

TOWN OF PALM BEACH

Office of The Town Clerk

MINUTES OF THE SPECIAL TOWN COUNCIL MEETING HELD ON MONDAY, OCTOBER 8, 2001

I. CALL TO ORDER AND ROLL CALL

President Jack McDonald called the Special Town Council meeting to order at 1:03 p.m. On roll call, the following Elected Officials were found to be in attendance: President Jack McDonald; President Pro-Tem Sam McLendon; Councilman Brooks; Councilman Norman Goldblum; and Councilman Allen Wyett. Mayor Lesly Smith was absent. Also attending the meeting were: Town Manager Peter Elwell; Town Attorney John Randolph; Director of Planning, Zoning & Building Robert Moore; Assistant Director of Planning, Zoning, & Building Veronica Close; Zoning Administrator Paul Castro; and Town Clerk Mary Pollitt.

II. INVOCATION AND PLEDGE OF ALLEGIANCE

The invocation was given by Town Clerk Pollitt. President McDonald led the pledge of allegiance.

III. APPROVAL OF AGENDA

Councilman Wyett made a motion to approve the agenda. The motion was seconded by Councilman Brooks and carried 5-0 on roll call.

IV. REVIEW OF REGULATIONS AND PROCEDURES RELATED TO THE REVIEW OF ZONING APPLICATIONS

Attorney Randolph said he prepared some remarks from the standpoints of the passage of the Zoning Ordinance which is the legislative part and the application of the ordinance which is the quasi-judicial part.

The following is a verbatim transcript of Mr. Randolph's presentation and the comments made during the meeting.

MINUTES FROM THE SPECIAL TOWN COUNCIL MEETING HELD ON 10/8/2001

Attorney Randolph:

"The first phase, of course, is the legislative phase which you are involved in as a commission in the adoption of ordinances, and as a legislature, you've got the right to give consideration to any ordinance which you deem is reasonably related to the police powers that has been held long ago in Euclid vs. Ambler that zoning ordinances relate to the police powers. In applying the police powers, you may adopt zoning ordinances. However, those zoning ordinances have to have a relationship to the goal which you are attempting to accomplish. There has to be a substantial relationship between what you are attempting to do vis a vis the police powers and the zoning ordinance that you implement.

"Interestingly, things were, I think, a little bit easier for government, as it related to the adoption of zoning ordinances, five years ago as far as the ability to have them attacked. All we had to do, in order to sustain them, was to show that there was a substantial relationship to the police powers and what we were trying to achieve. Then they applied what is called the fairly debatable test, and if reasonable people could fairly debate whether or not there was a substantial relation between your regulation and the police powers, you would normally be able to sustain the ordinance.

"Interestingly, five years ago, we had the Bert Harris law come out which really has changed our obligation in that regard. Before, in addition to attacking the reasonable relation and the fairly debatable, they could attack on due process and that would be if you didn't give proper notice or give them the opportunity to be heard, etc. and also in the event there was a taking. It was pretty hard, at least in our setting, under our zoning ordinance, to have a taking under the application of our zoning ordinance because you would of had to taken all reasonable beneficial use of the property. But since the adoption of Bert Harris, that is no longer required. If in applying a regulation that you adopt after the adoption of the Bert Harris law in 1995, you impose an inordinate burden on a property owner. That property owner then has the right to file a Bert Harris claim. They have a year to do that, not from the time, I don't think, from the adoption of the ordinance, but the time in which you apply the ordinance. Now keep in mind, there have been no reported district court opinions on the application of Bert Harris yet. So we don't know what it is going to say, but as I read the law, it says they have a year from the application of the ordinance to file an action.

"So you could adopt an ordinance subsequent to 1995 and actually not have it attacked until the zoning department, for instance, has turned down a building permit as a result of it, and then they have, after they file the claim they have to file an appraisal and the appraisal has to show there has been an inordinate burden placed on their property. That means they cannot achieve a reasonable investment backed expectation on their property. We then have a 180 day work out period before they actually file suit. So they would file their claim and then we would have an opportunity to work things out with the individual to make a determination as to whether we want to mitigate or rescind the ordinance or whatever might be done to resolve the matter prior to their filing a claim.

MINUTES FROM THE SPECIAL TOWN COUNCIL MEETING HELD ON 10/8/2001

"One of the other things you need to consider in the legislative process in adopting an ordinance, if an ordinance is at all vague or can be interpreted for the property owner or the governmental entity, it is always going to be interpreted in favor of the landowner, because of the fact that the zoning is in derogation of the common law. Therefore, if there is any ambiguity or vagueness in the ordinance, it is going to be interpreted in favor of the property owner.

