

MINUTES OF THE SPECIAL TOWN COUNCIL MEETING HELD ON MAY 6, 1998

I. CALL TO ORDER AND ROLL CALL

The meeting to consider actions taken by the City of West Palm Beach at its May 4, 1998, Commission meeting was called to order by President Lesly Smith at 1:30 p.m. in the Town Council Chambers. On roll call, the following Elected officials were found to be present: Mayor Paul Ilyinsky, President Lesly Smith, President Pro-Tem Sam McLendon, Councilmen Jack McDonald, Leslie Shaw, and Allen Wyett. Also present were: Acting Town Manager Peter Elwell, Town Attorney John Randolph, Director of Public Works Al Dusey, Town Engineer Jim Bowser, and Town Clerk Mary Pollitt.

II. INVOCATION AND PLEDGE OF ALLEGIANCE

The Invocation was given by Mrs. Pollitt. Mrs. Smith led the Pledge of Allegiance.

III. APPROVAL OF AGENDA

Mr. Wyett made a motion to approve the agenda. Mr. McLendon seconded the motion. On roll call, the motion carried unanimously.

IV. CONSIDERATION OF ACTION TAKEN BY THE WEST PALM BEACH CITY COMMISSION AT ITS MEETING ON MONDAY, MAY 4, 1998, REGARDING RIGHT-OF-WAY IMPROVEMENTS IN THE TOWN OF PALM BEACH

Attorney John Randolph said he would like to review events that led to the present. He said that for a period of months the Town's staff has been dealing with staff in the City of West Palm Beach regarding the coordination of efforts of the Town and the City relating to the Town's D-14 storm sewer project—to the extent that the City of West Palm Beach hired an engineer to prepare design guidelines and graphics in regard to the work that needed to be done related to their (water) lines which conflicted with the Town's pipes. Those lines are over the Town's pipes. Mr. Randolph reported that Erik Olsen described very aptly that design and presented the existing problem and West Palm Beach's responsibility to move forward with the resolving of the conflict.

Mr. Randolph continued that in reliance upon the work that was being done by the City in coordination with the Town, the Town let specifications and a bid award was granted to go forward with the D-14 project, which is about a \$2 million project, with the City's share being \$250,000. Mr. Randolph said it obviously made sense within that project for the Town's contractor to do the work and be reimbursed by the City for the \$250,000 portion.

Mr. Randolph said that after the Town had gone ahead with the contract, and in fact being in the ground at this point, he learned through the contact between the Town's staff and the City's staff that there was concern that the City Commission would approve these projects although historically these projects have always been approved as a matter of coordination between the two entities. Mr. Randolph said he learned that although the City's staff had been involved with the projects all along, for some reason, these projects were not coming to the City Commission with a recommendation from staff as they normally would. As a result of those concerns, President Smith wrote a letter to Mayor Graham and the City Commissioners expressing the Town's concerns in this matter coming to the City Commission without recommendation. Mr. Randolph said Mrs. Smith's letter urged that the City meet its responsibilities and move forward with the contract and the removal of these lines.

Mr. Randolph reported that President Smith, Al Dusey, Peter Elwell, and he attended the City Commission meeting on May 4th to express concerns and the Town's position regarding the issues. He said the first thing they learned from the City Attorney, when the matter came up, was his advice to the City Commission was going to be that in the event the City would go forward with these projects—there are four of them—that a condition would be applied that the projects would only go forward in the event the Town would agree to reimburse the City 100% for the cost of the improvements in the event the Town ever bought the City's system. Mr. Randolph said that was the first time they heard about that condition, and he heard about it at a break about 5 minutes before Pat Brown made that

announcement. Mr. Randolph said that at the same time a good presentation was made by Eric Olsen wherein he defined the project and, although he did not state it outwardly, he apparently said the City had the responsibility to move forward on this project.

