TOWN COUNCIL MINUTES OF MEETING HELD ON JULY 14, 1992

Roll Call

I. CALL TO ORDER AND ROLL CALL President Heeke called the meeting of the Town Council to order on July 14, 1992 at 9:30 AM in the Town Hall Council Chambers. On roll call, all elected officials were found to be in attendance. Also attending for a portion or all of the meeting were: Mr. Doney, Mr. Randolph, Mrs. Peters, Chief Elmore, Chief Terlizzese, Mr. Dusey, Mr. Bowser, Mr. Elwell, Mr. Jakubiak, Mr. Boggs, Mr. Zimmerman and Mr. Frank.

Invocation

II. INVOCATION AND PLEDGE OF ALLEGIANCE - Father Gushee of Bethesda-by-the-Sea Episcopal Church gave the invocation. Pledge of Allegiance was led by President Pro Tem Weinberg.

Presentations

III. PRESENTATIONS

Res. 33-92

A. Resolution No. 33-92 - Recognizing with Appreciation the Efforts of the Bicentennial Eagle Restoration Committee:

Mr. David J. Gradman, Chairman
Mrs. James A. DePeyster, Vice-Chair
Mrs. Loren Fletcher Cole
Mrs. Henry Phipps Hoffstot
The Honorable James R. Knott
Mr. Sidney A. Kohl
Mr. Granville A. Morse
Mrs. Earl E.T. Smith
Mr. John E. Stewart

Mayor Marix read Resolution No. 33-92:

A RESOLUTION OF THE TOWN COUNCIL OF THE TOWN OF PALM BEACH, PALM BEACH COUNTY, FLORIDA, COMMENDING THE BICENTENNIAL EAGLE RESTORATION COMMITTEE FOR ITS OUTSTANDING LEADERSHIP OF THE BICENTENNIAL EAGLE RESTORATION PROJECT.

Motion was made by Mr. Ilyinsky, seconded by Mrs. Douthit to approve Resolution No. 33-92.

Mayor Marix distributed a framed resolution of appreciation to the committee members in attendance: Mr. Gradman, Mrs. dePeyster and Judge Knott.

Comments of the Mayor

IV. COMMENTS OF THE MAYOR - Mayor Marix commended the Bicentennial Eagle Restoration Committee for the wonderful work they did in restoring the eagle and thanked them again.

V. APPROVAL OF AGENDA

NOTE: Items listed on the "APPROVED AGENDA" will be approved by one motion of the Town Council, unless the Mayor or an individual Council Member requests that certain items be deleted from same and be individually considered.

Attorney Randolph requested Item IX. Committee Reports A. The Administrative and Personnel Committee of June 24 and July 13 be removed from the agenda as they have satisfactorily resolved this matter with Mr. Higgins. Mrs. Wiener recalled she and Mr. Weinberg met for nine hours on this matter and there were astounding charges made which have now disappeared as they were unfounded and unwarranted and she was sure that was the reason this matter has been resolved. Mr. Weinberg moved that IX. A be removed from the agenda. Seconded by Mrs. Douthit. On roll call, the motion carried unanimously.

President Heeke noted Item XIII. B.1, Variance No. 33-92, Robert Radkay requests this item be withdrawn. Mr. Ilyinsky noted there is a mistake in the square footage for Item XIII. B.3 and it should be 2,040 square feet rather than 2,200 as printed. President Heeke noted Item XIII.B.4, Special Exception No. 15-92, 375 South County Associates has asked to be deferred and he believed this was a second request. Mrs. Wiener moved that Special Exception No. 15-92 be withdrawn. After discussion, Mrs. Wiener withdrew her motion stating the proper way to handle this is to let it come up at its regular time on the agenda and have Mr. Broberg address it then. Mr. Heeke noted Item 8, Variance No. 43-92 - D. Dixon and Pauline B. Boardman request a postponement to the August meeting and there was no objection from the Council on this request. Motion was made by Mr. Ilyinsky that the Regular Agenda be approved as amended. Seconded by Mrs. Wiener. On roll call, the motion carried unanimously.

APPROVED AGENDA (ITEMS VI. THROUGH VIII.)

Mrs. Wiener requested the Minutes of April 14 and 16, 1992 be removed from the Approved Agenda and deferred to the August Town Council Meeting. Mr. Ilyinsky stated he had a question on the type of beverage license that Scotti's is requesting and that item was also removed from the Approved Agenda. Mrs. Wiener moved the Approved Agenda be approved with the removals as stated. Seconded by Mr. Weinberg. On roll call, the motion carried unanimously to approve the Approved Agenda as amended.

VI. APPROVAL OF MINUTES OF APRIL 14 AND 16, 1992 (Deferred).

Licenses & Permits

VII. LICENSES AND PERMITS

A. Charitable Solicitations

Char. Solicitations

1. Palm Beach Community College Foundation, Inc.; No. 338-92
2. American Cancer Society; No. 19-93
3. Planned Parenthood of the Palm Beach Area, Inc.; No. 120-93
4. International Game and Fish Association, Inc.; No. 235-93
5. Alzheimer's Association; No. 256-93

B. Beverage Licenses

1. Request for Transfer of Ownership/Name Change of a 4COP Alcoholic Beverage License by Jean Pierre Leverrier, Leverrier, Inc. d/b/a Bistro Chez Jean Pierre from Ann Zweig King d/b/a Alligator Joe, Inc./ANNZ, 132 North County Road — Beverage Licenses

VIII. NEW BUSINESS — New Business

A. Bid Awards

1. Sealed Bid No. 021-91/92 - Traffic Light Lift Platform — Sealed Bid 021-91/92

B. Other

1. Consideration of Modification of Ventilation System in Police Department Firing Range.

REGULAR AGENDA — Reg.Agenda

Mayor Marix asked if the Town Attorney and staff could look at the Results form used for reporting what charitable organizations raise in the Town as she believed there should be some alterations to it. Mr. Doney responded he would talk to Mr. Randolph and Mrs. Peters on this subject.

Request for Change of License Classification from a 3PS to 4COP Alcoholic Beverage License by Stephen Lynn Keidaish, Keidaish Enterprises Inc. d/b/a Scotti's Fine Wines & Liquors, 333 South County Road - Chief Terlizzese advised this is an upgrade of the liquor license from a package store license to a 4 COP. The Chief stated the applicant wishes to increase his license type and asset value and has no intentions of changing the package store situation to a consumption on premises. Chief Terlizzese advised their approval is conditioned on there be no seating on the premises and there will be no consumption of any alcoholic beverages on the premises and it will continue to operate as a package store. Mr. Ilyinsky moved for the change of license with the conditions attached to it as stated by the Chief. Seconded by Mrs. Wiener. On roll call, the motion carried unanimously.

IX. COMMITTEE REPORTS — Committee Reports

A. Administrative and Personnel Committee of June 24 and July 13, 1992 - This was removed from the agenda.

REPORT OF THE ADMINISTRATIVE AND PERSONNEL COMMITTEE

MEETINGS HELD ON JUNE 24, 1992 AND JULY 13, 1992 — Admin. & Personnel Comm.

JUNE 24, 1992:

The Administrative and Personnel Committee held a meeting on June 24. 1992 commencing at 10:23 AM to 12:15 PM in the Town Hall Council Chambers, and reconvened at 2:00 to 3:30 PM on June 24, 1992, in the Third Floor Conference Room at Town Hall. In attendance were the Administrative and Personnel Committee members, Mrs. Hermine L. Wiener, as Chairperson and Mr. M. William Weinberg as Committee member. Also attending were Town Manager Doney, Director of Public Works Dusey, Town Attorney Randolph, Town Clerk Peters, Personnel Director William C. Crouse, Douglas Higgins and from the Public Works Vehicle Maintenance Bureau, Dave Kyzar, Robert Black and Paul Weber. All witnesses were given the oath by the Town Clerk and gave their testimony on the appeal by Douglas Higgins of his discharge from Town employment. After hearing the testimony and reviewing the documents presented, a subsequent meeting of the Administrative and Personnel Committee was scheduled for July 13, 1992 at 9:30 AM in the Town Hall Council Chambers to hear the testimony of additional witnesses who were not able to attend the June 24, 1992 meeting and to further consider this appeal.

JULY 13, 1992:

The Administrative and Personnel Committee held a meeting on July 13, 1992 commencing at 9:39 AM to 12:35 PM in the Town Hall Council Chambers. In attendance were Committee Members, Mrs. Hermine L. Wiener, as Chairperson, and Mr. M. William Weinberg as Committee member. Also attending were Town Manager Doney, Director of Public Works Dusey, Town Attorney Randolph, Town Clerk Peters, Personnel Director Crouse, and from the Public Works Department - Lloyd McCoy, Michael Sharpe. Dave Kyzar, Henry Thomas Barnes, Walter Allison. Also attending were Mr. Douglas Higgins and his attorney, Thomas L. Rolle.

The witnesses were administered the oath and gave their testimony, and after hearing their testimony and reviewing the documents presented, and listening to the summarization by Mr. Dusey and Attorney Rolle, IT IS THE ADMINISTRATIVE AND PERSONNEL COMMITTEE'S UNANIMOUS RECOMMENDATION TO THE TOWN COUNCIL THAT THE DECISION OF THE DIRECTOR OF PUBLIC WORKS DUSEY AND TOWN MANAGER DONEY BE UPHELD ON THE TERMINATION OF DOUGLAS HIGGINS.

The Committee did not agree that the decision of termination of Mr. Higgins was racially motivated as the documentation shows there has been a two year effort made to come to some kind of understanding between the Department of Public Works Vehicle Maintenance Bureau and Mr. Higgins, however, if the possibility existed for a lesser position in the Public Works Department other than the Vehicle Maintenance Bureau, and Mr. Higgins would agree to take this lesser position, then he be maintained as an employee. NOTE: NO FURTHER ACTION WAS TAKEN ON THIS MATTER AS AN AGREEMENT WAS WORKED OUT WITH DOUGLAS HIGGINS AND HIS ATTORNEY.

X. OLD BUSINESS — Old Business

A. Ordinance - First Reading

1. Ordinance No. 8-92 - Proposed Amendment Regarding Vacancy in Candidacy. — Ord. 8-92

ORD. 8-92 Attorney Randolph stated he had written a letter to Mr. Doney with regards to the comments raised at the last meeting. He advised subsequent to that time, he has been advised by Mrs. Peters that the deadline to put a question on the November Ballot would be the end of August and therefore, a second reading would have to had by the August meeting. He had some problems with the Ordinance which he has not been able to resolve and also had some doubts about the intent of the Statutes is to mandate the Town Council provide a procedure for filling of a vacancy as the reading of the Statute would indicate just that. He stated if they wished to establish as a procedure that one person could remain, however, at the discussion of the Council last month, he believed there were some questions as to whether or not the Council actually wanted to do that. He doesn't know of any community who has dealt with this Statute and suggested a clarification be received from the Attorney-General, to which the Mayor and Council agreed.

