# MINUTES OF THE TOWN COUNCIL MEETING HELD ON WEDNESDAY, NOVEMBER 12, 1997

## 1. CALL TO ORDER AND ROLL CALL

The Town Council Meeting was called to order by President Smith at 9:30 a.m. on November 12, 1997. On roll call the following Elected Officials were found to be in attendance: Mayor Paul Ilyinsky, President Lesly Smith, President Pro-Tem Leslie Shaw, Councilmen Jack McDonald, Sam McLendon, and Allen Wyett. Also in attendance for all or a portion of the meeting were: Town Manager Robert Doney, Assistant Town Manager Peter Elwell, Assistant to the Town Manager David Jakubiak, Town Attorney John Randolph, Chief Code Compliance Officer Brian House, Finance Director James Demming, Golf Pro Manager Rick Dytrych, Personnel Director Bill Crouse, Planning, Building, & Zoning Director Robert Moore, Planning, Building & Zoning Administrator Paul Castro, Police Chief Joseph Terlizzese, Fire-Rescue Chief Ken Elmore, Public Works Director Al Dusey, Recreation Director Russell Bitzer, and Town Clerk Mary Pollitt.

## II. INVOCATION AND PLEDGE OF ALLEGIANCE

The invocation was given by Rabbi Scheiner of the Palm Beach Orthodox Synagogue. President Smith led the Pledge of Allegiance.

## III. PRESENTATIONS

### A. Presentation to Mrs. Maria Pollock in Recognition of Eugene N. Pollock's Service on the Town's Golf Commission from 1995 to 1997

Mayor Ilyinsky presented a plaque to Mrs. Pollack in loving memory and recognition of her late husband, Eugene Pollock.

## IV. COMMENTS OF THE MAYOR

Mayor Ilyinsky reminded all that November 23-28, 1997 was Fellowship Week, which would provide an opportunity for persons of all faiths to come together and promote fellowship in the community.

Mayor Ilyinsky recognized Town Clerk Mary Pollitt for the award of Certified Municipal Clerk, and commented that her efforts and dedication had been valuable to the Town of Palm Beach.

Mayor Ilyinsky congratulated Chief Elmore and all members of the Fire-Rescue Department in the Communications Division in receiving a Class II rating from the Insurance Services of the United States. He commented that the Fire-Rescue Department was the finest in the world.

Mayor Ilyinsky reminded all of the Holiday Tree Lighting on Royal Poinciana Way on Monday, December 1, 1997; at Memorial Park on South County Road on Tuesday, December 2, 1997 at 5:30; at Worth Avenue and Hibiscus at 6:30 P.M.

## V. APPROVAL OF THE AGENDA

**The following changes were made to the Agenda:**

**Added:**

Motion made by Councilman McLendon, seconded by President Pro-Tem Shaw, to add Consideration of the Worth Avenue Sidewalk Project, under X. New Business, D. Other, Item 5. On roll call the motion carried unanimously.

Motion made by Councilman McLendon seconded by President Pro-Tem Shaw to add Consideration of the Issue of News Racks in the Town of Palm Beach, under X. New Business, D. Other, Item 6. On roll call the motion carried unanimously.

Motion made by President Pro-Tem Shaw, seconded by Councilman McLendon to add Consideration of the Issue of Traffic control Between Mar-a-Lago and Widener's Curve, under X. New Business D. Other, Item 7. On roll call the motion carried unanimously.

Motion made by President pro-Tem Shaw, seconded by Councilman Wyett, to add Consideration of the Issue of the Existing Traffic Light on Sunset and County Road, under X. New Business D. Other, Item 8. On roll call the motion carried unanimously.

Motion was made by Councilman Wyett, seconded by Councilman McLendon to approve the Agenda as amended. On roll call the motion carried unanimously.

*(After discussion heard regarding ITEM VI. COMMUNICATIONS FROM CITIZENS, motion was made by President Smith, seconded by President Pro-Tem Shaw, to add Consideration of the Issues Regarding the Residents of Park Avenue and the Conditions Relating to the Operation of the Palm Beach Hotel, 251 Sunrise Restaurant, and the Palm Beach Hotel Annex, under X. New Business D. Other, Item 9. On roll call the motion carried unanimously).*

## VI. COMMUNICATIONS FROM CITIZENS - 3-MINUTE LIMIT PLEASE

Dr. Rhonda Nasser, 242 Park Avenue, spoke regarding disturbances in the area from C. J.'s Restaurant and the 251 Sunrise Restaurant-- specifically open garbage dumpsters, rats, noise, truck deliveries, shouts and laughter of people, parking problems, engine noises, and commercial vehicles. She requested:

1) restriction of operating hours for C.J's Catering Business;
2) limit the evening hours of dumping for both C.J.'s and the 251 Sunrise Restaurant;
3) enforce, as per the agreement in 1996, trash pick up and all deliveries for the restaurant be on Sunrise only;
4) that no parking of vehicles be allowed to the rear of the hotel;
5) restrict the hours of drinking and serving of food for the outdoor patio area of the 251 Sunrise Restaurant.

Carol Hicks, 251 Park Avenue, spoke regarding the video she had sent in concerning the noise level in the area, requesting consideration by the Town Council.

Gilda Ellis Beane, 248 Park Avenue, spoke regarding the noise level in the area, and the trash from the restaurants, requesting that the proper procedures for odors and noise be followed and enforced by the Town.

Donald Dement, General Manager of the Palm Beach Hotel Condominium Association, representing approximately 300 condominium unit owners, spoke regarding the comments of the above residents, stating that there had been an attempt to work with the Environmental Department people, the Health Department people, Code Enforcement people, etc., and everything that had been asked for was completed. Programs had been established to clean dumpsters and the surrounding area. He maintained that trash pick up noise was unavoidable. He commented that there was not total control over the restaurant and catering operations, and that he would be happy to help in any way he could.

Mrs. Smith passed the gavel and moved that discussion of this problem be added to the Agenda under X. New Business, D. Other, Item 9. The motion was seconded by President Pro-Tem Shaw. On roll call the motion carried unanimously.

Mrs. Ann Herman spoke regarding the 15th Annual LPGA Par III Tournament, which would be held on Saturday, January 31, 1998, and invited all to attend. She addressed the proposed signal light on South Ocean Boulevard by the Par 3 Golf Course , and asked that it be put on hold for the time being.

Francine Bernard, 234 Park Avenue, spoke regarding the situation on Park/Sunrise Avenue agreeing with the discussion that had taken place today.

Mariano Garcia, who had represented the restaurant at 251 Sunrise during the approval process, spoke regarding the situation on Park/Sunrise Avenue, and maintained that the owners of the restaurant acknowledged their responsibility for any problems occurring within their space, and were willing to address them. They were also aware of the ongoing problems through the years between the residents of Park Avenue and the hotel. He invited all to a meeting which could be held to address the issues.

Attorney Charles Hickman, representing the Condominium Association, spoke regarding ongoing litigation between his client and Dr. Rhonda Nasser, and the issues involved.

Catherine Bradley, resident of Park Avenue, commented on the noise and disturbances on Park/Sunrise Avenue.

Adrian Winterfield spoke regarding the situation on Park/Sunrise Avenue, stating that it was important to those involved, but probably not to the rest of the community, and suggested that this matter be the subject of a special meeting, or be considered at committee level.

Mr. Winterfield addressed the question of occupational licenses, which he maintained merited attention from either the Town Manager or a Council Committee to ensure that the ordinance was being applied consistently.

**APPROVED AGENDA**

**VII. APPROVAL OF MINUTES OF OCTOBER 14, 1997**

**VIII. LICENSES AND PERMITS**

**A. Charitable Solicitations**

1. The Society of the Four Arts; No. 62-98
2. Juvenile Diabetes Foundation International, Palm Beach Chapter; No. 240-98
3. Adopt-a-Family of the Palm Beaches, Inc.; No. 254-98
4. Kiwanis Club of Palm Beach; No. 380-98
5. American Committee for Sharre Zedek Medical Center; No. 396-98
6. Crohn's & Colitis Foundation of America, Inc.; No. 415-98
7. Brandeis UNWC West End Chapter; No. 429-98
8. Support, Aid & Fundamental Essentials for Children (S.A.F.E.); No. 430-98

**Other - Results Forms Filed Late and $25 Late Fee Paid**

9. The American Heart Association; No. 6-98
10. The Peggy Adams Animal Rescue League of the Palm Beaches, Inc.; No. 7-98
11. The March of Dimes Birth Defects Foundation; No. 27-98
12. The Garden Club of Palm Beach; No. 123-98
13. The Community Foundation for Palm Beach and Martin Counties, Inc.; No. 221-98
14. New Hope Foundation; No. 398-98
15. American Red Magen David for Israel; No. 410-98

**Other - Results Forms Filed Late - No Late Fee Paid**

16. The Jewish Theological Seminary of America; No. 27-98
17. Paracare Association of Palm Beach, Inc.; No. 143-98
18. Town of Palm Beach 15th Annual Pro-Am Benefit Golf Tournament; No. 227-98

Councilman Wyett moved approval of the Approved Agenda. The motion was seconded by President Pro-Tem Shaw. On roll call the motion carried unanimously.