Mr. Randolph said that after Pat Brown made that pronouncement, he spoke on behalf of the Town and indicated he did not feel that was a reasonable condition. Mr. Randolph said there were four projects, and the first two projects were projects that were going to be initiated by the City of West Palm Beach as part of their regular improvements. Mr. Randolph reported he indicated to the City that perhaps the Town does not have much control over what projects they might initiate and what conditions they might wish to place on projects the City is going to initiate although the Town feels the City has the responsibility to move forward and maintain the system which they have not been maintaining and which Mr. Randolph believed Mayor Graham admitted the City has not been properly maintaining over the years.

Mr. Randolph said there were two other projects which are Town initiated projects where a conflict exists between the water distribution system and the Town's storm sewer system. The Town believes the City has the responsibility to move and restore its system. Mr. Randolph said he indicated that because the City has that responsibility that, in his opinion, it would not be acceptable to the Town Council to have any such conditions placed on the moving forward with their responsibility under this project.

Mr. Randolph said there was a lot of discussion regarding the issue, and two or three motions were made and failed, but the final motion that was approved was that the City would not move forward initially with the two projects which they are initiating; however, the City would go forward with the Town's projects, as agreed, subject to the Town Council accepting the condition that in the event the Town buys the system, the Town would reimburse the City at 100% for the cost of the improvements. Mr. Randolph said that was the motion that prevailed, and three of the commissioners were quite vocal regarding this matter. It was apparent that there had been some meeting of the City Commission where this matter had been discussed, and one of the commissioners was quite surprised; although their position had been somewhat unanimous in the past, he detected some disagreement from two of the commissioners who seemed to agree with the Town. Mayor Graham also agreed with the Town's position. Mr. Randolph said that Commissioners Warshauer, Zucaro, and Daves were quite vocal and indicated that they did not see (generally) any reason why they should put any money into the Town when the Town is suing them and that perhaps if the City took that position, it would bring the Town to the table. One of the commissioners mentioned that they had heard that on several occasions the Town was very close to agreement and maybe this action would bring the Town back to an agreement.

Mr. Randolph said the meeting was ended with the Town taking the position—and he still held this position and his advice to the Town Council was still the same—that it would not be reasonable for the Town Council to accept that condition. He said the reasons for that advice were as follows: first of all, Mr. Randolph did not think the City, when it is responsible to move these lines in the first instance and when the Town has relied to its detriment on the actions of their staff to the extent of letting a bid in regard to the project, he did not think it was reasonable for the City to place any conditions on this. Secondly, the Town should never agree to pay 100% of the cost of the improvements even in the event the Town would ever make an offer. If the Town would make an offer, depreciation should be considered, and Mr. Randolph said he did not think it was wise for the Town to come to these agreements on an item by item basis. If the Town would agree to attach the City's condition on these two projects or any condition, then a similar condition will be imposed every time the City of West Palm Beach comes into the Town to do work.

Mr. Randolph said he would have the Town Council members ask themselves if it would be wise to enter into this kind of condition at this stage before the Town had time to reflect upon the appropriate formula that would be used in the event the Town ever did opt to purchase the City system. Finally, Mr. Randolph asked if it is wise for the Town Council to be purchasing the City of West Palm Beach's system on a bit by bit or item by item basis which is what he thought this would lead to if this condition were accepted, because it would be a condition applied to everything else.

Mr. Randolph said he thought the Town Council had the following options:

1. To accept the condition and move forward as has been requested by the City of West Palm Beach;
2. Perhaps negotiate or modify that condition to incorporate depreciation and perhaps renewal and replacement;
3. Accept no conditions and to move forward with the work

Mr. Randolph said if the Town Council accepted no conditions, the option would be to move forward with the work, and the way the contract reads presently is the Town's contractor would do the work and the Town would be reimbursed by the City. He understood there was an option under that contract to remove that and the City could do the work.

