

TOWN COUNCIL MINUTES OF SPECIAL TOWN COUNCIL MEETING HELD

JANUARY 29, 1992

Roll Call

I. CALL TO ORDER AND ROLL CALL: A special Town Council meeting was called to order by President Heeke at 9:00 AM in the Town Council Chambers on January 29, 1992. On roll call, the following elected officials were found to be in attendance: Mayor Marix, President Heeke, President Pro Tem Weinberg, Councilwomen Douthitt and Wiener and Councilman Ilyinsky. Others in attendance for all or portions of the meeting were: Town Manager Doney, Town Attorney Randolph, Town Clerk Peters, Director of Public Works Dusey, Town Engineer Bowser, Mr. Jakubiak and Mr. Elwell.

Invocation

II. INVOCATION AND PLEDGE OF ALLEGIANCE: Invocation was given by Mrs. Peters and Pledge of Allegiance was led by President Pro Tem Weinberg.

III. APPROVAL OF AGENDA: Agenda was approved on motion of Mr. Ilyinsky, seconded by Mr. Weinberg. On roll call, the motion carried unanimously.

Char.Sol
App. for
Pilchuck Glass
School

IV. CONSIDERATION OF CHARITABLE SOLICITATION APPLICATION FOR PILCHUCK GLASS SCHOOL. NO. 333-92. Mrs. Peters explained other than the late filing, the application for Pilchuck Glass School is found to be in order. Motion was made by Mr. Ilyinsky to approve the Charitable Solicitation application for Pilchuck Glass School. Seconded by Mr. Weinberg. On roll call, the motion carried unanimously.

V. APPROVAL OF EXCERPT OF MINUTES OF JANUARY 14, 1992 TOWN COUNCIL MEETING REGARDING PEP REEF AT MID-TOWN PUBLIC BEACH AREA. After discussion, it was decided to put this matter over to the Town Council Meeting of February 11, 1992 since some members of the Council had not yet read them.

Contract with
American Coastal
Engineering

VI. CONSIDERATION OF PROPOSED CONTRACT WITH AMERICAN COASTAL ENGINEERING, INC., FOR PEP REEF AT MID-TOWN PUBLIC BEACH AREA. Mr. Heeke advised at the last meeting, staff was instructed to work out the draft contract as there were several items that needed to be concluded.

Attorney Randolph reported they have gone through the contract and were satisfied at the staff level that the changes made were appropriate, such as the sharing of the cost in the event there were any changes required to the reef and that has been made and incorporated in the first paragraph.

He stated he would like to go through the items that have not been resolved to which the Mayor and Council agreed. Mr. Randolph referred to Item C, Page 5, recalling Mr. Weinberg had asked the question as to how defects would be defined and who would make the determination as to whether or not there is a defect. He suggested the Town should make the determination as to what the defects were and he thought that was acceptable to Mr. Lickie, but found that was not the case as Mr. Lickie did not intend the Town would be the final arbiter in making the determination in the event there is a defect. He stated they have drafted the language that the resolution would be with the Court. He did not wish to presume the way the Council should act on this but is bringing it to Council's attention, as this has not been resolved and it is for the Council to make that determination.

Mayor Marix wondered if there would be a way rather than going to court to have a third party involved to make a determination. Mr. Heeke believed that was available through the mediation process, once the lawsuit is filed, rather than build in arbitration, as he was thinking of the cost of arbitration. Mayor Marix stated she didn't wish to go to court at all and gave an example that in the event there is a hairline crack, there could be a third party who would be an expert and could solve the matter rather than going to the court. Mr. Randolph asked if she meant that the Town would chose a third party and the American Coastal people would chose a third party and those two could chose another who would resolve the dispute, wondering if the Town would then be bound by that decision. Mayor Marix did not believe so as if at that point they couldn't solve it, then they could go to court. Mr. Randolph stated he could put language in the contract that in the event there is a dispute between the Town and the contractor, they would enter this process, and that would be completed within a reasonable period of time and in the event it cannot be resolved, they could go to court.

