTION: Council Member Andre moved to accept the selection of Mr. Donald Stilwell as Interim Town Manager subject to coming to terms in an agreement and authorize to begin negotiations; second Vice Mayor Kosinski.

VOTE: Motion approved; 5-0.

Recessed at approximately 7:46 p.m. – Reconvened at approximately 7:55 p.m.

XI. PUBLIC HEARING

A. SEZ2013-0004, Leonardo Arms Special Exception
A request for a special exception for an upland retaining wall seaward of the 1978 Coastal Construction Control Line in the Environmentally Critical Zoning District.

Mayor Mandel opened the Public Hearing

Mayor Mandel asked if any Town Council Member had ex-parte communication regarding this item. Council Member Andre – none; Council Member List – none; Council Member Raymond – none; Mayor Mandel – walked pass the site and spoke to the president of the condo association about six months to a year ago; Vice Mayor Kosinski – none.

LPA Attorney Miller swore in the witnesses.

Environmental Services Coordinator Laakkonen briefly reviewed the background of the request for a special exception to place a 300' +/- upland retaining wall seaward of the 1978 Coastal Construction Control Line in the Environmentally Critical Zoning District; and the construction included a dune feature. He introduced Mark Damon and Dr. Dabees of Humiston and Moore Engineers. He reported the LPA held a Public Hearing on December 10, 2013 where the LPA voted 5-0 to recommend approval (Member Durrett was excused, and Member Steele abstained).

Mark Damon, Engineer with Humiston and Moore Engineers (Agent for Leonard Arms), presented comments for SEZ2013-0004, Leonardo Arms Special Exception for the Leonard Arms Beach Club Condominium, on behalf of the Applicant. He utilized a PowerPoint presentation and reviewed the following aspects of the special exception request:

- Description of the location of the subject property (aerial location map displayed)
- Shoreline evolution of the subject property beginning in 1995 and compared to aerial photographs of the subject site in 1999, 2005, 2008, 2010, 2012; presentation slides depicted the

type of shoreline erosion that had occurred at the Leonardo Arms Condominium site and graphs on the shoreline profile evolution.

- Timeline of the project indicating the involvement of Humiston and Moore Engineers with the project (beginning March 2012); the channel that had existed in front of the condominium which increased the erosion level and threatened the building; and what has been done at the site to date such as but not limited to the designed and permitted sandbags as a temporary measure and action taken to address damage caused by Tropical Storm Debby. It was reported that the DEP and Town Sand Bag Permit would expire 4/4/14.
- Brief description of the proposed design for an upland retaining wall (buried by design) and the placement of fill material.
- Special exception criteria –
    - Based on recent years shoreline evolution and storm induced erosion changing conditions made the request appropriate.
    - The request was consistent with goals, objectives and policies of the Fort Myers Beach Comprehensive Plan; and the protective measures recommended consisted of beach nourishment, sand dunes, and shoreline protection through hardened structures.
    - The proposed wall would be a buried retaining wall located as close as feasible to the existing building and would be located landward of the existing temporary sand bags and Critical Wildlife Area (CWA).
    - the proposed project was outside the CWA, the dune restoration and planting would help restore the natural habitat;
    - The proposed wall would be buried, the design would help reduce potential detriment to existing property, and placement of existing rocks at the two of the wall corners would help reduce effects to adjacent properties if the wall was to become exposed and to directly interact with incoming waves.
    - Upon approval of the special exception, the project would be in compliance with the applicable general zoning provisions and supplemental regulations pertaining to the use of the property.

Environmental Sciences Coordinator Laakkonen, presented comments for SEZ2013-0004, Leonardo Arms Special Exception for the Leonard Arms Beach Club Condominium, on behalf of the Town of Fort Myers Beach. He displayed a PowerPoint presentation which included but was not limited to an aerial photograph of the site, and he noted the location of the subject property at 7400 Estero Boulevard. He reviewed the Applicant's special exception request (which applied to Building #2):

- Aerial photograph indicating the Little Estero Island Critical Wildlife Area boundaries.
- Subject property 'low spot' and sandbag line.
- Special exception request for an upland retaining wall seaward of the 1978 Coastal Construction Control Line in the Environmentally Critical Zoning District.
- Zoning – Mixed Residential (upland of the 1978 CCCL) Environmentally Critical (upland retaining wall location).
- Future Land Use – Residential Multi-Family Recreation (upland retaining wall location).
- Proposed Site Plan – it was noted where the boundaries of the CWA and the 1978 CCCL were located in relation to the subject property; that the subject buildings were constructed prior to the 1978 CCCL; proposed dune planting and vegetation (fill area), and the changes in angles on the wall.