Mr. Randolph continued that the Town could do the work and take whatever comes in regard to what happens to the lines. He did not think that is acceptable from the standpoint that it is apparent when the contractor goes into the trenches to do the work that the City's water lines are going to break; therefore, they will be ruptured, and the Town will have delays as the City comes in to repair the lines. The Town may be paying extra money under the contract to the contractor for delays.

Mr. Randolph said he thought the final option was to go forward with the work; give notice to the City of West Palm Beach immediately that the Town is going to conduct the work, and the Town expects to be reimbursed for the cost of the work. The cost of the work will be stated in the notice which the Town has fixed in the contract and will state costs in addition to any change orders that may come about. Mr. Randolph recommended that process be followed pursuant to the Statute 337.401, copies of which were provided to the Mayor and Town Council. Mr. Randolph noted that under that section there is a responsibility of an entity that has its utilities within a right of way to move them upon thirty days notice, and the Town has given well over that thirty day requirement as a result of negotiations with the City of West Palm Beach. The section has a procedure for removing or relocating any utility, and after having given notice, to charge the City for the cost of moving. The City would have the opportunity to contest that, but if they don't contest it and it is not resolved, the copy of the Town's notice becomes final and can be made a lien against the City system.

Mr. Randolph said the Town Council may want to consider amending the current law suit that is pending to incorporate a complaint for potential damages in the amount in excess of the \$250,000 as a result of the Town's having detrimentally relied upon actions by the City of West Palm Beach.

Mr. Randolph said this concluded his report.

Mrs. Smith asked Mr. Dusey if he would explain the diagram that Mr. Olsen put up at the City of West Palm Beach's meeting and where the pipes are located that were being discussed?

Mr. Dusey said the particular problems start on Seabreeze Avenue where the sanitary sewer line lies above the water line, and the plan that was developed with West Palm Beach's participation was to move the water line and to space it properly from the sewer line—replace the sewer line and then also construct a new storm sewer—all in their proper places, and the construction would be messy but not particularly difficult. Mr. Dusey said, as a practical matter, it is not possible to replace the sanitary sewer in its present location because of the location of the water line. Without additional engineering of some magnitude, Mr. Dusey could not say whether or not the project would even be constructed at this point in time. He said the sanitary sewer could perhaps be moved to where the water main would have been placed, but that left a problem with the placement of the storm sewer line. Because of the location he thought it might have to go, and the construction technique involved, his staff was not sure that could be constructed. He said Seabreeze Avenue is up in the air presently as far as it is even buildable—as is.

Mr. Wyett asked Mr. Dusey if any of the four major projects the Town has a problem with, could any of them, logically and on a practical basis, be deferred until season?

Mr. Dusey said all of them could be deferred to next season. He noted that Seabreeze Avenue floods and has flooded for quite some time. The Town has the pump station ready to pump the water so it does not flood, given normal rain storms, and it is just a matter of getting the right sizes of pipes. He thought there was an expectation from the residents that the work will be done this year.

Mr. Dusey, responding to Mr. Wyett's inquiry on the other three projects, said the Barton Avenue area also floods and is a problem. Central Avenue runs between Barton and Seabreeze and some alley work that has problems with drainage are all part of that flooding problem. He identified Palmo Way as a problem that could be deferred. Mr. Dusey said that by doing the work on Palmo Way, the water main will probably break one or more times during construction—not because of anything the contractor would do, but because the work is being done in the street.

Mr. Dusey said that the Royal Palm Way project is the City of West Palm Beach's project and is not associated with anything the Town is doing. He noted that five breaks have occurred on Royal Palm Way in the recent past including two breaks last year within days of each other. The pipes are so brittle they will probably break again if the pipes are not fixed.

Mr. Dusey said the other location is Seminole which had broken seven times since 1995.

Mr. Wyett said he had the impression that the City was cutting its nose off to spite its face on the Royal Palm and Seminole projects because one or two more breaks will prove to be more expensive for replacement.