Mr. Lickie advised if the Town doesn't want to be bound by the decision of this particular Board, he believed it should be left silent, and ultimately they could go to court. He stated as a practical matter when there are disputes, that is the type of procedure which one would enter into and an agreeable resolution would try to be found, such as hiring outside engineers to come in and look at the reef to determine if there is or is not a defect. He believed if the parties still intend to disagree, then the court would be the ultimate arbiter. Mr. Lickie announced the sole point of the paragraph was to allow the Town to be the sole source of determination and notification that there is in fact a defect and whether they learn it from DNR or someone locally, but if there is a problem with the reef, the Town would notify American Coastal. He stated then if it was obvious there was a defect, it shouldn't be a problem, but if it is something that is debatable they would enter into some reasonable negotiations to try and resolve it. Mr. Heeke believed this was still an option and it was not foreclosed or required, to which Mr. Lickie agreed believing that the Town didn't want to be bound to being the final determinator.

Mr. Weinberg stated he would feel more comfortable if there was some indication that the third party would have an engineering background. Mayor Marix asked if it would be a coastal engineering background? Mr. Heeke believed that was what they were suggesting and if there is a dispute, each side would prepare themselves quite well and have appropriate advice for the experts, whether it be a constructional engineer or a coastal engineer.

Mr. Randolph asked if the Council was suggesting there be nothing in the contract to address the dispute process? Mr. Heeke wondered if it were necessary as when in the normal course of events, if a dispute arose, there would be information from an expert which would be further investigated and the contractor would also be doing the same thing. Mr. Randolph felt if it were left in, it might force the parties to get to the table and try to have the matter resolved. Mayor Marix asked if there was anything wrong with putting it in the contract? Mr. Lickie suggested perhaps some precatory language which would state the parties would agree to attempt alternative dispute resolutions prior to going to court and this would point the parties in that direction but

would not be binding. Mr. Ilyinsky liked the third party arbitration system stating he thought that would be the best way to go. Mr. Weinberg agreed noting the third party should be a professional. Mr. Ilyinsky believed the third person would be named by the two others. Mrs. Douthit felt they would all be professionals by nature of the beast.

Mr. Lickle stated they would be agreeable to non-binding arbitration, or the binding arbitration. Mr. Randolph believed the point made by Mr. Heeke that both of the parties would want to resolve this without going to court, but if it is left in, it does set forth a procedure to attempt to resolve the dispute and forces the parties to the table before going to court, if there was some resolution process that would not be binding on either party. Mr. Heeke stated this would insert language in the contract which would require the party to mediate but would not be binding. Mayor Marx agreed since it is not known who will be making those decisions later. Mrs. Wiener envisioned the problem where one could not get along with the other and he would go to the table and state that and then leave and by doing that, he had responded to the requirement. Mayor Marx stated under some circumstances, however, some relatively minor problem may arise and if that language is not in there, it would have to go court. Mr. Heeke stated his concern was if there was a relatively minor problem, and this language was in there, how far would the rabbit be chased up the tree. Mayor Marx felt if it were minor, it wouldn't get to that point to begin with and if the Town is made aware there is a crack and they go to American Coastal and tell them, and the response is it doesn't matter and they state their reason, the Town would probably agree but if the Town shouldn't agree, then they would go through the resolving process but if they all walk off, then we could go to court. She felt the language would be helpful.

Mr. Ilyinsky stated what if something should happen to Mr. Rauch and someone else took over the project and they didn't feel towards the Town as Mr. Rauch did, it could create a problem.

Mr. Ilyinsky moved there be language in the contract to encourage the parties to non-binding resolution of any problems with the Town and American Coastal Engineering might have, selecting their experts to handle it and if they do not agree, and it becomes necessary to get a third opinion, the two experts would select a third expert on a dispute resolution. Mrs. Douthit commented it was her thinking that the numbers of people should not be specified as the more you have, the more confusing it can get, and asked if they could just recommend non-binding mediation prior to court action or something like that? Mr. Lickle stated each side would hire their own experts and if they could not agree, they would agree to submit their findings to a third expert who would break the tie. Mayor Marx thought that language would be a little more general and that would possibly say exactly how many people would be involved.

Mr. Doney advised the language would force the issue and it would be non-binding, but working in good faith, it should be able to be resolved. Mr. Randolph agreed indicating there should probably also be some sort of a time schedule as if the parties feel it is not working out within a reasonable period of time, they could opt out at that time. He believed what he was hearing is they would like to have some sort of language which would force the parties to the table, but that they would not be bound to a decision and if for some reason, the arbitration is going on for too long a period, the parties would have the opportunity to opt out. Mayor Marx believed it should state that rather than going to court action, they would be required to have this method of working it out. Mrs. Douthit agreed but felt there should be a time period. Mr. Heeke pointed out if there is an emergency situation, however, this time period could stand in the way.

