

MINUTES OF A SPECIAL TOWN COUNCIL MEETING OF
FEBRUARY 8, 1993 AT 5:01 PM.

Roll Call

I. CALL TO ORDER AND ROLL CALL: President Heeke called the Special Meeting of the Town Council to order at 5:01 PM. On roll call, the following Elected Officials were found to be in attendance: Mayor Marix, President Heeke, President Pro Tem Weinberg, Councilwomen Wiener and Douthit. Also in attendance for all or a portion of the meeting were Town Manager Doney, Attorney Randolph, Mrs. Peters, Mr. Elwell, Mr. Jakubiak, Mr. Moore, and Mr. Zimmerman.

Invocation

II. INVOCATION AND PLEDGE OF ALLEGIANCE. Invocation was given by President Heeke. Pledge of Allegiance was led by President Pro Tem Weinberg.

Approval of Agenda

III. APPROVAL OF AGENDA: Agenda was approved on motion of Mrs. Wiener. Seconded by President Pro Tem Weinberg. On roll call, the motion carried unanimously.

Proof of Publication

IV. PROOF OF PUBLICATION. Mrs. Peters confirmed that the Proof of Publication has been filed for the record.

Ord. 1-93
Second
Reading

V. SECOND READING OF ZONING ORDINANCE NO. 1-93 - Mr. Randolph read Ordinance 1-93 by caption:

AN ORDINANCE OF THE TOWN COUNCIL OF PALM BEACH, PALM BEACH COUNTY, FLORIDA, AMENDING ORD. NO. 2-74, AS AMENDED, THE OFFICIAL ZONING ORDINANCE OF THE TOWN OF PALM BEACH; PROVIDING AMENDMENTS TO ARTICLE 2, SECTION 2.10 ENTITLED "DEFINITIONS", BY REVISING DEFINITIONS (11.1) "BUILDING HEIGHT OF CORNER LOT", DEFINITION (22.1) "FLOOR AREA RATIO" AND DEFINITION (38.1) "NONPROFIT CULTURAL CENTERS", TO PROVIDE AMENDMENTS TO ARTICLE IV, ENTITLED DISTRICT REGULATIONS, TO PROVIDE AMENDMENTS TO SECTION 4.20, SCHEDULE B, "SCHEDULE OF USE REGULATIONS", BY ADDING MUSEUMS OCCUPYING DESIGNATED HISTORICAL LANDMARK BUILDINGS AS SPECIAL EXCEPTION USES IN CT-S DISTRICTS; BY REMOVING NONPROFIT CULTURAL CENTERS FROM SPECIAL EXCEPTION USES IN RD-1 AND RD-2 DISTRICTS; BY CHANGING NONPROFIT CULTURAL CENTERS FROM PERMITTED USE TO SPECIAL EXCEPTION USE IN CP-C AND C-B DISTRICTS, BY EXTENDING EXPIRATION DATE OF CHARITABLE EVENTS IN ALL RESIDENTIAL DISTRICTS BY ADDING PROVISION SETTING FORTH ALLOWABLE ACCESSORY USES FOR HOTELS IN RD-2 DISTRICT; BY ELIMINATING ACCESSORY USE ITEM 4 FROM RD-1 DISTRICT; TO PROVIDE AMENDMENTS TO ARTICLE 5 ENTITLED "SUPPLEMENTARY LOT REGULATIONS", BY AMENDING SECTION 5.15, "LOT AREA", TO REQUIRE NEW SINGLE FAMILY DWELLINGS BUILT ON PARCELS WITH LAND AREA EQUIVALENT TO OR GREATER THAN FOUR TIMES THE MINIMUM LOT SIZE FOR THE DISTRICT BE SUBJECT TO SPECIAL EXCEPTION APPLICATION; BY AMENDING SECTION 5.17, "EXISTING SINGLE FAMILY DWELLING DEVELOPMENT", BY REWRITING SECTION FOR CLARITY PURPOSES ONLY; BY AMENDING SECTION 5.30, "YARD REGULATIONS", PROVIDING LOT COVERAGE EXEMPTIONS FOR OPEN TRELLISES, BY AMENDING SECTION 5.36, GARDEN WALLS AND FENCES", BY INCREASING ALLOWABLE HEIGHT OF WALLS AND FENCES IN FRONT, SIDE AND REAR YARDS; BY AMENDING SECTION 5.47, "BEACH AREA", PROVIDING OCEAN VISTAS WITH LIMITED IMPROVEMENTS ON ONE HALF OF BEACH PROPERTY WIDTH; BY AMENDING SECTION 5.50, "ACCESSORY BUILDINGS AND/OR STRUCTURES", PROVIDING FOR TWO STORY ACCESSORY BUILDINGS ON PROPERTIES EXCEEDING 20,000 SQUARE FEET IN R-B DISTRICT; TO PROVIDE AMENDMENTS TO ARTICLE 6 ENTITLED "SUPPLEMENTARY USE REGULATIONS", BY AMENDING SECTION 6.54, "ACCESSORY COMMERCIAL USES IN A HOTEL", BY ELIMINATING REFERENCE TO RD-1 DISTRICT; TO PROVIDE AMENDMENTS TO ARTICLE 8 ENTITLED "NONCONFORMITIES", BY AMENDING SECTION 8.12 "CONVERSION OF NONCONFORMING USES", BY DELETING A PORTION THEREOF FOR CLARITY PURPOSES; BY AMENDING SECTION 8.24, "TERMINATION OF NONCONFORMING BUILDINGS AND/OR STRUCTURES". PROVIDING FOR RECONSTRUCTION OF BUILDINGS DESTROYED MORE THAN 50% BY FIRE OR OTHER CASUALTY OR ACT OF GOD; PROVIDING FOR SEVERABILITY; PROVIDING A PENALTY FOR A VIOLATION HEREOF; REPEALING ALL ORDINANCES OR PARTS OF ORDINANCES IN CONFLICT HERewith; PROVIDING FOR CODIFICATION; PROVIDING AN EFFECTIVE DATE.

Mrs. Douthit moved for approval of Ordinance No. 1-93. Seconded by Mrs. Wiener.

Mr. Heeke recalled some aspects of the prior draft have been referred to the Zoning Commission for further study and report back to the Town Council.

Mr. Heeke called for discussion on Section 2, the District Regulations to which there was no response. Mr. Heeke called for discussion on Section 3, the Supplementary Lot Regulations to which there was no response. Mr. Heeke called for discussion on Section 4, the Supplementary Use Regulations to which there was no response. Mr. Heeke called for discussion on Section 5, Non-Conformities, to which there was no response. Mr. Weinberg asked if they could go back to Section 2 to which Mr. Heeke agreed. Mr. Weinberg referred to the section on Charitable Events which are limited to one per calendar year in a private residence and asked if there was any change. Mr. Heeke stated this is scheduled to sunset April of 1995, so that was extended for two years.

On roll call, the motion carried unanimously.

Mr. Moore asked if the Council wished to address the use of alternates on the Zoning Commission to which Mr. Heeke agreed, stating the Council wanted to look at all of the Committees and Commissions and suggested there be some uniformity on the various Committees as some have alternates and some do not. He stated it was his recommendation that the Zoning Commission is one of the Commissions that should have at least three alternates as there have been occasions when due to illness or travel, during the Zoning Commission hearings, it has created a hardship with not

MOORE
REFIM BORISMENT
(sic)

Phone: 1-800-262-2633
Fax: (850) 701-0715
www.mccinnovations.com

having a full complement of Zoning Commissioners in attendance at the yearly hearings, and he would like to see a provision for their being alternates.

Mayor Marix thought perhaps in a way they are chipping away at this as some alternates have been added to some and not others, and she believed serious thought should be given as to the number of members they needed on each Committee, and perhaps even have the Council membership extended to seven members. She thought the entire picture should be looked at thoroughly before they started adding to the Commissions. She suggested a Committee be appointed to really examine this and report back to the Council. Mr. Heeke noted if the number of Council members was changed, it would mean an amendment to the Charter.