Mr. Dusey concurred that every time the City has to come over on an emergency basis, they waste money, and he thought the City recognized that. That is why the City pursued both of those projects on their own. Mr. Dusey added that the storm sewer projects are important to the Town and the residents because there is flooding on both of those streets, and this is a way to get rid of the flooding.

Mr. Wyett asked if the water pipes come across the lake at Royal Palm Way or are they further away?

Mr. Dusey responded that there was no intra coastal crossing there. Royal Palm Way is fed from a different direction.

Mr. Elwell said that Attorney Randolph could speak to the issue, but he thought it was important that the focus for this meeting should be on the two projects initiated by the Town. He said Mr. Wyett's and Mr. Dusey's comments were quite accurate; however, it may not be wise for the City of West Palm Beach to not pursue those projects, but Mr. Randolph's recommendation, in terms of action that the Town Council might take, would relate to requiring the City to participate in the Town's projects.

Mr. Wyett noted that when the Town's streets have been opened up in the past, the water pipes are so fragile that almost anything can destroy them since almost nothing is left of them. He said that a shovel into the ground can destroy the pipes.

Mrs. Smith recalled that it was Mr. Olsen from West Palm Beach who put up the diagram to show that their pipes would break, and he did specify that they would break and that it would not survive during any of these projects. Mrs. Smith noted that it was West Palm Beach's staff who made that observation—not the Town's staff.

Mrs. Smith said she would like to say that the four Town representatives went to the meeting in West Palm Beach with the very best of intentions and felt that perhaps there was a communications problem between the staffs. She said they were there as an informational group for the City Commission and as backup, and when it was determined that fifty percent of the people sitting on the commission were very vitriolic towards the Town, they realized there was no hope. Mrs. Smith said they did attempt to bring them back to the table by stating that historically this had always been done and attempted to bring them back on the basis that the two staffs had worked together and in effect had a verbal commitment from the City to support the Town in this project. Mrs. Smith said that nothing worked, and they apparently had made up their minds in a very dynamic and she understood a very confrontational attorney/client meeting had been held the week before as mentioned by Commissioner Warshauer when he let loose with his tirade. Mrs. Smith said he was upset that the entire Commission was not going along with him in attempting to blow the Town of Palm Beach out of the water.

Mrs. Smith reiterated that the group really tried to deal with the City of West Palm Beach. Mrs. Smith reported she asked the Commission if they would go along with the four projects, and she would bring the condition to the Town Council that perhaps the Council would reimburse the City next year or it would be discussed. The Commission replied negatively. Mrs. Smith said she told them the representatives at the meeting could not agree to anything because the Council had not hear about the condition.

Mrs. Smith said that Mayor Graham spoke in favor of the Town; Commissioner Hooks spoke for the Town; and Commissioner Koons spoke for the Town on the basis that the City had made a verbal commitment to the Town to go along on the four projects. The vote by the Commission ended up 3-2.

Mr. Wyett said he would like to make a statement that he was glad the Town did not have politics on this side of the water. He thought that one of the problems was a political problem—if the Mayor said “yes” her potential opponent, Mr. Zucaro, said “no”—and the opposite happens.

Mr. Wyett said he did not hear it mentioned that the City of West Palm Beach, through their Water Department, has maintained that they have 8% of revenues allocated to the Town of Palm Beach. He reported that revenues in 1996 were \$6,800,000; rounded to \$7,000,000 and multiplied by 8% = \$560,000. Mr. Wyett noted that the City is reneging on \$250,000, and the Town of Palm Beach residents are paying for repairs that are figured into the water bills. If the pipes never needed to be repaired, that may be a justification for reducing the rate by 8%.

Mr. Wyett said he took all of his figures from the lawsuit filed by Attorney Randolph against the City of West Palm Beach. The final statement to the Court listed revenues from the Town of Palm Beach as \$6,800,000.

Mr. Shaw said he agreed that there was an apparently interesting political body across the water where they have been sitting on both sides of the fence with one group wanting one thing and the other group wanting something else. Mr. Shaw asked if Mayor Graham indicated she was in favor of this project, why did she not sign the Interlocal Agreement when it arrived on approximately March 16th?