B. Ordinances - Second Reading

Ord. 4-92

1. Ordinance No. 4-92 - Amendments to Noise Ordinance - Attorney Randolph read the Ordinance by title:

AN ORDINANCE OF THE TOWN COUNCIL OF THE TOWN OF PALM BEACH, PALM BEACH COUNTY, FLORIDA, AMENDING ARTICLE IV OF THE TOWN CODE OF ORDINANCES RELATING TO NOISE; PROVIDING AN AMENDMENT TO SECTION 12-47 (e) TO PROVIDE THAT THE USE OF LAWN MAINTENANCE EQUIPMENT SHALL NOT BE PROHIBITED ON SUNDAYS OR LEGAL HOLIDAYS: FURTHER PROVIDING AN EXEMPTION FOR GOLF COURSE MAINTENANCE EQUIPMENT UNDER CERTAIN CIRCUMSTANCES; PROVIDING AN EXCEPTION FOR LAWN MAINTENANCE EQUIPMENT USED ON PROPERTIES OF MORE THAN THREE ACRES IN SIZE, PROVIDING AN AMENDMENT TO SECTION 12-50 SO AS TO PROHIBIT DURING CERTAIN TIMES AND DAYS OF THE YEAR HAMMER DRIVEN PILE DRIVING AND TO PROHIBIT DURING CERTAIN TIMES AND DAYS OF THE YEAR DR SANDBLASTING MACHINES AND JACKHAMMERS; PROVIDING FOR SEVERABILITY; PROVIDING FOR REPEAL OF ORDINANCES IN CONFLICT; PROVIDING FOR CODIFICATION; PROVIDING AN EFFECTIVE DATE.

Motion was made by Mrs. Wiener to adopt Ordinance No. 4-92 on second reading. Seconded by Mr. Weinberg. On roll call, the motion carried unanimously.

Ord. 7-92

2. Ordinance No. 7-92 - Amendment to Taxicab Ordinance _ Attorney Randolph read Ordinance No. 7-92 by title:

AN ORDINANCE OF THE TOWN COUNCIL OF THE TOWN OF PALM BEACH, PALM BEACH COUNTY, FLORIDA, AMENDING ARTICLE XIV, TAXICABS, AT SECTION 10-326 SO AS TO REQUIRE PROOF THAT THE APPLICANT HOLDS A VALID FLORIDA COMMERCIAL DRIVER'S LICENSE; PROVIDING FOR SEVERABILITY; PROVIDING FOR REPEAL OF ORDINANCES IN CONFLICT; PROVIDING FOR CODIFICATION; PROVIDING AN EFFECTIVE DATE.

A motion was made by Mrs. Douthit, seconded by Mr. Ilyinsky to approve on second reading Ordinance No. 7-92. On roll call, the motion carried unanimously.

C. Bid Awards

Sealed Bid 012A-91/92

Res. 32-92

1. Sealed Bid No. 012A-91/92 - Palm Beach Golf Course Irrigation Pumping Station - Consideration of Resolution No. 32-92. Attorney Randolph read Resolution No. 32-92 by title:

A RESOLUTION OF THE TOWN COUNCIL OF THE TOWN OF PALM BEACH, PALM BEACH COUNTY, FLORIDA, AWARDING A BID TO FLORIDA DESIGN IRRIGATION FOR PALM BEACH PAR 3 GOLF COURSE IRRIGATION PUMPING STATION.

Motion was made to approve Resolution No. 32-91. Seconded by Mrs. Wiener. On roll call, the motion carried unanimously.

Appointment

D. Appointment

Code Enforcement Board

1. Code Enforcement Board - One Three-Year Term to Expire April 1995 and Two Alternate Members for a Term of Two Years to Expire April 1994 - Deferred from April Meeting.

Motion was made by Mrs. Wiener to reappoint Mr. Bailey Storey to the Code Enforcement Board. Seconded by Mr. Ilyinsky. On roll call, the motion carried unanimously.

Mr. Weinberg moved that Scott Sloane be appointed to the Code Enforcement Board to take the seat that Mr. Walton is vacating. Seconded by Mrs. Wiener. On roll call, the motion carried unanimously.

Motion was made by Mr. Weinberg to defer the appointments of the alternate members to the August Town Council Meeting. Seconded by Mr. Ilyinsky. On roll call, the motion carried unanimously.

New Business

XI. NEW BUSINESS

A. Ordinances - First Reading

Ord. 9-92

1. Ordinance No. 9-92 - Amending Chapter 8 of Town Code of Ordinances - Garbage and Trash. Attorney Randolph read Ordinance No. 9-92 by title:

AN ORDINANCE OF THE TOWN COUNCIL OF THE TOWN OF PALM BEACH, PALM BEACH COUNTY, FLORIDA, AMENDING CHAPTER 8 OF THE TOWN CODE OF ORDINANCES RELATING TO GARBAGE AND TRASH AT SECTION 8-15 THEREOF SO AS TO PROVIDE THAT TRASH PLACED IN THE RIGHT-OF-WAY BE ADJACENT TO THE PROPERTY FROM WHICH IT CAME; PROVIDING FOR SEVERABILITY; PROVIDING FOR CODIFICATION; PROVIDING AN EFFECTIVE DATE.

Motion was made by Mr. Ilyinsky to approve Ordinance No. 9-92 on first reading. Seconded. by Mrs. Douthit. On roll call, the motion carried unanimously.

B. Resolutions

1. Resolution No. 31-92 - Amending Recreation Department Resident After School Program Fee Res. 31-92

Attorney Randolph read Resolution No. 31-92 by title:

A RESOLUTION OF THE TOWN COUNCIL OF THE TOWN OF PALM BEACH, PALM BEACH COUNTY, FLORIDA, AMENDING THE RECREATION DEPARTMENT RESIDENT AFTER SCHOOL PROGRAM FEE.

Motion was made by Mr. Ilyinsky to approve Res. 31-92. Seconded by Mrs. Douthit. Mrs. Wiener recalled there was some discussion at the Finance & Taxation Committee meeting that if the fees for the residents was being raised, the nonresidents' fees also should be raised but the Seaview Park Commission did not agree. She strongly felt that they do not recover all of the funds and this program is something which the Town's taxpayers have to pay, and she felt it was their obligation to retrieve these funds from the nonresidents of the Town who are not taxpayers. She would like to see the same relationship continued as it has been done in the past.

Mr. Doney noted that Mr. Bitzer was here earlier and is not in the room at this time and suggested this matter be deferred to later in the meeting when Mr. Bitzer is able to speak to it. Mr. Doney recalled the nonresident rate was increased last year to $60 and the Seaview Park Commission and Mr. Bitzer's recommendation is to keep the resident fee at $40 and retain the $60 fee for the nonresidents for the after school program versus making it a $40 and $80 fee. Mayor Marix asked why the gap was not being maintained at the same level? Mr. Doney responded the FY91 fees for grades one through five for the resident was $30 and the nonresident was $50; FY92, the nonresident fee was increased from $50 to $60 and the resident's fee was left the same. He reported what has been recommended for FY93 is to increase the fee for residents from $30 to $40, but leave the nonresident fee the same as it was last year. He advised that participation in the program at this time shows 23 residents and 10 nonresidents. Mrs. Wiener suggested they meet it half-way and make the nonresident fee $70.00? Mr. Ilyinsky thought perhaps that was a little high. Mayor Marix thought it was causing the taxpayers additional moneys for the nonresidents and that was the problem.

President Heeke understood the Town may lawfully charge the difference that it costs the Town for a nonresident as for a resident and if they get that figure too much out of balance, the risk is run of having to justify the difference. Mrs. Wiener asked if the Town was obligated to provide services for people who do not live in the community to which Mr. Heeke responded if the program is open to the public, they are obligated. Mrs. Wiener asked if they would be in jeopardy if they raised the cost? Mr. Randolph responded it has to be a reasonable rate related to the cost. Mrs. Wiener pointed out there were no confrontation last year when the rate was raised and wondered why they would assume there would be if it was raised now? President Heeke suggested this be adopted and then Mr. Bitzer be asked if there was sufficient justification to increase the nonresidents and this could come back to the next meeting. Mrs. Wiener suggested the increase be to $70 for the nonresidents. Mr. Randolph suggested the Resolution be amended prior to the end of the meeting after Mr. Bitzer is consulted.

Mr. Ilyinsky withdrew his motion as did the seconder. Mr. Doney noted this will be Item 6 under New Business (D).

C. Appointments Appointment Bldg.Board of Adjust. & Appeals

1. Building Board of Adjustments and Appeals - Two Three-Year Terms to Expire July 1995.

Motion was made by Mrs. Wiener to reappoint Jeffrey Smith and John Cassidy to the Building Board of Adjustments and Appeals for a three year term to expire July, 1995. Seconded by Mr. Weinberg. On roll call, the motion carried unanimously.

2. Zoning Commission - Balance of One Term to Expire February 1993 - Zoning Comm

Mr. Doney noted this appointment is to fill the seat of Mr. Grace, who resigned. Mrs. Wiener noted there was a resume on Robert Wood and his background is such, noting he has written a book on Land Use and although she has not met him, she thought his background phenomenal she would like to see him on that Commission and she moved that Robert Wood be appointed. Seconded by Mr. Weinberg. On roll call, the motion carried unanimously.

D. Other

1. Consideration of Proposal for Auditing Services for Fiscal Year Ending September 30, 1992 (FY92) from Coopers and Lybrand - Auditing Services

Mr. Doney recommended the Town Council accept the proposal of Coopers & Lybrand for the fiscal year ending FY92, with the fee of $59,500, which is less than last year. Motion was made by Mr. Ilyinsky to approve the Town Manager's recommendation to accept the proposal of Coopers & Lybrand. Seconded by Mr. Weinberg. On roll call, the motion carried unanimously.

2. Consideration of Department of Environmental Regulation's "Intent to Issue" Permit/Water Quality Certification to Dredge and Fill for Port of Palm Beach Proposed Expansion (Slip No. 3). DER Water Quality - Port of PB

Mr. Heeke reported there is a deadline date here and the Town Attorney needs authorization to file a document which will take some preliminary research and it may not delay the action for too long a period, but it would put the Town in a position to know exactly what they need to do to build a case against the Port. Mrs. Wiener felt they needed to move forward and she would like to see the Town Attorney to proceed to which the remainder of the Council agreed as well as the Mayor who asked if there was anyway the Council could get the environmental study needed? Mr. Doney reported the Corps of Engineer has not as yet issued the Notice of Intent form and this is for the State Permit, the Department of Environmental Regulation. He indicated they do not want to push the Corps on the Notice of Intent permit, but have sent a letter that an Environmental Impact Study needed to be completed.

President Heeke thought they may want to write the people who are running for re-election to Congress as well as telephone calls to the same folks they have been dealing with on other matters, as good response has been received.

Mrs. Wiener suggested that there should also be a few phone calls made on this today. Mr. Ilyinsky noted there was a permit issued in the Bahamas a few years ago and the silt is still in the water from that project which he found unbelievable but it is something that could happen here and he just wanted to point that out. Mayor Marix stated this is a serious matter. Mrs. Douthit agreed noting the slip is big enough to harbor an aircraft carrier and if this was allowed, the traffic of cruise ships would be greatly increased, which means more pollution problems and creates a hazard for the small recreational boating.