"Now, you know there are a lot of things we can do in zoning as long as they relate to the police powers, and as long as they are reasonably related to what you are intending to do. One of the things to keep in mind that's important is that aesthetics is a valid consideration in adoption of a zoning ordinance. Aesthetics can relate to the massing of the building; it can relate to the appearance of the building; as a matter of fact, there have been cases that have been upheld which have allowed you to zone and regulate colors in zoning ordinances. You have to give notice when you do that. You can't act arbitrarily with an abuse of discretion. I have seen some communities who have a color palate for instance. That color palate is on file in the building department and states that these are the colors on this color palate that you will be able to use. So, I think it is very important that you know that aesthetics is indeed an appropriate consideration under a zoning ordinance.

"Moratoria are a legitimate tool to be used in a community also in the realm of zoning. Moratoria would be used in a situation where you feel that you need to conduct a study before you have the answers as to what you might or might not want to legislate. You have to be careful in adopting a moratoria. You have to follow all the same rules and regulations involved and noticing and having a public hearing for the adoption of a zoning ordinance. It has to go through the same procedures. It has to be temporary, and it has to be reasonably related to the problem that you are attempting to cure. If you are going to do a study and you anticipate it will take a year to do—a year is not necessarily an unreasonable period of time to conduct a study, but you have got to declare an end to that. You can't just use it as a vehicle to stop growth in a community. I think that you, in a sense, when you adopt zoning in progress are putting sort of a stop gap measure on zoning while it is under study. I wouldn't consider that necessarily a moratoria, because all that does is indicate that no permits shall be granted for a matter which is undertaken for review by your zoning department. As long as you can show that matters are legitimately being undertaken for review, a person should not be able to attack that permit. Keep in mind that when we adopt zoning in progress, that we don't apply it retroactively for people who are already in the loop. There is case law that indicates that we may be equitably estopped from applying it to somebody who has come in with an application and the horse is out of the barn and we say 'we should have stopped that'. Well, I think we can stop it as long as there were studies being undertaken when that came in, but if there weren't, it would be hard to have zoning in progress apply in those instances.

MINUTES FROM THE SPECIAL TOWN COUNCIL MEETING HELD ON 10/8/2001

"Principles such as FAR and CCR have proven to be valuable considerations in legislation of zoning. The thing I would caution you on is this: there has been a lot of discussion, not only in the Town of Palm Beach, but in a lot of other municipalities regarding the issue of 'mansionization'. A lot of people come up with what seemed to be on their face rather simple answers, and I've heard some of these at some of the Zoning Commission hearings that I sat on. People will say why don't we just have a cap on square footage? It has been pointed out that there have been municipalities that have put a cap on square footage. The questions you need to ask yourself in the event you are attempting to regulate zoning in that fashion, rather than in the way we do by CCR or FAR or any of the other principles that we use, is remember that there has to be a reasonable relationship between your police powers and the goal you are attempting to achieve. You might want to question how a court would look at, say, a ten thousand square foot limitation on all building when a person may have three or four acres and be able to perhaps properly plan for a ten thousand square foot house whereas someone on a 24,000 square foot lot might not be able to. So, you've still got that reasonable relation test. More importantly, a lot of these states and cites that have been pointed out as having dealing with zoning by placing a cap on square footage, don't have a Bert Harris Act. We have a Bert Harris Act and the good thing about Bert Harris is that it doesn't apply to legislation which you had in place prior to its adoption. You can't be attacked under Bert Harris for those actions, but you can be attacked for any changes you make after the adoption of Bert Harris or the application of Bert Harris in May 1995. If you put on a building cap for instance and I'm not saying you can't, but the kinds of things you need to consider: Could somebody say that you have placed an inordinate burden on their property by putting that regulation or some other regulation in place."

Allen Wyett:

"Sometimes we put a regulation that all houses are a certain number of square feet. Let's go through special review. How would that be covered?"

Attorney Randolph:

"If you wanted to do that, you could have a special exception process. We do have a site plan review process and a special exception process in place for several things, but you could always have a provision that indicates any home in excess of 10,000 square feet must go through a site plan review or special exception process, something like that so you could review it."

Norman Goldblum:

"If they buy a property ninety days ago, and we have a restraint in place. Is Bert Harris still considered even though (indistinguishable) they bought the property?"

Attorney Randolph:

"Yes, I think that Bert Harris could still be applied. Are you suggesting that they bought it with the knowledge that ..they bought it before the regulation went into effect or after the

MINUTES FROM THE SPECIAL TOWN COUNCIL MEETING HELD ON 10/8/2001

regulation went into effect?"

Norman Goldblum:

"The regulation went into effect before they bought it. Could they still go back to Bert Harris Act?"

Attorney Randolph:

"That has not been answered in the law. There has been a lot of discussion in regard to it. I believe that the most recent case law that I have seen in that regard would indicate that they could rely upon Bert Harris even though they knew the regulation when they bought the property. I think there is a very recent case, not in Florida, but in the federal courts which might be applicable on that instance."

