

TOWN COUNCIL MINUTES OF SPECIAL TOWN COUNCIL MEETING OF

SEPTEMBER 14, 1992

I. CALL TO ORDER AND ROLL CALL. President Heeke called a Special Meeting of the Town Council to order at 11:06 AM on September 14, 1992 in the Town Hall Council Chambers. On roll call, the following elected officials were found to be in attendance: President Heeke, President Pro Tem Weinberg and Councilwoman Wiener. Absent were Mayor Marix, Councilwoman Douthit and Councilman Ilyinsky. Also attending were: Mr. Doney, Mr. Randolph, Mr. Dusey, Mr. Bowser, Mr. Elwell, Mrs. Martinuzzi and Mrs. Peters.

Roll Call

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

Invocation

III. APPROVAL OF AGENDA: Motion was made by Mr. Weinberg to approve the agenda as printed. Seconded by Mrs. Wiener. On roll call, the motion carried unanimously.

Approval of Agenda

IV. CONSIDERATION OF PEP REEF PROJECT AT MID-TOWN REGARDING ISSUES DISCUSSED AT SEPTEMBER 8, 1992 TOWN COUNCIL MEETING: Attorney Randolph called for a statement for the reason for this special meeting, as there is a provision in the Code which establishes the procedure for Special Town Council Meetings which states whenever possible and practical, twelve hours notice be given. He stated it was his understanding it was not possible to give the twelve hours notice. He understood that there would not have been a quorum available for the remainder of the week and because of information recently received, the Town Council President determined an Emergency Meeting should be called.

PEP Reef

President Heeke reported he was advised this morning of the letter which was sent by DNR, as he was not available over the weekend. He knew of the schedule of Mr. Weinberg and he also was not going to be available later in the week, and there was a need to proceed promptly in reaction to the letter from DNR, so that was the purpose of calling this Special meeting.

Motion was made by Mr. Weinberg, seconded by Mrs. Wiener to reconsider the motion made at the September 8, 1992 Town Council Meeting with regards to the authorization of advanced payment, which was an accommodation authorized by the Town Council. Motion carried unanimously on roll call.

Mr. Heeke called on Mr. Doney to read the letter from Kirby Green of DNR into the record:

Mr. Doney advised the letter was faxed on Friday, Sept. 11, 1992 at approximately 4:36 PM:

Sept. 11, 1992

Bernard A. Heeke
Town of Palm Beach
Post Office Box 2029
360 South County Road
Palm Beach, Fl. 33480

Dear Mr. Heeke:

SUBJECT: DBS 90-268

This letter is to document a meeting held on this date with representatives of American Coastal Engineering, Inc. and the Department staff. Information provided to this office on September 9, 1992 and additional information provided at our meeting indicates that some of the 55 interlocked units have settled approximately three feet. This settlement exceeds the tolerance level of 1.0 foot set forth in the test plan. Such a large settlement and the increased freeboard of the structure makes it extremely unlikely that the project performance specifications will be met. Therefore the Department is unwilling to proceed with the test until this problem is investigated.

In accordance with the requirements set forth in the test plan, the Department orders that all installation of the units be stopped immediately. Additionally, the permittee shall provide the Department with alternative plans to correct the problem within thirty days. These plans shall be approved by the Department. The Department reserves the right to require additional testing on a reduced scale or using laboratory tests and engineering analysis prior to resuming the installation of the full scale test. The Department also reserves the right to require that the existing interlocked units be removed and reinstalled once the problem is resolved.