Replacement of Sanitary Sewage Force Main

3. Consideration of Request for Emergency Replacement of 400' Section of Sanitary Sewage Force Main.

Mr. Heeke stated the emergency is explained in the 7-6-92 memorandum from Mr. Dusey to Mr. Doney. Motion was made by Mr. Ilyinsky to approve the emergency request to replace 400' of sanitary sewage force main. Seconded by Mr. Weinberg. On roll call, the motion carried unanimously.

PEP Reef Project

4. Consideration of PEP Reef Project at Mid-Town - Request for Waiver to Section 12-51, "Hours for Construction Work" of Town Code.

Mr. Doney advised American Coastal has requested a waiver so they would be allowed to work on Sunday and this would be only used on a contingent basis, provided that the work could not be performed Monday through Saturday and they are hopeful that the work could be completed but if there is a problem and it is not completed, they would like to have this contingency program in place rather than delay this to a time when the Town Council could meet. Mr. Weinberg moved that American Coastal have this special authorization for Sunday action. Seconded by Mrs. Douthit. On roll call, the motion carried unanimously.

TC Work-shop on Water

5. Consideration of Request to Set Date and Time for Town Council Workshop Meeting on Water Conservation Study by James M. Montgomery Consulting Engineers, Inc. -

After discussion, it was agreed that the Workshop meeting be held on August 27, 1992 at 9:30 AM.

6. Consideration of Resolution No. 31-92.

Res. 31-92

Mr. Bitzer advised it was not his recommendation to increase the nonresident fee for after school care as last year this was increased twenty per cent and the question of maintaining a ratio is a good one, but he pointed out the ratio did get out of whack last year when the fee was increased for the nonresident and there was no increase in the resident's fee. He reported the average is normally 40 to 50% and that is consistent with all of the other programs. He believed the increase would allow them to recover approximately $17,000 and this program normally costs $20,000 and in addition, they also have to have a cost cutting in part time staffing which still be within the HRS Guidelines and they may be able to recover the total cost of this particular program.

He felt the bottom line is with these changes, he believed the program will cover its own costs and he suggested they revisit this again in the Fall. Mrs. Wiener asked if he was stating this program does pay for itself to which Mr. Bitzer responded affirmatively. Mrs. Wiener recalled the conversation that it was a problem if the Town residents were picking up the tab for non-Town residents. Mayor Marix asked when he said "covering expenses" does it mean they were covering everything including the electricity and she asked if he was talking about covering all of the "real" overhead? Mr. Bitzer responded there are no hidden costs in this and the direct costs would be totally covered and this would include a portion of the janitorial, staffing, utilities, staffing, materials and supplies. He suggested this be revisited to see if there are any increases in the other and then they would be around the same differential as they are in their other programs. He stated this whole thing was thrown off kilter last year as there should have been an increase in both residents and nonresidents last year. He stated they are basing this figure on the surveys which were done in the summer and these surveys could be done again in the fall and readjusted.

Mr. Ilyinsky stated he will go along with the recommendation of Mr. Bitzer and he moved Res. 31-92 be adopted as drafted. Seconded by Mr. Weinberg. On roll call, the motion carried unanimously.

XII. APPROVAL OF WARRANT LIST AND FUND EXPENDITURES FOR JUNE 1992 -

Motion was made by Mr. Ilyinsky, with a second by Mrs. Wiener to approve the Warrant List and Fund Expenditures for June, 1992. On roll call, the motion carried unanimously.

XIII. DEVELOPMENT REVIEWS

Major Matters - Architectural Comm.

A. Major Matters Previously Considered by the Architectural Commission at Their Meeting of June 24, 1992 - Excerpt Available in Town Manager's Office.

Motion was made by Mr. Ilyinsky to approve the major matters considered by the Architectural Commission at their meeting of April 24, 1992. Seconded by Mr. Weinberg. On roll call, the motion carried unanimously. The major matters were:

B16-92 - Entrance addition for Luis and Lillian Fernandez, 246 Eden Road. APPROVED.

B20-92 - New residence for Martin Cannon-Mochorowski, 240 El Vedado Rd. APPROVED CONDITIONALLY.

B25-92 - New residence for Alice Meerwarth, 243 Merrain Rd. APPROVED.

B22-91 and B26-91 - Robert Eigelberger, 109 Atlantic, 240 N. Ocean - APPROVED.

B32-92 - New Bungalow for Mr. & Mrs. Ronald Perelman, 641 N. County Rd. APPROVED CONDITIONALLY.

B37-92 - Satellite Dish and Sign for Testa's Hotels and Restaurants, Inc., 231 Royal Poinciana Way. DEFERRED.

B24-92 - Landscape Plan for Mr. & Mrs. Nelson Peltz, 548 N. County Rd., APPROVED.

B112-90 - Revision of plans of tennis court pavilion of Stephen Levin, 446 N. Lake Way. APPROVED.

B46-91 - Landscape Plan for Carl Asplundh, Jr., 1100 N. Lake Way. APPROVED.

B76-91 - Revisions to previously approved plans for residence of Mark Klaine, 157 Dolphin Rd. - APPROVED.

B11-91 - Revisions of Euro-Homes, Inc., 252-254 Atlantic Ave. DEFERRED.

B57-91 - Revisions on residence of Barbara Tuck-Cresci, 235 Chilean Ave. - APPROVED.

B28-90A - Landscape Plan for Robert W. Gottfried, Inc., 133 Wells Road. APPROVED CONDITIONALLY.

B19-92 - Revisions to residence of Mr. & Mrs. Christopher Asplundh, 1334 N. Lake Way. APPROVED.

B39-92 - New residence for Dr. & Mrs. Richard Rodman, 233 LaPuerta Way. APPROVED CONDITIONALLY.

B40-92 - New roof, revisions for residence of Vesenaz (John Maragon), 212 Sunset Ave. - APPROVED.

B41-92 - Remodel of residence of Susan E. Polan, 249 South Woods Road. APPROVED CONDITIONALLY.

B42-92 - Commercial Building for A. Paul Prosperi/John Whelton, 275 Sunrise Avenue - CONCEPTUALLY APPROVED WITH CONDITIONS.

B43-92 - Demolition and new residence for Daniel Manella, 685 Island Drive. APPROVED CONDITIONALLY.

B44-92 - Dale Gunn, 515 South County Road. - APPROVED.

B45-92 - Garage Addition for Mark & Beverly Kessenich, 404 Seaspray Ave. - APPROVED CONDITIONALLY.

B46-92 - Columns for residence on corner of La Costa Way and North Lake Way (Estate of Paul L. Maddock). APPROVED.

B47-92 - Sign for One Royal Palm Way Condo, 100 Royal Palm Way. DEFERRED.

B48-92 - Gazebo - Lydia Mann, 1440 S. Ocean Blvd. APPROVED.

B49-92 - Addition to residence of John Wilbur, 109 Mediterranean Rd. APPROVED CONDITIONALLY.

Mr. Ilyinsky asked about the status of the large project which has made the papers on Clarendon Avenue? Mr. Zimmerman's response was it has been on the agenda of the Architectural Commission in June and they approved, on a conceptual basis, the main house only. He recalled the Commission asked to see additional architectural details relative to the main house and there were some concerns of the neighbors. He reported they must return to the Architectural Commission in August for a final approval on the main house only.

Mrs. Wiener recalled conceptual approval was something that the Council always regarded as a no-no, and for a Town Commission to give one is puzzling to her, and she had a problem with the major size of this project and the significant impact it would have in the area. Mayor Marix believed that there would be more impact with eight homes being built there. Mr. Heeke stated he believed they were getting into a discussion on something that was not properly before them and he didn't believe it was appropriate to be talking about it without any representatives before them to respond to their questions.

Mrs. Wiener wondered if they were talking about the same thing as her problem was eight homes or forty or fifty staff people. Mr. Heeke noted there was nothing in this report and he believed this should not be discussed at this time. Mr. Ilyinsky believed his question was answered. Mr. Winterfield addressed the Council stating he believed there was another meeting of the Architectural Commission in which only this subject was considered and he was not personally satisfied that a staff dormitory for twelve or sixteen people was a normal use for an accessory structure and if that is true, this matter should have come before the Council before it was considered by the Architectural Commission.

Mr. Randolph responded stating that anything that is passed by the Architectural Commission is still subject to the zoning regulations of the Town and the Town staff when it makes its' review makes the determination that a variance is necessary. He wanted to make another point and that was he assumed there was nothing in this report being considered by the Council on the major matters before ARCOM, but he wished to point out that the language in Section 5.38 (a) stated that in addition to appeal, the Town Council should consider major projects at their next regularly scheduled meeting after consideration by ARCOM. He believed there was an argument to be made that if they don't consider the conceptual approval of it at the next meeting following the ARCOM meeting, the Council has probably lost the opportunity to make any comments on the conceptual approval although they will have the opportunity to deal with the final approval when that comes before the Council. Mrs. Wiener asked in whose court was the ball? Mr. Randolph responded that since ARCOM did consider it at their last meeting, it would certainly be right for the Council to consider it today but by not dealing with it today, the Council will lose its opportunity to comment on the conceptual approval but will have not lost the opportunity to comment on the final approval as to design.

Mrs. Wiener commented they are talking about something very major and it could very well be the beginning of a series of such things. Mr. Randolph advised the Ordinance does say the Council shall consider major projects at their next regularly scheduled meeting, but just because they don't have enough information before the Council to give a final approval today, he thought this was an action they could take as then they will have considered it at the next regular meeting and have complied with the Ordinance. Mr. Heeke asked if they could approve the rest of the major matters considered and exclude this particular item. Mr. Randolph pointed out this isn't included in the report at all.

Mr. Ilyinsky moved the Major Matters considered by the Architectural Commission at their meeting of June 24, 19922 be approved. Seconded by Mr. Weinberg. Mrs. Wiener asked if they can defer this major project, since there is no information. Mr. Heeke pointed out they haven't accepted the conceptual approval. Mrs. Wiener noted it wasn't in the report so there is nothing to accept since they were not apprised of it. Mr. Randolph reported it will come back before the Council in a subsequent report as the applicant still has the right to move forward with the Architectural Commission. Mr. Heeke noted the Council has not accepted the conceptual report. Mrs. Wiener pointed out that was because it hasn't been given to them.

Old Business

B. Variances, Special Exceptions and Site Plan Reviews

Old Business

Var. 33-92

1. Variance No. 33-92 - Robert Radkay, 220 Seminole Avenue; to allow construction of a swimming pool providing a side yard setback on 7' in lieu of 10' required. R-C District. Deferred from June Meeting. Letter dated July 2, 1992 from Robert Radkay Requesting Withdrawal. This matter was withdrawn early in the meeting when the Agenda was approved.