Mr. Weinberg commented he has doubted the wisdom that has been used in the selection of members in the past and he did not believe people should be appointed to committees merely because they write a nice letter asking for an appointment. He thought before anyone is put on a Commission or Committee, they should be able to prove they have attended meetings of the Committee or Commission they wish to be appointed to, and they would have some idea of what the Commission has been all about, and then he or she should be interviewed by several members of the Council. Mayor Marix thought another good idea might be that the people who are interested in being appointed to a particular Committee, should be asked to come to a Town Council meeting, and have an open interview so the public could hear what they have to say.

President Heeke recalled there have been letters of interest sent to the Mayor and Council and in response, their attendance at some of the meetings has been encouraged, so they would have some idea of what they are undertaking. Mr. Heeke advised Mr. Randolph is in the process of drafting modifications to several ordinances to increase the numbers who would serve on certain commissions but the basic problem of being shorthanded on some of the Commissions, such as the Zoning Commission, and that was the reason he suggested alternates be provided.

Mr. Doney advised on the Golf Commission, where this issue came to light about adding additional members and alternates, he has asked Mr. Bitzer and Mr. Moore to prepare a table that would give the number of members and alternates and other criteria of boards and commissions, which could be reviewed as back-up when the Golf Commission appointments will be discussed at the March 9, 1993 Town Council meeting.

Mayor Marix thought it may be appropriate that if the members who are serving and can't make but two meetings per year, they be asked to resign. Mr. Heeke recalled the County and several other communities have a uniform ordinance which covers absenteeism, among other things, and this can be brought back to the next Council for further consideration.

ITEM VI. CONSIDERATION OF REQUEST FOR DEFENSE REIMBURSEMENT BY MR. ROBERT L. MOORE, DIRECTOR OF PLANNING, ZONING AND BUILDING - COMMISSION ON ETHICS AT THE SPECIAL TOWN COUNCIL MEETING OF FEB. 8, 1993 AT 5:01 PM

The following is a verbatim transcript:

PRESIDENT HEEKE: We will go on to the next item of business, which is Consideration of Request for Defense Reimbursement by Mr. Robert L. Moore, Director of Planning, Zoning and Building - Commission on Ethics. Mr. Wearn? I've asked Mr. Moore, I've suggested he not be here because I think Mr. Wearn can speak for him.

ATTORNEY JAMES MCCARTNEY WEARN: I concur in his leaving the room, unless the Commission desires for him to be here. Madam Mayor, Mr. President, Members of the Town Council, my name is James Wearn, I'm a resident and also a lawyer. I am here today representing Robert L. Moore, who is a Public Official, your Town of Palm Beach Building, Planning and Zoning Official. The reimbursement sought today is per a memorandum from Mr. Moore to Mr. Doney, dated December 21, 1992, and it requests reimbursement of legal fees of \$6,104.17, Air fare to Tallahassee of \$166.00, \$29.00 for miscellaneous travel expense, those dollar figures totaling \$6,299.17, with bills and receipts attached. And also, to authorize the reimbursement of two Vacation Days and two Personal Days expended to be credited back to Mr. Moore. Those were all expended in connection with charges of official misconduct in his capacity as the Director of Planning, Building and Zoning Department. The - in connection with the request you have received, I am given to understand Town Attorney Randolph's opinion which is extensive, but essentially identifies a two pronged test for your consideration of this reimbursement request.

The first test being that the charges arose out of performance of official duties or in connection with them; and the second test being that it is serving a public purpose - that the public has an interest in the controversy. My files are approximately four linear inches thick and I will try to abbreviate the presentation on these matters pertinent to those two tests. The charges essentially involved the acquisition of used surplus or discarded building materials, or items, in connection with Mr. Moore's construction of his home. Before he embarked on any effort to acquire any of these used surplus or discarded materials, he consulted with the then Town Manager, Mr. Delano, who indicated that he did not see a problem with the activity and referred Mr. Moore to consult with Town Attorney Randolph. Mr. Moore did consult with Mr. Randolph and Mr. Moore's position is that he was advised that it did not constitute, as contemplated, any violation of law or ethics, but it may give the appearance of a question. Mr. Moore did then go forward and acquire some articles, a number of different articles of either used, surplus, or discarded materials; and where appropriate, he paid the going used or surplus rate for those. When I say that he did that, I am really relying upon a report of investigation of the Ethics Commission, which made that determination.

In other words, he paid what anybody would be required to pay for those items, were any of us to go out into the market, here in the Town of Palm Beach, to acquire any of those items. Specifically, I would like to go to - to and through - the record items in the Commission on Ethics' complaint and determinations - I do not know that they are a part of the Town's record at this point, however, they are public record and they became public record when the Ethics Commission determined to exonerate Mr. Moore from all, and I repeat, all charges involving this matter. Initially, we have the complaint on Ethics' violation which is addressed against Senior Building Official and Inspector Robert L. Moore. That is pertinent to the first prong of the test. It is against him in his official capacity. It alleges in its' statement of facts three items, specifically:

Consideration of Request for Defense Reimbursement by Robert Moore.

VERBATIM TRANSCRIPT

VERBATIM
TRANSCRIPT

First being, unauthorized compensation under a cited Florida Statute.

The second being, misuse of public position, again under a cited Florida Statute.

The third being, conflicting employment or contractual relationship again under a cited Florida Statute.

Based upon that complaint, which incidentally attached newspaper articles headlines starting out: "Building Inspector says he didn't trade favors for bargains." Things such as that. I believe that clearly evidences that these charges against him were in his official capacity as the Building Official for the Town, thereby fulfilling the first prong of the test.

The first document that is issued out of the Commission on Ethics in such a complaint is what's called: "A Determination of Investigative Jurisdiction and Order to Investigate". Its third paragraph states: "The complainant alleges that the respondent received construction materials from building projects he reviewed as Senior Building Official for the Town of Palm Beach and that he used these materials in the construction of his personal residence." Clearly again, the charges are levelled against Mr. Moore in his official capacity as the Building Official. The determination of Investigative Jurisdiction an order for investigation goes on to quote the Statutes that were involved in the three charges that were made and then addresses those from the standpoint of what precisely the charges will be that will be investigated.

The first, under Paragraph 6, cites a Florida Statute, saying "it prohibits a Public Employee from soliciting or accepting anything of value, based upon the understanding that the respondent's official action and judgment would be influenced thereby. The allegations are sufficient to indicate a possible violation of this provision." (end quote) and based upon that finding, that was an investigative subject. Clearly again in his official capacity.

Next, at Paragraph 7, the allegations were found legally sufficient for a possible violation of the prohibition from accepting anything of value when he had either actual knowledge that it was given to influence his official actions; or when he had constructive knowledge, based upon the exercise of reasonable care under the circumstance that it was given to influence actions in which he was expected to participate in his official capacity as Senior Building Official of the Town of Palm Beach. So there was a second charge framed again in his official capacity.

Paragraph 8 involved the question of whether the allegations indicate the respondent misused his position. Those allegations were found to be legally insufficient to indicate a violation, so we have two charges then pending still.

At Paragraph 9, violation of prohibition from having an employment or contractual relationship with a business entity which is doing business with, or is subject to the regulation of the respondent's agency. Which apparently is the Town's Building Department. That's a very important one, because we'll come back to that one. This prohibition also prohibits the respondent from having an employment or contractual relationship which creates a continuing or frequently recurring conflict between his private interests and the performance of his public duties; or which impedes the full and faithful discharge of those public duties. The advocate considered there was a possible violation of this provision - excuse me, the Executive Secretary of the Ethics Commission - as a result of which there was now a third charge or a third allegation, or complaint.