Sincerely,

Kirby B. Green, III
Director
Division of Beaches & Shores

CC: Bob Doney
Hans Rauch
Bob Dean
Hal Dean
Lonnie Ryder

Mrs. Wiener stated she feels like she is repeating herself as she has had a lot of problems with this particular project, especially with the veracity with which this Council has been addressed by the American Coastal people and their attorney. She recalled last Council meeting, they indicated the problem was minor and they didn't believe they would have any problem with DNR, and that was speculation on their part and she accepted it as such, but she believed the Town people should have knowledge about those things. She was concerned about the request to prepay for the materials delivered by the subcontractor. She recalled she did question the Town's attorney on the Town's relation with the subcontractor and her concern that the American Coastal had not

PEP Reef
(cont'd)

supplied the Town with the kind of financial information about their company which she believed was necessary for a government entity to do business with a company, especially when there were no other bidders. She now finds the Town in a situation that the contractor seems to be having cash flow problems and the citizens of the Town of Palm Beach are playing the part of a bank and she has a problem with that. She felt when you do business with someone, it has to be straight up and truthful. She had read in the paper shortly after the storm when a representative of ACE commented the reef was in fine shape and there was no problem. However, in the latest article last week she read that ACE was aware of the sinking and DNR was not aware of that until September 9, 1992. She felt the Town has to observe its' end of the contract, however, she thought it was foolhardy and incorrect for the taxpayers of this Town to pay in advance.

Mr. Heeke stated he was alarmed by one of the statements in Mr. Green's letter that with such a large settlement of the units, it would be extremely unlikely that the project performance specifications could be met. He stated that is why he called this Special Meeting. He stated with respect to the action taken on September 8, 1992 by the Town Council, the contract did not call for payment but the Council authorized same, however, this information contained in DNR's letter of September 11, 1992 was not available to the Council at the time their decision was made to authorize payment. He felt the matter should be addressed by a full Council and it should be deferred until the next Town Council meeting, and perhaps there be an accord at that time between ACE and DNR, and the Council will be able to act with further information available.

Mr. Weinberg commented at no time did he ever believe there was a relationship between the Town and the Sub-Contractor and he didn't feel it was the Town's responsibility to prepay a situation in this regard. He stated it was always his feeling that they were buying a reef for the protection of this community, rather than engaging in an experiment and asked when the additional units were installed, before or after the Hurricane Andrew?

Beth Mitchell, Vice-President of American Coastal Engineering addressed the Council noting their attorney was not able to attend this meeting on such short notice. She advised she had a meeting in Tallahassee after the Town Council meeting last week with DNR. She wished to address some of the issues. She wished to go on record with the statement that Hurricane Andrew came on August 24, a Monday, and she swam the reef on Wednesday, the 26th, and visibility was very difficult and all she could do was to swim from one end to the other and look at the top of the reef. She made comments to the Press which she stressed were preliminary comments as they would need more visibility before she could see what was happening, but her initial reaction was that the units were in line and that is what she told the Press, although it may have been interpreted differently.

Ms. Mitchell recalled on Friday, August 28, the subcontractor did try to install additional modules and while they were attempting to install the first unit, it was discovered there were deviations in the elevations. She stated the sub-contractor was having problems with visibility so the job was stopped and the ACE people came back to the office and decided the best thing to do was to get some beach profile information. She advised they did tell the sub-contractor to not continue working and this was prior to the Town Council meeting and prior to the DNR's letter. She wished everyone to know that they did not continue in bad faith and they have attempted all along to proceed in good faith.

Ms. Mitchell advised that after the beach profile information was received and the Coastal Engineer analyzed it and the waves died down, they decided there was more of a problem than they had perceived, with regard to the freeboard and how the reef was supposed to work, as it was designed to have 2.5 feet of water above it at all times. She realized it would not meet the requirements of the test plan as it was too far into the water. She then came to the Council Meeting and told them what was going on and again acted in good faith, as they made the Council aware there was a problem and they needed time to resolve the problem and they needed to go to DNR, which she did, so in terms of their veracity, she was not sure that was a fair comment on American Coastal's actions to date.