**REGULAR AGENDA**

**IX. OLD BUSINESS**

**A. Ordinances (Third Reading)**

**1. Ordinance No. 12-97 - Amendments to Charitable Solicitation Ordinance**

Town Attorney Randolph read Ordinance 12-97 by title:

AN ORDINANCE OF THE TOWN COUNCIL OF THE TOWN OF PALM BEACH, PALM BEACH COUNTY, FLORIDA, AMENDING CHAPTER 10, ARTICLE 5 OF THE TOWN CODE OF ORDINANCES RELATING TO CHARITABLE SOLICITATIONS; PROVIDING FOR SEVERABILITY; PROVIDING FOR REPEAL OF ORDINANCES IN CONFLICT; PROVIDING FOR CODIFICATION; PROVIDING FOR AN EFFECTIVE DATE.

Councilman Wyett moved approval of Ordinance 12-97. The motion was seconded by President Pro-Tem Shaw. On roll call the motion carried unanimously.

**B. Other**

**1. Consideration of Agreement with the Citizens' Association South of Sloan's Curve to Implement Beach Cleaning Program *(Deferred from September 9, 1997, and October 14, 1997)***

Mr. Randolph presented a revised Agreement, commenting that liability language had been incorporated, which was included in Section 7 of the Agreement, providing that the Association itself, not the property owners who give permission to come onto their land, would defend, indemnify, and hold harmless the Town of Palm Beach, its officials and representatives from any obligations or actions which occur pursuant to the terms of the Agreement. It was provided that the Association should maintain, and enforce, a comprehensive general liability insurance policy, listing the town as an additional insured on the policy, with limits of not less than $500,000 per occurrence. There were other minor modifications made--figures were taken out under Section 5, and percentages were now indicated.

Councilman Wyett moved approval of the Agreement with the Citizens' Association South of Sloan's Curve to Implement a Beach Cleaning Program. The motion was seconded by Councilman McDonald.

Attorney Max Schorr commented that another important change in the Agreement was that the name of the condominium organization had been changed to the "Citizens' Association of Palm Beach, Inc.", and he requested that Town Attorney Randolph make that change in the Agreement.

In response to President Smith, Town Attorney Randolph explained that the Agreement was between the Town and the Citizens' Association, and it would be up to the Association to get the agreements from any hotels that would be included in the beach cleaning process, which would be included as an exhibit attached to the Agreement.

President Pro-Tem Shaw asked for clarification as to the membership of the Association, now that the name had been changed.

Town Attorney Randolph noted that the Agreement obligated the Town only to those properties located between Sloan's Curve south to the Town limits.

Attorney Schorr noted that there was a provision in the Agreement that the properties referred to were located south of Sloan's Curve. He mentioned that the Association had not approached all of the condominiums, but had approached many who had expressed an interest in joining in the beach cleaning program, however, there had been no contracts signed as yet, nor had every one of the hotels been approached. The intention was to solicit each and every condominium member in the area, as well as the two hotels. The Association could not go forward until the Agreement was approved by the Town and executed.

President Smith stated that she had understood that the Association had planned to have a membership meeting prior to the Town Council Meeting, at which time it was to be determined how many of the condominiums would be participating; that once the Town Council knew how many condominiums were participating the Agreement would be executed.

Attorney Schorr replied that Mr. Wolfe had informed him that there had not been a meeting of all of the condominium members to ascertain their willingness to participate, although he had approached them informally and a unanimous interest had been expressed. He suggested that a firm commitment from participants be obtained before the Town would invest any money in the project.

Public Works Director Al Dusey reported that it was the intention of the Town not to proceed with equipment purchase or anything else until there was an indication from the vast majority of the members of the Association that they would participate.

Town Attorney Randolph added that the language in the Agreement itself contemplated the fact that the Town would not sign the Agreement, or be bound to it, until it determined that there was a sufficient number of participants.

Councilman Wyett amended his motion of approval of the modified Agreement, to include the understanding that approval was subject to review to determine that a sufficient number of property owners would participate, and that the liability concerns of the Town Council would be met at the December Town Council Meeting. On roll call the motion carried unanimously.

**2. Consideration of Request for Authorization for Town Manager to Execute Golf-Pro Concession Agreement and Modify Employment Classification for the Operation of the Palm Beach Municipal Golf Course for FY98 *(Deferred from September 9, 1997, and October 14, 1997)***

Town Manager Doney reported that the Golf-Pro Concession Agreement had been prepared, and offered that Recreation Director Bitzer could provide more details, if necessary.

Recreation Director Bitzer advised that the Golf-Pro Concession Agreement and modification of employment classification was basically the same as that approved for the Tennis Pro Manager position, so that the Town was in compliance with IRS regulations. Mr. Bitzer referred to his memorandum of October 24, 1997, wherein staff recommendations were made as following:

1. The Golf Pro-Manager position would be reclassified as a regular full time position.

2. The Town Council would authorize the Town Manager to execute a Concession Agreement with the Golf Pro-Manager to be effective December 1, 1997, through September 30, 1998.

3. Approval of recommendations #1 and #2 would be as outlined in the proposed compensation plan dated October

24, 1997.

Golf Pro-Manager Rick Dytrych commented that he had only some minor disagreements with the proposed contract.

Town Manager Doney stipulated that the contract had been discussed in detail with Mr. Dytrych, and a package had been recommended that addressed the IRS requirements. He stated that he believed the overall compensation package was fair.

Councilman McLendon commented that he believed some of the personal incentives for Mr. Dytrych were reduced with this contract, and he was not favorably inclined.

Town Manager Doney responded that the issue originating with the recommendations of Nolen, Holt & Miner, had provided the opportunity to look at all contractual arrangements, which had been done, and he believed the resulting employment package was fair and equitable to both Mr. Dytrych and the Town.

Auditor Mark Veil addressed the Town Council, stating that the issue had come up through the Nolen, Holt & Miner Report, and evaluation of various possibilities had been made. The cleanest thing to do was to either make a person an employee or contract out the whole operation. An attempt had been made with the Golf Pro-Manager Agreement to create something that would be defensible within the IRS regulations, so that Mr. Dytrych could still retain his earning power.

President Pro-Tem Shaw commented that he was opposed to the employment aspect, and felt that the Golf Course could be run in a fiscally responsible manner, with goals, and could easily be reviewed. He specified that the Town would have better control in a contractual situation than in an employee situation, and he was opposed to making the change, as outlined in his memorandum of November 8, 1997 concerning this subject.

Risk Manager Barbara Martinuzzi addressed the Town Council in regard to the question of liability, stating that the Town would now be accepting responsibility for worker's compensation exposure for Mr. Dytrych as an employee, should he be injured in the course and scope of his employment. The Town had not had that exposure previously. From a liability standpoint, the Agreement was drafted as it had been previously for the concession responsibilities as well as for the liquor liability; therefore, the only additional exposure for the Town would be the worker's compensation exposure for Mr. Dytrych.

President Pro-Tem Shaw replied that he was concerned about the worker's compensation liability, as well as the structure of the relationship of the pro to his employees.

Town Manager Doney responded that the Concession Agreement required that Mr. Dytrych provide for any employees that he may employ from time to time, which would protect the interests of the Town.

Recreation Director Russell Bitzer clarified that there was no change in the wording of the Concession Agreement from the existing Agreement. There was therefore no change in the legal responsibility for sub-contractors.

Assistant Town Manager Peter Elwell referred to page 3 of 5 of the Agreement, wherein the worker's compensation employer's liability section addressed these concerns.

President Pro-Tem Shaw expressed that his concern was the point at which sub-contractors would say they were no longer employees of Mr. Dytrych, but employees of the Town, entitling them to benefits, retirement, etc.