And fourth, at Paragraph 10 - respondent - it was found that the allegations of the complaint again were legally sufficient to allege a violation of Mr. Moore for using information which was not available to members of the general public and which was gained by reason of his official position to secure personal gain or benefit for the respondent - for Mr. Moore.

Those framed essentially the four charges upon which an investigation was then ordered. That being the order for the investigation. The investigation then proceeded and we have a Report of Investigation which contains 20 pages - excuse me, 22 pages of exhibits, including checks and memoranda and payments that Mr. Moore made, which additionally contains 11 - excuse me, 10 pages, single space, legal size, of investigative reports by an investigator of the Commission on Ethics. It includes substantial interviews with every person who could be found who had any knowledge or information concerning these four allegations. The investigative report is conducted by someone who is essentially like a police officer going out to do an investigation. It was substantial and it was quite detailed on all and each and every of the items of surplus or discarded material that was acquired. Based upon a review of that report of investigation, a lawyer from the Attorney-General's office, who is not connected with the Commission on Ethics, then makes what's called an "Advocate's Recommendation". The Advocate's Recommendation here was again ten pages long. Without going through it in detail, it found on the first allegation that there was no basis for a finding of probable cause. And recommended that the Ethics Commission when it met in its public meeting up in Tallahassee, find no probable cause for the charges to be pursued.

On the second charge of violation, it did essentially the same.

On the third charge involving the acquisition of the goods, that is, solicitation or acceptance, that is, the conflicting employment or contractual relationship which is the allegation of acquiring goods at less than value of what someone ordinarily would be required to pay for them. The advocate found and recommended that there be a finding of probable cause, with respect to that allegation.

On the fourth allegation, the advocate recommended a finding of no probable cause. So, if the Ethics Commission made a decision to follow all of the recommendations of the advocate, Mr. Moore would be faced with going to trial on one charge, however all of the charges were clearly intertwined one with the other. I made a response for Mr. Moore to the advocate's recommendation on that particular item and only a little bit of it do I wish to bring to your attention. I said: "if there is a used car dealership ever built, added onto or renovated in this public employee's jurisdiction" and of course we know that wouldn't happen in the Town of Palm Beach, it involves the concept: "or a charitable thrift store was located there where items are available at the used, junk, or scrap retail market, any such public employee would be at risk to buy a used car, or a Goodwill Industries or Salvation Army used shirt or scrap rug." In fact, at my suggestion, the Associate Counsel, before the Ethics Commission, as I did not make the trip, I hired Associate Counsel in Tallahassee to appear with Mr. Moore, presented to them that if - presented to them the concept and they inquired of the advocate if this would be true - that if there was a grocery store within the jurisdiction here in the Town of Palm Beach, and officials went to the grocery store and

bought food, they would violating the Ethics law, and that was the charge that the advocate was recommending. The Advocate said "yes, that is correct - that is what I'm recommending."

I submit to you that these charges and the necessity to defend them, was made necessary in meeting the two prong test, as a result of which, Mr. Moore should receive and I respectfully submit your favorable determination to allow him the reimbursement sought. More specifically, having gone through those items in the official record of the Commission on Ethics, I'd like to file with the Town Clerk all of the record that I've referred to so that it is of record for any further consideration that may be necessary.

Mr. Heeke: Thank you. We'll receive that as part of our record.

MR. WEARN: Thank you. I submit that I believe that I've shown beyond any doubt, the meeting of the first prong of the test that was related to.

The second prong of the test is a question of serving a public purpose. The four charges related directly to this public official's duties which serve a public purpose. Once again, in the case of Ellison vs. Reid, a First District Court of Appeal case in 1981, a copy of which you were given and was quoted at the bottom of the second page of Mr. Randolph's memorandum: "If a public officer is charged with misconduct while performing his duties and serving a public purpose, the public has a primary interest in such a controversy and should pay the reasonable and necessary legal fees incurred by the Public Officer in successfully defending against unfounded allegations of the official misconduct." That means that you are not asked to pay for these fees and costs when there is an unsuccessful defense. They are merely asked when there is a successful defense. I submit that the Town has a interest in protecting its officers from untimely - when I say officers I mean public officers - such as yourselves from untimely and illegal recall petitions as in Thornber vs. City of Ft. Walton Beach, also cited by Mr. Randolph. That is a public purpose. The reputation and standing of the Building Official and his protection are strong public purposes. I believe it serves the public purpose for the Town of Palm Beach to pay for this successful defense of the misconduct charges. Again, the public has a direct purpose in insuring the integrity and reputation of all of its officials and the Town has a public purpose in the responsible defense of its employees from irresponsible charges.

I submit that the evidence that we had presented today clearly demonstrates both prongs of the required test have been met and therefore, I respectfully request the Town should find favorably for the request for reimbursement. I would suggest that with this presentation, there is sufficient evidence for the Town Council to find in favor of the reimbursement. I would respectfully suggest that if - that you may ask your Town Attorney if sufficient grounds have been presented here today for making that award in accordance with the two tests. I've tried to be as brief and to the point as I can on this rather lengthy and detailed subject - I hope that I have not left any questions unanswered, but I'd be happy to answer any, if I may. Thank you for your consideration.

MR. HEEKE: Thank you, Mr. Wearn. Mr. Randolph?

MR. WEINBERG: Can we hear from Mr. Randolph?

MR. RANDOLPH: Yes. Did you want to hear anything - do you have any specific questions or do you want me to address or summarize the memo, or....

MR. HEEKE: Yes sir. Would you, Mr. Wearn ah, framed the question for the Town Council to ask if there has been sufficient presentation.

MR. RANDOLPH: I think all the facts are before you to allow you to act on this matter.

MRS. DOUTHIT: Just as a matter of curiosity, I gather from what you said that this merchandise is available - could be if they remodeled the Biltmore and Breakers or anything in Town - merchandise is available but only those people connected with construction would know of this - be it the carpenters on the job - the inspectors from the Town or - it isn't advertised in any way?

MR. WEARN: No, it's not, but it's perfectly public record what construction activity is ongoing and the Commission on Ethics did - their investigator - did get into that specifically and concluded that it was sufficiently available public information - that anyone could find out and act on, at any time, if they merely went to a location where there was construction activity ongoing and made an inquiry.

MRS. DOUTHIT: I once bought a bathtub from the (inaudible).

MRS. WIENER: Mr. Randolph, would you please summarize your legal position?

MR. RANDOLPH: Yes. There is a - there's a lot of case law on this and there have been a lot of Attorney General's opinions in regard to it, and because of that I wanted to set forth to the Council the various instances that have involved this type of question relating to reimbursement of expenses successfully defending these types of actions in the past. These cases have had a common theme and that is the two prong test that Mr. Wearn has alluded to. The cases consistently hold that in order for a Council to reimburse a Public Official, there has to be two tests that are met to your satisfaction. And when I say to your satisfaction, the Attorney General, although he has been asked this question in many instances, has for the most part, except for one case, turned it back to the Council for the ultimate decision and said that this - the determination of whether this two prong test has been met is really a question of fact - a question of mixed law and fact to be determined by the Council. The two prong test is:

1. That the performance - that the expenditures arose from the performance of the officer's official duties; and
2. That it was while serving a public purpose.

Now, as you can see from the memo I've provided you, there was at one time an opinion that I believe was interpreted by the Court with regards to the second prong of that test, which held that the public purpose prong of that test has to be met by showing that the act itself was a public purpose. That case was subsequently distinguished in the Thornber case, which indicated that that second prong could be met not just based upon whether the act was a public purpose, but if that

VERBATIM
TRANSCRIPT

person had to defend himself against a charge that that second prong could be determined to be the public purpose. The Attorney General commented on that and said that that seemed - that last case by the Supreme Court seemed to differ from the case law as it had developed but until the Court determined something different in regard to that, the Attorney General was bound to that. So from that standpoint, I think it could be supported that the mere cost of the defense of this Public Official in this particular instance, could, if you determined it on a factual basis, meet the second prong of that test. So I think the remaining question then is whether or not the first prong of the test has been met. The first prong of the test, as you recall, is whether or not the legal defense expenditures arose from the performance of the officer's official duties.