- Request for a 300' long upland retaining wall; construction of a dune including 420 yards^3 of beach compatible sand [same grain size and color]; and burying 10 yards^3 of rip rap along the base of the wall.

He reviewed the supporting regulations according to Section 34-88 Special Exceptions:

- Function – Town Council shall hear and decide all applications for special exceptions permitted by the district regulations.
- Considerations – In reaching its decision the Town Council shall consider the following, whenever applicable:
  - Section 34-88(2)(a) – accelerated erosion and lack of sediment input have created changing conditions that make the request appropriate. Staff anticipates that the erosion in the CWA may continue. Preliminary shoreline analysis by the Town's coastal engineering consultant, Coast and Harbor Engineering, suggest that the CWA was a nodal point and future shoreline change was likely.
    - It was also possible that the shoreline has stabilized but the dynamics along the CWA and the possibility of future storm events make it impossible to forecast shoreline change accurately. In staff's opinion, an upland retaining wall was the best possible option to protect he upland building and it was an appropriate request. Slides were utilized [aerial photographs entitled "Sediment Transport near Leonardo Arms" 1995 and 2012 were provided by Humiston and Moore Engineers] and discussed to show the sediment movement in the area which showed the prevailing wave climate from the southwest, sediment transport bifurcates, shoreline response and adjustments with erosion and accretion responses, and the CWA erosion of subject property.)
  - Section 34-88(2)(e) – whether the request was consistent with the goals, objectives, policies and intent of the Fort Myers Beach Comprehensive Plan.
    - Since the Applicant was proposing an upland retaining wall and has minimized potential negative impacts, the proposed project does not conflict with the Comprehensive Plan.
  - Section 34-88(2)(f) – whether the request meets or exceeds all performance and locational standards set forth for the proposed use.
    - The location of the upland retaining wall was located in the EC and beyond the 1978 CCCL which necessitates a Special Exception. The Applicant has proposed to place the upland retaining wall as close to the building as possible which minimizes negative impacts to the beach and CWA.
  - Section 34-88(2)(g) – whether the request will protect, conserve, or preserve environmentally critical areas and natural resources.
    - Staff's opinion was that the need for this project to protect the upland building and the measures proposed by the Applicant to reduce impact to the shoreline incorporated into the project minimizes risk to the beach system and the subject property. Placing the upland retaining wall landward of the active beach system and creating a dune, implements the best coastal management practices for the project. The dune vegetation will also support sea turtle nesting which does not current exist in this area.
  - Section 34-88(2)(h) – whether the request would be compatible with existing or planned uses and not cause damage, hazard, nuisance, or other detriment to persons or property.

        - The inability to predict future shoreline dynamics with certainty introduces a risk of potential future erosion resulting in conditions that may result in hazard to neighboring properties. When designing and analyzing projects that interact with the natural environment, consideration should be given to outcomes on either end of the spectrum. In the case of the proposed upland retaining wall, the Applicant has developed a very reasonable and logical project approach that seeks to minimize potential negative environmental impacts while protecting the upland property.
        - It was also possible that future erosion could fully expose the upland retaining wall and alter long-shore currents and wave refraction which could result in erosion of neighboring properties. If the upland retaining wall would be exposed in the future, it would functionally become a seawall which would possibly have impacts on neighboring properties and the beach in front of the Leonardo Arms.
    - Section 34-88(2)(i) – whether the requested use would be compliance with applicable general zoning provisions and supplemental regulations pertaining to the use set forth in LDC Chapter 34.
        - The very nature of this request was not in compliance with general zoning provisions in LDC Chapters 26 and 34. This type of project; however, is contemplated by the LDC and Sections 26-77(b) and 34-652(e)(1) which require a special exception for "*a hardened surface along the Gulf of Mexico*" (26-77(b) and 34-652) and for "*Accessory structures to include any building, structure, or impervious surface area which is accessory to a use permitted by right or by special exception in the EC District (34-652(e)(1))*.
        - Staff recommended finding that the requested use, as conditioned, was in compliance with applicable zoning provisions and supplemental regulations pertaining to the use and allowed by a special exception in LDC Section 34-88.