Sam McLendon:

"When the existing or the first real substantial zoning ordinance was enacted, I don't know how many years ago. It was before my time. Was there anything in the building code that addressed the issue of all the places that became non-conforming as a result of that zoning?"

Attorney Randolph:

"You know, I don't know the answer to that except to say that I believe that, even in our original zoning ordinance, that there was a provision relating to non-conforming uses and non-conforming structures which is indeed a general principle of law that zoning only applies prospectively that it cannot apply retroactively so that those that were in before the enactment are non-conforming and grandfathered in."

Sam McLendon:

"But there's no addressing of what they could have done before that new zoning regulation went into effect?"

Attorney Randolph:

"Right. The new zoning regulations would preclude them from going forward in the same manner as they went forward before the regulations changed. Now there is something called amortization that can be used as it relates to grandfathered uses. Normally that relates to landscaping or to signs where you allow someone to realize their investment backed expectation in the something under an ordinance and people will put in a five year, ten year, or fifteen year amortization period in which to eliminate all non-conforming uses. You could adopt an ordinance, for instance, which says that by the year 2020, this kind of landscaping shall be required around houses or that all these signs shall be outmoded. Case law has substantiated amortization laws like that to deal with the phasing out of non-conforming uses."

Norman Goldblum:

MINUTES FROM THE SPECIAL TOWN COUNCIL MEETING HELD ON 10/8/2001

"Australian pines have to be out of here by 2006."

Attorney Randolph:

"That's an example of that kind of thing."

Sam McLendon:

"I guess it's no secret, probably incorrectly so, I am sympathetic towards someone who wants to do something that is reasonable and will make his property better appearing and better usable. If his place has been zoned to be non-conforming, I lean toward granting reasonable variances even though I think it may not meet the letter of the code."

Attorney Randolph:

"I think you would have to change your ordinance in order for you to do that. The code, as it exists, does not allow it, and we'll get into that in just a few minutes when you're done with this topic relating to the legislative aspects of it."

Allen Wyett:

"Do I read correctly that as frequently stated to this Council by attorneys, as a hardship that the house conformed to the old zoning and that's in the new zoning and therefore they had a hardship. That is not a hardship."

Attorney Randolph:

"No, I don't believe that's a hardship."

Jack McDonald:

"I was just going to say that when you could go into the variances and special exceptions part of your presentation, I think that some of the frustration the Council was feeling and what precipitated this workshop was that Mr. Wyett made some comments a meeting or two before when he wasn't sure we could attach conditions to a special exception. So there seemed to be some confusion, and I think Mr. Brooks was a little frustrated because he wasn't sure what the requirements to grant a variance were. So if you could just sort of emphasize those."

Attorney Randolph:

"I will, in just a couple of minutes, get into variances."

Bill Brooks:

"I just wanted to know if it would be appropriate at this time, if I were to address, broadly, the question of a moratorium or do you want to wait until you finish with what you are doing?"

Attorney Randolph:

MINUTES FROM THE SPECIAL TOWN COUNCIL MEETING HELD ON 10/8/2001

"No, and you can do that now."

Bill Brooks:

"I generally would be opposed to a moratorium sort of willy-nilly, but I see value if it is undergirded by a plan, and a plan that would address values. For instance, a green space, and the reason I say that, if you look at the monies that this Council has expended to fixing infrastructure and then we see situations that are cutting down, actually, by the granting of variances or existing code, cutting down on green space. So, I am wondering would this be something, for instance, could come out of the Zoning Commission to the Council with Mr. Moore's and Mr. Castro's help?"

Attorney Randolph:

"The answer is 'yes'. That would be a legitimate study."

Bill Brooks:

"Absolutely. Let me give another example: it's a 100 ft. wide lot. The code presently calls for side yard setbacks of 15 ft. Supposing the Zoning Commission said let's make it 20 ft. Again, in keeping with the value of green space. Some may say with that 'okay' but then they could go higher and then I would say, 'Maybe not'. Maybe under the Berman Case (precedence) under aesthetics, could say 'no'. Another thing that perhaps, and I say perhaps, a moratorium could—let's look at our Town. If you run from the very north end to Barton, we have two north/south arteries; we then pick up with three, counting Cocoonut, County, and up to Ocean again until we get to the bend, and we're down to one. Additionally, we have often talked, and we should, about in the season with increased traffic. I am saying, again, in light of the possibility of a moratorium, how about the year round resident who is becoming increasingly more significant in the Town?"

"Let's take, as one example, Eldorado, which is just one example amongst many of narrow streets in the north end. A moratorium possibly now, not just under Berman but maybe under health and safety, where do the construction vehicles impede Fire-Rescue or Police? That's not counting the daily encumbrance or the solid waste people or the clippings on the designated day. So, I'm trying to look at all of these and say, 'Moratorium without a plan I think would be wrong'. I know a couple of years ago, I chatted with Mr. Moore and with you (Mr. Randolph) and I was shot down at the time. Why not limit one knock down per block? Why not limit it to one on an east/west, north/south, 1500 linear feet, I don't know 1500 linear feet, whatever Mr. Moore would come up with."