I've set forth several cases here for your consideration. Each one of them involves a separate set of facts - all of which appear to be instances where a Public Official was performing a public duty or an official duty during the - which related to the charge. For example, in the first case of Ellison vs. Reid, a property appraiser had given examination papers to his employees while attending a training program. In the second case, a Mayor had spotted someone being arrested for a felony and had urged the Police Officer to release the man under the recognizance of his parents. He therefore, I think it was determined was performing an official duty. In another case, a Councilmember had voted where she should not have voted, where there was an actual conflict, so in that instance it was determined that that was in her official capacity. In another case, some members of the public body had violated the Sunshine Law and that was determined to be as part of their public duty. In another case, there was a reimbursement of travel expenses which was determined to be - at least it was first determined to be improper by a City Manager, and that was determined to be a matter of fact that the Council could consider as to whether or not that was part of the official duties of the official. They sort of have a common theme in that regard and then there is one Attorney General's opinion which actually answered the question, rather than referring it back to the Council, it answered the question and that was a question where a County Commissioner was alleged not to be a resident of the District in which that County Commissioner had run and there was litigation arising out of that and in that particular case, the Attorney General ruled that the inquiry did not involve charges of misconduct while performing official duties of the County Commissioner, but conduct which occurred before the Commissioner's election to the office. Accordingly, the Attorney General ruled that that charge did not evolve from the official duties of the Public Official and therefore could not be paid by the municipality. Really, the determination for you, I think, at this meeting is to determine whether or not both prongs of the test have been met and I think the - if I look at the - if I read the case law properly, it appears that there is - that you can make a determination that the defense itself served the public purpose. The final question then, is whether or not you think the activities involved here meet the first prong of the test as to whether or not the performance of the officer - whether or not the expenses arose from the performance of the officer's official duties. And obviously, there are - that's a - I think there are two ways of looking at that - and I think you have to weigh the facts and make a determination. When I say two ways - a presentation has been made to you as one way. And then, you may look at these cases and make a determination to the contrary.

MR. HEEKE: Let me suggest something to members of Council - Mr. Randolph has indicated that there seems to be ample basis for the determination of the second prong issue, rather than discuss that issue, would anyone care to make a motion that the second prong test has been met? I am speaking to Council, Mr. Winterfield. I'm asking for a motion.

MRS. DOUTHIT: Yes, I think I can do that.

MR. HEEKE: Alright--that's - the motion has been made is there a second?

(No response).

MR. HEEKE: I'll pass the gavel and second the motion.

MR. RANDOLPH: Mr. Heeke, under discussion - I didn't mean by making that statement to take the factual determination in that regard away from this Council - I think that is your determination to make and I didn't mean to state that as a matter of law, that that prong had been met. I was simply pointing out that one of these cases did indicate that the defense of an action of this sort has supported payment in the past.

MR. HEEKE: Yes, sir. And that of course, was the Supreme Court speaking in effect - the earlier case - the Reid case - that was the lower court.

MR. RANDOLPH: That's correct.

MR. HEEKE: First District Court, I think is your citation.

PRESIDENT PRO TEM WEINBERG: Before we vote, may I ask Mr. Randolph a question.

MR. HEEKE: Please.

MR. WEINBERG: I'm not a legal minded individual. But I do bear in mind that Mr. Randolph is our attorney and we pay him for his legal knowledge and brilliance and I would like to know if he can state for me, at least, his opinion regarding the fact that this act took place as a performance of an official duties.

MR. RANDOLPH: I cannot make that decision. I think that's the issue that's before you to make. I can only elaborate for you the law which has been applied to instances such as these in the past and on that basis and on the basis of the facts, that decision will have to rest with you.

MR. HEEKE: The reason for calling for the motion on the public purpose because I thought that was the easier of the two for the Council to reach in light of the presentation made by Mr. Wearn and the documents have been received into the record and the interpretation of the Supreme Court in the Thornber case. Mr. Winterfield?

ADRIAN WINTERFIELD: My name is Adrian Winterfield. I live at 445 Brazilian Avenue. I respectfully request - suggest - that the Thornber case be looked at very closely at its facts. And the facts there involve defense of a recall petition of elected officials. Which petition clearly affected the whole operation of municipal government. This is something that had enormous publicity. The defense of an action before the Ethics Commission is totally confidential until completed.

Nothing in the defense of a charge before the Ethics Commission affects operation of municipal government. I will respectfully suggest that it is taking great liberties with the language of Thornber to attempt to apply it to the facts here. Thank you.

MRS. WIENER: Mr. Randolph, do you have anything on that?

MR. RANDOLPH: No, that's an interpretation of the facts. I think cases are real clear. I think the Attorney General, quite frankly, in his opinion seemed quite surprised with the Thornber decision, but, in the face of it, was reluctant to reverse it, and therefore, referred a question, similar to the one you have before you back to the Council. I mean, I could - if you wanted me to - elaborate on what Mr. Winterfield stated, but....

MRS. WIENER: Okay.

MR. HEEKE: I think it's a very broad holding and I think that's really why I was going to the second issue first. Mr. Weinberg, do you want to call the vote?

MR. WEINBERG: I don't want to call the vote yet.

MR. HEEKE: You don't want to call it at all - you want more discussion on the second issue?

MR. WEINBERG: I'm puzzled by it. I want to do what is fair and right at all times. And I must ask Mr. Randolph to help me to resolve my confusion again. In regard to prong number two, it seems to me I've read this and I've heard this today that the lawsuit charges our client - our officer - in his capacity as a Public Official when he was functioning on a personal and not a public level at the time.

MR. RANDOLPH: It sounds like you are referring to prong number one in asking that question. Because prong number two...

MR. WEINBERG: I told you I was confused...

MR. RANDOLPH: Yes, prong number two is a determination as to whether or not - it used to be whether the act itself was a public purpose. I think number two would have been pretty easy - it might have been - well let me retract that. At one point, the courts were clear as to the fact that the act itself had to be a public purpose in order to meet that prong of the test. Then the courts in Thornber applied kind of extended that test and said that you don't necessarily have to relate the public purpose prong to the act, but you even look at the defense and if you determine from a factual standpoint that it's a legitimate interest in serving the public for public officials to be able to defend themselves against acts of this sort. Then I believe the court is saying you can make the determination from a factual standpoint that that's a public purpose. I think before that they were saying you couldn't extend it that far. I think the question you asked is in regard to prong one. And that is whether or not the expenditure arose from the performance of the officer's official duties, and I'd like to read a quote from an Attorney General's opinion which states as follows: "If the City Commission determines that the Ethics Commission proceeding arose out of or in connection with the performance of the officer's official duties, and serves a public purpose, the official's legal fees incurred in successfully defending against such action must be paid by the City." So, they're talking about - in that sentence, they're talking about the two prongs - the "serves the public purpose" is the second prong; and the other one "arose out of or in connection with the performance of the officer's officials duties." I think there are two ways of looking at that, in my mind, and if I were a fact finder I would have to look at it from two standpoints:

1. Does the case law mean - and the application of the facts in this case - mean that the officer actually had to be performing an official duty, when he did the act?

For instance, would the tax appraiser's office - passing out tests to his employees before the test, etc. -- that was done as an act while he was performing his official duties. Most of these other cases dealt with the person's official duties. If you looked at it that way, and simply applied those cases - a person might say buying items for a private interest is not an official duty. However, others might look at it and say, and I believe and I can't speak for the applicant, but I sort of gleaned this from the presentation, that even though the act may not have been an official duty, the fact is it arose while he was a public official and but for the fact that he was a public official, there would not have been a charge. However, nothing was done in this instance, that a private person could not otherwise do. There is nothing illegal about a private person going and buying a particular item at or below the low market cost. So, if nothing was done that a private person could not do, then the argument could be extended that but for the fact that he was a public official, he would not have been charged with this violation. I don't know if that is helpful, but I'm trying to outline for you the two sides that could be applied to the first prong on he test. I think you could - and that's what I think you need to wrestle with.