Var. 37-92

2. Variance No. 37-92 - Barbara Rogers, 1435 South Ocean Boulevard; to allow construction of a pool cabana providing a 20' south side yard setback on lieu of 30' required. R-AA District. Deferred from June Meeting. -

Attorney Robert Deziel addressed the Council on behalf of Mrs. Rogers, advising he was there before the Council requesting a pool cabana. He was before them last month and was asked to go back to the drawing board to see if there was any way to minimize the variance requested. He advised the neighbors to the south have no objection to the granting of this variance.

Mr. Deziel commented on the hardships, noting this property is situated in the R-AA zoning district which requires a 150' frontage whereas this property has only 130'. He believed another hardship is considering the zoning district and the pool cabana she wishes to construct, it would be a hardship to put this in any other area on the property as it would have to be between the ocean and the main house. He stated another point is the existing structure which is seven feet wide is not being practically used as at this time.

Mr. Deziel believed they had followed the direction of the Council to minimize the variance and have narrowed it down as much as possible. He believed the hardships did exist as the lot is a nonconforming lot and the improvements could not be seen from South Ocean Boulevard and the only neighbor who would be impacted is familiar with the project and does not object.

Mr. Zimmerman gave the staff comments, noting they did object last month as it was their opinion the pool cabana could be relocated on another part of the property or diminished in size and the applicant has diminished the size and increased the setback slightly. He stated the staff's additional concern was relative to the hardship and Mr. Deziel has addressed that point.

Mrs. Wiener believed they have done what they were asked to do, however, she did not view living in the R-AA District as a hardship, however, she would like to move that Variance No. 37-92 be granted, as the applicant has minimized it as he was requested to do by this Council. Seconded by Mr. Ilyinsky.

Mr. Heeke asked if there was anyway additional property could be acquired from the neighbor to the south as he believed that that would make that property nonconforming? Attorney Deziel responded he did not believe that was attempted. Mr. Heeke stated he always had a problem with granting a variance when he had difficulty identifying a hardship, however, he didn't believe there was a possibility of the applicant acquiring additional property.

On roll call, the motion carried unanimously.

Spec.Excep. 10-92

3. Special Exception No. 10-92 With Variance - Linda A. Gary Real Estate, 201 Worth Avenue; to allow Brokerage, office and professional use, to occupy 2,200 square feet, and a variance to locate Brokerage office on the first floor. C-WA District. Deferred from June Meeting.

Linda Gary addressed the Council, indicating she has been in the real estate business for 24 years, starting out with Earl Hollis and then with Martha Gottfried for sixteen years. She stated presently she is on the second floor of the 201 Worth Avenue building and wishes to relocate to the first floor. Attorney Robert Deziel then addressed the Council for the applicant, indicating this has been on the agenda for four months and he sought permission to operate a real estate brokerage office on the first floor of the 201 Worth Avenue Building, which is C-WA zoning district.

Mr. Deziel advised that after working with the application and studying the Code, he believed he had a novel argument on how this use can be allowed without a variance application. He wished to pursue the Special Exception first and then pursue the variance, Section 8.12 issue.

He explained from a practical standpoint, they feel the proposed use they wish to place at 201 Worth Avenue does fit into the community. He is not here because they found a minor technicality in the Code, but they think they have something that really fits from the Town's standpoint as they believe the proposed use melds in with the community as it is a transition area between the retailers to the west and to the north and this will be a melding transitional use horizontally and vertically he thinks it will work because it is a multi-storied building and above the first floor there is predominant office use and on the first floor, there are retail uses.

Mr. Deziel commented on the fact that traditionally there have been retailers on Worth Avenue and offices have been up to three or four, but currently there are two. He felt this proposed use is not inconsistent with the purposes of the preamble of the C-WA District. He thought it was fair to say that a retail office which has 92% of its listings of which it has sales is Town Serving and is a long term need which fits into the statement in the preamble.

Mr. Deziel addressed the fact of why they think the Special Exception is warranted, as this application originally stated they wanted to use space which was 2200 feet, which is the footage the landlord told them existed there, but since then they have had the space calculated by an engineer and it turns out to be 2,040'. He stated their lease was negotiated at 2,095' for whatever reason as it was part of the deal. He believed that the proposed use complies with all the requirements for Special Exception for use of space in excess of 2000', including all the Items in Section 6.40, including (L) which requires the use be Town-serving and greater than 50% of the use be for Town persons. He has had an independent auditor audit Linda Gary's services and sales for the last five years and the audit produces results that 90% of her business was in the Town of Palm Beach. He stated of the 14 listings Linda Gary now holds, they are all residents of the Town. Spec.Excep. 10-92 (cont'd)

Mr. Deziel felt it was something in their favor for the fact that it is a minimum request to exceed the 2000 square feet threshold by forty feet. Mrs. Douthit believed it was the confines of the building to which Mr. Deziel responded it comes down to the thickness of the walls.

Mr. Deziel stated the next issue is to discuss what is the tag-along requirement to operate their proposed use within the 2040 square feet and it is his belief a Special Exception is needed with Town Council approval pursuant to Section 8.12 of the Code. He stated this idea was presented to the Zoning Department on June 16, 1992 where he formally requested a review of what type of approval they actually needed, as it is his belief he needs Section 8.12 and not a Variance. He believed a Variance pursuant to Section 10.13 in the Code is a modification from the literal interpretation of the provisions of the Zoning Code and he is requesting a literal interpretation of the Zoning Code. He stated this section allows any nonconforming use to be converted to a more restrictive nonconforming use, provided that the Use is more appropriate to the District than the existing Use. He noted the existing Use was a Bank and the proposed Use is a Real Estate Office; and the proposed Use would have no greater adverse effect on the surrounding occupants and properties than the existing Use. He stated the four elements that needed to be met are:

1. It must be nonconforming to nonconforming.
2. It must be a more restrictive use.
3. It must be more appropriate.
4. It must have no greater adverse effect.

He addressed each issue. He stated with respect to the adverse effect, the proposed Use must require less parking and by its nature, professional office use is much less intense than a banking use. He believed a bank would have more foot traffic and it doesn't seem to him that a real estate office is going to cause a traffic problem or more of a traffic problem than a bank.

He stated the next item is whether or not it is more appropriate and many of the items he has just discussed would apply here. He felt a real estate office would fit in better with the neighborhood. He felt also the parking would make it more appropriate.

He stated the third issue is whether or not their proposed use is more restrictive. He believed the Building Department deems more restrictive to be "more intense", whereas, he disagrees with them believing "more restrictive" means "less intense" and he has found places in the Code where it states more restrictive means less nonconforming and that is why he believes 8.12 applies in this case, as the theory behind it is to allow an applicant to put in a use which is no more permitted but is better than the use that existed.

He felt that a nonconforming use to him means as the definition describes and that is "a nonconforming use is a use lawfully in existence at the effective date of this Ordinance". He asked Mr. Zimmerman if the bank was a conforming use? Mr. Zimmerman responded at the time the bank originally occupied the space, in the late seventies, financial institutions were a Permitted Use. Mr. Deziel stated the Bank started out as a Permitted Use however, it is no longer a Permitted Use on the first floor, nor a Special Exception Use, and that means it has to be a nonconforming Use. He noted on the other hand, his client's real estate firm is neither a Permitted Use or a Special Exception Use so she would also be a nonconforming Use, so they come up with the fact that they are going from nonconforming to nonconforming.

He believed a literal interpretation of the Code would show them that they really didn't need a variance, provided they can meet the tests, which is no greater adverse effect and this use of his client's is more appropriate. He believed 8.12 makes sense as these two items are definitely not the criteria they have to prove when they have to prove a variance. He didn't believe a hardship should have to be proven if the Town benefits in the process, which he believed was the case here.

Attorney Randolph believed Mr. Deziel has done a good job of analyzing the Ordinance and his argument is convincing, however, he was not entirely comfortable with the argument as there is another side - and he doesn't know if the Building Department believes that 8.12 applies to going to something less restrictive as it is his legal opinion that that was what 8.12 was meant to do, and that is allow a nonconforming Use to go to a less restrictive nonconforming Use and that is his interpretation as they certainly would not want to have a more intensive nonconforming use go into that space. He felt the burden was up to Mr. Deziel to show that the Use was less intense, as 8.12 is intended to do that. Mr. Heeke asked if he was saying they should be aiming towards a less intense Use to which Mr. Randolph agreed.

Mr. Randolph stated "restrictive" is the word that causes some discomfort for the staff of the Building Department.

Mr. Zimmerman stated the staff did differ with this, however, he has heard the discussion today and they are now moving in a direction more desirable as to the intent of that particular section 8.12.

Mr. Randolph felt this was before the Council as an appeal of the Administrative Official initially indicated a variance was necessary and subsequent to the filing of the application, Mr. Deziel made the determination that it was his feeling a variance was not needed. Mr. Randolph felt this needed to be divided into two parts, one, that this is an appeal of the Administrative Official's opinion that the variance is needed; and secondly, on the outcome of that, they move forward with the application. He recalled in the past the Building Department has made the determination that to allow a Use which is not otherwise allowed on the first floor in a C-WA District is nothing more than the granting of a Variance as far as location within the District. He believed the Council could not allow by variance a Use to exist within a District which is not

Spec.Excep. 10-92 (cont'd)

otherwise allowed in the particular District. He stated an argument has been proposed in the past that we have been wrong in granting variances in the past to allow someone to have a Bank or a Real Estate Office on the first floor since that is now a Use not allowed within the District.
Mr. Randolph did not believe that was the case, as a Use is allowed in the District, but is not allowed on the first floor, therefore, all that is being requested is a Variance. He commented that in order to be consistent with the way these matters have been dealt with in the past that the Council has to look at a Bank and a Real Estate Office, but particularly a Bank as a Special Exception Use in the District itself and not necessarily a nonconforming Use on the first floor and to do otherwise would fly in the face of how they have been treated in the past, as indeed, if they follow the argument as presented by Mr. Deziel today, the Council is saying these are nonconforming Uses and therefore we have been wrong in the past by allowing variances to allow a Use in the District, which is not otherwise allowed. He reported it is his position and the position of the Building Department, even though Mr. Moore was in agreement with Mr. Deziel's position here, after a great deal of deliberation, he felt that in order to be consistent with what has been done in the past, they cannot treat a Bank or Real Estate Office on the first floor as a nonconforming use within the District, as a Bank is a Special Exception Use and under 8.13, a Special Exception is described as "Any Use which is permitted by the Town Council as a Special Exception in a District under the provisions of this Chapter shall not be deemed a nonconforming Use in such Districts."

Attorney Randolph recalled in 1980 Banks became a Special Exception Use in the C-WA District and had been permitted prior to that time and he believed Mr. Deziel's argument is that that is not the case and Banks became a Special Exception Use on the second floor, therefore, since it was permitted on the first floor before and after 1980 is no longer permitted on the first floor, it is a nonconforming Use and therefore is moving from one nonconforming use to another nonconforming use and to that Mr. Randolph did not agree, because of the manner in which this was applied in the past.