Mr. McLendon said he understood the staff did not recommend approval.

Mr. Shaw said he was not sure where the Town was standing as far as the document went.

Mr. Randolph responded the Commission had to approve it, and then would sign on behalf of the Commission.

Mr. Shaw said the bottom line was that the Town Council knows it has to deal with the system that is best for the residents. There is a storm drain project that is costing the residents a great deal of money and it has a purpose. He said it is not a question but the Council will go forward with it. The question is where does the Council go from here? He said he would like the question answered, “What are the processes that the Town Council has to do to go to condemnation of the entire water system?” He noted that it had been discussed by Council before. He said he thought the next question was, “What is the process in having them remove their entire system?” He said he knew that in certain utilities and certain relationships, if the agreement is canceled, the area must be restored to the condition that it was prior to the putting in of the system. Mr. Shaw said he did not know if this was applicable, and obviously this is something that the City of West Palm Beach cannot do very well, and obviously at some point before the Town Council gets to that, a settlement will have to be reached.

Mr. Shaw said if there were a lien placed against the system, he questioned what the Town would do with the lien.

Mr. Randolph replied he was not sure, but the Town might foreclose against the system.

Mr. Shaw said he personally thought it was outrageous that the Town was put in this position, but on the other hand, maybe he should be thankful—the Town knows who its friends and enemies are.

Mr. Wyett said that under the old contract, any pipe put in the street and connected with their water system becomes the property of the West Palm Beach Water Department. Mr. Wyett questioned if the Town put pipes in the system, who would actually own the pipes?

Mr. Randolph responded he was not sure what rights the Town had in regard to the West Palm Beach's system—it was their system within the Town's right-of-way at this point. Mr. Randolph said he could not give a definitive answer but it was his guess that if the Town performs work on their system, the Town has simply improved their system. The Town does not have a link that the Town owns within the system.

Mr. McLendon asked what the contract obligations were if the contract was deferred?

Mr. Dusey replied that the Coconut Row project could proceed, and that should be done no matter what. The alley is essential; perhaps Barton too. He said there were elements of the project that could be continued, and he would have to sort through the project to determine what could and could not be done.

Mr. McLendon asked if the sanitary sewer was on top of the water main?

Mr. Dusey replied that it was under the water main.

Mr. McLendon asked if Mr. Dusey had any idea who put the water main in the wrong place and who was responsible for that?

Mr. Dusey responded that the City of West Palm Beach purchased the water system from the Flagler Water System years ago. Mr. Dusey said he did not know or understand why both the water main and the sewer system were placed in the same area, and the street was very wide.

Mr. McLendon asked Mr. Randolph if the Town attempted to do the project without having anything to do with the water main and it broke, would it be the Town's responsibility?

Mr. Randolph responded that under the contract, as he understood it, it would be the Town's responsibility if the Town goes forward under the terms of the contract and did not carve out that portion, the contractor would be doing the work. It would be up to the contractor to do the work in a reasonable manner. Mr. Randolph said he understood the contract and the Town's agreement with West Palm Beach stated that the Town's contractor would go ahead and do the work at a cost of approximately \$250,000. That contractor would have the duty to do that work in a non-negligent and reasonable manner, and it would be his responsibility to do it in that manner.

Mr. McLendon said if the plan was not to replace the water main and the sewer work was started, who would be responsible?

Mr. Randolph said Mr. McLendon's question does not assume that the Town is taking the responsibility for the water mains. Mr. Randolph said he thought it was the City of West Palm Beach's responsibility to come into the Town and fix their mains; however, the City may make a claim against the Town stating the Town had performed the work negligently, and that is the reason the system broke resulting in another court appearance. Mr. Randolph said he did not think the City would have a good cause of action on that when some of the lines will fall apart when the dirt is removed from around them.

Mr. McLendon said he thought the City of West Palm Beach had been put on sufficient notice regarding the condition of the pipes.