MR. HEEKE: That really - your last comment was why I suggested the motion on the second prong - I felt that was so broad but we really need to really address the first prong.

MR. WEINBERG: That is "while serving a public purpose?"

MR. HEEKE: Literally, while he is employed as a Building Official.

MRS. WIENER: If one accepts that.

MR. HEEKE: Beg pardon?

MRS. WIENER: If one accepts that.

MR. HEEKE: That's right.

MR. WEARN: Mr. President?

MR. HEEKE: Yes.

MR. WEARN: If we reached the second question, I'd like to be heard on that, because I believe that I can fulfill both of the possibilities.

VERBATIM
TRANSCRIPT

MR. HEEKE: Okay. I was attempting to take the second question, because I thought the first question was more difficult. There seems to be sufficient reticence.....

MRS. DOUTHIT: But my feeling is that he had to be performing public duty or he wouldn't have known this stuff was available. He was clearly on the site checking, negotiating, doing whatever civic or official businesses had to be done. Or inspections. And that's when he saw the stuff was available and it was available to anybody.

MR. WEINBERG: And you interpret that as serving the public purpose? He was serving the public purpose at the time the material became available to him?

MRS. DOUTHIT: Or to anyone else.

MR. WEINBERG: It wouldn't have been denied to anyone else. No.

MR. HEEKE: Does that help you, Mr. Weinberg?

MR. WEINBERG: I - I have a major problem with it - when it's reduced to its simplistic terms. I have received calls from the voters of the Town who bring it down to a very simple sentence - when a man is buying a bathtub, what does that have to do with a public purpose - period. And why should the public being involved when he buys something for personal use. I mean. We have many citizens who are involved in this. This is our money. Other people's money - taxpayer's money - and I have a great regard for Bob Moore. I am delighted he was given a clean bill of health by the Ethics Commission, but this question - I don't mean to have a (inaudible) at the moment, but I am very much concerned about it. In our jobs as responsible to our public. In our jobs as responsible to our public officials. They are sometimes in conflict and I'm at the midst of that conflict at this moment.

MR. HEEKE: Well, perhaps if we remember the steps that Mr. Moore took at the time he made those acquisitions that were outlined by Mr. Wearn. He checked with the then Town Manager, Mr. Delano and with the Town Attorney. The Ethics Commission investigation found that he paid the same prices as anyone else would have under similar circumstances, however, he happened to be the Building Official, at that time. Whether he had unique knowledge - which might be any different than say from a sub-contractor - who might be looking at material he could use on another job site, but that's hard to see why that would cause him to incur legal expenses. I think it's simply because he was the Building Official at the time the complaint was lodged.

MRS. DOUTHIT: But he was exonerated by the Ethics Committee on all charges - which means - in my way of thinking that the complaint was basically invalid to begin with.....

MR. HEEKE: Mr. Wearn, did you want to.....

MRS. DOUTHIT: And I think we need to defend our officials.

MR. WEARN: Mr. Randolph has clarified for you that there is enough in the record that has been presented to you for you to find favorably on this question and I submit that it is in the public interest for you to find favorably on this question, just similarly to the way the Ethics Commission did. Thank you.

MR. HEEKE: Mr. Winterfield?

MR. WINTERFIELD: Relative to the first prong, in the performance of the officer's official duties, merely repeating that he did something as Building Official, does not satisfy the requirement. Because if it were done as a private individual, as has been noted, there would have been no Ethics complaint to start with, certainly, he was the Building Official. Would he have been in violation of his duties, had he not done this? Was this an essential part of his duties? Of course not. But how far can one overlap? If one looks more closely at Mr. Wearn's brilliant brief, one finds something very interesting - one invokes and he will correct me, if I misstate his position, he invoked an exemption which refers to purchasing goods in a private capacity - underlined three times. I simply submit that one cannot at the same time do something in a private capacity - and in the performance of one's official duties. Thank you.

MAYOR MARIX: Mr. Heeke?

MR. HEEKE: Yes, ma'am.

MAYOR MARIX: I am sure this won't help anyway - I think there is a bit of a problem - none of us - except you - are attorneys - and we are faced really with a lot of case law and legal matters. Maybe we should go to Code law and we wouldn't have so big a problem - sorry about that too. It seems to me that if the Ethics Committee, after their immense whatever they did there has found this matter to be in order and they obviously - I presume - they are very versed on rights and wrongs and ethics. I do not really see that it would be up to this Council to question their validity, although of course we can't. They would send it back to us to make the decision. I think in a way you can look a little bit that he really shouldn't be spending taxpayer's time, even if it were one minute, buying whatever it was he bought, anymore than someone else who is working for any employer - whether they be the Town or anyone else - should take their own time to make personal phone calls or to do many things. Unfortunately, it's all - maybe it's life - a certain amount of personal business is done when it probably shouldn't be - but really it would seem that if the Ethics Committee has said what he did was in line, the way I look at it - he didn't do more than some other Town employee spends his time on trying to - while on the Town payroll - is checking on prices of insurance or something. So I don't think - I don't think people should spend their time with - when they are employed - doing their own little things - but many of them do and I think really my opinion is after the in depth study the Ethics Committee made - even if they sent it back to us - we should really accept the fact from an ethical point of view, he didn't really do any problem and it's important - likewise - that any employee realizes that they shouldn't be liable for this kind of a lawsuit when they are on their official business. If they have been thoroughly checked out by the Ethics problem and it appears that he did nothing wrong. I figure it's minor what was wrong - wasting a little bit of Town time - but I don't believe that any Town employee should be subject to these kind of expenses when they got cleared. Did I confuse you completely?

VERBATIM
TRANSCRIPT

MR. WEARN: Again, if we've reached--Mr. Winterfield spoke to the first issue which is not before the Council on a pending motion. If we get to that, I'd like to address that.

MR. HEEKE: Mr. Weinberg, are you comfortable with calling a vote on the motion which addresses only the second prong?

MR. WEINBERG: If the motion were repeated, I think I would be comfortable - as it's a long way here from Tipperary.

MR. HEEKE: The motion and the second was to find in favor of Mr. Moore on the second prong of the test - under the broad Florida Supreme Court I think - was a public purpose.

MR. WEINBERG: While serving a public purpose. Well, you know the motion and I am calling upon Mrs. Peters to call the roll.

MRS. PETERS: Mrs. Douthit?

MRS. DOUTHIT: Yes.

MR. HEEKE: Mr. Heeke?

MR. HEEKE: Yes.

MRS. PETERS: Mrs. Wiener?

MRS. WIENER: No.

MRS. PETERS: Mr. Weinberg?

MR. WEINBERG: No.

MRS. PETERS: Mayor Marix?

MAYOR MARIX: Yes.

MR. HEEKE: Now, let us address what I think is probably the more difficult of the questions and that is the performance of the officer's official duties. Mr. Wearn?