Mr. Adrian Winterfield addressed the Council asking why they were reluctant to engage in binding arbitration as the whole purpose is to accelerate the procedure and if the arbitration is binding, there would be no appeal, except for the enforcement of the finding, but if they go to court, no-one knows how long that will take and the nature of the defect may be such that it would be aggravated if it should drag on. He felt with a qualified professional arbitrator the matter could be handled far more quickly.

Mr. Ilyinsky asked what the difference was between binding and non-binding arbitration. Mr. Heeke explained non-binding means that either party can seek remedy through the court, but if it is binding arbitration, they would be bound by the determination of the third party and he was not in favor of that, to which Mrs. Wiener agreed.

Mr. Ilyinsky amended his motion to have it include a time constraint. Motion was seconded by Mrs. Wiener. On roll call, the motion carried unanimously.

Mr. Randolph stated the next item is at the top of Page 6, and this is the amount of the surety bond for reassignment if required, or for correction of defects. He believed they should hear from Mr. Dusey and the contractor as to what they felt would be a reasonable figure. Mr. Heeke asked if it should be a percentage of the estimated cost of realignment? Mr. Dusey stated it is difficult to come up with a figure as this would be for defects in the units themselves and the realignment, if necessary so it could be a range from one hundred thousand to over a million dollars and he suggested the figure be in the range of \$250,000 anticipating that the reef will not deteriorate and become unusable because of faulty materials.

Mr. Randolph stated a minimum should be set for the bond, but if the premium is negligible perhaps an additional one hundred or two hundred thousand, they should go to that extent. Mrs. Wiener asked Mr. Lickle what he thought this figure should be. Mr. Lickle responded it is difficult to put a number on this. Mrs. Wiener thought they should figure out the worse case scenario and they would take the number of units and the actual cost to do the work, without profit, as this part of it should be non-profit. Mr. Lickle stated it would be a non-profit deal because it would be up to American Coastal, but the specifics that can be given are estimated cost of the realignment and/or replacement of units, however, the question is to what extent could the theoretical liability extend as it is unknown - would it be one unit or all units, and that is the problem. Mrs. Wiener responded what would it cost if we did all of them - the actual cost - and then a determination can be made.

Mr. Rauch addressed the Council indicating if he drew on his experience with the reef that is installed, there was a storm on March 10, 1989 which required them to realign a portion and it came to approximately five per cent of the total cost of the reef. He stated when they designed the new reef, they paid a lot of attention to that and fashioned it in such a way that it is their hope this would not occur under normal circumstances and they have had tank tests for stability and calculated for a 66 year storm wave and under those conditions the reef is calculated to stand double the amount of force. He advised five per cent of this cost would be \$100,000 and they have precisely addressed that point by the new design. Mrs. Wiener stated now they have some idea.

Contract with
American
Coastal Eng.
(cont'd)

Mr. Heeke asked if they have investigated what the premium amount would be? Mr. Lickle stated this has not been completed due to the time constraints and the uniqueness of this project as the insurers are gathering data with actual premiums as nobody has ever done a project like this before. He stated some of it is Lloyd's and some of it is other insurance companies and they are trying to put it together as a package, and they also must decide what the exposure might be in order to determine the premium. Mrs. Wiener asked if they had any ballpark figure? Mr. Lickle responded it was as much as two points on the value of the bond.

Mr. Heeke suggested it be up to \$7500 for the premium. Mrs. Wiener did not agree, indicating it should be the bond amount that they set.