Assistant Town Manager Elwell responded that the current Agreement created a darker line between the portions of the responsibilities of Mr. Dytrych as a Town employee managing the Golf Course operation, and that of operating the concession, teaching, sales duties, etc. Now when a part-time employee was hired, it would be easy to determine whether his/her functions were being performed relating to the Town-employee portion of the position of Mr. Dytrych, or to the Concession operation portion of the position of Mr. Dytrych.

Councilman Wyett commented that he agreed with Mr. Shaw, in that the Concession Agreement had many aspects of an independent contractor.

Auditor Mark Veil explained that part of the difference between the historical contract and the current contract was that in the historical arrangement, concessions were provided to Mr. Dytrych from various golf cart rentals, range balls, etc., however the Town was buying and maintaining the golf carts, and the Town was picking up the range balls. The attempt with the current contract was to define what the Town truly controlled and what Mr. Dytrych was truly employed to do for the Town. The thought process was that Mr. Dytrych used his talent for giving golf lessons to his benefit to earn money. Likewise, management was not interested in running a retail operation, so Mr. Dytrych was provided the opportunity to run the merchandise shop.

Mr. Bitzer commented that the direction staff received was that the Town Council wanted the control of the Golf Course to be kept under staff, rather than going to an outside management group; that was the reason that the current Agreement had been created.

Town Manager Doney explained that staff had tried to identify and subdivide the parts of the re-classification of both the Golf and Tennis Pros to ensure that the interests of the Town were protected. They would both continue to report to the Recreation Director.

Mr. Elwell clarified that the functions outlined could conceptually be performed by two different people, however, because of the history and the success of Mr. Dytrych as a golf pro the Town was working in a situation where one person would be both the Pro-Manager, under the Personnel system and job description of the Town, and also teaching the lessons and operating the concession through the contract. Under the old Agreement, everything was mixed in together. The purpose of the current Agreement was the cleanest divide between the employee responsibilities and the contractual opportunity to gain private income.

Mr. Bill Guttman, Palm Beach Civic Association, addressed the Town Council, stating concern that the distinction between an employee and an independent contractor for IRS purposes seemed to be driving how the organization and management of the Par III was conducted. He suggested that someone ought to be in charge from a managerial perspective, both for the revenues and expenses of the Par III. The Concession Agreement created an incentive for Mr. Dytrych with respect to lessons and certain other revenue aspects at the Par III, but it did not force him from a compensation point of view to focus on methods of reducing expenses at Par III, or increase the revenues outside of the limited areas where there was incentive compensation.

Councilman Wyett moved that staff be directed to negotiate a traditional contract (such as the previous contract) with Rick Dytrych, to extend the current contract so that there would be time to do that, and to look at all the terms to see what needed to be cleaned up in the old relationship. The motion died for lack of a second.

President Smith suggested that the new contract be implemented, with a review taking place in one year, at which time it could be decided whether to go back to the traditional contract, or leave the new contract in place.

Town Manager Doney stated that he believed that would be a fair and good proposal for consideration by the Town Council.

Mr. Elwell further explained that it was important to clarify that Mr. Dytrych was an employee of the Town currently, and had been for nineteen years. The management agreement had come back from year to year because the details of that could be changed at the discretion of the Town Council.

Auditor Veil clarified that nothing was changing in terms of the responsibilities of Mr. Dytrych. He would be doing the exact same thing as he had been. The majority of his time had been spent managing the Golf Course at the direction of the Town. The lesson time and merchandise time were minimal. The revised contract was an attempt to clean up the situation in order to make it a defensible IRS position, yet still retain the compensation package of Mr. Dytrych, as well as Mr. Dytrych himself, as he was a valuable employee to the Town.

President Smith asked who would be responsible should Mr. Dytrych be injured while he was giving a golf lesson?

Risk Manager Martinuzzi replied that it would be his own problem. While he was doing any concession-related duties he would be responsible for his own injuries.

Councilman Wyett moved that the decision on the contract be deferred to the January 1998 Town Council Meeting, so that alternative proposals could be considered. The motion was seconded by President Pro-Tem Shaw. On roll call, the motion failed 2/3, with Councilman Wyett and President Pro-Tem Shaw casting affirmative votes; President Smith, Councilmen McDonald and McLendon casting negative votes.

Councilman McDonald moved that the proposed contract with Mr. Dytrych be entered into for the remainder of the current fiscal year, through September 30, 1998, and that the other independent contractor operation be investigated during that time, and/or any performance objectives that would need to be put into the contract. The motion was seconded by Councilman McLendon. On roll call, the motion carried 3/2, with President Smith, Councilmen McDonald and McLendon casting affirmative votes; President Pro-Tem Shaw and Councilman Wyett casting negative votes.

**3. Consideration of Tent Permits and the Length of Time Allowed for Tents to Remain in Place *(Deferred from June 10, 1997, and August 12, 1997)***

Director of Planning, Building & Zoning Robert Moore addressed the Town Council, explaining that the Town Council had asked that the matter of tent permits and length of time allowed for tents to remain in place be reviewed. Research had been conducted to determine the procedures of other communities, which varied widely. He requested that this issue be brought before the Ordinances, Rules & Standards (ORS) Committee to be discussed at a later date, in order to develop a policy for the Town of Palm Beach.

Councilman McLendon, Chairman of the ORS Committee agreed with the suggestion of Mr. Moore., and it was determined that the meeting date would be set at the December 9, 1997 Town Council Meeting.

**4. Consideration of Street Lights on Lake Trail *(Deferred from June 10, 1997, and October 14, 1997)***

Director of Public Works Al Dusey reported that an estimate to complete the lighting on Lake Trail had been prepared, which amounted to $160,000. The costs could be approached in three different ways:

1. Include the costs in the Fiscal Year 1998-99 Capital Improvement Program in the next budget session.
2. Appropriate the money from the Capital Improvement Fund Reserve, which was currently approximately $400,000.
3. Appropriate the money from the General Fund Reserve, which was approximately $5,154,000.

President pro-Tem Shaw moved approval of placing street lights on Lake Trail, to proceed immediately, with the appropriation of $160,000 coming from the General Fund Reserve account. The motion was seconded by Councilman Wyett.

In response to Councilman McLendon, Mr. Dusey indicated that solar lighting had been reviewed, and it was a question of aesthetics, as the fixtures were not very attractive and there were limits on types of fixtures available. He suggested that direction could be taken if it was the desire of the Town Council. He agreed to resurrect the research that had been done previously so that it could be reviewed at the time street lights for the whole Town were discussed.

Councilman Wyett recommended that no trees be cut down to make room for the lights.

On roll call the motion carried unanimously.

5. **Consideration of Date and Time for a Special Town Council Meeting to Consider the Comprehensive Coastal Management Plan (CCMP) Update and Shore Protection Board Recommendations *(Deferred from October 14, 1997)***

Garrison Lickle, Chairman of the Shore Protection Board , addressed the Town Council, reporting that the Applied Technology & Management (ATM) report was not concluded, and suggested that it be accepted at a regular Town Council meeting, with a Special Town Council meeting being held in February or March to review the entire package (which would include the technical, financial, and legal portions, as well as the "plain English" workbook being prepared at the direction of the Shore Protection Board). Once the whole concept met with Council approval, Mr. Lickle explained that the Shore Protection Board would then ask the Town Council to embark on the educational campaign so that the general public could totally understand the plan in order to vote on a referendum. He approximated that it would take six months to one year before a referendum could take place.

President Smith clarified that an update would be received from the Shore Protection Board at the January Town Council Meeting, at which time a date could be set for the February or March meeting.

6. **Consideration of Items to be Discussed at the Finance and Taxation Committee Meeting on Friday, December 12, 1997, at 10:00 a.m. *(Deferred from October 14, 1997)***

President Pro-Tem Shaw requested that the meeting be postponed, as there was a conflict in his schedule. The meeting was re-scheduled to be held on Monday, December 15, 1997 at 10:00 a.m. in the Town Council Chambers. Items to be considered at the meeting were to discuss the FY97 year end results, and to lay the groundwork for projects that would be going into the FY99 Budget.

7. **Consideration of Setting Date and Time for a Special Town Council Meeting Regarding Water Issues (Suggested Tentative Date and Time: Thursday, December 11, 1997, at 10:00 a.m.) *(Deferred from October 14, 1997)***

Town Attorney Randolph reported that Councilman Wyett had asked whether it would be appropriate for Ionics, Inc. to make a presentation to the Town Council. Mr. Randolph had responded affirmatively, with the condition that Mr. Wyett recuse himself and not participate in the discussions. Mr. Randolph suggested that other companies who were involved in this type of work be invited to make presentations at the same time.