MR. WEARN: The question is a broad question which is in connection with the public official's duties. I quoted to you from the determination of investigative jurisdiction, but I quoted to you from other things also. I need to go back and restate that - and additionally elaborate upon the four charges that were made, because the four charges that were made contemplated that while he was on official business, he was allegedly improperly doing the four things. Not merely occupying his position but actually in fact alleged to be on official business. So the allegation is that he was on official business at the time that he was doing things. From paragraph three, the complaint alleges the respondent received construction materials from building projects he reviewed as Senior Building Official for the Town of Palm Beach. Let me elaborate on that - because both prongs of the concept that Mr. Randolph identified for this first prong of the test, that is, occupying the position and alleged official misconduct while on official business - on official duty are met by the allegations. The first one which allegedly prohibits a public employee from soliciting or accepting anything of value based upon the understanding that the respondent's official action or judgment would be influenced thereby. On that one, I'll go on to quote what the Order says the allegations say: "The allegations (and I quote) indicate the respondent solicited and accepted items, including marble and tile from a project at L'Ermitage - toilets and a whirlpool tub from Two Breaker's Row - lumber from R. W. Gottfried Construction - seawall material from the Palm Beach Country Club - French Doors from a contractor remodeling a restaurant on Worth Avenue and fill dirt from a condominium being built on South Ocean Boulevard. It is further alleged that the respondent may have solicited some of these items while he inspected the various projects in his capacity as Senior Building Official." I would tell you again that the investigation on this first allegation proved negative. No basis. Yet he had to defend himself to get to that point and to get to a Commission on Ethics opinion that supported the advocate's recommendation that there was no basis for that allegation. Again, the allegation is while he inspected - that is performing official duties - while he inspected the various projects in his capacity as Senior Building Official.

MR. HEEKE: Mr. Wearn, why don't we just take that one issue and let the Council discuss that. Is there any discussion about whether that meets the prong of the performance of the officer's official duties - the allegation itself.

MRS. DOUTHIT: I don't think he solicited any of this stuff - it was just there.

MR. HEEKE: I think we are looking at the allegations which prompted the defense.

MR. WEARN: These are allegations -these allegations fit the prong of the test - if the allegations had been made that he was off duty - that would have been something else. The allegations were made that he was on duty.

MRS. DOUTHIT: Well, now if he came back and he saw some - any human being may see something that they like - and then he came and he spoke with the Town Manager and then he spoke with the Town Attorney and how do we know he didn't go back on Saturday as a private individual to say "yes" and here's the money.

MR. WEARN: They investigated all of that and determined that did not happen - that a violation did not occur as alleged.

MRS. DOUTHIT: Yes.

MR. HEEKE: The allegation was that during - on his official duties - as I understand what was just read to me. While he was actually performing the duties - the allegation says the wrongdoing occurred.

MR. WEARN: That's correct.

VERBATIM
TRANSCRIPT

MRS. DOUTHIT: That's the difficulty with allegations.

MR. HEEKE: Well, that's what you have to - that's why they are here for a reimbursement of the monies.....

MR. WEARN: It's that allegation which brings us within the prong of the test on his official action. Either as a public official, because he was a public official, which is one side of that first prong which Mr. Randolph identified - or allegations that while he was performing official duties, he violated that law - and those are the allegations that are made, so I submit to you that he fits both of what Mr. Randolph identified as would fulfill the first prong. Thank you.

MR. HEEKE: Is there any discussion by Council? (No response) - I'll call for a motion.

MRS. DOUTHIT: Well, I will make the motion that would clear Mr. Moore on this first prong based on the investigations of the Ethics Committee and we know happened.

MR. HEEKE: And the actual allegations that were made?

MRS. DOUTHIT: Yes.

MR. HEEKE: Is there a second? I will second (handling the gavel to Mr. Weinberg). Mr. Winterfield?

MR. WINTERFIELD: Rather than repeating the remarks I made the last time I came to the microphone, I must respectfully submit that it is premature to go to a vote on this without reviewing each of the allegations, because I respectfully submit if anyone of the allegations fails to meet the two prong test, then there should be no reimbursement. I wish Council would focus as Mr. Weinberg pointed out, that there is the interest of the public involved. And the principle that unlawful expenditure of funds can create liability on behalf of those authorizing unlawful expenditures. There is one very simple way of handling this and that would be to deny the application and to allow Mr. Wearn to present his arguments in court. In that manner, the Council would certainly be fulfilling its duty to the taxpayers and if the applicant prevailed, he would receive the compensation. Thank you.

MRS. DOUTHIT: And it would cost the taxpayers two or three times as much.

MR. HEEKE: I think the Town Council has the obligation to find the facts.

MR. RANDOLPH: Mr. Chairman?

MR. HEEKE: Yes, sir.

MR. RANDOLPH: I need to clarify the record in regard to a statement that was made by Mr. Wearn - just so there's no misunderstanding. A statement was made that the Town Attorney indicated that there was sufficient information to allow you to find favorably in regard to this application. I don't want that to be misinterpreted. When I answered your question previously - I was very careful in the way I answered it and I indicated that there was sufficient factual information presented to you to allow you to make a determination as the judge of this. However, I want to point out that I have been very careful in my memorandum not to involve myself in the decision making process on this. I think for obvious reasons. And all I did was set forth the case law and the Attorney General's opinions and indicated that it's up to you to make the final determination and I also indicated that if there was any question remaining as to the proper application of the law that the appropriate place to submit this would be to the Attorney General and not to me.

MRS. WIENER: I'd like to say a couple of things. This thing has gone off in a strange tangent. First of all, obviously from my silence which is not the usual, I am greatly troubled by this whole question. I'm also troubled with the way we're discussing it. I'm troubled because if indeed and that is the fact - the Ethics Commission has said that the behavior is legal and acceptable, then I don't think we ought to be talking about the charges at this point. I might not have been uncomfortable discussing those charges at another time, but I don't think they have any place here - the adjudication has been made, and I don't know why we're being led down this path of attempting to determine whether or not Mr. Moore was doing the legally correct thing or whether or not the charges were valid. The fact is that decision has been made elsewhere and what we are talking about is the money involvement. I find it strange that one set of people makes a determination of guilt or innocence and another set of people pays - and I think that's where our problem is. I think we sit here with a man that we're all very fond of. We like him personally. We think he does a good job. However, when we review the record, I believe at the time he was about to do this, there was sufficient question in his mind that he did in fact ask his superior and ask the Town Attorney. I think the answer that the Town Attorney gave him should have indicated to him that there might be trouble afoot. Based on the Town Attorney's suggestion that the appearance might not be the best even though the action itself might be correct, I have a problem paying that bill, because in fact, public perception becomes reality. There is a problem with it. If there weren't a problem with it, we all are fond of Mr. Moore - or at least I am, and I am sure the rest of you are or we wouldn't be sitting here kind of hunched around for an hour discussing this when in fact we know that his record is considered clear, but there obviously is a problem. I would frankly be a lot happier if this subject had not come up as I advised Mr. Moore, as a matter of fact. Because I think there are some things in the public perception - some things that are extremely painful for a public official to say and do publicly - that I think an employee should not test. And I think asking for this reimbursement is one of them. I find it extremely painful. Both on behalf of the public and on behalf of the Town - or that part of it that I'm included in. And I am wondering whether or not it might be wise just to let it go at that.

MR. HEEKE: Mr. Wearn, would you like to comment?

MR. WEARN: I appreciate the opportunity - the first question was were we considering the charges? Our entire effort today has been to not pose any question of right or wrong concerning the Ethics Commission decision, but to merely tell you that in order to meet the tests, the allegations fit within the tests. The allegations do fit within the tests. No-one is asking you to pass on the merit of the allegations. Secondly, the question was raised how one set of governmental bodies is determining the guilt and another is being asked to pay. Well, the Ethics Commission has no authority or jurisdiction to make the payment, or to order the Town of Palm Beach to make the payment, and in fact, the proper forum for seeking the reimbursement has been

adjudicated a number of times to be the elected officials of the government involved, from which the public official is charged with wrongdoing in his official capacity, as here. Thank you.

MRS. WIENER: I would just like to say - now that you've brought it this far - I'd like to make a couple of comments about the Ethics Commission, which are well known throughout the State of Florida. The Ethics Commission pussyfoots. The Ethics Commission has practically no teeth. Short of murdering your wife, I think you can probably make a very good case in front of the Ethics Commission. I understand it as well as you do, Mr. Wearn. And I didn't want to get into a discussion of this with you.