Mrs. Smith said she did go on record to say when Commissioner Daves said "This would bring us back to the table," she thought he was really thinking that it would bring the Town to its knees. Mrs. Smith said she stated she would almost guarantee that this Council would not be back at the table negotiating under those terms. However, it was Erik Olson, head of the City's Water Department, who stated that the lines had to be replaced, and that they concurred and had agreed to go along with the Town of Palm Beach's contractor doing the work and reimbursing the Town as they have done for the last six or seven years for similar projects.

Mr. McDonald noted that Mr. Randolph did not mention any requests for an injunction and asked if there were any reasons for that?

Mr. Randolph replied that he was thinking along the terms of injunctive relief and was preparing a complaint in that regard, and it could still go that way, but quite frankly because there appears to be a remedy under the law, in the form of 337.401, he felt the Town might not prevail on injunctive relief at this time.

Mr. McDonald asked if was going to amend the complaint asking for damages?

Mr. Randolph replied negatively. He said he could do that in addition to following 337.401, but perhaps not get emergency injunctive relief.

Mr. McDonald asked what would happen if Mr. Randolph were to ask to escrow the payment of the water bills? Since the City will not maintain the water system, Mr. McDonald asked if the payment of the water bills could be escrowed?

Mr. Randolph said that had been discussed previously, and he would be happy to look at that and deliberate on the answer. Mr. Randolph said he could not give an answer as to whether that could be done, and before he recommended against that, perhaps circumstances are such presently that there might be better support for that.

Mr. Shaw said he had asked if that could be done in the law suit—if the 25% surcharge could be set aside as an escrow account, and it was determined by Mr. Randolph that he did not want to necessarily modify the suit at this point.

Mr. Wyett suggested the Town could just escrow the money it pays for water—which is considerable. He noted that the Par 3 Golf Course used almost \$100,000 of water yearly. He did not think the residents money could be escrowed, because the City has a franchise to come into the Town, but each resident pays his own water bill.

Mr. Randolph said he thought that issue would have to be considered “long and hard.”

Mr. Elwell reminded the Council of the four alternatives that were laid out by Attorney Randolph at the beginning of the meeting. He said that one of them was to reject the condition that the City placed upon its approval and to move forward with the Town’s project less the water portion of it. He continued that there was discussion about the implications of that in terms of whose responsibility would it be under that scenario to fix the pipe when it breaks, because the Town fully expects the pipes to break.

Mr. Elwell said although it was thought that it would not be the Town’s responsibility to fix the pipes under that scenario, staff described the chaos that would be created in the process—as the pipes break, probably several times during the course of the work in the street—that will delay the project, resulting in extra costs for the Town. Coordination will be required with the City to have them come over to do emergency repairs. Mr. Elwell urged the Town Council to choose one of the other three options and not that one.

Mrs. Smith said that one thing that was not mentioned was that in addition to the delays to the project and the extra money, the public safety of the residents would be at stake. Mrs. Smith said it was the most outrageous thing that the City of West Palm Beach had given no consideration to the residents of the Town of Palm Beach who are, in fact, their biggest customers. She said that cutting off their water was disgraceful behavior.

Mr. Shaw asked if last year’s project that was cut short, had funding that was already approved that affected this project?

Mr. Dusey responded that was correct; however, the funds were included in the award this year.

Mr. Shaw asked if this agreement has a termination date?

Mr. Dusey said there was not a termination date, but it would have terminated with the completion of construction.

Mr. Shaw asked if it had been completed?

Mr. Dusey responded that last year’s project was not the same magnitude or scope of this year’s project. He said that by picking up Cocoanut Row, it might be argued that the piece of Cocoanut Row that is being finished would fall under the other project, but the water part of that is not significant.

Mr. Elwell added that last year’s project was closed out, and even though at one time some of what is being done this year was in the scope of work last year, that project is finished.