Environmental Sciences Coordinator Laakkonen offered a recommendation:

- Taking into consideration the current and existing conditions of the subject property, staff recommended approval of the construction of an upland retaining wall in the Environmentally Critical zoning district and recommended the following conditions for approval:
    1. If the building was ever demolished due to redevelopment or acts of nature, the upland retaining wall and rip rap must be removed and the property be brought to compliance.
    2. ~~If the wall was ever exposed due to avulsion from a storm event, the dune vegetation must be replanted once the beach returns to is pre-storm profile within 12 months of the storm event~~. Changed at the 12/10/13 LPA.
    3. If the wall was ever exposed due to avulsion from a storm event and sand was lost from in front of the wall, the beach in front of the seawall must be restored by means and nourishment once the beach returns to its pre-storm profile if the wall does not become naturally buried again in 12 months of the storm event.
    4. Daily monitoring is conducted during construction to ensure that wildlife, particularly sea turtles, beach nesting birds, and shorebirds are not impacted by construction activities.
    5. The dune vegetation should be planted on 12" by 12" spacing and be composed of native sea oats (*Uniola paniculata*), dune sunflower (*Helianthus debilis var. vestitus*) panic grass (*Panicum amarum*), and railroad vine (*Ipomoea paniculata*).
    6. The dune vegetation must achieve 80% plant survival after 6 months.

Mr. Damon clarified that at the December 10, 2013 LPA meeting Condition #2 and #3 were changed to:

> #2 - "*For the first three years following construction of the upland retaining wall, should the wall become exposed due to avulsion from a storm event, the dune vegetation must be replaced if the beach naturally returns to its pre-storm profile within 12 months of the storm event. Re-planting shall be from the top of the wall to a maximum seaward distance of 15 feet. Natural recovery shall be considered to reach pre-storm condition, when the area between the wall, the beach profile and Mean High Water Line (MHWL) meets or exceeds that measured for pre-storm conditions.*"
> #3 – "*For the first three years following construction of the upland retaining wall, should the wall become exposed due to avulsion from a storm event; the dune shall be restored by means of if the beach does not naturally return to its pre-storm profile within 12-months of the storm event and the dune does not recover. Dune restoration shall be from the top of the wall to a maximum seaward distance of 15 feet. Natural recovery shall be considered to reach pre-storm condition, when the area between the wall, the beach profile and Mean High Water Line (MHWL) meets or exceeds that measured for pre-storm conditions.*"

Environmental Sciences Coordinator Laakkonen explained the intent of the two conditions.

Mayor Mandel questioned that a 'pre-storm event' was a future storm.

Environmental Sciences Coordinator Laakkonen responded in the affirmative.

Mayor Mandel noted that the Town had vegetation requirements in the north end and questioned if they could be imposed into the subject project.

Environmental Sciences Coordinator Laakkonen explained why he would not recommend including that as a condition.

Discussion ensued concerning the vegetation requirements in the north end.

Mayor Mandel questioned that the sand would be approved by the DEP (i.e. size and color).

Environmental Sciences Coordinator Laakkonen responded in the affirmative.

Mayor Mandel asked if a member from the LPA was present for comment.

No LPA member was present for comment.

Public Comment opened.

No speakers.

Public Comment closed.

Discussion was held concerning the critical nature of the proposed wall.

MOTION: Council Member Andre moved to approve the request for a Special Exception (SEZ2013-0004) for an upland retaining wall seaward of the 1978 Coastal Construction Control Line in the Environmentally Critical Zoning District with conditions 1-6 as contained in the draft Resolution 14-02; second Vice Mayor Kosinski.