MR. WEARN: That's not my understanding. And I have witnessed....

MRS. WIENER: It's a fact.

MR. WEARN: where from what I've observed - its not a fact. But thank you very much for the opportunity to comment. Thank you.

MRS. DOUTHIT: Well all I - my one reason - I do feel that we should pay this bill is that these are allegations against a Town employee, anybody can make allegations against anybody and I do not want for our employees or anyone else to feel threatened. People can make allegations that are totally groundless and someone can be in a very difficult defensive position over - in a totally unjustified accusation. And this has been, all through the Ethics Committee.

MR. HEEKE: Well, of course, all of us - except Mayor Marix sat through the privilege of being named individually as defendants of a law suit.

MRS. DOUTHIT: I think we all did.

MR. HEEKE: And we were all sitting there and the Court determined there was no wrong doing on the part of any sitting member of Council, but we were subjected to that irrespective of the motivation behind our being a party to it. Our position really wasn't too different from what we have here. We are not looking at the retrying the facts, as Mrs. Wiener pointed out - that's what we are not about. We're at the point on Monday afternoon, when all of that is behind us, and investigators, through apparently lengthy work, eliminated many of the allegations, but nevertheless had to go through that process - as we had to go through the process of having a motion to dismiss us denied. And staying a party to the lawsuit to its bitter end. I think our employees was subjected to something very, very similar to this. Motive has nothing to do with it. The actual act of our - in this case voting or not voting - that particular litigation - his purchase or not purchasing - it's not what we are deciding. We're deciding whether under the test that has been set up - if his cost of mounting a proper defense should be reimbursed. And I think the same as our defense was taken care of through our insurance carrier, so we did not see that directly as Town Officials except through the premiums the Town paid for that type of insurance coverage - we're really not an awful lot different as long as the precise tests have been met. And none of us like the situation, I agree. But I don't think, as a Councilman, I feel that Mr. Moore should have to bear these expenses. Sitting here today and looking at what we are being asked to determine.

MAYOR MARIX: You mean anymore than any Council member would have had to bear cost of the defense in some of these lawsuits which we've had?

MR. HEEKE: Yes, ma'am.

MRS. WIENER: Of course, there is a major difference - the difference being that our defense is taken care of by the Town by whatever attorneys they're assigned under the pool, depending upon the amount of money, etc., and I don't know whether there is any situation where the Town, in fact, would have provided the legal help, could have, should have, or would have, but this is entirely different in that it was done in the realm of the private hiring of an attorney, none of which we were ever privy to, I'm sure many of us know lots of attorneys. So it isn't the same as far as I'm concerned.

MR. HEEKE: Mr. Pryor?

MR. LOUIS PRYOR: Mr. President, Madam Mayor, Members of the Town Council - my name is Louis Pryor. I live on 227 Brazilian, and I speak only as one of the Town citizens. I've learned a lot about law this evening - but - and I appreciate the decision is difficult for you. Whatever, the decision and perhaps particularly if the decision is in favor of - if the decision particularly is in favor of paying his expenses, I think I would suggest that the Town Council instruct Mr. Randolph to find some way to explaining the decision. Very carefully. To the citizenry. And to the employees of this Town, so that there is no threat particularly in the case of the employees of this Town - that a precedent will have been deemed to have been set. That we would regret in the future. Thank you.

MR. HEEKE: Well, hopefully, we won't encounter charges before the Ethics Commission in the future.

MAYOR MARIX: What if we do encounter charges in front of the Ethics Committee, I would certainly be very happy if they were proved to be without basis. I mean, I think the difference - I see what Mr. Pryor is saying - but I do think we've got to bear in mind that the Ethics Committee found no problem.

MR. PRYOR: On the other hand, what the Ethics Committee found is really not (inaudible) (he was not using the microphone).

MAYOR MARIX: Mr. Doney, do any of our guidelines for employees have any comments to make about - if they get into legal problems? What happens when they prove themselves okay or not? Is there any reference to that in any of our employee handbooks?

MR. DONEY: Not in our employee handbooks or our personnel regulations - I don't know when it's appropriate - or if it is appropriate, but I know administratively, the issue of ethics is very much in the forefront and I think that prior to the Commission on Ethics' decision, administratively, I had made a determination on the matter and I felt very strongly about it and I know this is a very difficult issue for the Town Council and the Mayor to determine and the policy

VERBATIM
TRANSCRIPT

alternatives which Mr. Randolph has outlined for you and I reread last night again, the case law as a non-attorney and really sympathize with the Town Council. It's tough. I could see and based upon Mr. Wearn's statements and comments tonight, I can see both ways and by reference the request, but I - to answer your question directly, Mayor, there is not any provision for reimbursement of legal expenses when a Commission on Ethics charge has been filed, that's why I felt, because of the complexity of the charge, I needed help from the Town Attorney and requested by memorandum his research on it and he set that forth and I think it's worth mentioning again that one of the alternatives Mr. Randolph had mentioned was that the Town Council, if it was so inclined could request the office of the Attorney General to make ultimate decision, and that again being one of the alternatives. I....

MAYOR MARIX: Mr. Heeke, I'd like to follow up my comment with Mr. Doney - having in mind, and I can fully appreciate what Mr. Pryor just said, after we've made this decision or referred it to the attorney, whichever we decide to do, I think possibly it would be in order to have some administrative procedures or whatever or comments in your manuals, so this would not like Mr. Pryor said, maybe establish a precedent for the future.

MR. DONEY: I think I do need to clarify that this issue occurring when the prior Town Manager was here was one issue, and in 1991, I did issue a memoranda to all Department Heads that related to all Town employees about my comments and opinions on ethics and we all are governed as public employees by Chapter 112, and need to make sure that our behavior and actions are consistent with 112 and we're, in my opinion, myself included, are all accountable and responsible for our own actions. I know that in Mr. Moore's case, when I had to make my determination on the issue when it had arisen, I probably can either read that memorandum or answer questions about it, but it was a very difficult issue that was posed to me administratively, and I spent a tremendous amount of time on it. The Town Council has spent not one one hundredth of the amount of time I did with that issue.

MAYOR MARIX: That's why I thought maybe we should have some tighter guidelines, Mr. Doney, so that you wouldn't have to spend one hundred hours another time.

MR. DONEY: I don't think it was the tighter - it wasn't the tighter guidelines that was the actual interpretation issues that were involved with it and I'd like to quote from my memorandum to Mr. Moore dated May 23, 1991, it references the correspondence back and forth: "After giving careful consideration to the written and oral information which you have provided regarding the incidents which occur several years ago, and your comments on the particular circumstances at that time, I believe that I have sufficient information upon which to base my decision, and that further investigation is not warranted at this time. Based upon my review of the written information which you have provided and our discussions of same, I do not believe your actions were illegal or violated any written Town regulations which existed during the period when these incidents occurred. However, I question whether you exercised proper professional judgment and discretion regarding how your actions would appear or be perceived and how your actions would reflect upon you and the Town. I request that in the future, you carefully consider not only the legality but also the perceptions and appearances of your actions and that you act accordingly to preclude the future occurrence of any incidence similar to those relating to the subject matter. Also based upon my review of the information which you have provided and our discussions on same, I believe that you did have special knowledge of these surplus materials, as a result of your position with the Town. I believe your position with the Town afforded you access to a greater level of detail regarding the surplus materials than the general public would have had. I also wish to address the second to the last paragraph of your May 14th memorandum, which reads: 'Lastly, this is a subject on which many years ago I was given advance approval and sanctions for my actions by your predecessor Town Manager.' In my opinion whether you checked with and received the advance approval of the Town Attorney and former Town Manager at that time is relevant but not the basic issue. The ultimate decision to initiate your actions was your own and the responsibility and accountability for same rests with you. I believe all Town employees must use the utmost discretion regarding questions of ethics and conduct and that each employee is directly responsible and accountable for their own actions. Finally, I believe we must both put this subject behind us but use it as a valuable learning experience." That was dated May 23, 1991 and it was done after considerable amount of research and discussions with the Personnel Director, the Town Attorney and it was a very difficult decision. I respect on a day-to-day basis, Mr. Moore's professional work, however, each instance in my opinion, is based on its own merits and in this instance, I'd - that's the reason I provided this memorandum. I have subsequently, in 1991, made reference to the Commission on Ethics the State Law Chapter 112, and I find it very difficult as I believe, the Town Council does, and also at this very time the County Commission is trying to, by Ordinance, create an Ethics Ordinance. It's tremendously complex and regardless of how much legal research is done in advance, there are always issues that are subject to interpretation. That's why I felt, rather than trying to - you can't cover all the cases, and I felt it's best to rely on Chapter 112 in terms of the accountability and actions of Town employees.