Mr. Bowser said there may be an opportunity, under the old agreement, as Mr. Dusey mentioned, to recover what water costs the Town will have this year. Mr. Bowser said he believed the total was less than \$15,000.

Mr. McLendon asked Mr. Dusey if there was a place where the sanitary sewer could be placed, other than under the water main?

Mr. Dusey replied that without doing additional engineering, he thought the sanitary sewer might be placed where the water main was going to be placed. He added that all of the grades have to work and the connecting laterals.

Mr. McLendon asked how far below the water main was from the sanitary sewer?

Mr. Bowser responded he thought the water main was no more than a foot or two above the sanitary sewer. He said one of the anticipated problems is the possibility of tunneling underneath the water main if the sanitary sewer line is moved to the north. Mr. Bowser said this will probably result in the creation of a hole that is eight or ten feet wide when the desired depth is reached. The water main will have to be supported, and there is a real concern that the contractor will not be able to make that kind of a span, not to mention the costs involved for that type of excavating. Mr. Bowser recommended the additional charges the Town would incur in order to work around the water mains, absent of a break, be born by the City of West Palm Beach since they are not choosing to participate in the contract. Mr. Bowser said the contractor will probably submit hefty change order prices in order to work around the pipes. Mr. Bowser said the costs should be identified and forwarded to the City of West Palm Beach to see where they go.

Mr. Bowser said the contractor may claim additional costs because he may have to work slower, because the first element of all of the projects is to replace the water main. He said the replacement of the water main is the first

element of all of the projects, and when the water main is in good condition, the rest of the street may be torn up without worrying about the condition of the water main.

Mayor Ilyinsky said, from a philosophical point of view, he was moderately appalled by the City of West Palm Beach's decision. He said that proved beyond a reasonable doubt what former Mayor Earl E. T. Smith said, "Never trust anyone in politics." Mayor Ilyinsky said the three Commissioners (who voted against the Town) were considered as his best friends, not only in politics, but also in a semi-social way.

Mayor Ilyinsky said it was a great disappointment; however, Mayor Nancy Graham was sincerely upset by the vote. Mayor Ilyinsky suggested that this Council turn this matter over to its administration and to the Town Attorney. Mayor Ilyinsky requested a written opinion from Attorney Randolph based on what is legally permissible by the Town—specifically what the Director of Public Works can physically do; how the Town Manager can do it; and why it can be done from the Town Engineer. He said the Town Council could discuss the issues for hours, but they should either enact or reject based on Attorney Randolph's opinion.

Mayor Ilyinsky said he had great admiration for the members of the Water Committee, but he thought it was time to dissolve that committee, because the City of West Palm Beach will not talk to anyone who is a member of the Town's Water Committee. This has become a major issue, and there should not be any more meetings other than with the entire Council.

Mrs. Smith asked if the Mayor was suggesting the Council should tell the staff and the Town Attorney to proceed with the project?

Mayor Ilyinsky replied he thought the Council had given the staff and the Town Attorney direction to come up with the best ideas that they know.

Mr. Randolph said it seemed to him that, at the very least, the Council should make a decision as to whether the Council will accept the condition of the City of West Palm Beach and to do that by motion at this meeting. Mr. Randolph said it was going to be his recommendation that the Town move forward with the notice of provisions of 337.401 and that the Town undertake the work and incur the expenses and go forward with the project. Also, Mr. Randolph recommended that the Town Council authorize the Town Attorney to amend the law suit to include a count for damages as deemed appropriate.

Mr. Randolph said he did not have an opportunity to talk to Mr. Elwell, Mr. Dusey, and Mr. Bowser regarding their thoughts on going ahead with the project and charging the costs to the City or whether or not the Town should do the project and not touch the City's portion. He said if there was any uncertainty regarding which of those two options to take, that should be discussed and presented at the Tuesday, May 12th meeting with a report.

Mrs. Smith asked Mr. Dusey if he were ready to answer those questions at this meeting?