Public Works Director Al Dusey offered that several companies could be identified that would be involved in this type of work, and invited to make a presentation to the Town Council.

Councilman McDonald commented that he believed it was appropriate for the Town Council to listen to information without having to have a workshop or taking any action.

Councilman Wyett suggested that more companies be invited to make presentations, with open bids requested, and the best proposal being considered. He clarified that his duties to the Town superceded any relationship he had with Ionics, Inc., and that he owned 1/100 of 1% of Ionics, Inc.

Town Manager Doney noted that there would have to be a very specific definition of what a request for proposal would entail.

Town Attorney Randolph commented that a general presentation could be heard in regard to what different companies had to offer, without any commitment to evaluate anything at the end of the process. The Town Council could hear the presentation, and determine at some future date whether to go forward or not. At that time, the formal bidding process could begin.

Councilman McDonald moved that a meeting date be set, with four companies being invited to make presentations of no longer than one hour. The motion was seconded by President Pro-Tem Shaw.

Town Manager Doney commented that the Town had used Hutcheon Engineering to do water supply update alternatives, water re-use, etc., and it was possible that they could provide an update on current technology and costs.

Councilman McDonald agreed with Mr. Doney, withdrew his motion, and moved that Hutcheon Engineering Company be contacted by Mr. Dusey, to invite Mr. Potts to give the Town Council an update on current technology at the December Town Council Meeting. President Pro-Tem Shaw withdrew his second to the original motion, and seconded the current motion. On roll call, the motion carried 4/0, as Councilman Wyett had recused himself.

**8. Update of the Social Contract Between the Federal Communications Commission and Comcast Cablevision, Inc.**

Assistant to the Town Manager David Jakubiak reported that the Town Council had authorized the Mayor to file a letter with the Federal Communications Commission (FCC) regarding a Social Contract entered into between Comcast Cablevision, Inc., and the FCC. The Social Contract would not be beneficial to the Town, as it permitted Comcast to go unregulated as far as rates were concerned. The intention of Comcast was to upgrade 80% of their systems. Currently, the Town was at a 550 megahurtz system, and the Town had been told by Comcast that it would not be part of the upgrade, however, rates could be increased to subsidize the other systems throughout the United States. Sixty per-cent of Comcast systems would be upgraded to a 750 megahurtz system, which was beyond the current system of the Town. Various communities and municipal organizations had filed comments in opposition. Currently, there were two options available for the Town: 1) to enter into an appeal process, either alone or joining with other muncipalities (which would cost $30,000-$50,000); 2) the Town could address these issues with Comcast at the end of its short term franchise with Comcast, which would expire in two years.

President Pro-Tem Shaw requested more information on joining other municipalities in an appeal process.

Mr. Jakubiak replied that the appeal deadline was December 9, 1997. Three other municipalities, who were clients of Attorney Nick Miller (the telecommunications attorney hired by the Town) were currently considering appealing. According to Mr. Miller, the costs would be $30,000-$50,000 total.

President Pro-Tem Shaw recommended that the municipalities of South Palm Beach, Manalapan, or any other municipalities serviced by Comcast, be contacted to determine participation in an appeal and associated costs.

After discussion, it was determined that the Town Council would not expend additional monies on an appeal process at this time.

**X. NEW BUSINESS**

**A. Ordinances**

**1. Ordinance No. 15-97 - Amendment to Dune Protection Ordinance by Eliminating Reference to the Coastal Construction Control Line**

Town Attorney Randolph read Ordinance 15-97 by title:

AN ORDINANCE OF THE TOWN COUNCIL OF THE TOWN OF PALM BEACH, PALM BEACH COUNTY, FLORIDA, AMENDING CHAPTER 6, ARTICLE 4, DUNE REMOVAL OR ALTERATION, OF THE TOWN OF PALM BEACH CODE OF ORDINANCES, SECTION 6-36(A) AND (I) TO ELIMINATE REFERENCES TO THE COASTAL CONSTRUCTION CONTROL LINE, REPEALING ALL ORDINANCES OR PARTS OF ORDINANCES IN CONFLICT HEREWITH; PROVIDING FOR CODIFICATION, AND PROVIDING FOR AN EFFECTIVE DATE.

Councilman McLendon moved approval of Ordinance 15-97. The motion was seconded by Councilman Wyett. On roll call the motion carried unanimously.

**B. Resolutions**

**1. Resolution No. 49-97 - Establishing Solid Waste Fees**

Director of Public Works Al Dusey reported that Commercial Solid Waste Fees were re-calculated every October, based on the newly adopted budget, and tipping fees established by the Solid Waste Authority of Palm Beach County. Resolution 49-97 set forth the results of those calculations for the upcoming year, beginning in January 1998.

Councilman McDonald moved approval of Resolution 49-97. The motion was seconded by Councilman McLendon.

Town Attorney Randolph read Resolution 49-97 by title:

A RESOLUTION OF THE TOWN COUNCIL OF THE TOWN OF PALM BEACH, PALM BEACH COUNTY, FLORIDA, ESTABLISHING COMMERCIAL SOLID WASTE COLLECTION FEES TO BECOME EFFECTIVE JANUARY 1, 1998.

On roll call the motion carried unanimously.

**2. Resolution No. 50-97 - Re-adopt Guidelines for Routine Dune Maintenance**

Director of Planning, Building & Zoning Robert Moore reported that Town ordinance called for the dune maintenance guidelines to be re-adopted. There had been no changes needed in the guidelines, which would remain the same as last year.

Town Attorney Randolph read Resolution 50-97 by title:

A RESOLUTION OF THE TOWN COUNCIL OF THE TOWN OF PALM BEACH, PALM BEACH COUNTY, FLORIDA, RE-ADOPTING THE TOWN GUIDELINES FOR ROUTINE DUNE MAINTENANCE.

President Pro-Tem Shaw moved approval of Resolution 50-97. The motion was seconded by Councilman McLendon. On roll call the motion carried unanimously..

**C. Appointments**

**1. Golf Commission - Three Member, Three-Year Terms to Expire November 2000**

Allen Shore and Stuart Shulman were re-appointed to three-year terms. James Maddock was appointed to a three-year term, and Larry Ochstein was appointed as an alternate member.

**D. Other**

**1. Consideration of Request by Mr. Robert Spiegel, Royal Poinciana Plaza, for Appeal of Late Payment Penalty for Solid Waste Bill**

Larry Dietler, employee of Royal Poinciana Plaza, addressed the Town Council, reporting that it was his fault that the solid waste bill had been paid late, and that he was present today to plead his case. He explained that the bookkeeper took maternity leave in the middle of September, prior to processing the solid waste bill. The job of paying the bills became his, and he was not aware that the solid waste bill was due prior to the end of the month. He had paid the bill at the end of the month, and incurred a late payment penalty.

After discussion, Councilman McDonald moved that the request for appeal for relief be rejected. The motion was seconded by Councilman Wyett. On roll call the motion carried 4/1, with Councilman McLendon casting a negative vote.

**2. Consideration of Participation in the 1997-98 Palm Beach County Legislative Delegation Public Hearings**

Town Manager Doney referred to the memorandum of Director of Public Works Dusey, dated October 31, 1997, wherein it was recommended that representatives from the Town attend a Palm Beach County Legislative Delegation public hearing to request assistance in obtaining State funding for the upgrade of the Sand Transfer Plant as part of the Inlet Management Plan implementation. The request would be for $1,130,000 in State funding for the Plant upgrade.

Councilman McLendon moved that Mayor Ilyinsky and President Smith be authorized to attend the Palm Beach County Legislative Delegation Public Hearing scheduled for Wednesday, December 10, 1997. The motion was seconded by President Pro-Tem Shaw. On roll call the motion carried unanimously.

**3. Consideration of Request by the Florida Shore Beach and Preservation Association for the Town to Join the "Beach Watch" Lobbying Program**

Town Manager Doney referred to the letter dated October 15, 1997, from the Florida Shore & Beach Preservation Association

(FSBPA) to Public Works Director Dusey, inviting the Town of palm Beach to join the FSBPA's "Beach Watch" lobbying program. He explained that the Town Council had appropriated $5,000 last year to assist in the Statewide effort to gain additional funding sources for beach projects. The annual cost of "Beach Watch" membership was $3,000. Mr. Doney requested authorization for an appropriation from the Undesignated General Fund balance.