After discussion, Mr. Heeke suggested the bond amount should be \$250,000. Mr. Randolph indicated they may have to come back on this if the premium is going to be exorbitant. Mrs. Wiener believed the language should read: "not to exceed \$250,000". Mr. Randolph stated that was in the language originally and he took it out as it was thought that determination would be made at the time the contract was signed. Mayor Marix suggested they stated they would like to have \$250,000 and if the administration considers it is unduly high, they could come back at the February meeting. Mr. Heeke stated the language states this is subject to the approval of the Town, and this would include the quality of the insurer and the amount of the premium, to which Mr. Randolph agreed but the question is whether it would be left up to staff or whether the Council wants to look at it again. Mayor Marix thought if it is found the bond could be bought from a reputable company for a reasonable premium, the staff should do it but if that is not the case, the Town Council will then look at it. Mr. Lickle suggested it should be conditioned upon negotiations not to exceed the two points of the value of the bond. Mayor Marix asked what it were two points one? Mr. Lickle responded they could set it at three points and they will do their best to negotiate the lowest rate with a quality company which has to be approved by the Town. Mr. Randolph felt he had enough guidance to bring it back to the Council if they should get bogged down on this issue.

Mr. Randolph advised the Council that all of the insurance policies must be in place before the contract is executed, even though there is a fourteen day provision, Mr. Doney will want to see binders that all of this is in place. Mr. Lickle clarified the language says "prior to the inception of any work" and not "prior to signing". Mr. Randolph indicated he did not want the Town to be bound to a contract and find they will not find insurance in place that has been required as part of the contract. Mr. Lickle understood that but in the contract there is a fourteen day requirement and if those policies are not provided within that period, the contract could be cancelled. Mr. Heeke noted if that was the case, the contractor would be proceeding during that fourteen days at his own expense. Mr. Randolph stated he had no problem with that as long as there is a provision that the Town does have the right to cancel the contract. Mr. Lickle viewed it as an automatic breach of contract if after the fourteen days, the insurance was not provided. Mr. Randolph asked if a sentence could be added to reflect that to which Mr. Lickle agreed.

Mr. Doney asked if Article XIV, Page 11, had been resolved to the Town Attorney's satisfaction? Mr. Randolph stated it has, noting this was a provision he asked to be added and means that the title to the project will be with the Town of Palm Beach for all work that has been paid for and at any time if this is cancelled, the title is with the Town and the contractor has asked that there be an exception for that for any trademark, service mark or patentable rights or equipment relating to the proprietary design specification. He stated he has had conversations with Mr. Lickle who asked if the forms were paid for, would the Town have title to them as that would be something that is a patentable right of the contractor. Mr. Lickle stated he thought the whole discussion had come up about the Town having title to those forms and when the value was explained, it was almost a moot issue as the forms would be unusable after twenty three forms and the total cost of the forms was \$138,000. He stated the segments would be titled in the Town's name and if for any reason they were poured and were not installed but once they are installed, they are owned by the Town.

Mr. Randolph asked what happens if they are not unusable or in a bad state and the contract is cancelled when only a few segments have been produced, would there be any objection by the contractor and the Town of owning those forms, having paid for them? Mr. Rauch stated that would be debatable but on the other hand should the forms be needed and if they are able to be used and there was a desire to have the reef extended or another section built, then there would be no extra charge for a future reef construction for new forms. Mayor Marix asked if they wanted to copy the reef or have someone else copy it, the patent exceptions would apply. Mr. Rauch stated if they wanted to use the forms which were still useable, there would be no charge. Mrs. Wiener asked what if somebody else comes along, would they allow them to use it as that was her concern as the Town would be paying for something that someone else would have the use of and she would like to see some kind of language that this would only be used for the Town. Mayor Marix felt if that was the case, they would pay for the use of them. Mr. Lickle responded it would be acceptable that these forms would only be used for this particular project or any extensions of the project with the Town of Palm Beach.

Mr. Lickle referred to the termination clause on Page 11, Article XIII. Mr. Randolph stated there was discussion as to whether there should be termination without cause and he thought they should as the termination with cause is in Article XII at the bottom of Page 10 and that deals with breach of the contract, which would be termination with cause. He stated the language reads: "The Town reserves the right to terminate this contract at any time upon fourteen days prior written notice to the contractor." He commented that in such event, the contractor shall be paid for everything he has done up to that time.

Mr. Randolph referred to Item 4 under D is a new item and the contractor added that. Mr. Lickle explained staff is agreeable to leave this as an open item pending the DNR Test Plan being developed. He advised this item is for administrative costs for compliance with the paper work required not only by DNR, but DER, ARMY CORPS. etc. and the estimate, including buoy replacement and monitoring the reef during the four year period and it is not known what that figure will be and as long as everyone understands there is a figure which will have to be developed and this can be left as an open item at this point. Mr. Randolph asked if he wanted to eliminate this item to which Mr. Lickle responded they should make reference to it that an amount will be agreed upon to comply with the permit monitoring, etc., and American Coastal will, if the Town wanted to take over the buoy maintenance, they would reduce it accordingly.