"I think we also, if I read this correctly, should look at the people who live here twelve months of the year who have to put up with the trucks, the noise, the dirt, and then say we have to stop now because the real people are coming back or someone's coming back. I'm just wondering if we don't have this a little whacky. So, I throw that out."

MINUTES FROM THE SPECIAL TOWN COUNCIL MEETING HELD ON 10/8/2001

"Then I would suggest that people maybe take a little walk. I would like people to look at 322 Australian, and have someone explain to me how this could be built right next to a Florida bungalow. Thanks to Mr. Moore's vigilance, we ducked the bullet on 302 Seaspray. I don't know if these people owned money in Rinker, but there was precious little green space left; there still is although Mr. Moore has made some adjustment.

"We talked about the paver 'd jour, Chicago brick, and we have the argument to offer: pervious vs. impervious. Perhaps we could say 'pervious' if we were analogizing what the bard did in the Merchant of Venice where the quality of mercy is not strained but dropped gently from the heaven. But our rain doesn't drop gently from the heaven, it's more like a belly gusher. So is this pervious or is it impervious? I don't know. These are reasons that I would like to see with a plan that we address. My feeling is that we are pretty close, I know it's an emotional phrase, to ad hoc zoning. I just don't feel we have a total grip on it. My observations, sir,"

Attorney Randolph:

"You've raised a lot of questions, and I won't attempt to answer them all, since I think that most of them are observations as opposed to questions. But, in regard to your first statements relating to whether there should be more setback or more height or that sort of thing, that is the type of thing that we typically address through zoning in progress as opposed to a moratorium and a lengthy study in regard to it. As soon as we hear from the Zoning Commission, for instance, that they wish to study a greater setback, from say let's go from 25 to 50 ft. or a lesser height, from 30 ft. to 25 ft. At that time, we will declare zoning in progress which will preclude Mr. Moore's department from issuing permits to anyone who is proposing to build something that is in contravention of the study. I'm not sure that is the kind of thing that would be involved in a moratorium. Now, that's not to say that there aren't certain issues that need to be studied such as drainage and some of the other things that you have mentioned. Normally, a moratoria are sustained when there is a water shortage, for instance, and somebody needs to say, 'Look, we're going to stop building until we know our people can get adequate water.' If there is a drainage problem, continuous flooding problems in Town, and somebody says, 'Look, we've just got to stop building until we come to the end of that.' If there is a legitimate study in place which is really aimed at dealing with the problem, then I think a moratorium is an appropriate tool to use. It cannot be used as a guise to stop growth for a period of time as a zoning tool. It really needs to be used legitimately to make a determination as to what the study is.

"It is always difficult when during this moratorium period you're going to stop all construction, and that's the thing I would ask you to think about when you do it. It would be better—moratoria are more often sustained when they are narrowly tailored to meet the goal you are trying to achieve."

Norman Goldblum:

MINUTES FROM THE SPECIAL TOWN COUNCIL MEETING HELD ON 10/8/2001

We had trouble with flooding last season, and we asked for a moratorium, and you said we couldn't do this.

Attorney Randolph:

"No, I never said you can't do a moratorium. I've never said that."

Norman Goldblum:

"Because I tried to get one in. Until we got the flooding corrected, we could never get it through. What the reason was, I don't know."

Attorney Randolph:

"It would be inconsistent for me to have made a statement that you cannot adopt a moratorium, because what I have stated today is my position in regard to a moratorium. I would caution you that whatever you do be narrowly tailored. If, for instance, you just did a study and said, 'We're going to stop all building until we get to the bottom of this flooding problem', and then you find out that really building or adding on to houses and it's not covering up any more green space is not going to relieve flooding, and you know that from the first instance, then your moratorium – you're going to lose on your moratorium from the very first standpoint."

Norman Goldblum:

"Well, we did make changes. The ground had to hold two inches of rain water."

Attorney Randolph:

"Exactly and that 's the type of thing you have to look at. That would be the kind of thing that you study, that you would hire experts to study, and in that particular instance, that's what you put in place to attempt to deal with the problem rather than impose a moratorium. Keep in mind, there were also, not legal impediments to doing that, but I think political and practical impediments to doing that. I think this matter came before your Zoning Commission, and the Zoning Commission said they did not agree to have a moratorium, if I recall correctly. So, it's not a legal impediment."

Allen Wyett:

"I think the Council used the right approach on that drainage problem. We, I believe, correct me if I am wrong, put zoning in progress where we are looking at two inches vs. one inch retention. Therefore, we put zoning in progress, if you're going to build a new house or expand an old house that was subject to those rules, you had, during this period of time, agree to put two inches in. That was the proper tool, and I think we have been applying most of these things correctly."