Mr. Heeke noted the Town Attorney's opinion is that when Mr. Deziel states it goes from a nonconforming Use to a nonconforming Use that that is not the case as Banks were a Permitted Use. Mr. Randolph stated it is his opinion this is a Special Exception Use in the District and the only thing that is being asked to be changed is the location from the second floor to the first floor. Mr. Randolph stated he does indeed believe this is a variance which will require them to go forward with proof of hardship.

Mayor Marix believed this is something that probably needs to be cleaned up by the Zoning Commission as she views Mr. Randolph treating this as an up and down area in the C-WA District and Mr. Deziel referred to a side by side area in his remarks. Mr. Randolph responded he is treating the area as a whole rather than developing a horizontal zoning. Mayor Marix recalled the Use was taken out of the ground floor for whatever reason, so that area just because it is to the right or the left as opposed to up and down should not be treated any differently. She agrees with Mr. Deziel that this is a nonconforming Use downstairs as it might be across the street or two blocks away. Mr. Randolph advised the Use that Mr. Deziel is requesting is not allowed on the bottom floor, so Mr. Deziel states because it is not allowed, it is nonconforming and he is going from one nonconforming Use to another, which is a good and convincing and logical argument. President Heeke stated this is contingent on the first use being nonconforming and the Town Attorney states the Bank was not nonconforming because of the definition in Section 8.13. Mayor Marix pointed out it is not allowed to be there to which President Heeke disagreed stating it is permitted as a Special Exception. Mayor Marix stated that would be upstairs. Mr. Randolph agreed it could not be on the first floor. Mayor Marix stated that is why it not allowed in the downstairs area.

Mr. Randolph advised if the Town had taken the position in the past that they could not grant a variance to allow the use of a Bank on the first floor or any real estate or professional office on the first floor, he would be very comfortable in agreeing with Mr. Deziel, however, it is belief that to go along with Mr. Deziel now, in light of the way that these applications have been treated in the past would be contrary to how these applications have been handled in the past. He recalled it has never been called a Change of Use but has been dealt with as a Change of Location within the District and therefore justified it could be granted by Variance.

Mrs. Wiener asked if they were talking about the last use of that property as a Bank because the last use of that property was not as a Bank but a retail use last year of paintings and photographs, so they are really talking about the Use that was there before. Mr. Zimmerman reported the building owner was very much aware of the zoning regulations and he approached Mr. Moore requesting use of the space on the first floor on a temporary basis for the sale of art work and he believed they were there for two or three weeks. Mrs. Wiener did not agree stating she recalled it was more like six months. Mrs. Douthit recalled there was a gallery there and asked if they paid rent? Mr. Zimmerman did not know. Mr. Deziel recalled he had a discussion with Mr. Moore, who is not here today, that the previous use never received a Certificate of Occupancy and was not permitted in terms of a permit in that location he recalled Mr. Moore did not believe this temporary use stopped the Use of the prior nonconforming Use, or the Bank. Mrs. Wiener stated she could not believe the Building Department would permit people to move in and do business without having the appropriate license? She knows there was an interim situation here that was not a Bank and she would like to see it cleared up.

Mr. Deziel responded he did not bring that issue up since he did feel comfortable with the Building Department's position when he was told about it, but notwithstanding that, he believed that in Section 8.15 which addresses Termination of a Non-Conforming Use, and it was Mr. Deziel's belief that the use that existed there, no matter how it existed, would terminate the existence of the prior nonconforming Use. He believed there would have had to be an intent. Mr. Randolph believed that was they had to have the intent to terminate for any period of time, and he assumed that the fact that the use was terminated for a period of time would be evidence of the intent. He really couldn't comment on it as he has had no discussion on this with Mr. Moore. He reads this section as if there is an intentional abandonment and that could be for a week or six months, or a non-intentional abandonment which would be for a period of two years.

Mr. Heeke recalls the purpose of the two year period is to allow a landlord, for instance in a hotel, to move another restaurant back into the premises, however, it sounds like here something did come in in the interim and he too recalls seeing art there on that corner.

Mrs. Wiener stated she had no problem with entertaining the application but she is unhappy hearing there was a Bank there and that is the Use that has been referred to and she knows there was a retail operation in there after the Bank.

Mr. Deziel stated he has just been informed by the owner's representative that the interim people never had a lease and never paid rent but were occupying space in the interim while the landlord was looking for a replacement use. Mrs. Wiener believed that was immaterial if they paid rent or not. Mr. Deziel stated it was a use unauthorized by the landlord as he had to evict them and it was a use not authorized by the Town. Mrs. Wiener asked Mr. Zimmerman if he had an explanation as this should have been picked up by the Code Enforcement people, to which Mr. Zimmerman responded he cannot offer an explanation as he simply does not know. Spec.Excep. 10-92 (cont'd)

Mr. Deziel indicated to the Council the landlord did not have a mindset to terminate the Bank Use as whoever was there did not have a lease and the landlord was not collecting any rent. Mrs. Wiener did not think that was essential to the argument but what she viewed as essential is there was a retail business in this space and she didn't know if he paid rent or didn't pay rent, but what she is saying there was a retail business there after the Bank.

President Heeke asked Mr. Deziel to confer with his owner over the lunch break and he may have some additional information to offer on this application after lunch.

Lunch break was taken.

President Heeke reconvened the meeting after lunch.

Mr. Deziel addressed the Council indicating it is unfortunate that Mr. Moore is not here today, as they have gotten to this point with Mr. Moore giving him the comfort that since there was a lack of a Certificate of Occupancy when the retail business was there, the Bank's use was not terminated. Mr. Deziel talked with the landlord's leasing representative who told him this prior use was never permitted by the Town and since they were in there unlawfully, they were not an intermittent use. He has reviewed cases which tell him that it was inconceivable to discontinue a nonconforming use and to have an intervening conforming use if it is for a temporary period and there was the intent to continue with the nonconforming use. He stated they have an issue here that was totally unexpected to him because of the conversation he had with Mr. Moore. He stated the space was never modified and two-thirds of the time they were in that area was spent trying to get them out of there, and there is case law which supports the concept and it doesn't automatically mean that the intent to terminate is evident by putting someone else in there.

Mr. Deziel felt with respect to the interpretation of the Zoning Code with regards to Section 8.15, the intent has to be weighed heavily and that intent is evidenced by the fact that the landlord never retrofitted the space for this interim tenant, who was there on a temporary basis. He also knows there is case law which states when there is an intervening conforming use, they can still retain their nonconforming use status.

Mr. Heeke recalled Mr. Randolph has told the Council that he is not of the opinion that Section 8.12 applies with respect to the first issue - nonconforming to nonconforming. Mr. Heeke felt that since the Town Attorney has given the Council that advice, he doesn't believe they would want to render an opinion to the contrary. Mr. Randolph responded he felt the argument presented is a good and legitimate argument, however, he is not convinced that it makes Section 8.12 applicable. He reported the purpose of an Administrative Appeal is for this Council to listen to both sides of the argument and then make their determination. Mayor Marix felt they should be looking at a solution which is best for the Town. Mr. Heeke felt the question is whether they move to the variance issue or not.

Mr. Deziel realized Mr. Randolph is not comfortable with Mr. Deziel's position but he really believed that what Mr. Randolph wanted was to have his cake and eat it too, as the Code states a real estate office is not a Permitted Use, and not a Special Exception Use on the first floor but is a Special Exception Use above the first floor. He recalled there is a provision in the Code which he believed was the one that makes his position prevail and that is Section 8.10, which gives the Council an "out" with respect to the historical interpretation that the Town is taking when they are talking about a "location" variance. He states the Section states: "A Use is, for purposes of this Chapter, a nonconforming Use is the Use or any physical characteristic of said Use are not in full compliance with all regulations of the Zoning District." Mr. Deziel interpreted that to say the physical characteristic they have which is not in compliance is the location, up and down. He stated this is the first time they have an "out" which is they don't have to rely on the historical argument that the way to go from one floor to another is by variance. He felt this section is saying is there is a problem with the Use or the physical characteristics, they are deemed to be a nonconforming Use. He believed they were having a problem with their physical characteristics as if they wanted to be on the second floor, all they have to do is prove a Special Exception. He stated they want the first floor, but the Code states they can't have that by Special Exception nor by Permitted Use and the only thing that is left is the physical characteristic which is not in full compliance with the District. He believes that is what Article 8 is intending to do and he has case law which states that, in general, is that what Article 8's of the Zoning World are intended to do. He recalled the Town Attorney talking about the Special Exception in Section 8.13, which states that if it is permitted by the Town Council, it is not a nonconforming Use, and the Town Attorney is saying there can be a Bank on a second floor by Special Exception and therefore it is a Special Exception in that entire zoning district. Mr. Deziel did not know how that could be as they can't get it on the first floor and he can't have it by Special Exception and when he comes to the Council on Article 8, the Town Attorney tells him he can get it by Special Exception and if that is the case, he will go through those criteria. He felt he was boxed in a corner and this is unfamiliarity on everyone's part with the prior applications of this provision and that is why he is saying he doesn't want to go through the Variance process, but wants a literal interpretation and the Code states if there is a physical characteristic problem, they can get it.

Mrs. Wiener stated she would like to make a recommendation as this looks it could go on for hours and a lot of it is dependent on the conversation Mr. Deziel had with Mr. Moore and her recommendation was this be held over to the August meeting. Mrs. Douthit believed the question raised should be reviewed by the Zoning Commission.

Mr. Heeke believed there were several questions which needed to be addressed such as is the proposed use less intense? Mr. Randolph responded it doesn't seem to make any sense to address those issues until a determination is made on the threshold question as to whether or not Section 8.12 should apply and if they decide that should apply and it is also decided there has not been an abandonment, then consideration should be given as to whether the proposed Use is less intense, etc. Mr. Randolph stated Mr. Deziel has set before them today the question as to whether or not the only criteria should be those set forth in Section 8.12, and they shouldn't be held to the hardship criteria. He felt the mere fact, if they decided to do that, that they would sustain his position or the position of the Town's staff, that would not defeat the application as he then would have the right to move forward with the Variance.

Mr. Randolph explained as far as the appeal of the Administrative Official's opinion in regards to the argument between Mr. Deziel and himself, if they rule against him, the Council would still have to address the issue of the abandonment. Mr. Heeke believed that Mrs. Wiener wanted to postpone this until they have the opportunity to address this matter with Mr. Moore.

Spec.Excep. 10-92 (cont'd)

Mr. Deziel asked if in the consideration of a variance, the prior use would not be an issue? Mr. Heeke responded affirmatively. Mr. Deziel asked if it was conceivable to pursue the variance application at this time and if he doesn't prevail on the variance, he would then have the opportunity to come back on the Administrative Appeal on the 8.12 application to which Mr. Randolph responded he thought that could be done to which Mr. Heeke agreed. Mr. Deziel conferred with his client and asked to proceed with the Special Exception application No. 10-92 and defer consideration of the Appeal on Section 8.12.

Mr. Heeke asked for a motion to proceed in this fashion and Mrs. Douthit so moved and Mr. Ilyinsky seconded the motion.