Contract with
American Coastal
Eng. (cont'd)

Mr. Dusey explained the paperwork has not been defined as yet and he thought there would be extraordinary things done with the monitoring plan and American Coastal may or may not play a role in that as well as the Town and this is wide open at this time and he would rather leave it that way for future discussion and negotiations if need be, as there may be no role for American Coastal and it is just not known as yet. Mr. Heeke believed it will depend on what the DNR will require. Mr. Dusey agreed stating that is not known as yet. Mr. Lickie advised it would not only be DNR as the other agencies may require, because of the experimental nature of the project, exhaustive amounts of paper work, sand testing, etc., which must be complied with and it could be extensive.

Contract
with Amer.
Coastal eng.
(cont'd)

Mrs. Wiener believed it should say that administrative costs to comply with permit monitoring requirements will become a part of this contract at such time as they are aware of what those requirements will be. Mr. Randolph was not sure they would want to bind them to say it would be part of the contract as they don't know the cost as they may find they want to negotiate the monitoring. Mr. Doney believed it should be mentioned in an appropriate way acceptable to the Town Attorney and advised them that American Coastal can do a defined scope of work with identified manhours for complying with the recording and monitoring requirements as identified in the permits with the conditions as in that way it would be similar to the Water Resources Study and they can separately identify the monitoring functions. Mr. Lickie advised that was acceptable and suggested general language be used that indicates this is a matter which will be worked out to the mutual satisfaction of both parties.

Mr. Randolph asked if the extended liability insurance amount has been determined on Item 3? Mr. Lickie advised that also has not yet been determined. Mr. Doney asked if the fourteen day period would apply also to the bond and all other attachments and requirements identified in the contract? Mr. Lickie responded if he was talking about the surety and the extended liability insurance which would all be presented prior to the fourteen day expiration.

Mr. Randolph stated he doesn't know how to resolve the amount in this Item 3. Mr. Lickie advised they will discuss with Town staff as some of this may fit within the Town's self-insurance if the title is turned over to the Town, and this may offset some of the premium involved in having an extended liability program and would be duplicative of any normal overhead cost. Mr. Doney advised he has discussed this with the Risk Manager who feels these would be over and above any of the insurances the Town has within its current package and he was envisioning the extended insurance package would be one where American Coastal would acquire it and meet the specifications and it would be at the Town's expense and the Town would be named as an additional insured. Mrs. Wiener agreed as this could affect the whole tax base if there was a catastrophic effect and she thought the two should not be aligned. Mr. Lickie understood this and stated he believed that was the way it was proceeding, but it was their thought that if the premium was higher than expected, this might be a possibility to weave this through the Town's self-insured package, as since the Town is paying the premium it may be in a position to get a less expensive binder than American Coastal.

Mr. Randolph reported this is for the indemnification provision which will survive after the thirty six month period. Mr. Lickie stated that was correct plus the liability portion under the indemnification and it would not be through the 36 month period as that would be covered under the Surety Bond. Mr. Randolph asked if the Town had agreed to the cost of an insurance policy for the contractor to indemnify the Town, as he didn't recall that being discussed. Mr. Lickie believed it was discussed at the last meeting and Mrs. Wiener recalled also it was discussed and she voted against it and that was one of the reasons why she voted against it. Mr. Randolph advised if this premium is in an exorbitant amount, he would bring this back to Council before they expend the funds for the premium but he would like to have some guidelines. Mr. Heeke asked if there was any idea of what the premium would be? Mr. Lickie responded they do not have any amount to present at this time. Mr. Heeke decided this may have to come back to which Mrs. Wiener agreed.

Mr. Lickie advised if staff does feel comfortable with the number, based on past history and experience, they would not have to come back.

Mr. Randolph stated that completed his comments on the contract. Mr. Doney indicated there were two other issues he had to raise, one is a motion is needed to authorize the Town Manager to execute the contract and secondly, authorizing the transfer of funding from the Capital Improvement Fund.