Councilman McLendon moved approval of the $3,000 membership fee for the "Beach Watch" lobbying program. The motion was seconded by Councilman McDonald. On roll call the motion carried unanimously.

**4. Consideration of Request for Office Panel System for Finance Department**

Finance Director Demming recommended that the Finance Department be furnished with six workstations, separated by acoustical panels and a customer service counter with a waiting area. He established that the noise level would be reduced, storage space enlarged, employees would be provided more effective private work areas, and the Finance Department would be offered more of a professional business office environment.

Councilman McLendon moved approval of the request for the workstation system for the Finance Department. President Pro-Tem Shaw seconded the motion. On roll call the motion carried 4/1, with Councilman Wyett casting a dissenting vote.

**5. Consideration of Worth Avenue Sidewalk Theme.**

Councilman McDonald commented that several years ago, the Worth Avenue Association did a design for a theme of sidewalks along Worth Avenue, and would like to present the project to the Town Council at the December 9, 1997, Town Council Meeting. He moved that this item be added to the Agenda for the December meeting. The motion was seconded by President Pro-Tem Shaw.

Town Manager Doney expressed that Public Works Director Dusey had commented that there was a need for uniformity of surface, and insurance issues must be satisfied, and these things would be evaluated by staff prior to the December meeting.

On roll call the motion carried unanimously.

**6. Consideration of Newspaper Racks In the Town of Palm Beach**

Councilman McDonald reported that he had been approached by the Palm Beach Flagler Rotary Club to review the system of displaying newspapers in the Town. He distributed a photograph of a suggested approach, and suggested that the Town Council authorize Town Attorney Randolph to check for any constitutional restrictions, and for staff to follow through on what had already been discussed, apparently, by the Civic Association with Assistant Town Manager Elwell. He suggested that perhaps several civic groups could participate together, and moved that this item be added to the Agenda for the December 9, 1997, Town Council meeting. The motion was seconded by President Pro-Tem Shaw. On roll call the motion carried unanimously.

**7. Consideration of Traffic Control Between Mar-a-Lago and Widener's Curve.**

Councilman McDonald commented that the traffic conditions in the area between Mar-a-Lago and Widener's Curve needed improvement, and requested that investigation be conducted on a way to improve the situation. He moved that this item be added to the Agenda for the December 9, 1997, Town Council meeting. The motion was seconded by President Pro-Tem Shaw.

Director of Planning, Building & Zoning Robert Moore stated that there were currently several ongoing projects in the area. Generally each site had an on-site inspector, who was instructed not to allow the trucks to stop and block traffic. One remedy would be to have the contractors pay for an off-duty police officer for enforcement. He offered to speak to Police Chief Terlizzese, as well as the inspectors, to ascertain what had caused the situation.

On roll call the motion carried unanimously.

**8. Traffic Light on County Road and Sunset.**

President Pro-Tem Shaw commented that the traffic light on County Road and Sunset needed re-evaluation, and moved that discussion of this item, as well as the Brazilian/County Road intersection be discussed at the December 9, 1997, Town Council meeting. The motion was seconded by Councilman McDonald. On roll call the motion carried unanimously.

### 9. Park Avenue Trash/Permitted Uses of Property

President Pro-Tem Shaw moved that this item be added to the Agenda for the December 9, 1997, Town Council meeting. The motion was seconded by Councilman Wyett. On roll call the motion carried unanimously.

## XI. COMMENTS OF THE TOWN COUNCIL MEMBERS

Councilman McDonald commented that he had two complaints from architects in terms of communication of changes contemplated in Zoning in Progress, and suggested that the Building Department investigate a way of notifying people who were designing plans and building homes so that they would be aware of what was included in Zoning in Progress.

Councilman McDonald commented on the length of the Agendas for Town Council meetings, pointing out that deferrals were frequent, and many applications continued to come back. He suggested that only one deferral be given to applicants. In addition, he stated that he did not believe that it was the responsibility of the Town Council to design projects that were presented at meetings, which he considered also prolonged the meetings.

President Pro-Tem Shaw commented that he wished to set the record straight. In July of the current year, his wife had sent a letter to the Mar-a-Lago Club indicating resignation from the Club. That resignation went through, and Mr. Shaw established that they were no longer members of the Club.

## XII. APPROVAL OF CHECK REGISTERS FOR OCTOBER 1997

Councilman Wyett moved approval of the Check Registers for October 1997. The motion was seconded by Councilman McLendon. On roll call the motion carried unanimously.

## XIII. DEVELOPMENT REVIEWS

A. Major Matters Previously Considered by the Architectural Commission at Its Meeting of October 22, 1997 - Minutes Available in Town Manager's Office

DEFERRALS AND CONTINUATIONS - MAJOR PROJECTS:

B70-97 Application by Salomon Dayan, 476 South Ocean Blvd., to demolish most of existing residence to allow for new two-story residence - removed from Agenda.

B87-97 Application by Donald Malasky, 251 Tangier Avenue, for demolition of existing residence and new two-story residence - deferred.

B91-97 Application by Classic Homes and Remodelers, Inc., 217 Miraflores Drive, for new residence - approved.

B95-97 Application by Mr. and Mrs. F. Quinn Stepan, 1554 North Ocean Way, for a 1,242 square foot second floor addition - deferred.

NEW BUSINESS - MAJOR PROJECTS:

B98-97 Application by Gregory Gozzo, 127 Ocean View Road, for new single family residence - deferred.

B99-97 Application by Mr. and Mrs. John Zenko, 232 Tangier Avenue, for new two story Neo-Classic residence - deferred.

B100-97 Application by Euro-Homes, 306 & 314 Chilian Avenue, for new two story Mediterranean style duplex - deferred.

B101-97 Application by Mr. and Mrs. George Merck, 1197 North Lake Way, for demolition of building and tennis court - approved.

B102-97 Application by Frisbie, 611 Tarpon Way, for revisions to previously approved plans - approved.

B103-97 Application by Mr. and Mrs. Damon Mezzacappa, 1485 South Ocean Blvd., for new Venetian style residence - approved.

President Pro-Tem Shaw moved approval of the Major Matters considered at the Architectural Commission Meeting of October 22, 1997 and the Minutes of same. The motion was seconded by Councilman Wyett. On roll call the motion carried unanimously.

**B. Time Extensions**

**1. Consideration of Request for a Six (6) Month Time Extension for Special Exception No. 3-96 - Mr. and Mrs. Quentin Wahl, 206 North Ocean Blvd.**

Attorney Robert Deziel, representing the applicant, withdrew his request at this time, as he has just learned that was the desire of the applicant.

Councilman McDonald moved acceptance of the withdrawal of the request for a six month time extension for Special Exception 3-96. The motion was seconded by Councilman Wyett. On roll call the motion carried unanimously.

**C. Variances, Special Exceptions, and Site Plan Reviews**

At this time, Town Clerk Pollitt administered the oath to all those who would be speaking to this portion of the Agenda.

**Old Business**

**1. SITE PLAN REVIEW NO. 6-97 - Salomon Dayan, 476 South Ocean Blvd.; located in the R-A Zoning District; to allow construction of a new two-story residence on a lot 14,996 sq.ft. in lieu of 20,000 sq.ft. required. *(Deferred from August 12, 1997, September 9, 1997, and October 14, 1997)***

Director of Planning, Building & Zoning Robert Moore reported that a letter had arrived today requesting postponement to the December 9, 1997, Town Council meeting.

In response to the question of President Smith, Mr. Moore explained that the applicant was awaiting permit approval from the State of Florida, and he considered that 5-7 months would be necessary as processing time. He suggested that it be deferred to a date certain at a future Town Council meeting.

President Pro-Tem Shaw moved deferral of Site Plan Review 6-97 to the April 14, 1998, Town Council meeting. President Smith passed the gavel and seconded the motion. On roll call the motion carried unanimously.

**2. MODIFICATION OF SITE PLAN REVIEW APPROVAL #2-97 - Luxury Homes by Gozzo, 127 Ocean View Rd.; located in the R-A Zoning District; to allow an increase in lot coverage from a previously approved limit of 3,600 sq.ft. to a requested lot coverage of 4,117 sq.ft.. *(Deferred from October 14, 1997)***

Ex-parte communication was declared by President Pro-Tem Shaw with Attorney Royce, and Mr. Rosenthal concerning the project, and by President Smith with Architect Lindley Hoffman on the merits of the application.

Attorney Ray Royce addressed the Town Council, recalling that a motion had been made at the October Town Council Meeting that this matter be deferred so that the size of the house could be modified.