Attorney Randolph:

"Finally, in regard to that issue and in regard to the legislative process, indeed it is

MINUTES FROM THE SPECIAL TOWN COUNCIL MEETING HELD ON 10/8/2001

appropriate in zoning to deal with things like traffic, parking, drainage, and these other things in addition to the zoning regulations. Keep in mind that your better way to deal with the public streets is not through a zoning ordinance, because the zoning ordinance deals with the private property so you want to deal with things like on site parking particularly in commercial areas and residential areas also, but I would recommend that you would deal with the congestion on the streets through other ordinances rather than zoning ordinances. Now, we do have within our zoning ordinance the Arlington Plan and the Gainesville Plan, and those are zoning ordinances that relate to permit parking. That's one way of controlling traffic.

"I guess one final statement under this part of the presentation is that a person who is intending to build in the Town needs not only to look at the zoning ordinance but to all of what I call the land development regulations or LDR's. LDR's are just what they say -- Land Development Regulations -- so a person just shouldn't look at zoning and then feel that they can go ahead and build whatever they are entitled to build under zoning. They also have to look at your Architectural Commission Ordinance, and they have to look at your Landmarks Ordinance. We have indeed put language in the Code that a person is not entitled to necessarily build to the maximum; that they have other things they have to comply with, but as you know, we have taken the issue of size away from the Architectural Commission so that people can rely, at least to a certain extent, on the zoning ordinance for those issues knowing when they go to the Architectural Commission, they are going to be dealing with architectural concerns and to the Landmarks Commission, landmarks concerns.

"I guess that ends that part of the presentation, unless you have questions."

Sam McLendon:

"I just want to make a comment and a question, I guess, Skip. I can remember very well when the first few of the large homes were being built in the north end. We were peppered by people with the loss of privacy being able to look down and being dwarfed by these big units. We thought we were pretty smart. We were going to use some different numbers and require less percentage of the site developed, and boy we were inundated at the next Council meeting by everyone who was losing equity or potential equity in their future plans to develop the site. It's certainly not easy."

Jack McDonald:

"Any questions before Mr. Randolph goes into session 2?"

"Mr. Wideman, it is a Town Council workshop. We don't generally allow public input, but if you want to come up and ask a quick question.... Are you sure?"

Floyd Wideman:

"I'm Floyd Wideman. I live somewhere up on Eldorado Lane. In that last point you were

MINUTES FROM THE SPECIAL TOWN COUNCIL MEETING HELD ON 10/8/2001

making, Skip, where you've taken away any consideration of size from ARCOM. The thing that we seem to be forgetting, we're talking about hard numbers. No where are we talking about impact on the neighborhood. No where are we talking about impact on abutting lots. You take a neighborhood such as the one I live in which is basically a 4,000 to 5,000 square foot bunch of houses, maybe 20 streets, and we turned down an 11,000 square foot house and it was appealed to the Town Council who approved it. So here goes this big thing up right in the middle of all these small houses. I don't think we are addressing that at all and maybe in zoning, you can't, but I think we should try to."

Attorney Randolph:

"I think our attempt is to address that and to give the Architectural Commission the ability to deal with that. I think that what the Town Council took away, so to speak, was you getting into, ARCOM, getting into the numbers business and then making a determination, for instance, that 11,000 sq. ft. or 11,000 cu. ft. is too much in your opinion. The zoning ordinance deals with that and ought to be able to be relied upon by those that are building under it, but they also have to know that when they come to you that the architectural design and the manner in which their house fits into the neighborhood is within your jurisdiction. And that if the zoning ordinance, for instance, allows a two story house and all the houses on the street are one story that you don't have the right to tell them that they can't have 10,000 sq. ft. i.e. 5,000 on each floor, but you do have the right, to the best of your ability, to make that structure to conform to that neighborhood. Not by saying we want it 8,000 and not 10,000 but by saying we think it would look better if you set back the second story so the massing wasn't so great. That's the type of review process that you have without getting into the numbers business."

Floyd Wideman:

"Okay. I think that's wrong because I think it's too loose, but if that is the way it is, we'll deal with it."

Attorney Randolph:

"That's the way it is now, and that's not to say that the Town Council can't continue to review that and look."

Robert Moore:

"In furtherance of what Mr. Randolph was saying and for Mr. Wideman's benefit too, they have the ability, currently, at the Architectural Commission to deal with the mass on the property, not the square footage, not the cubic content, as Mr. Randolph had said, but the arrangement of that mass on the property. So if it is better to put a one story portion on one side of the property so it doesn't look down into somebody's pool, the Architectural Commission has the ability to do it, and, frankly, they have been doing it, and I don't think the Council has seen any appeals from ARCOM in over a year. That part of it seems to be working fairly well."