Mrs. Wiener thought this was now a matter of Mr. Deziel having his cake and eating it too and she objected. Mayor Marix stated she had a problem with the interpretation of the Code. Mrs. Douthit agreed stating it was not clearly defined.

Mr. Heeke suggested they proceed with the application for the Special Exception with the Variance and when that it is concluded, a decision will be made as to whether or not there should be any further action.

Mr. Deziel advised he will not repeat some of his arguments which he laid out earlier that this would be better for the area and not as detrimental to the area arguments as these also run through the vein of obtaining a variance and at this time, he will jump into the hardship which he viewed as the fact that they have space and putting aside any prior existing uses or what has been there is the fact that there is a space on the corner of a mixed retail office building which they would like to use for a real estate brokerage operation. He stated on both sides of this building there are retail tenants within the same structure and above the space there are office tenants.

Mr. Deziel proposed that the first hardship which exists is the location of the building and the physical characteristics of the building, which is the building is located at a busy corner, South County Road and Worth Avenue; and it looks like an office building. He thought it was difficult for the landlord to keep a full house of retail tenants there. He thought it was the only building west of County Road on Worth Avenue that could qualify for the Town's general thinking that all of the businesses on Worth Avenue need to be conforming and retail orientated. He stated this was the only building west of County Road could going the direction of a retail use. He believed there was no other first floor use on the Avenue that is not retail except for the two existing grandfathered real estate brokerage offices. He stated the hardship is they have a space that under Schedule B, Article IV is prohibited by Special Exception from being allowed because of the Town's zoning policy. He stated this building is predominantly an office building, albeit the first floor permits retail only.

He felt the real approach would be to have a variance from 8.12 and since it is so uncertain as to what it means, they are hardshipped by that fact and for the benefit of the Town, this granting would be moving in the right direction.

He thought there was a variance theory in location zoning and a variance theory from the application of a code provision and it is his position that because there is so much unfamiliarity of this provision and there is no-one to blame for that except the lack of use, that they are hardshipped by that and if the intent behind 8.12 is looked at, it's idea is to allow what he is proposing.

Mr. Heeke called on Mr. Zimmerman for his comments and Mr. Zimmerman noted this is a very complicated matter. He believed that 8.12 to the best of his knowledge has never been used and this is the first time any applicant has requested consideration under the provisions of Section 8.12 as Mr. Deziel has interpreted that section.

Mr. Heeke called for public comments and there were none. Mr. Heeke noted there are letters in the record from merchants on Worth Avenue and nearby, and they were from Dino Demondi Salon, Bonnie Keller, Ralph Lauren Polo, Valentino, Cape Cod Cafe, and Ferragammo.

Mr. Adrian Winterfield addressed the Council recommending a way to handle this would be to certify the whole question to the Zoning Commission and offer the applicant the right to have a short term occupancy, depending upon the ultimate disposition of the question as he believed they were groping and he personally believed there should be a Special Exception without the indication of being above the first floor and recommended that no violence would be done to the characteristics of the District if banks and offices were permitted on the ground level as Special Exceptions as this provision has not been in the Ordinance for a long time and it was slipped in without a great deal of discussion and recommendation of one Council member. He believed this problem has been handled in other Districts but he personally has been uncomfortable with the reasoning that went behind these dispositions. He believed they have been told the hardship is not for the proposed tenant but for the landlord and he felt that was perfectly correct.

He stated on 8.12, they needed to get beyond 8.15 first and pointed out that it states: "The change of a Use to a more restrictive or conforming use for any period of time shall be considered an abandonment." He did not believe there was anything submitted on legal authority and perhaps it would be controlling but on the plain language of the Ordinance, there already has been an abandonment.

Attorney Gus Broberg appearing on behalf of Martha Gottfried, Inc. addressed the Council to strenuously object for obvious reasons as the Code states no new real estate office can be opened on the first floor.

Mr. Heeke advised the Council will now go into Executive Session. Mrs. Douthit felt that a real estate office from a density and intensity standpoint would be much less than a bank and parking would also be less than it would be for a bank, and in this case they are talking of phantom spaces in any event. She felt an office located there would be a distinct improvement over a bank being located there and it would also involve less people.

Mayor Marix believed if they were talking about a variance, they needed to show a hardship and she believed the hardship of that building is on one side, it is definitely a shopping street and on the other side, along County Road, there is a mixture of shops and banks, so she viewed this area as an office section, which puts this piece of property in a different light.

Mrs. Douthit believed the frontage for this particular building on Worth Avenue was something like twelve feet. Mr. Deziel believed it was three times as long on County Road as it was on Worth Avenue. Spec.Excep. 10-92 (cont'd)

Mr. Heeke asked if they needed to put a door on the County Road side, would they still be confronted with the variance question? Mr. Zimmerman responded the door location would not be relevant as that would not resolve the zoning problems.

Mrs. Wiener commented she always has had a problem with granting things that are based on fiction but she has no objection to this particular variance now, as a small part of this building faces Worth Avenue and it is not a major problem and at times they do get overzealous and she doesn't see a particular problem as they have addressed it and that is her point of view.

Mr. Weinberg believed a retail store is a store and a real estate office is retailing real estate and what they don't need is more empty stores on Worth Avenue and he has no objection to this variance.

Mr. Heeke stated he doesn't view a real estate office as a retail store as this falls in an office type category and his concern is a precedent setting problem for later on. He believed the small boutique stores are the character of Worth Avenue and on the intensity question, he too believed it would be less intense than a bank, although there would be one more day of operation as real estate offices are usually open on Saturdays. He stated his main concern is an inadvertent conversion of Worth Avenue to other than retail shops. He had listened with great interest to the comments of Mr. Deziel on the fact that this office would be fronting on County Road and this would lend itself to a transitional mode and he is persuaded by that argument. He stated his future concern is opening the door to other real estate offices and law firms, and businesses that sell services. He thought he was more concerned that the question of precedent setting be answered and they don't open the door for these things to be going down the Avenue and not fly in the face of the Comp Plan. He felt it was an extremely close question as to whether it should be granted as the nature of this building is such that it isn't duplicated elsewhere on the Avenue and he hoped that future Councils would understand why this was approved by this Council. Mayor Marix knew this was a major problem as on the other end of the Avenue are major banks and perhaps they wanted to do a Zoning in Progress. Mr. Heeke did not believe that would solve this issue.

Motion was made by Mrs. Wiener to grant the Special Exception No. 10-92 with Variance as the building is on the corner of County and Worth Avenue and is transitional and a larger part of the building is on County Road rather that Worth Avenue. Mrs. Douthit seconded the motion on the grounds too that the intensity is down and the automobile traffic and parking would be phantom anyway. Mr. Heeke asked if they would like to amend the motion that the entrance to the office be on County Road and it would have a County Road address to which Mrs. Wiener amended her motion to include those conditions. Mr. Ilyinsky asked if they should allow the attorney to talk to his client about that? Mrs. Douthit accepted the amendment as the seconder.

Mr. Deziel asked if they could have the South County doorway and use it to enter and exit the office but leave the Worth Avenue address as that is what the building is known as and that really is the address. Mr. Ilyinsky knows that Worth Avenue is a strong, potentially attractive address and the zip code is greatly in demand and perhaps the applicant would prefer to have the Worth Avenue address. Mr. Heeke appreciated what he is saying, but his argument is that he wants to protect Worth Avenue as a retail address for retail shops and he believed they should be using the County Road address. Mrs. Wiener agreed. Mrs. Douthit was concerned about the precedent this would set.

Mr. Randolph stated the motion is based upon the application as filed and not on any oral request for a Variance from Section 8.12. Mrs. Wiener agreed.

Mr. Heeke restated the motion: The Special Exception with Variance be granted conditioned that the entrance to the real estate office will be on County Road and it would have a South County Road address. On roll call, the motion carried unanimously.

4. Special Exception No. 15-92 - 375 South County Associates, 375 South County Road; to allow a 3,900 square foot, 150-seat restaurant and to allow a portion of required off-street parking to be within 500 feet of premises. C-TS District. Deferred from June Meeting. Letter Dated July 1, 1992 from Peter Broberg Requesting Postponement to September Meeting. Spec.Excep. 15-92

Attorney Gus Broberg requested this be postponed to the September Meeting in order that their plans may be finalized. Mr. Heeke pointed out this is not the first postponement of this particular issue and he requested that Mr. Broberg withdrawn the application and reapply in the Fall to which Mr. Broberg agreed.

5. Consideration of Appeal of Planning, Zoning and Building Department's Decision Regarding North Boundary Line at 300 El Brillo Way for Proposed Setback of Swimming Pool by James McCartney Wearn, Attorney. Postponed from June Meeting. Appeal - 300 El Brillo Way

A. Variance No. 42-92 - Ralph MacDonald, 300 El Brillo Way; to allow construction of a swimming pool providing a rear yard setback of 5' in lieu of 10' required. R-AA District. Var. 42-92

Mr. Heeke recalled there is a question on this application as to where the boundary of the property is and it is not within the province of the Council to make that determination so Mr. Wearn graciously agreed to come back to this meeting and request a variance. Mr. Heeke stated this is a landmarked property and language has been provided for the motion.

Mr. Wearn read the proposed motion: "If the north boundary as set forth in the applicant's appeal and the appeal be granted that the new pool setback is approved, then the variance would be found moot. If the north boundary is not as set forth in the appeal, the Variance be granted and the appeal be denied." He explained in either event, the pool location would be the same.

Mrs. Wiener moved the appeal be granted, as they believe they may be looking for a five foot variance, and in the event the variance is needed, the motion is to grant it, but if the variance is not granted, then it would be moot. Seconded by Mr. Ilyinsky. On roll call, the motion carried unanimously. Mr. Wearn advised he has a letter in favor of this that he would like to make a part of the record to which Mr. Heeke agreed.

New Business

New Business

Var. 40-92

6. Variance No. 40-92 - Robert W. Gottfried, 1415 South Ocean Boulevard; to allow construction of a single family residence at a building height measured from an elevation of 23' in lieu of 7.5' as established by Town Zoning Section 2.10 (11.3). R-AA District. -

John Gosman, Architect, addressed the Council requested the variance which is a transfer of the grade reference from the existing elevation of Ocean Boulevard to the ridge of the property, which is 23'. Mr. Ilyinsky recalled the Council has dealt with similar matters of this type and he would like to move the Variance No. 40-92 be granted. Mr. Weinberg asked for the Building Department's comments and Mr. Zimmerman explained this is a topographical problem and they have been granted in the past and they have no objection. Seconded by Mr. Weinberg. On roll call, the motion carried unanimously.

Var. 41-92

7. Variance No. 41-92 - Jeffry and Barbara Picower, 1300 South Ocean Boulevard; to allow construction of a two-story dwelling at a building height measured from the existing site elevation of 21.5' instead of elevation 7.5' as required, and to allow construction of an observation tower with a gross floor area approximately 3% of the dwelling in lieu of 1% maximum allowed per Section 5.22(d). R-AA District. -

Attorney Paul Prosperi stated the first part of the variance is asking for the zero datum to be set at 21.5'. Mrs. Douthit moved for approval of the request for the zero datum to be at 21.5'. Seconded by Mr. Weinberg. On roll call, the motion carried unanimously.