Architect Lindley Hoffman presented the revised site plan of the proposed home at 127 Ocean View Rd. The floor plan had been reduced to 3,893 sq.ft. The lot coverage percentage had now gone to 23.4%. The set back had been increased to 18', and 23'5". The house had been moved forward, the height of the building had been reduced by 6", and other changes had been made so that the total floor area was now under 6,198 sq.ft. The floor area ratio was 3.73, as opposed to the allowed 4.5, and the cubic content ratio was now 4.1, as opposed to the 4.4 allowed. This had been accomplished by taking a little space out of every room. He noted that President Pro-Tem Shaw had suggested that the garage be moved from 36' to 42', and the garage had been moved to 38'. This had been done to accommodate the swimming pool and the distance from the house. The height of the tie beam had been reduced.

Director of Planning, Zoning & Building Robert Moore commented that the applicant had made an effort to reduce the coverage.

Attorney Ron Kolins, representing the opposing neighbors, addressed the Town Council, stating that this matter had been ongoing for almost one year. He stated that, in his judgement, Mr. Gozzo was persisting in trying to put a square peg into a round hole; attempting to manipulate the Town Council and the Architectural Review Commission. He referred to Section 9.63(k) of the Town Code, wherein the mass and size of a proposed home was addressed. He reminded the Town Council that the average total square footage of the other homes on the street was 3,321 sq. ft. He recounted the various times the project had been heard either before the Town Council or the Architectural Review Commission. He suggested that the house was way out of scale with the neighborhood, was too large, and too massive. He offered that Mr. Gozzo could make the house a one-story house, which would be more acceptable to the neighboring residents.

Attorney Royce responded that he believed Mr. Kolins had recounted the history of this project as a design to irritate the Town Council, and he hoped that Mr. Kolins had not been successful in doing that. Since he had not been involved with the project previously, he stated that he could not answer to what had been done before, nor could Architect Hoffman. The house now had less size and bulk. Most houses on the street were approximately 30-40 years old. On all of the waterfront areas along the ocean there were large houses.

The nearest house to the proposed house was 94' away, and the bedrooms were on the east side, looking away from the proposed house. There was a storage area, garage, and one kitchen window that would be facing the proposed house. The proposed house had been moved back to almost double the setback, so that the view down Ocean View toward the lake would be preserved. He offered that the tie beam could be reduced, if so desired by the Town Council.

President Pro-Tem Shaw moved approval of Site Plan 2-97, with the condition that the tie beam be brought down to 22'. The motion was seconded by Councilman McLendon.

Town Attorney Randolph referred to the provision in the Code which indicated that before any site plan could be approved the Town Council must make a finding that the approval of the site plan would or would not adversely affect the public interest, and certify that the specific zoning requirements governing the use have or have not been met, and further that satisfactory provision and arrangement had or had not been made concerning the following matters where applicable which were defined in "A" through "K" of the provision. Mr. Randolph then paraphrased those matters:

A. Sufficiency of statements of ownership.
B. Intensity of use and/or purpose of the proposed development in relation to adjacent or nearby properties, and the affect thereon.
C. Ingress and egress to the property.
D. Location and relationship of off-street parking.
E. Proposed screens and buffers to preserve internal and external harmony and compatibility for the uses inside and outside the property boundaries.
F. Manner of drainage.
G. Utilities.
H. Recreational facilities and open spaces.
I. Such other standards as may be imposed by the zoning regulations.
J. Height of commercial structures. (Not applicable).
K. Visible size and bulk. The proposed development should be so arranged that it minimizes the visible bulk of the structure to drivers and pedestrians on abutting roadways.

He noted that findings must be made in support of the motion.

President Pro-Tem Shaw replied that he believed the findings were met.

President Smith asked Attorney Royce and Architect Hoffman whether a one-story house had ever been considered?

Attorney Royce responded that had not been considered because it would be difficult to get appropriate and fair square footage on a one-story house. Such an expansion would probably require smaller setbacks on the south side, with less of a view down Ocean View Rd.

Building Official Moore commented that 4,150 sq. ft. would be the maximum one-story house that could be put on the property without requiring a variance. He noted that there was a prior approval of a different project on the site, which had been approved by the Town Council, but rejected by the Architectural Commission. One of the reasons that it had not been looked at favorably by the Architectural Commission was because of its bulk and mass. The applicant had recognized that, and hired a new architect and lawyer, brought another plan back before the Town Council, and was now seeking approval. He suggested that the figures brought in today were in the proximity, and probably even less, than what had been approved by the Town Council for a prior applicant (6,300 sq.ft.).

Councilman Wyett asked if the project would return to the Town Council on appeal if it was turned down by the Architectural Commission?

Attorney Royce replied that he did not know the answer to that.

Town Attorney Randolph clarified that the motion in no way was intended to preempt the jurisdiction of the Architectural Commission in regard to its duties relating to the project

President Smith asked Mr. Randolph where the applicant would be left, should the Town Council approve the site plan today, and the Architectural Commission turned it down?

Mr. Randolph replied that the applicant could either accept or appeal the decision of the Architectural Commission, and come back to the Town Council.

On roll call, the motion of approval with condition made by President Pro-Tem Shaw failed 2/3, with President Pro-Tem Shaw and Councilman McLendon casting affirmative votes; President Smith, Councilmen McDonald and Wyett casting negative votes.

Councilman McDonald moved denial of Site Plan 2-97, based on the adverse impact on the neighborhood.

President Smith clarified that the applicant had approval for the site plan, but had a denial on the design of that site plan, and asked if the applicant could go back to the Architectural Commission with modifications on the design presented today?

Architect Hoffman explained that what had been approved was the footprint on a plat, and that footprint had certain setback requirements, which had been approved--anything brought back to the Architectural Commission would have to meet those same setback requirements.

Attorney Kolins noted that the approval for a site plan with a 3,600 sq. ft. footprint had been forwarded. It was then incumbent upon the applicant to design a house consistent with that for presentation to the Architectural Commission. That was the scope of Town Council approval in this matter.

Zoning Administrator Paul Castro explained that what had basically occurred was that the site plan that was provided at the meeting in March was for a 3,900 sq. ft. footprint, which included the porte cochere, and approval of the plan as shown at the meeting was accomplished, but the long entry to the motor court had to be eliminated, and a covered walkway from the garage to the house could have been provided if the applicant so chose. A moderately covered entry feature would be allowed on the front of the proposed house, and there was discussion relative to connecting the two buildings. Mr. Castro stated that from his recollection approval to connect the garage to the main house had been granted, as well as submitting the site plan to the Architectural Commission for mass and scale based on the approval of the footprint connecting the garage to the main house.

Building Official Moore stated that he believed the applicant had taken the interpretation of the approval and attempted to create more square footage on the second floor than what was actually shown. That had increased the mass of the house to the degree that the Architectural Commission felt that it was too massive for the property. There had been some architectural license taken by the applicant, and Mr. Moore established that he believed that was where the project had started down its road of demise at the Architectural Commission. Now there was a new attorney, new architect, and a new site plan review and it was back before the Town Council. Mr. Moore stated that he believed the approval from March was still valid, and could be re-negotiated at the Architectural Commission with a substantial change.

Town Attorney Randolph advised that it was his opinion that the applicant had an approval, and that with a substantial change as determined by the Building Department, the applicant could go back before the Architectural Commission under that previous approval.

Building Official Moore explained that when the architect on the project changed the applicant elected to come in for more square footage than what had been previously approved; therefore, a new site plan review was required. It was his opinion that the applicant could not now go to the Architectural Commission without reducing the plan to the originally approved square footage--approximately 300 sq. ft. smaller than what was presented today.

Attorney Royce requested that all exhibits, photos, etc., be made part of the record, and be left with the Town Clerk.

After further discussion, the motion of Councilman McDonald to deny, based on the finding that the public interest was adversely affected, and the applicant had not satisfactory met all conditions set forth in Items A-K of the Town Code, was seconded by Councilman Wyett. On roll call the motion carried 3/2, with President Smith, Councilmen McDonald and Wyett casting affirmative votes; President Pro-Tem Shaw and Councilman McLendon casting negative votes.

**New Business**

3. **<u>VARIANCE #35-97</u> - J. S. Raynor, Trustee, 496 N. Lake Way; located in the R-B Zoning District; to allow construction of a 6' high garden wall at the rear and side property lines within 25' of Lake Trail, in lieu of 4' maximum allowed.**

Director of Planning, Zoning & Building Robert Moore commented that staff had noted that the application needed additional notification by advertising for the garden wall side yards within 25' of Lake Trail, and he requested that the north/south portion of the variance be considered today, with the east/west portion of the request being deferred until the December 9, 1997, Town Council meeting.