MINUTES FROM THE SPECIAL TOWN COUNCIL MEETING HELD ON 10/8/2001

"The atypical house that Mr. Wideman might have mentioned on a large piece of property that is surrounded by smaller pieces of property and smaller homes, that one can be dealt with in a different fashion and may be being done so under the R-B study as it goes to the Zoning Commission."

Attorney Randolph:

"On to the next subject, the subject with which you deal throughout the year as opposed to just during the zoning season, because it is during the zoning season that you legislate and that's what we've talked about, but during the rest of the year, you deal with the quasi-judicial application of the zoning ordinance. The difference between legislative is that you are making the rule, and quasi-judicial where you sit as judges. You are determining the appropriate application of the rule. You apply the rule because you have certain criteria within your ordinances that have to be met in order for an application to be successful. So that's the way it is determined whether or not something is a quasi-judicial process as opposed to a legislative, and that is the process that you sit in on a monthly basis in site plan review, special exceptions, and variances.

"Before I go into the differences between the variances and special exceptions, we should just review the quasi-judicial process. You know, sitting as judges, that as a judge you should not have ex-parte communications with the attorneys. You can't talk to the attorneys, one on one, outside the hearing itself, so the courts came out and said you shouldn't be able to do that as a public body either, because it is not fair to the applicants. They should have an opportunity to all speak together with you.

"Due to the wrath of the municipalities, we said these keeps us from talking to our constituents. Ex parte communications were then allowed. It was amended so as to allow ex parte communications as long as you declared those ex parte communications at the meeting. In declaring those ex parte communications, what you are supposed to do is not only announce whom you spoke to, but the subject matter that you talked about so that everyone in the audience who has an interest in the application knows what your mind set is. They won't know your mind set, but they will know the same thing that you do about the input that you have, because your decision is supposed to be made at the public meeting, based upon information you hear at the public meeting and not on any preconceived notions. So, as you know, we have the swearing of witnesses which is not absolutely required but is a good idea at such a hearing. We have cross examination of witnesses, notice of the hearing, and due process. Formal rules of evidence are not necessarily followed and are not required to be followed, but you do have to give fundamental fairness and due process at the hearing.

"The process of review for such a thing as granting of variances, special exceptions is going to be by petition for writ of certiorari which is an appeal. If somebody is going to attack your legislative decision, it is going to be a trial de novo, a new trial where experts come in and

MINUTES FROM THE SPECIAL TOWN COUNCIL MEETING HELD ON 10/8/2001

testify as to why the ordinance has a substantial relation to the goal you are trying to achieve, etc. and that it is fairly debatable, but in variances and special exceptions, the court will simply review the record, and as long as reviewing the record, the judge sees that there is competent, substantial evidence to substantiate your decision, in other words, evidence on which a reasonable person could rely in making their decision, may well sustain your decision. It's not a re-weighing of the evidence. I don't care if there are ten people that spoke against it and one in favor. If that one in favor was competent, substantial evidence, the courts are not going to throw your decision out, or they shouldn't throw your decision if you based it on that testimony. But keep in mind that the testimony has to be competent. It can't be just an opinion of a neighbor who says I'm sorry, I just think this set back is too great. It's got to be competent evidence, from someone who has the ability and knowledge to speak about it, usually what we know as expert testimony although it doesn't always have to be from an expert. But what you have to keep in mind is that it can't be based on one person's opinion, and it can't be based upon the number of people in the crowd who feel that way. Decisions are not made on the basis of an applause meter as one court has said. They are based upon competent, substantial evidence. So your decision is going to be sustained normally if you've got some evidence to base your decision on. That's why when you make a motion to grant something or to deny something, you should incorporate in the motion findings so that the court can look at your motion and your findings and make a determination that indeed these findings are in the record. That will help the court in making their determination.

"So we've got variances and we've got special exceptions, and you heard me say it before, variances are very difficult to receive. In order to grant a variance, at least the way our code is written now, and that's not to say you cannot change your code if you like, but the way the code is written now, in order for a person to be granted a variance, they need to meet all, each and every one, of the criteria that are set forth in our ordinance -- the criteria relating to hardship, the uniqueness of the land, the fact that it is not self imposed, and that sort of thing. Variances can't be granted for financial hardship or medical hardship. They can't be granted because someone says I've got a growing family, I need this extra room or that it is going to cost me so much if I don't get this hardship. They are generally granted on the basis of the uniqueness of the property, and it runs with the land; not with the individual involved. So, if a person has a growing family that doesn't apply to the land, because someone else who had a smaller family might be able to get along fine in that particular house. So, I think it is important for you to remember that these variances run with the land, not with the individual who is making the presentation or that may be living in the house.