Attorney Prosperi introduced Mr. Mark Ferguson, the architect. Mr. Prosperi stated the second part of the variance is to have an observation tower, with a part of this being a stairway which comes under Section 5.22 (A). Mr. Prosperi asked if there would be living space to which Mr. Prosperi responded there is not as this would be an observation tower.

Mr. Heeke called for Mr. Zimmerman's comments who explained the staff had no problem with the topography side of the variance, but as far as the tower is concerned, they felt that due to the design of the tower with a portion of it being open to the weather, the stair consuming a considerable amount of floor space, that this was a minimal request and they have no objection.

Mayor Marix felt that because of the topography, this tower is going to be very high as this is a huge house of approximately 20,000 square feet and wondered how this will be viewed as there is really no way of knowing what it will look like and she didn't want it to be a massive monster. Mr. Prosperi stated this house is smaller than Casa Apava which has a tower and which is located adjacent to this house to the south. He stated this property is approximately the same size as the Machek property to the north. He indicated this will have a wall in front of it and will be heavily landscaped and the impact will be less than Casa Apava. Mayor Marix asked why the pictures couldn't show this as it may be very nice but she had a concern about it being massive. She believed it was a house on a hill behind a wall covered with trees but this Council has no way of knowing that and asked how he could tell? Attorney Prosperi believed the houses on either side can be shown when they go before ARCOM. Mayor Marix stated meanwhile they are here to give him permission to do what he is asking and they don't really know what it is going to look like. Mr. Heeke stated he has no problem with the hardship aspect on the height but this is a new construction and he felt the architect is hired to make it conform to the Town's Zoning Code and that is the function of the architect and it can still be aesthetically pleasing. He stated he does have a problem with the size which exceeds what is in the Code.

Mrs. Wiener stated she was happy to hear that this house is of a lesser size than what would have been permitted and she moved for approval. Seconded by Mr. Ilyinsky. On roll call, the motion carried unanimously.

Var. 43-92

8. Variance No. 43-92 - D. Dixon and Pauline B. Boardman, 5 South Lake Trail; to allow construction of a 12' high property line fence along a portion of the south lot line in lieu of the 6' height limitation in Zoning Ordinance Section 5.36(a), (c), (d), and 5.45. R-A District. Letter Dated July 10, 1992 from William E. Corley, III Requesting Postponement to August Meeting. - This variance was postponed until the August meeting.

Var. 44-92

9. Variance No. 44-92 - David Mack, 958 North Lake Way; applicant requests an amendment to Variance No. 17-92 which allowed a two-story addition at the NW corner of residence at a 10' side yard setback in lieu of 15' required; amendment would extend the size of the addition 13' to the west providing previously approved setback of 10'. R-B District. -

Attorney Robert Deziel addressed the Council indicating this is an amendment to a variance previously approved and previously amended, recalling they received permission to add on a dining room and the redesign included a loft area and they were not certain the previous approval contemplated the loft area and the substance of this amendment is to provide an additional seventy feet of encroachment into a sideyard setback. He stated the area increased will be for five feet by approximately thirteen feet and it is in a heavily landscaped area and cannot be viewed by the neighbors or from the bike trail.

Mr. Zimmerman reported there are no objections from staff. Mrs. Wiener moved that approval be given for Variance No. 44-92. Seconded by Mr. Weinberg. On roll call, the motion carried unanimously.

Var. 45-92

10. Variance No. 45-92 with Site Plan Review - Allied Dunbar Property, Inc., 237-243 Worth Avenue; to allow modification of a nonconforming property; applicant proposes

demolition and partially replacement which would bring property into conformity in all areas but parking; the parking nonconformity would be reduced from a 94-space deficit to 44. C-WA District. -

Mr. Heeke noted this would have a net reduction of approximately 4300 square feet. Attorney James McCartney Wearn addressed the Council for the applicant. Mr. Zimmerman reported the conditions the staff would like to see added to this approval as the Town Engineer would like to have a drainage retention in the rear with a storm water overflow pipe to the Worth Avenue system. He suggested also that all buildings on the property be surveyed to ensure that the roof drains do not tie into any sanitary sewers and there be no landscaping other than grass on the rear utility easement and the property owner should investigate the condition of the sanitary sewer along the rear easement and upgrade, if necessary. He stated all demolition debris should be carried out through the rear parking lot area.

Mr. Wearn stated he had no objection and if it was possible, they would carry out the debris through the rear parking lot.

Mr. Weinberg moved the Variance No. 45-92 be granted with the conditions as outlined by Mr. Zimmerman. Seconded by Mrs. Wiener. On roll call, the motion carried unanimously.

11. Variance No. 46-92 - Robert and Wendy Meister, 1375 South Ocean Boulevard; to renew Variance No. 32-87 to allow a kitchen in the guest house and to provide that upon construction of a new residence on this lot such second kitchen can be continued. R-AA District. Var. 46-92

Attorney Prosperi addressed the Council indicating this would be a continuation of a kitchen agreement which was granted in 1979 to the former owners of the property. Mrs. Douthit moved that with all the necessary agreements with the Building Department, Variance No. 46-92 be approved. Seconded by Mr. Ilyinsky. On roll call, the motion carried unanimously.

12. Special Exception No. 16-92 - Asset Management Group of America, Inc., Murray's Palm Beach Restaurant, 2880 South Ocean Boulevard; pursuant to Section 6.61(c) of the Town Zoning Ordinance, request for renewal of Special Exception No. 4-91, which allowed placement of seventeen (17) outdoor dining seats in conjunction with an existing restaurant. C-TS District. - Spec.Excep. 16-92

Mr. Heeke indicated this was the one year renewal. Mrs. Douthit assumed there were no difficulties encountered in the past year. Mr. Zimmerman responded to the best of his knowledge, there has been no problem. Mrs. Douthit moved for approval for the continuance of this agreement for one more year and approve Special Exception No. 16-92, Asset Management Group of American, Murray's Palm Beach Restaurant. Seconded by Mr. Ilyinsky.

Mayor Marix asked if anyone ever checks if additional chairs are not put out in these outdoor seating arrangements? Mrs. Douthit believed they had to abide by the Fire Safety rules. Mr. Heeke agreed noting there are spot checks made periodically. Mayor Marix believed there were some violations around Town. Mr. Heeke asked Mr. Zimmerman to make a note to check on this to which he agreed.

On roll call, the motion carried unanimously.

13. Special Exception No. 17-92 - Claude C. Mimun, 1144 North Ocean Boulevard; pursuant to Section 6.15 of the Town Zoning Ordinance, allow owner to use the existing walled play area as a ball rebound facility. R-B District. Spec.Excep. 17-92

Mrs. Mimun addressed the Council indicating her husband and her family have recently moved into this home and she would like to use the play area structure as a rebound for tennis, handball and racket ball. She wishes her children to be able to use this and allow a safe play area for them as this area is already fenced in. Mr. Heeke asked if when the building plans were prepared, did they intend to use this for this purpose? Mrs. Mimun responded they did intend to use it as a play area for the children. Mr. Heeke asked did they intend to use the structure for a rebound wall to which Mrs. Mimun responded affirmatively.

Mr. Zimmerman reported the staff is concerned about the nearby property owners and if this is approved, there be an additional wall constructed on the west side of the play area for sound deflecting purposes and additionally, there be a restriction on the hours and it should be the same hours that tennis ball machines are useable. Mr. Heeke asked if the Building Department had known this area was going to be a rebound wall, would the plans have been approved to which Mr. Zimmerman responded they would not have, but in all fairness the plans showed a wall but didn't state what the wall was specifically to be used for and therein lies the problem.

Mrs. Douthit asked how high was this wall to which Mrs. Mimun responded it is eight feet by twenty feet. Mayor Marix believed there have been rebound walls denied over the years. Mrs. Mimun commented on the fact that she has young children and she would be able to supervise them in the backyard and they could be playing hopscotch, skating, etc. and they would not be in the street.

Janice Thorstad addressed the Council indicating she was a next door neighbor at 110 El Pueblo Way. She stated she has four children who are involved in tennis but they play at the Breaker's or at the Recreational Center. She had placed calls to Mr. Smith, Chairman of the Architectural Commission and to the Building and Zoning Department asking them how this wall could have been erected. She indicated this wall is very close to her living area and urged the Council to not approve this request. She believed there were some letters of objection on file from the neighbors in this area.

Mrs. Thorstad recalled when this home was being first constructed, she called Mr. Zimmerman in the Building Department as she believed the height was too high and she felt when this was approved by the Architectural Commission, this wall was going to be used as a rebound court and after the wall is built, she finds out they are going to request a variance to the Code.

Mayor Marix recalled this was the same house which was overbuilt by 900 square feet to which Mr. Zimmerman responded at one time, yes, it was. Mrs. Thorstad recalled when her house was built, her architect was very cognizant of the Code and adhered to it and later on, she wished to put in a gate and was not allowed to do so as the gates were higher than what the Code would allow, so she knows in the past the Building Department has been very emphatic about upholding the Code regulations.

Mr. Ilyinsky believed that one of the nicest things this Council can do is to keep this Town a little different than what other Towns are and this is one thing they can do as if this is granted, it would be opening a Pandora's Box and he hoped she would understand as to how horrified he would be if this was granted. Mr. Ilyinsky moved the Special Exception No. 17-92 be denied. Seconded by Mrs. Wiener explaining there is not another one in Town and she realizes as younger families do move to Town, it may be something that they needed, but the Town does provide a wonderful Recreational Center. She believed if this was approved, it would be setting a precedent and they will be flooded with other applications of this type.

Mr. Heeke noted had the true purpose of the wall been explained in the beginning, it would not have been allowed. He believed that an alternate motion would be to require the wall to be moved. He stated the motion on the floor is to adhere to the principles of this Town as they have been very consistent in the past with regard to matters of this kind.

On roll call, the motion carried unanimously for denial.

Mr. Ilyinsky asked if this would have to be removed? Mrs. Mimun asked if she could erect a basketball hoop on it? Mr. Heeke believed that would not eliminate the problem of noise. Mayor Marix believed it probably should be removed as the kids will use it. Mrs. Wiener believed if the wall was removed, it would make a healthier and happier situation for everyone concerned. Mrs. Mimun stated she wished to cooperate and wanted to be a good neighbor. Mr. Heeke suggested she could voluntarily offer to remove the wall or agree to put in some planting as this would be a possible solution.

Mrs. Thorstad addressed the Council asking that the wall be removed as she has children and she knows when she is away, they do things that they wouldn't do when she is there with them, so she was sure the wall and slab would be used by the children when Mrs. Mimun is not in the house. She has been a good neighbor and they did contact her on the wall after it was built. She is going to have to make some changes on her side of the property and even if they planted something on their side of the fence, the issue is the wall and slab does exist and if used, it will be noisy.