Ex-parte communication was declared by Councilman Wyett with Mr. Horowitz, the owner of the property, who attempted to justify the application; by President Smith with Mr. Horowitz by phone concerning the wall; by President Pro-Tem Shaw with the owner of the property, Mr. Horowitz, requesting support for the application; by Councilman McDonald with Mr. Horowitz, who attempted to justify the application; and by Councilman McLendon by phone with Mr. Horowitz, who attempted to justify the application

Councilman McDonald commented that the owner actually showed as J. S. Raynor, Trustee, and if that was actually the fee simple owner, he questioned if, legally, discussion with Mr. Horowitz qualified as discussing with the owner of the property?

Town Attorney Randolph responded that it was correct legally, however, the main thing was to identify the person communicated with by a Council member.

Attorney Trent Steele, representing the owner, addressed the Town Council, stating that the house was under construction at the end of Miraflores on the Lake, and the owner would like to move into the house by Thanksgiving. Today, the only issue before the Town Council was the request to increase the size of the wall that directly abutted Lake Trail from the present 4', to 6'. He provided photographs of the existing 6' hedge that was presently in front of the wall, advising that any addition in the height of the wall would be obscured by the hedge. The reason for the request was primarily a safety concern, as a result of the difference in elevation between the subject property as it abutted the bike path, and the bike path itself. The elevation of the bike path was not very high, and the owner had needed fill to put the house at the proper level, resulting in an elevation difference of 2'. The 4' wall, therefore, only provided a 1' safety wall between the subject property and the bike path, resulting in a safety concern. The owner of the subject property was also the owner of the adjacent property, known as the Vicerage, which also had a 6' wall behind it, and both houses would then have a uniform wall, similar in height.

Councilman Wyett moved approval of Variance 35-97. The motion was seconded by Councilman McLendon.

Building Official Moore noted that the additional height of the wall was also needed to comply with the swimming pool.

Councilman McDonald requested information on the hardship.

Attorney Steele responded that the hardship was the elevation required by FEMA; the elevation relationship to the wall was then affected.

Building Official Moore pointed out that this was much like a point of measurement variance because the Lake Trail was at a much lower elevation than the abutting properties.

Councilman Wyett amended his motion of approval of Variance 35-97 to include the finding of hardship as set forth in the Town Code 10.13, specifically mentioning safety and FEMA. On roll call the motion carried unanimously.

4. **<u>VARIANCE #36-97</u> - Cynthia Kasper, 309 Hibiscus Ave.; located in the R-C Zoning District; to allow construction of an addition to the garage providing a side yard setback of 3.47' in lieu of 10' required.**

Ex-parte communication was declared by President Pro-Tem Shaw with Attorney Broberg concerning the design; and by Councilman McDonald with Mr. Lee Gordon regarding the procedure to appear before the Town Council in reference to the application.

Attorney Peter Broberg, on behalf of Cynthia Kasper, addressed the Town Council, stating requesting an extension of the garage 18", for a total of 25 sq. ft. The garage was presently built with a side yard setback of 3.47', and the extension would go in that same line to bring the length of the garage to 20' so that a car could be put inside. He distributed photographs of the area to the members of the Town Council. The increase requested today would take the total lot coverage of the property to 1,621 sq. ft., which was 32.9% of the lot, which was still less than the 35% lot coverage required in that zone.. The hardship was that the structure had not been built to fit a larger car, and there was nothing that could be done to increase the size of the garage, other than the present request.

Councilman Wyett moved approval of Variance 36-97. The motion was seconded by President Pro-Tem Shaw.

Building Official Moore gave the following staff comments: Town Manager Doney requested additional explanation on justification for the minimal variance. Mr. Moore pointed out that the structure was landmarked, and would have to go to the Landmarks Commission afterwards.

President Smith mentioned that was part of the reason for the hardship.

On roll call the motion carried unanimously.

5. **<u>SPECIAL EXCEPTION #42-97</u> - Bernard Marden, James Marden & Patrice Auld, 1290 S. Ocean Blvd.; located in the R-AA Zoning District; to allow a continuance of use of a second kitchen in the guard house, an approval granted the previous owner.**

Attorney Ronald Kochman, representing Bernard Marden, James Marden and Patrice Auld, addressed the Town Council, expressing that Mr. Marden and his children had purchased 1290 S. Ocean Blvd. this year. A variance for a second kitchen in the gate house had been obtained in 1991, and Mr. Marden was required by the variance to request a special exception to continue the use of the kitchen for his family and guests.

Building Official Moore commented that this was a Standard Kitchen Agreement, and when that was executed it would no longer be a variance, but a special exception.

President Pro-Tem Shaw moved approval of Special Exception 42-97. The motion was seconded by Councilman McLendon.

Ex-parte communication was declared by Councilman McLendon with Attorney Kochman.

On roll call the motion carried unanimously.

6. **<u>SPECIAL EXCEPTION #43-97</u> - Testa's Inc., 219 & 221 Royal Poinciana Way; located in the C-TS Zoning District; to allow the restaurant to provide live music thereby establishing a nightclub.**

Ex-parte communication was declared by Mayor Ilyinsky with the owners of Testa's on the merits of the application.

Attorney Frank Lynch, on behalf of Testa's Inc., addressed the Town Council, explaining that the intention was only to add live music to the restaurant, as the opportunity to provide live background music was in accord with the competition. He assured the Town Council that if any problems resulted, the Testa family would promptly address them. He noted that he had received comment from Zoning Administrator Castro that the music would be in the Garden Room with the roof closed. Per Town Code, open air music was permissible until 1:00 A.M., and Testa's would like that opportunity. At this point, the location of the band within the restaurant was unknown, however, Mr. Lynch requested the opportunity to have Testa's police that, with the Town Council requiring that Testa's come back every six months to review the situation to determine if there were any complaints.

Building Official Moore gave the following staff comments: Police Department: Who would control the tone of the music? The location of the music in the restaurant was questioned. Mr. Moore noted that the application stated "non-amplified" music, and requested further explanation. Comprehensive Plan: Application is not clear in the intent of the activities--needs more information. Building Department: Needs more information on the music. Town Manager: Requested additional information, details of hours of operation, music, and all operation issues.

Zoning Administrator Castro commented that it had been determined that live music could be used in a restaurant as long as it was not for entertainment, but purely for background music. The reason for the request in this instance was that the music planned was more than just background music, and was entertainment.

Attorney Lynch advised that he did not see the distinction between entertainment and background music. The intention was to provide background music, and if he had represented anything else to Mr. Castro he apologized for that.

Mayor Ilyinsky noted that the type of music was of enormous importance to the Town, citing instances of complaints years ago from a nightclub called "Lu-Lu's," however, music of the type used by Janiero's was quite acceptable to residents.

President Smith commented that Janiero's was in a residential area, whereas Testa's was in a commercial area.

President Pro-Tem Shaw expressed concern over the words "non-amplified" in the application, which he considered may result in an enforcement issue.

Attorney Lynch replied that there would be a keyboard involved.

President Pro-Tem Shaw responded that was amplified, and would need to be addressed, as well as the language "it is not intended at this time that dancing be permitted or a dance floor be created." He questioned the intent of the language.

Attorney Lynch responded that there was no intention of allowing dancing or creating a dance floor. The point of the language in the application was that Mr. Lynch did not want to preclude the use of a dance floor for all time.

Building Official Moore commented that the request was very open ended, and gave his opinion as to what entertainment was versus background music: If advertising was done to bring customers in based upon the fact that the restaurant had music, then that was entertainment. Background music was something that would not need to be advertised. He cautioned that if this request was granted today without some type of condition, and the property was sold, the only item that would require a return to the Town Council would be the Town-serving requirement.

Attorney Lynch agreed that it would not be advertised that live music would be played at Testa's, and in the event the restaurant was sold, agreed that the new buyer would come back to the Town Council to receive approval to operate in the same fashion.

Councilman Wyett commented that this was the first test of the 1996 Zoning, which had specifically been put in place to prevent the spread of nightclubs. He noted that the Town had seen a tremendous spread of nightclubs and restaurants, to the point where traffic and noise was a major concern of the Town Council, the Zoning Commission, and residents of the Town. He suggested that the request include some restrictions, and that the request be amended and deferred until the next Town Council meeting.