"I think that sort of a landmark case, it's an unfortunate landmark case because the Town was involved and I was involved, was the Bernard vs. the Town of Palm Beach case where someone applied for a variance to enclose a bedroom within the setback on the second floor. The neighbors objected because the window from that bedroom was going to be looking down into their pool, etc. So they filed an appeal, a petition for a writ of certiorari, and I

MINUTES FROM THE SPECIAL TOWN COUNCIL MEETING HELD ON 10/8/2001

believe in that case, there was competent, substantial evidence to sustain the decision that was made by the Council, and there may have even been argument that all the criteria had been met, but the Court ruled that you cannot obtain a variance unless you can show that without the variance, there is no reasonable beneficial use of the property. That is a hard standard to meet, and I, to this day, respectively, think the court was wrong reaching that decision on that basis, because on that basis nobody could receive a swimming pool variance, because you don't have to have a swimming pool. You can have a reasonable, beneficial use on the property if you have a 2,000 square foot house. So, on the basis of what they ruled, you can't get a variance if you have a reasonable use with a 2,500 sq. ft. house but don't have a swimming pool or a tennis court, but I don't think you have to be too concerned with Bernard as long as you concern yourself with all of those criteria and make the applicant prove that they have met all of those criteria before you grant the variance, and in granting the variance, indicate the reason that you have granted it.

"Finally, special exceptions. That's a different animal all together. Remember the burden is on the applicant to prove that they have met the criteria for a variance; whereas with a special exception, if an applicant comes forward with an expert and shows that they have, on their face, met all the criteria set forth in your code for the granting of a special exception, they're entitled to a special exception. So, the burden shifts at that point for you as a Council to be able to show that they have not met those criteria. You have to base that, not on your opinion, but on competent, substantial evidence which means that you should have something in the record to support your decision that they don't meet those criteria for a special exception. In most instances, if the other side has presented an expert to indicate that they have met the criteria, you better have an expert to show that they have not, and that's sometimes difficult when someone comes before you with a special exception and you have to rely on the expertise from someone other than your building officials who are present. For instance, someone coming in who has something to do with noise, and they bring in a noise expert and you don't have one, you would have a hard time turning down the special exception.

"I think that you have the right, in that instance, if that happens to allow a deferral on the time until you have an opportunity to consult your own expert. I would recommend that you do that if you ever find yourself in that position. It is only fair, I think, that both sides have an opportunity to present their experts and then have you make your decision on that basis.

"Now all of this relating to variances and special exceptions is included in that February, and I'll give you another copy, memo of 2000 when I gave a workshop similar to this when new Council members came in. We have covered the quasi-judicial hearings, we've covered, I think, variances and I've covered special exceptions, and I would just summarizing by saying that the burden placed on the Town to sustain on appeal the granting of a variance is a great burden. Therefore, the Council should be careful, not only in the granting of variances, but in the manner in which it grants same. On the other hand, with Special Exceptions, because

MINUTES FROM THE SPECIAL TOWN COUNCIL MEETING HELD ON 10/8/2001

they are a use which is permitted, the greater burden placed on the Town is not in the granting of the special exception but in the denial of same. Remember variances are not permitted so the burden is on the applicant to show they are entitled to them. Special exceptions are permitted uses - subject to their meeting a criteria. So, the burden is then on you to show that they cannot get it, and that is all I have to say about that."

Jack McDonald:

"Thank you, Mr. Randolph. Questions?"

Norman Goldblum:

"Special exceptions - if we have to hire an expert, is the cost of that expert go to the person who is applying for the special exception if they lose?"

Attorney Randolph:

"Not if they lose, but I believe there is a provision in our code which allows us to hire an expert and charge that against the applicant."

Norman Goldblum:

"No matter which way it goes?"

Attorney Randolph:

"Correct."

Norman Goldblum:

"We ought to note that when the special exceptions are applied for."

Jack McDonald:

"I will give the Council the benefit of my experience, then I'll go to Mr. Wyett.

"I would say that in the seven or so years that I have sat here, probably 75% of all the petitions asking for a variance don't meet the hardship test. Do not meet the hardship test. So when you regularly should be rejecting 75% of the variance requests.

"Mr. Wyett."

Allen Wyett:

"Jack, I'm not agreeing or disagreeing with you. I think it's more like 85%, but that's not my point.

"The attorneys coming before us, both in public here and private meetings with them, always complain, you're too tough, you're too hard. The town has got small lots and one particular appeal to me just in the last two months, which has not come to the Council yet, — my lot

MINUTES FROM THE SPECIAL TOWN COUNCIL MEETING HELD ON 10/8/2001

is rectangular, so therefore it's not irregularly shaped, but it's not very deep. It's very long, and that's a hardship to build on."

Attorney Randolph:

"Could be, and that's exactly the type of thing you look for in determining whether to grant a variance. The lay of the land, we commonly use a pie shaped lot, which is perhaps at the end of a cul-du-sac which shows that they can't enjoy what everybody else on that street might be able to enjoy if they have to build to your setbacks, because they can't get their house in that setback. That may equally apply to a rectangular lot within a street full of square lots; one that is not as deep as the others.