Mayor Mandel noted his preference to have vegetation regulations for the north end of the island extended on the rest of the island.

AMENDMENT: Motion maker included the Recommended Findings and Conclusions:
1. Changed or changing conditions do exist that make the requested approval, as conditioned, appropriate;
2. The requested special exception, as conditioned, is consistent with the goals, objectives, policies, and intent of the Fort Myers Beach Comprehensive Plan;
3. The requested special exception, as conditioned, meets or exceeds all performance and locational standards set forth for the proposed use;
4. The requested special exception, as conditioned, will protect, conserve, or preserve environmentally critical areas of natural resources;
5. The requested special exception, as conditioned, will be compatible with existing or planned uses and will not cause damage, hazard, nuisance or other detriment to persons or property;
6. The requested special exception, as conditioned, will be in compliance with the applicable general zoning provisions and supplemental regulations pertaining to the use set forth in LDC Chapter 34.

SECOND: Second agreed with amendment.

VOTE: Motion approved, 4-1; Mayor Mandel dissenting.

Mayor Mandel closed the Public Hearing.

B. Second of Two Public Hearings of Ordinance 13-10, Prohibition of Elevated Pools

Mayor Mandel opened the Public Hearing.

Town Clerk Mayher read the title of Ordinance 13-10:
ORDINANCE 13-10, PROHIBITION OF ELEVATED POOLS AN ORDINANCE AMENDING CHAPTER 34, ARTICLE IV, DIVISION 2, IN THE TOWN OF FORT MYERS BEACH LAND DEVELOPMENT CODE, "ACCESSORY USES, BUILDINGS, AND STRUCTURES;" AMENDING SECTION 34-1173, "DEVELOPMENT REGULATIONS;" ADDING A NEW SUBSECTION (3), "HEIGHT" TO PROVIDE THAT ACCESSORY STRUCTURES MUST COMPLY WITH THE HEIGHT LIMITATIONS FOR PRINCIPAL STRUCTURES AND PROVIDING THAT SWIMMING POOLS AND SWIMMING POOL DECKS CANNOT BE HIGHER THAN THE CROWN OF THE

ADJACENT ROADWAY; PROVIDING FOR SEVERABILITY AND AN EFFECTIVE DATE.

Town Attorney Miller pointed out that there had already been one Public Hearing on Ordinance 13-10; and she distributed and explained some alternative language for Council's consideration:

- Accessory structure shall comply with height limitations for principal structures; *accessory structures that are not made structurally a part of the principal building shall be limited in height to no more than 42" above the natural grade of the parcel on which the accessory structure was located.* (This would include roofed accessory structures such as a gazebo, detached garage or tool shed that currently under the Code had a 10' setback from a man-made canal.)
- *Swimming pools, tennis courts, decks and other similar non-roofed accessory facilities that are not made a part of the principal building shall be limited in height to no more than 42" above the natural grade of the parcel on which the accessory structure was located.*

Vice Mayor Kosinski asked if the broader language would limit a person wanting a canopy on a boat dock.

Town Attorney Miller noted the boathouses in Chapter 26 are exempted from all setbacks.

Council Member Andre noted the boathouses were exempt from a zero foot setback on the seawall but it was a 25' setback from the side raparian lines. He questioned consistency since the language in the exhibit from the Town Attorney talked about the 'natural grade of the parcel' yet the ordinance referred to the 'adjacent crown of the road'.

Town Attorney Miller pointed out that prior direction from Council pertaining to issuing permits referred to the 'natural grade', and the ordinance could be changed.

Council Member Andre noted his view that the accessory structures and grade should be in the ordinance title. He questioned if landscaping could be included in the ordinance so everything was 42" and 25'.

Town Attorney Miller reported that if that was to be included the Council would likely need an additional hearing.

Council Member Raymond questioned what would happen with properties that had been built up since a pool would be higher than the crown of the road.

Town Attorney Miller explained it was being changed to 42" above the natural grade of the parcel where the structure was located.

Council Member Andre noted an error to change ~~development~~ to <u>develop</u> in Section 1.

Mayor Mandel asked if a member from the LPA was present for comment.

No LPA member was present for comment.