Mr. Heeke believed they were ready for the motion to authorize the execution of the contract with the changes and contingent upon whether or not staff wanted to bring back Item E-3 when the figure is known to the Council.

Mrs. Wiener stated she had a few questions she would like answered as she had a concern about the experimental project and wondered if the Town had ever been involved in a dual situation of buying an experiment that was not bid? Mr. Doney responded negatively to which Mr. Randolph agreed. Mrs. Wiener stated she would feel relieved if there was some information concerning both the company and the project and asked if incorporation papers were available? Mr. Lickie advised he had them. Mr. Randolph stated he did not have them. Mrs. Wiener asked if that would include the Board members and the officers of the corporation and the investors? Mr. Lickie responded it would include the officers and the directors which are public information but not the investors. Mrs. Wiener asked if they would have a problem giving them a list as with the Town not being the final arbiter and that is the reason she asked the first question as the Town is not usually purchasing an experiment. Mr. Lickie responded it is a private company with each of the investors being share-holders and all of who would have a say-so as to whether or not they wanted the information revealed.

Mrs. Wiener asked if there was on record the most recent quarterly statement? Ms. Mitchell responded negatively. Mrs. Wiener asked if they could release it to the Town as the Town is doing business with their company? Mr. Lickie responded it is not a public company so as far as an audited statement, it would not be required. Mrs. Wiener recalled these are requested for such things as charitable solicitation permit and since the Town is doing business with American Coastal, that is where she is coming from. Mr. Lickie responded charities are usually 501(c)(3) organizations. Mrs. Wiener stated she wanted to get across the point that the Town is in an extremely unusual situation here dealing with an experiment and she is asking if these things can be made available and if they can't, that will be fine too, but she felt she had to ask these questions to see if they are available.

Contract with
Amer. Coastal
Eng. (cont'd)

Mrs. Wiener commented on the law suit that is pending against American Coastal which she read about in the paper with regards to a patent matter and asked if there were any other law suits with which American Coastal was involved? Mr. Lickie responded negatively.

Mrs. Wiener stated since they are not going out to bid on this, the actual cost of any of the materials or time is not known and asked if they could or would they be prepared to state if they were in the normal profit range of ten per cent plus or minus in either direction of the two? Mr. Lickie stated he didn't believe that could be calculated at this point, depending upon the ultimate expense is to the company after the installation is completed.

Motion was made by Mrs. Douthit to authorize the Town Manager to execute the contract, upon the satisfactory completion of the details as discussed this morning. Mr. Ilyinsky asked if this would have to come back to the Council before final execution? Mr. Heeke stated the only way would be if the staff was not comfortable with certain items. Seconded by Mr. Ilyinsky. On roll call, the motion carried 3-2 with Mr. Weinberg and Mrs. Wiener voting against the motion.

VII. ANY OTHER MATTERS:

Funding for
PEP Reef

A. APPROPRIATIONS OF FUNDING FOR THE PEP REEF AT MID-TOWN PUBLIC BEACH AREA. Mr. Doney asked if the Town Council would consider a motion authorizing the transfer of funding which currently exists for the Mid-Town Beach Nourishment Project in the Capital Improvement Fund to the Mid-Town PEP Reef Project. He advised the prior appropriations were in the amount of \$3,314,953 and expenditures of \$922,147, however, there has been reimbursement of \$481,099 from DNR. He recommended this again be revisited during the upcoming budget year, however, the motion today is to authorize the transfer of \$1,984,000 plus the numbers identified for the Exhibit D and Mrs. Douthit so moved indicating she would also like to include any other costs which were discussed today with regards to insurance. Mr. Doney believed that was covered under Exhibit D. The motion was seconded by Mr. Ilyinsky. On roll call, the motion carried 3-2 with Mr. Weinberg and Mrs. Wiener voting against the motion.

Notice to
Proceed

B. AUTHORIZE THE NOTICE TO PROCEED BE ISSUED SUBJECT TO THE EXECUTION OF THE CONTRACT. Mrs. Douthit moved the Town issue the Notice to Proceed after the contract is executed. Seconded by Mr. Ilyinsky. On roll call, the motion carried 3-2 with Mrs. Wiener and Mr. Weinberg voting against the motion.

Adjournment

VIII. ADJOURNMENT. There being no further business, the meeting was adjourned at 10:25 AM.

Grace T. Peters
Town Clerk