"It's very rare, I believe, that variances need to be granted for new construction, except in cases where they have a situation where they have a lot like that which is different or unique, that is not the same as other lots, but for new construction, normally, you can get a reasonable home on the property, and I'm not the architect, so I would have to allow the architects and the attorneys who represent them to deal with that. But, the other argument that is made that you referred to that is made by attorneys and architects who come in is that we have made so many changes to our zoning ordinance throughout the years, that there are so many non-conforming structures in Town, that in many instances, they need variances. That may well be, but the way the ordinance is drafted now, it is clear, that they have to meet all of these criteria in order to be granted a variance, regardless of the fact that there are so many non-conformities. I agree with Mr. McDonald that had I been called upon to defend many of the variances that have been granted over the years, I would be hard pressed to defend them, because the argument would be made that they didn't meet all the criteria set forth in the code."

Allen Wyett:

"You get this argument also when people wish to add to the existing home, and they wish to invade the setback, either the front or the sides, on the premise that pre-existing zoning allowed it, and there is not other place to put the expansion. Is that a hardship?"

Attorney Randolph:

"Well, Bernard would say no, because Bernard says that but for the variance you have no reasonable, beneficial use of the property. Well, if they've got a house there, and they have been using it for the last ten years or twenty years, why should they be entitled to a variance just because they want to make an addition to it."

Allen Wyett:

"This one particular thing that is discouraged from coming to the Council, I told them they could come, but I would discourage them. They wanted angle of vision. They wanted front yard setback, and I said, 'You have a pretty good size lot, why are you asking for this? Isn't there some other place on the lot to put this that would conform to zoning?' The answer

MINUTES FROM THE SPECIAL TOWN COUNCIL MEETING HELD ON 10/8/2001

came back, 'Yes, but there is a hardship.' I said, 'What's the hardship?'

"Well, we'd have to tear down 50 - 75 year old magnificent trees to do it.' I said, 'Well, I wouldn't want to lose 50 - 75 year old magnificent trees, but I don't know if I could possibly advise you that you are going to get the variance.'"

Attorney Randolph:

"Remember one of the criteria is that it has to be the minimum variance which will make reasonable use of the land."

Jack McDonald:

"Mr. Moore."

Robert Moore:

"Mr. McDonald if I might – Mr. Randolph and I were talking about special exceptions and variances. Another item that the Council has pretty regularly been seeing on their monthly agendas for the platted lots that are non-conforming lots are site plan reviews. I thought you might want to somewhat comment on site plan reviews and what their duties were related to that."

Attorney Randolph:

"It's the same. Under a site plan review which is always required on a special exception, but there might be instances where a site plan review is required without having a special exception. There are specific criteria in the code that are required to be met for site plan review also. So, if a person comes in and meets those criteria, normally the application would be granted if they meet that."

Jack McDonald:

"Any other questions?"

Thank you, Mr. Randolph. Are there any other matters?"

Allen Wyett:

"For tomorrow's meeting, I would like to have added to the agenda a refinancing authority. On television the other day, I noted professionals felt that refinancing on bond issues specifically, might hit a low sometime between November and December with nobody knowing exactly. Under our new Charter, the Town Manager is a CEO, Executive Officer, and I would like the Council to give him the authority with the advice of bond counsel to refinance any of the bonds we have outstanding if it is desirable without having to have a special Town Council meeting to confirm it."

MINUTES FROM THE SPECIAL TOWN COUNCIL MEETING HELD ON 10/8/2001

Jack McDonald:

“Thank you, Mr. Wyett.

“Are there any other matters?”

Allen Wyett:

“Yes.

“I would also like tomorrow to defer the Recreation Commission appointments, and I’ll go into it tomorrow.

“Then, because of all the rhetoric that is going on in our newspapers on Sunday about the beach, I would like this new Council to reconfirm, just as a matter of public knowledge and confirmation that this Council stands behind the beach decision to reconstruct our beaches that was authorized by the Council in 1999, just really a PR item.”

Jack McDonald:

“Thank you, Mr. Wyett.

“Are there any other matters?”

End of verbatim transcript.

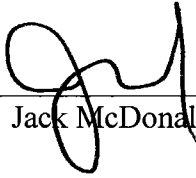
V. ANY OTHER MATTERS

There were none.

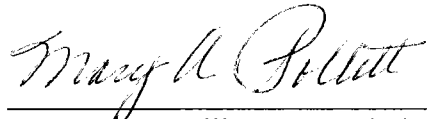
MINUTES FROM THE SPECIAL TOWN COUNCIL MEETING HELD ON 10/8/2001

VI. ADJOURNMENT

The meeting was adjourned at 2:00 p.m.



Jack McDonald, President



Mary Pollitt, Town Clerk