Public Comment opened.

Jessica Titus, resident, requested clarification on the already permitted structures; and noted her belief that the issue was not elevated pools; rather it was setbacks, and the process and the 40% rule. She reviewed various other questions which included but was not limited to staff's authority to issue an administrative approval, why staff believed there were ambiguities in the Code, why would a home be permitted any sort of approval or variance for setbacks (less than 40% improved) when it was located on three lots, and why certain notes within the TrackIt System still could no longer be viewed. She listed other questions she had pertaining to no 'stop work' orders were issued; was a permit issued for one property after the moratorium was in place; grandfathering properties; would the Town demand the elevated pools be dismantled and do they have the authority to do so; and did the Town carry 'errors and omission' insurance for staff errors. She discussed her opinion regarding the homes with elevated pools and what the Town should do; and reviewed the timeline for Ordinance 13-10.

Mayor Mandel requested Ms. Titus forward her questions to the Town Clerk so staff could respond.

John Heim, resident, explained that as a 'clean water activist' he did not support elevated pools and extreme over-development in the Town.

Tracy Gore, resident, explained that she was unsure about what today's discussion was about and noted she was deeply concerned if the ordinance was 'tweaked' today.

Town Attorney Miller explained how the Town needed to continue on with what was started with the Resolution ('zoning in progress'), and then adoption of the subject ordinance which would put the Town in the best legal position with the lawsuits.

Mayor Mandel questioned if any of the permits that had been granted for elevated pools would be allowed to move forward while the moratorium was in place.

Town Attorney Miller pointed out that there was a permit issued long before the commencement of 'zoning in progress'.

Community Development Director Fluegel reported there was one under construction with the pool which was almost completed; and 301 Palermo was under construction and the pool deck was up but the pool permit was not obtained before the moratorium.

Tom Babcock, resident, expressed his belief that Council should come up with a clear strategy since now there was pending litigation regarding the elevated pool permits; and that the strategy should accomplish two things: 1) assure there was a moratorium on permits for elevated pools that were not consistent with how the Town's land development codes had been interpreted in the past; and 2) to correct the mistake made when the permits were issued administratively. He stated he would support the language being proposed if three conditions were met: 1) that there was no admission that our LDC was ambiguous; 2) that the clarifying language reflected how previous staffs, LPAs, and Town Councils interpreted the LDC; and 3) that there was admission that the staff acted inappropriately by issuing a

permit administratively rather than to use the processes defined in the LDC. He discussed his belief that the permit should not be issued administratively and asked Council to make sure their decision today did not put the Town in a weaker position for pending litigation.

Public Comment closed.

Council Member Andre asked if the proposed ordinance was adopted that elevated pools could not go forward.

Council Member List discussed her concerns about the matter and that the Council needed to make sure no one could misinterpret the codes.

Mayor Mandel noted that Council should not be making statements about the matter due to pending litigation; and suggested Council meet with the outside counsel they just voted to retain in order to obtain counsel's opinion.

Town Attorney Miller recommended continuing the Public Hearing to a date certain.

Discussion was held.

MOTION: Mayor Mandel moved to continue the Public Hearing for Ordinance 13-10 to February 18, 2013 at 6:30 p.m. and schedule as soon as possible a closed session with Attorney Knott; second Council Member Andre.

VOTE: Motion approved; 5-0.

Mayor Mandel closed the Public Hearing.

XI. PUBLIC COMMENT*

*Item heard after Item XV, Agenda Management.

Public Comment opened.

Tracy Gore, resident, questioned if the moratorium was for the pools or the structure that holds the pool.

Community Development Director Fluegel explained his belief that the moratorium in effect was for the pools only; however, if staff saw a deck permit in the spirit and intent of the moratorium they would bring it to Council.

Town Attorney Miller expressed her understanding that staff had not issued any permits since the resolution went into effect for either a structure to hold a pool or the actual swimming pool.

Community Development Director Fluegel responded in the affirmative. He stated that he would look into Ms. Gore's concern regarding Mr. Orlandini's permits.

Tracey Gore reported that she was informed by staff that the permits in question would allow the deck structure to be constructed.

Public Comment closed.