Mrs. Douthit believed children would be using it if it was allowed to remain. Mr. Weinberg believed the wall should come down within the next sixty days. Seconded by Mrs. Douthit. Mrs. Wiener believed that a foot or so of planting would have acted as some sort of a buffer.

On roll call, the motion carried unanimously.

Spec.Excep. 18-92

14. Special Exception No. 18-92 with Variance - The Society of the Four Arts, 439 Royal Palm Way; to allow owner to change the use of this three-story building from multi-family residential to non-profit cultural center. A variance is requested to allow interior structural alterations to this nonconforming structure per Section 8.23. R-B District.

Mrs. Douthit was sure all were familiar with this and she would be happy to make a motion to approve the Special Exception No. 18-92 as this will definitely be a reduction in density.

John Schuler addressed the Council for the Society of Four Arts, pointing out they will be removing the children's library to this new building and by doing so, they will add more space for the children.

The motion was seconded by Mrs. Wiener.

Mr. Zimmerman stated there are some comments from the staff for conditions to be added, if the Council approves this, and the first one is to check out the roof drains and any other storm drainage on the site to make sure these do go into the storm sewer and not the sanitary sewer; and secondly, since the building has not been used for some time, the condition of the sanitary connection from the building into the main sewer should also be checked. Mr. Schuler had no objection to these requests.

On roll call, the motion carried unanimously.

Site Plan Review No. 1-92

15. Site Plan Review No. 1-92 - Stephen Levin, 446 North Lake Way; to review proposed placement of two sculptures as per Section 5.50(b) and 9.60 of the Town Zoning Ordinance. R-B District.

Stephen Levin addressed the Council seeking the variance for the placement of two sculptures on the western portion of his property, one being nine feet tall and the other eight feet tall.

Mr. Zimmerman reported this is not a variance but a Site Plan Review and the staff has no objection.

Motion was made by Mrs. Wiener to grant the Site Plan Review. Seconded by Mrs. Douthit. On roll call, the motion carried. (Mr. Ilyinsky was not in the room at the time).

C. Other

1. Consideration of Proposed Intergovernmental Procedure to be Established in Lieu of the Abolished Palm Beach Countywide Planning Council - Updated Status Report.

Mr. Timothy Frank reported there is no change in the status and the concept as presented last month to the Council has been presented to the Municipal League and today will be before the County Commission.

XIV. COMMUNICATIONS FROM CITIZENS - 3-MINUTE LIMIT PLEASE. - None.

XV. ANY OTHER MATTERS

A. Mr. Doney advised he has had a request from the Palm Beach County Municipal League for the Town to host a meeting in September. After discussion, the Town Council decided to not host the meeting in September, as many of the elected officials would be on vacation in September, but would be willing to do it later.

B. Letter received from Mrs. Hudson of West Palm Beach putting the Council on notice there was going to be an extensive marina expansion done by the City of West Palm Beach on their municipal marina. Mayor Marix pointed out there will be many more boats docked there which will require more openings of the Bridge and that is what was her concern.

C. SPECIAL TOWN COUNCIL MEETING. Mr. Doney reminded there is a meeting scheduled for August 27, 1992 to receive the report from Mr. Sundstrom on ASR and the progress report on the negotiations with the City of West Palm Beach. He recommended the Water Conservation Study from James M. Montgomery be heard, to which the Mayor and Council agreed. Spec. TC Meeting

D. UPCOMING MEETINGS: Mr. Doney advised he will be forwarding next week the tentative budget for FY93. He reminded all there is a Special Meeting scheduled for July 30, 1992 at 9 AM.

E. PHRASE TO BE ADDED ON APPLICATIONS FOR VARIANCES AND SPECIAL EXCEPTIONS. Mr. Heeke reported he had asked the Building & Zoning Department to add a phrase to the application requesting that if the applicant has a relationship with any member of the Council to indicate that on the form. He has discussed this subsequently with members of the Commission on Ethics, who are very much in favor of it. He also spoke with a Staff Attorney at the Florida League of Cities who was also in favor and they felt that question fostered the Sunshine Law and that is the reasoning he had behind this request. Phrase to be added on app. for var. & spec. excep.

Mrs. Wiener commented on the fact that when she saw this question on the application, she was amazed, as the Ethics Commission isn't worth the paper it is written on as the State people do practically anything they desire. She strongly believed the onus was not on the public but on the elected officials, as the public has no requirement to make its situation known as no private citizen needs to do that and the onus is on the elected officials and that is why she was concerned about it. She felt that anyone who comes before this Council in a Town of this size knows somebody on the Council and she really didn't believe the question on the form made any sense to her. She thought more problems would be created with it than what would actually be solved.

Mrs. Douthit stated she had no objection to having that question on the application for Variances and Special Exceptions as she didn't see it as any problem.

Mr. Heeke stated what the question was doing was asking if there was any relationship between the applicant and a member of the Council, and this is a member of the public who has come before the Council for some zoning purpose and at that point, the rest of the public does have the right to know if there is a relationship. He didn't believe the question necessarily meant there was a conflict but merely was a disclosure and it may cause the member of the Council to be reminded that he or she should think about whether there is a difficulty or not.

Mrs. Wiener stated disclosure is incumbent upon the public official and the elected official and is not incumbent upon a private individual and if they are untruthful or stretch the truth, they haven't done anything anyone can possible come to them about. Mr. Heeke did not agree. Mrs. Wiener did not think it was a simple question as there are people who appear here regularly who have close ties to the people on the Boards and on this Council and it could be embarrassing. Mrs. Douthit did not believe it really got into anything that was personal. Mrs. Wiener read the question stating it says "Are you familiar with?" Mr. Heeke believed it may have been misphrased as the purpose is whether or not there is a business relationship with a member. Mrs. Wiener felt that was a different story. Mr. Heeke stated that is what he was after, the business relationship question. Mrs. Wiener pointed out it didn't say that. Mr. Weinberg suggested there be a modification to the language.

Mr. Zimmerman clarified the language, reading: "Does the applicant have a relationship to any member of Council or business entity involving a member of Council?" Mrs. Wiener did not think it was clear language. Mr. Heeke felt if that applicant was coming before the Town Council requesting relief from a zoning provision, the public has the right to know if there is some ongoing business relationship or family relationship, and he believed that was the whole purpose of the Sunshine Law. He felt if an applicant was coming before the Council for some relief or some assistance from the elected officials, that is what the Sunshine Law is really all about.

Mrs. Wiener felt there were going to be embarrassing moments, as there are relationships which are close in this Town and they come before this Council and act as if they have never seen or heard of these people before, and she thinks they are looking for trouble. Mayor Marix understood what Mrs. Wiener was saying but she couldn't think of one case. Mrs. Wiener stated she could recall lots of them, but she didn't want to sit here and name them, but she will if this is what they are going to do.

Attorney Randolph believed the wording was much too broad and he didn't think it was a requirement to have such a question on the form, but if they want to have it on, he will take a look at it. He felt the obligation is on the member of the Town Council. He thought one of the problems of doing it is if the applicant misses something and something comes up later, the Council is placing a burden on the applicant. Mr. Heeke believed that sometimes the applicant is aware of some things which members of the Council do not know and he has had that experience of some things coming around the corner at him on a few occasions. He wished the applicant to be shooting square also. Mayor Marix recalled there was a case when someone in Mr. Heeke's law firm was representing an applicant and Mr. Heeke had no knowledge of that. Mr. Heeke stated there is always the possibility that someone in his firm in another state had a business relationship and he has no problem with the public knowing of that or the other members of the Council knowing that. Mayor Marix recalled there was a case some years ago when a niece or a cousin was representing someone and it was an extremely unpleasant situation.

Mr. Randolph recommended if the question is going to be on the application, it should be more specific and tailored after the Statute, to which the Council agreed, and Mr. Heeke asked Mr. Randolph to modify the present question on the form. Mrs. Wiener felt it should be understood where the onus is as if the applicant doesn't answer the question correctly, it would not absolve the Council member, to which Mr. Heeke agreed.

Mr. Randolph felt the preface could be "To the best of your knowledge....." Mrs. Wiener asked the question be removed from the application in the meantime. Mr. Randolph stated he could immediately modify it. Mr. Zimmerman reminded all there could very well be some of these applications already distributed. Mr. Randolph asked how long has this question been on the form to which Mr. Zimmerman responded it has been about six to eight months. Mr. Heeke stated it was his suggestion. Mrs. Wiener believed that matters of this kind should come before all of the Council. Mr. Heeke stated that is why he has brought it up as Mrs. Wiener did raise the question.

Phrase to be added on app. for var. & spec.excep.

Mayor Marix suggested in the meantime when the applications come back into the Building Department with the present wording on, they simply change the statement. Mr. Heeke didn't think it was going to be difficult to accomplish the preparation of the new wording. Mrs. Wiener indicated she would be interested to see some of the answers if this has been around for five or six months.

Mr. Heeke asked the Town Attorney to provide proper language to the staff and as soon as it is provided, it should be put on the application. Mrs. Wiener wondered what a "relationship" meant - could it be a relationship when she buys stocks from someone? Mayor Marix thought it could. She thought possibly along those lines, they should also consider charity things as if someone is serving on a Board or is the head of a fund drive and the Council is voting on whether or not a Charitable Solicitation Permit is going to be granted, is that going to be a problem? Mr. Heeke stated if the members of the Council were a member of one of the Clubs, that shouldn't preclude them from voting on it.

Mr. Randolph stated he will look at it and if it needed to be more specific, he will prepare the language.

Mayor Marix recalled there was a lot of publicity on when Mr. Ilyinsky voted on an issue of the Garden Club and his wife was involved in the Garden Club. Mr. Heeke believed rather than have it come up in a negative connotation later, it was his thought this question would help solve some of those problems.

Mr. Ilyinsky felt this needed to be thought through quite thoroughly as if someone from Publix comes before the Council for a variance or special exception, would the Council member exclude himself from voting just because he has been shopping at Publix for the last ten years? Mayor Marix thought if the member was the supplier of the products, then it might be a different story.

Mr. Heeke commented he takes it as the consent of Council that Mr. Randolph properly word the question and put it on the application as soon as possible.

Mrs. Wiener made the comment since they are on the subject of ethics, it was high time that this Council follow in the footsteps of other government authorities, that when people do come before this Council lobbying, trying to sell a product, that they be in a position where they so advise, rather than be "interested" citizens, when actually that is not the case and they have an interest in a particular product they are trying to present to the Council.

Mayor Marix stated she doesn't meet with people individually. Mrs. Wiener stated she wasn't stating that, she was talking about people who come before the Council and want to sell the Town something, but they come under the guise of "interested" citizens when that is not the case at all. Mayor Marix stated they couldn't curtail the people from using their freedom of speech. Mrs. Wiener stated she does not mean that, but this is a normal governmental situation and she would like to see something on that.

Adjournment

XVI. ADJOURNMENT - There being no further business to come before the Council, the meeting was adjourned at 3:55 PM.

Grace T. Peters
Town Clerk