Ms. Mitchell stated they realize they have to come up with a "fix" and the engineers are working on it and she believed there was a solution, but before they go out and go into mass production on the solution, they wanted an opportunity to ensure this was the actual "fix". She talked to the DNR staff on Friday, September 11, and Dr. Deveraux of DNR made the comment that the test plan itself provided for meetings between all of the parties on a regular basis to discuss how the reef is working, what is happening with the data, etc., and Dr. Deveraux believed that Hurricane Andrew precipitated the first meeting and there was a round table discussion and different options were discussed. She knew DNR was going to send the letter and there was discussion about whether or not to leave the units in, or take them out and what they should do. She recalled several of the staff members suggested the units be left in to see what would happen and that issue was left unresolved. She was instructed to come back and compile alternatives and go with the first idea to remove the discontinuity of the reef. She stated she was going to design a small test to make sure that this would actually be the fix.

Ms. Mitchell recalled when they were before the Council on September 8, they told the Council that ACE would be picking up the tab for this fix, and as a contractor they have that responsibility. She believed they were operating in good faith. She realized the main issue appears to be the payment to the sub-contractor and the only thing that has changed since last week is that the parties have agreed to work together closely to come up with a solution to keep this project going.

Mrs. Wiener responded to Ms. Mitchell indicating she felt she was an outstanding spokeswoman, but needed to tell her that the only thing that has changed is the parties have agreed to work closely together - and Mrs. Wiener did not view that as a change as that has been there from the start. She viewed the change that has occurred and what has precipitated this meeting is DNR has said "Stop".

Ms. Mitchell stated what DNR has suggested is that ACE doesn't install more units until they fix this problem, but ACE had already stopped.

Mr. Heeke asked if there should be a conference call made to Mr. Green? Ms. Mitchell thought that might be helpful noting that Mr. Green told her Friday that once they put the package together and his staff had reviewed it, he would be willing to come to the next Council meeting and discuss this matter further.

Mr. Heeke thought that would be the optimum that should take place at the next Council meeting when there is a full Council, however, he did have a concern now going ahead with the prepayment under these circumstances and that is why he called this special meeting.

PEP Reef
(cont'd)

Mr. Weinberg did not believe it was the Town's responsibility to take care of subcontractors who may have jumped the gun. Ms. Mitchell indicated she had discussed this with staff that they were going forward and attempting to get this project completed and unfortunately it took longer to get the Notice to Proceed. She believed the subcontractor was acting in the best interest of everyone in trying to get the project out in the water before the bad weather happened. She asked for staff comments on this as she felt strongly all have been acting in good faith.

Mr. Weinberg responded it was not a question of good faith but good business requires them not to take money in advance when their business relationship with their subcontractors would require them to finance their project and then be compensated, according to the contract.

Ms. Mitchell recalled discussing the fact that this work was done and there were 242 units in the water and what happened when they originally negotiated the contract, there was a certain method of installation being considered and the payment schedule set up was based on that method. She believed it worked out well in terms of the fabrication of the units, but they were not able to get started on the installation of this until August 6th, so effectively, when they were before Council on Sept. 8, they were talking about the fact that they had worked as fast as they could and were asking for payment for the work that was completed. She stated she would not have come before Council if she had thought that was an unfair request.

Mr. Heeke didn't believe anyone was jumping the gun but accelerated their effort due to their late start. Mr. Weinberg had no argument with that but felt the Town Council was not responsible for the sub-contractor as the Town's relationship is with ACE.

Attorney Randolph advised these discussions were held on September 8, and he thought the attorney for ACE agreed there was no responsibility under the contract and agreed there was no responsibility of the Town to a subcontractor, and as a matter of fact, he believed the Council understood they had no legal obligation of the Town Council under the contract and the issue was a request for an accommodation under the contract, and he didn't know if they wished to rediscuss those issues but probably should focus on what has brought them back here today and why they wished to reconsider the issue, which he understood the issue was on the basis of the letter received from DNR, which Mr. Heeke indicated contained a sentence that it was extremely unlikely that the project performance specifications will be met. He thought those are the things which should be discussed today and whether or not the decision made at the previous meeting should be modified.