Town Attorney Miller stated she was looking at the lawsuit and Count #5 dealt with 301 Palermo which alleged the Town reviewed the application (including deck and pool) and construction commenced in July 2013, and that the Town refused to issue the permit for the pool in the constructed deck.

XII. TOWN MANAGER ITEMS

A. Mound House Update

Parks and Recreation Department Director Norton stated he was available for questions and reported staff would take the Action Plan with SEARCH Inc. to CELCAB on Thursday.

Mayor Mandel reported he received a telephone call from a person who claimed there were plants on order for the Mound House classified as 'exotics'.

Parks and Recreation Department Director Norton reported he had investigated that claim and was informed it was not correct and he would forward the report to Council.

B. Action Items Recap

Interim Town Manager Wicks asked if the Mayor would contact the independent counsel they just voted to retain.

Mayor Mandel responded in the affirmative.

XIII. TOWN ATTORNEY ITEMS

Town Attorney Humphrey – no items.

Town Attorney Miller – no items.

XIV. COUNCIL MEMBER ITEMS AND REPORTS

Vice Mayor Kosinski – reported that on February 12th the Nao Victoria was coming into Snug Harbor and suggested presenting the ship with a Town flag.

Mayor Mandel noted a request for a proclamation for the Nao Victoria; he asked Interim Town Manager Wicks to obtain the information for the proclamation.

Consensus approved the Town flag and proclamation for the Nao Victoria.

Council Member Raymond – no items or report.

Council Member Andre – no items or report.

Council Member List – no items or report.

Mayor Mandel – reported there was a meeting of the Southwest Florida League of Cities who was also looking at a regional approach to FEMA flood insurance issues. He noted that Council Member Andre would be working on a presentation for the TDC on the mooring field for possible funding. He requested Council Member List create a description and guideline for working with Beach Elementary School for the future Council; requested Vice Mayor Kosinski prepare a guideline for the Town regarding the Spirit of '45 event; and requested Council Member Raymond work with the Town Clerk to create a 'time in action calendar' for what a Council would need to be aware of in each month.

Town Clerk Mayher announced that qualifying for the upcoming election would end this Friday at noon and currently there were four qualified candidates – Rexann Hosafros, Summer Stockton, Chuck Bodenhafer, and Joseph Kosinski.

XV. AGENDA MANAGEMENT

Council Member Andre mentioned an earlier notation at the Work Session about the need for equipment at Bay Oaks and indicated he believed another issue was the lack of storage.

Council Member List suggested BORC review the matter of storage at Bay Oaks, as well as storage alternatives.

Parks and Recreation Department Director Norton acknowledged the request for BORC to address storage issues at Bay Oaks and alternative storage.

Council Member Andre questioned why the topic of outdoor displays was no longer on Agenda Management and reminded Council to consider extending the fee waiver for outdoor displays.

Community Development Director Fluegel suggested a three month fee waiver extension and a waiver to the resubmittal requirements for the permit applications.

Town Attorney Miller noted staff had some revisions; and she was working on language regarding grandfathering existing businesses that were basically 'not legal'.

MOTION: Council Member Andre moved to extend the fee waiver and the resubmittal requirements for the permit applications for three more months for outdoor displays; second Council Member List.

Council Member Andre requested the matter go back on Agenda Management.

Public Comment opened.

No speakers.

Public Comment closed.

VOTE: Motion approved; 5-0.

Town Clerk Mayher reported the following item was on the Council Work Session Agenda for February 3rd:

- Review of the LDC regarding view corridors – Removed; waiting for closed attorney/client session with outside counsel.
- February 3rd potential date for the closed client/attorney session with outside counsel.

Council Member Andre asked the status of the photographs for the front of Town Hall.

Town Attorney Miller stated she would follow-up with the Public Works Director.

XVI. RECAP OF ACTION ITEMS

No discussion.

XVII. ADJOURNMENT

Motion by Vice Mayor Kosinski; second by Council Member List. Meeting adjourned at 9:23 PM

Adopted 3/3/2014 With/Without changes. Motion by Kosinski/Andre

Vote: 5-0

Michelle D. Mayher, Town Clerk

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