MR. HEEKE: Of course, in that point in time, the complaint had not been filed.

MR. DONEY: Pardon me?

MR. HEEKE: The complaint had not at that time been filed with the Ethics Commission, had it?

MR. DONEY: I don't know what the original date of the filing was.

MAYOR MARIX: It certainly had not been settled.

MR. DONEY: Oh no, it had not been settled. It is a confidential matter, I think, as Mr. Wearn had mentioned earlier and certainly when I was contacted, I certainly could not speak to anyone regarding my being contacted and responded directly to the investigator's questions at that time, and it's all set forth in the record also.

MRS. DOUTHIT: We have a motion on the floor.

MR. HEEKE: We do have a motion on the floor. Mr. Wearn, do you want to make any further comments?

MR. WEARN: I would only comment that Mr. Doney's memorandum clearly identifies that in conformance with the motion that is made that Mr. Moore, he considered to be acting in his professional capacity.

MR. DONEY: No.

MR. WEARN: Exercising proper professional judgment and discretion, and I would comment that the memorandum is Exhibit B to the report of Investigation. It was fully known to the Commission on Ethics. And it is part of the record.

MR. DONEY: Respectfully, Mr. Heeke, I take exception with Mr. Wearn - in terms of those excising of comments related to this, because I don't believe my memorandum leads to the comments that he's just made. I disagree with that.

MR. HEEKE: Mr. Winterfield?

MR. WINTERFIELD: For whatever relevance it may bear, I invite the attention of Council to a memorandum from Mr. Moore to Mr. Doney dated April 30, 1991, relative to use of a Town vehicle. It's hardly appropriate.....

MR. HEEKE: Mr. Winterfield, does this bear on the...

MR. WINTERFIELD: It certainly does....

MR. HEEKE: ...issue that we are confronted today and that is whether - was this a matter before the Ethics Commission?

MR. WINTERFIELD: No sir, but it is....

MR. HEEKE: If it wasn't before the Ethics Commission, Mr. Winterfield, I'd like to keep our discussion limited to that sphere - that's what we are called upon to do. All of us have stories about how this evolved and overtures that were made, etc., and that's really not what our issue is today.

MR. WINTERFIELD: I would respectfully submit that an admission by Mr. Moore that he was using a Town vehicle...

MR. HEEKE: I am going to rule you out of order, Mr. Winterfield, we're not talking about that - that issue was not before the Ethics Commission....

MR. WINTERFIELD: This is a factual issue..

MR. HEEKE: Mr.....

MR. WINTERFIELD: ...to determine whether or not he is entitled to compensation of expenses and how is it possible to determine that it is not relevant without hearing it, sir?

MR. HEEKE: I'm sorry, Mr. Winterfield, you're out of order. We are listening....

MR. WINTERFIELD: I take exception. Thank you.

MRS. WIENER: We have a motion and a second.

MR. HEEKE: We have a motion and we have a second.

MRS. WIENER: Well, it just seems to me that we could stay here all night and get more and more embroiled in this thing or we could call the question and just get it over with.

MR. WEINBERG: I will call the question. Mrs. Peters?

MRS. PETERS: Mrs. Douthit?

MRS. DOUTHIT: Yes.

MRS. PETERS: Mr. Heeke?

MR. HEEKE: Yes.

MRS. PETERS: Mrs. Wiener?

MRS. WIENER: No.

MRS. PETERS: Mr. Weinberg?

MR. WEINBERG: These charges arise from the performance of the officer's duties. I have no problem with the ethics involved, but I am disturbed by the use of public funds to defend an act of personal purpose and not a public purpose and therefore, I must vote no.

MRS. PETERS: Mayor Marix?

MAYOR MARIK: I see Mr. Weinberg's point entirely, but I think after listening to everything else, I would like to say that if I do vote the way I am about to vote - and I think you probably know what it is, I would like definitely and I would hope it would happen - I've got no power on it - to have our administrative procedures tightened up on these type of things. If you get through an Ethics Committee matter, you win, then you should go into under what conditions you automatically are going to be reimbursed. I just don't think we are attorneys - I'm not one. No-one else except Mr. Heeke is one and I just - I just don't think we should be put through this type of legal matter if we are - then we should have had a workshop first to be fully up on all these matters and with all of that, I am going to vote yes.

MR. DONEY: Mr. Heeke, procedural administrative detail - based upon the motions that were approved - I believe we need to return to what Mr. Wearn had addressed in the beginning and that's Mr. Moore's memorandum of December 21st, 1992 and this sentence is quoted: "It is for the aforementioned reasons, that I respectfully request that the Mayor and Town Council to authorize payment of these expenses and authorize two vacation days and two personal days expended to be credited back to me." If the Town Council wishes to authorize the payment, since this would be an

VERBATIM
TRANSCRIPT

unbudgeted item, it would be appropriate that - one alternative would be that the funding for the reimbursement be provided from the Undesignated General Fund Balance, and the other issues of the vacation days and personal day could be addressed by separate motion or together, depending on what the Town Council desires.

MR. HEEKE: I think we ought to take them separately.

MRS. DOUTHIT: I would move the monies be approved to be paid from the Fund....

MR. DONEY: Undesignated General Fund.

MR. HEEKE: Is there a second?

MR. WEINBERG: Well we have to pay from some place - we've already voted. Yes.

MR. HEEKE: Mrs. Peters?

MR. WEINBERG: You can take it from our salary.

MRS. PETERS: Mrs. Douthit?

MRS. DOUTHIT: Yes.

MRS. PETERS: Mr. Weinberg?

MR. WEINBERG: Yes.

MRS. PETERS: Mrs. Wiener?

MRS. WIENER: Didn't vote to appropriate it - I'm obviously not going to vote for the fund from which it shall come - No.

MRS. PETERS: Mr. Heeke?

MR. HEEKE: Yes. Alright, with respect to vacation days and

MRS. DOUTHIT: I would make a motion to deny those.

MR. HEEKE: Is there a second?

MRS. DOUTHIT: The vacation days -health days - whatever they are.

MR. DONEY: Two vacation days and two personal days.

MR. HEEKE: Is there a second?

MRS. WIENER: There is.

MR. HEEKE: Discussion on the motion? There being no discussion, Mrs. Peters?

MRS. PETERS: Mrs. Douthit?

MRS. DOUTHIT: Yes.

MRS. PETERS: Mrs. Wiener?

MRS. WIENER: Yes.

MRS. PETERS: Mr. Weinberg?

MR. WEINBERG: Yes.

MRS. PETERS: Mr. Heeke?

MR. HEEKE: Yes. Any Other Matters? Oh, excuse me.

MR. WEARN: May I say to all of you - thank you very much for your very deep consideration of this matter. I appreciate it. On behalf of Mr. Moore.

VII. ANY OTHER MATTERS: Mr. Heeke called for Any Other Matters and there were none.

VIII. ADJOURNMENT: Mrs. Wiener moved to adjourn the meeting and it was adjourned at 6:55 PM.

Adjournment

Grace T. Peters
Town Clerk