Zoning Administrator Paul Castro explained that when "nightclub" was placed in the commercial town serving district, a definition for "nightclub" was also placed in the Code, and he read that definition:

> *An establishment dispensing alcoholic beverages for on-site consumption whether or not food is served, and in which live music is provided by more than one instrument (except when providing only background dinner music) or entertainment is provided, or where dancing is conducted to live or recorded music.*

Building Official Moore advised that a dance floor would, therefore, be included in the nightclub license.

Attorney Lynch responded that there would not be a dance floor. He offered that music would end at 1:00 a.m., the restaurant would close at 1:30 a.m., no advertising would be done, if the property was sold the new owner would need to come back to the Town Council for approval, the roof would be opened, and the Town Council would have the opportunity to review every six months. If there were complaints, the Town Council would have the ability to revoke the right to keep the roof open and to have live music in the restaurant.

Councilman Wyett moved that the use of music be approved only in the enclosed areas of the restaurant (without the roof opened), with no amplified music other than keyboard, and that Testa's come back in three months for Council review.

Zoning Administrator Castro reiterated all other conditions of approval, as stated by Attorney Lynch:

1. Music would cease at 1:00 a.m.
2. The restaurant would be closed at 1:30 a.m.
3. No dance floor. No advertising. If so, the new owner would have to come back for an all new Special Exception approval from the Town Council.
4. Legitimate noise complaints, with the roof opened, would constitute a violation.
5. Return to the Town Council in three months.

Councilman McDonald seconded the motion for discussion.

After discussion regarding having the roof opened or unopened, Councilman McDonald withdrew his second to the motion of Councilman Wyett. The motion of Councilman Wyett then died for lack of a second.

Attorney Lynch specified that the band would be a jazz band, with a keyboard, saxophone, and drum.

President Pro-Tem Shaw moved approval with the following conditions:

1. Food, bar, and music would cease at 1:00 a.m.

2. Restaurant would be closed at 1:30 a.m.

3. The only amplification would be through a keyboard.

4. There would be no advertising of music.

5. The roof may be left open. In the event that there was a violation of the Town Code relating to noise, as documented by the Police Department, the roof would be closed and remain closed.

6. Testa's would come back to the Town Council at the February 1998 meeting to update on the operation. Review of the operation would take place at that time.

7. The Special Exception approval would not go with the land, and was strictly for the present ownership of Testa's.

The motion was seconded by Councilman McDonald.

Attorney Lynch accepted the conditions as stated in the motion of President Pro-Tem Shaw.

On roll call the motion carried 4/1, with Councilman Wyett casting a dissenting vote, as he was against the expansion of nightclubs.

8. **<u>SPECIAL EXCEPTION #44-97</u> - Robert E. Deziel, Trustee, 345 Polmer Park; located in the R-B Zoning District; to allow installation of driveway gates providing a 5' front yard setback in lieu of 18' required.**

Attorney Robert Deziel, representing Mr. and Mrs. Paul Fingold, addressed the Town Council. He explained that the property was held in his name, pursuant to a Florida Land Trust and the beneficial owners under the trust were Mr. and Mrs. Fingold. He presented a drawing of the property for inspection by the Town Council. He explained that the home had been built 20-30 years ago, and the existing piers and cast stone balustrades were installed at the time the home had originally been constructed, with the intention of installing the gates. The pillars, balustrades, and gate height all met current zoning code. The request was simply to allow the gates to be hinged to the existing piers. There was a 5' separation between where the gates would be installed and the edge of pavement. He submitted a survey of the property, and a drawing prepared by Architect Ames Bennett for the record. He clarified that the gates would be 4'6", which was allowed by Town Code. The gates would open up into the property, and would be monitored by either a radio activated opener, and/or a push button that would be located on the property of the applicant. A traffic study, prepared by Kimley-Horne, was submitted for the record, which indicated that a car waiting for the gates to open would not be in danger, or be a hazard to existing traffic.

Zoning Administrator Castro advised that staff had no objections to the request.

Councilman Wyett moved approval of Special Exception 44-97. The motion was seconded by Councilman McLendon. On roll call the motion carried unanimously.

**L. Other**

1. **Consideration of Request for Waiver to Hours of Construction by Mr. John A. McIntyre for Publix Supermarket, 265 Sunset Avenue**

Mr. Tom Gluble, Project Manager for McIntyre, Doherty, and Elwell, General Contractors from Sarasota, Florida, addressed the Town Council. The request today was for a variance so that night work would be possible in doing the renovation construction for Publix Supermarket at 265 Sunset Avenue. He introduced Mike Franza from the Construction Department of Publix, and Mark Morabito, Manager of the Publix Supermarket, and Jeff Leitner, Construction Superintendent. The reason for the request was so that customers could be serviced during the day. The store would be completely remodeled. Gates would be installed in the parking lot. A construction trailer would be set up, as well as storage trailers. Day work would be done to replace the air conditioning units on the roof, a new vestibule would be installed, and handicapped parking spaces would be re-designed. At night the noise would be limited, and Mr. Gluble approximated that 100 nights of work would be required

Superintendent Jeff Leitner, of McIntyre, Doherty, and Elwell, explained that the acoustical ceiling would be completely changed out in the store, as well as the air conditioning. The refrigerated cases would be changed out in five separate change outs at night. Half of the floor finished in the store would be replaced. He exhibited the architectural floor plan for the new store. The entire project would take approximately 130-150 working days.

Building Official Moore noted that staff recommended that saw cutting be done during day hours, and asked if the saw cutting could be done in the daytime?

Mr. Gluble replied that each department being worked on would then have to be closed down. The only place that saw cutting would be done would be in the bakery area.

Mr. Moore asked what arrangements were being made for inspections?

Mr. Leitner replied that case change outs would be pre-wired and a rough-in inspection would be done before the cases were changed out. The morning of the case change out, an inspection would be scheduled. He noted that he had participated in another project on Marco Island, where there was also a noise ordinance, and a decibel meter had been set up on the houses around the area when saw cutting and jack hammering had been done at night. The noise ordinance had never been violated.

President Pro-Tem Shaw suggested that additional parking for the construction trailers be secured, as parking was at a premium in the area already.

Mayor Ilyinsky commented that the proposed work would be started at the height of the season, and expressed opposition to the timing of the work.

Councilman McDonald moved deferral of the project until May 1998.

Councilman Wyett suggested that parking directors be added to the parking lot, as well as gates being installed immediately.

Mark Morabito, Manager of Palm Beach Publix, commented that since the 251 Restaurant had opened he had noticed daytime parking problems, and when cars that did not belong to employees were parked there they were towed away; last week 15 cars had been towed.

Councilman Wyett made the following suggestions: people would be kept in the parking lot during the construction stage, the gates would be put up immediately and kept closed after hours, that the work start no earlier than April 1, 1998, and that day saw cutting could be permissible during the summer.

Councilman McDonald clarified that the waiver would be approved with conditions, <u>if</u> the project could be started in April or May 1998.

Councilman McDonald moved approval of the request for Waiver to Houses of Construction by Mr. McIntye for Publix Supermarket with the following conditions:

1. The project would not start before April 14, 1998, and would be finished by November 15, 1998.
2. Saw cutting would be allowed at night unless complaints were received from neighboring properties.
3. Parking lot gates would be installed by January 1998, in order to control after hours parking on the lot.

President Pro-Tem Shaw seconded the motion.

On roll call the motion carried unanimously.

**2. Consideration of Request for Waiver to Hours of Construction by Ms. Kathy DeMario, 323 Worth Avenue**

Kathy DeMario, 323 Worth Avenue, addressed the Town Council, stating that a tenant had been lost in one of the frontage shops, and the shop had just been rented, provided that an extension could be granted for some work to be done inside the shop.

Building Official Moore commented that all deliveries must be off Worth Avenue, and recommended that no work be done on Sundays or holidays.

Councilman McDonald moved approval of the request for Waiver to Hours of Construction by Ms. Kathy DeMario, 323 Worth Avenue, with the hours being from 10:00 a.m. to 6:00 p.m., and the condition that no work be done on Sundays or holidays. President Pro-Tem Shaw seconded the motion. On roll call the motion carried unanimously.

## XIV. ANY OTHER MATTERS

There were none.

## XV. ADJOURNMENT

The meeting was adjourned at 6:25 P.M.

Mary A. Pollitt
Town Clerk

Prepared by:
Susan Eichhorn
Deputy Town Clerk
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