Mrs. Wiener pointed out there is not a full Town Council here today and she thought this matter should be brought back to the entire Town Council stating she did not recall there was an actual date which the payment should be made. Mr. Heeke did not recall that was a part of the motion but that it was within a reasonable period of time.

Mrs. Wiener reiterated she would like this to be considered by the full Council and she believed the payment should be held until the full Council considers this at the next Town Council meeting.

Mr. Dusey recalled they are allowed to invoice every three weeks, by their contract, and the Town has a fifteen day period to process that payment, and based on the action last week, the payment would have been properly timed and he would need to process it within fifteen days.

Attorney Randolph asked Mrs. Wiener if her statement to not make the payment until after the full Council considers this and asked if she meant to include any decision to make the payment to which Mrs. Wiener responded "absolutely." Mr. Randolph pointed out as the issue now stands, that before there was a motion to reconsider, a decision had been made to make the payment, so he asked her to make it clear that any decision to make the payment, pursuant to ACE's request, will be deferred until it is reconsidered by the full Council. Mrs. Wiener responded that is why she asked about the date, and then Mr. Dusey explained the terms of the payment schedule.

Mr. Dusey advised they have received a bill. Mrs. Wiener felt it was necessary to wait until the next October meeting to pay it. Ms. Mitchell reminded all the expenses have been incurred and they are working on a tight budget, and she was concerned about jeopardizing the project without any cash flow whatsoever. She believed their last invoice was postponed so they could come to Council which means they are now some weeks out of sync with the payment process.

Mr. Dusey reminded the Council the issue was with respect to prepayment of the units now in the water, not for payment for units fabricated, so payment of the units up to the point where Council told them to stop could be processed.

Mrs. Wiener stated she understood that the conversation centered around the \$200,000 prepayment for the units in the water. Mr. Dusey confirmed this was prepayment for the units in the water but not yet set. Mrs. Wiener believed there was no question about anything else. Mr. Dusey stated he thought it was a little tricky as Council asked the project be stopped at a particular point, so the whole project is not fully authorized at this point by Town Council and that was because of the cable situation, but the rest of the billing will just go on, as it would, pursuant to the contract.

Mr. Heeke stated he didn't want to jeopardize the project, but needed to be careful about future payments until they hear from Mr. Green directly.

Ms. Mitchell recalled when they were talking about this matter at the Town Council meeting on September 8, there was discussion about how much money was left in the contract and Mr. Bowser thought it was somewhere around \$700,000, if they were to go forward with the prepayment, and with the invoice presented, would leave the Town with \$675,000 left in the contract but they also have ten per cent retainage being withheld, so those monies are still available.

Mr. Heeke asked Mr. Randolph if they would now need a motion to reconsider the previous action of the Town Council as he didn't think a quorum could be had much before the October Town Council meeting, as he will be out of Town as will Mr. Weinberg. Mrs. Wiener reiterated her statement about having the full Council consider this. Mr. Heeke agreed.

Mrs. Wiener moved that consideration of the prepayment of approximately \$200,000 requested by American Coastal Engineering at the last Town Council Meeting of September 8, 1992, be withheld, as a result of the latest letter received on September 11, 1992 from Mr. Kirby Green of the Department of Natural Resources, and this action be reconsidered until the next Town Council meeting scheduled for October 13, 1992. Seconded by Mr. Weinberg.

Mr. Heeke recognized that this project is experimental, and the nature of experiments is there aren't any guaranties, however he believes American Coastal is optimistic that they are going to find a solution, but he wanted them to know where he was coming from.

On roll call, the motion carried unanimously.

IV. ADJOURNMENT. There being no further business, the meeting was adjourned at 11:45 AM.

Grace T. Peters,
Town Clerk

PEP Reef
(cont'd)

Adjournment