Mr. Dusey responded he would like to proceed with the project, but it was the Town Council's call. He said it was a very important project from a flooding standpoint, and Seabreeze is one of the worst streets the Town has. Mr. Dusey said if the project could proceed and the only way to proceed on Seabreeze is to have the contractor move the water pipe and if the Town Attorney thinks that can be done, his recommendation would be for the Town Council to authorize the additional amount of \$250,000 to take care of the water mains on the project and proceed with the methods suggested by Mr. Randolph for collection of those funds.

Mr. Randolph said he was saying that, and he wanted everyone to understand there was a risk if the Town were to do that. He said that somewhere along the line if the Town did not get reimbursed, that would be a subject of litigation. He added although litigation can be resolved in different ways neither does anyone know what costs would be involved in the event the Town would not do it and become involved in a situation where the City of West Palm Beach would claim the Town damaged their water lines. Mr. Randolph said the most practical way to go to get the job done is for the Town to do the work as has been relied upon and contracted for while giving the City of West Palm Beach notice that the Town is going to do that and charge the City those costs.

Mr. McLendon questioned if depreciation would be considered at some time in the future in regard to paying the full price for the water system. He said that, normally, 2% depreciation on water mains had been established in Florida, and the rate of inflation could be close to that on an average over a number of years, and that would not concern him, except that he would not want the (high) cost per foot to influence the establishment of the value of any part of the water system. He explained that it would not bother him to guarantee to reimburse the City of West Palm Beach the money in the future except what it might do to a precedent on the reproduction cost.

Mr. Wyett said he thought the Council set policy and cannot delegate that, and the Council has to give direction. Mr. Wyett said the Water Committee has not met with the City of West Palm Beach's counterparts lately. Mr. Wyett said the Town has to have the pipes whether the City or Town pays for them, and the key issue is to not dig the trench deeper and tunnel because that would probably cost as much as paying for the pipes. The project cannot be delayed, because two or three streets are flooding, and two major thoroughfares are having flooding problems. Mr. Wyett made a preliminary motion in case someone else wanted to amend it first: Direct the Town Attorney to take all legal action to protect the Town—the Town Council would not tell him what action but he should proceed with all haste—which would include amending the various issues that the Town accept their condition with a caveat that the Town would pay for the pipe on a depreciated basis of the life span of fifty years and secondly if the Town pays for the pipe, the Town have an agreement with the City, that those pipes belong to the Town because they are

attached to their system.

Mr. McDonald said he did not know how conditions could be attached to actions taken by the Town Council requiring conditions on the City.

Mr. Wyett said he thought the City wanted a solution to this problem, and they have exposure. Mr. Wyett said the Town would pretty much be giving them everything they want—the Town would indemnify the pipes should the Town buy them, subject to any reasonable depreciation schedule.

Mr. McDonald said he thought the Town Council should move ahead and not be dependent on any conditions or concessions from West Palm Beach. He thought the Town Council had to map its own plan.

Mr. Wyett said he was trying to give the staff two similar directions: the Council would accept the staff putting the pipes in, and the Council would guarantee the payment of the pipes if the Town bought the system at their cost minus any small depreciation based on a fifty year schedule.

Mr. McDonald said the City would have to agree to those terms and the Town is in a position where a decision may be necessary to move ahead. He did not think the decision should be dependent on the City of West Palm Beach's answer to accepting the Town's conditions.

Mr. McDonald said he did not think trying to negotiate with the City of West Palm Beach will be helpful presently, and he did not think he could support Mr. Wyett's motion.

Mr. Wyett said he did not make a motion, but put it on the table.

Mr. Shaw said he agreed with Mr. McDonald and thought the Town had to take the position that it should not take any conditions. He thought the City had a moral, if not a legal, obligation to go forward with it, and the Town will settle how the Town will be reimbursed as needed—if it is a court of law or liens or whatever. He said he was concerned that although the Town knows it has to do the work, the City would have to come in and do some connecting, testing, and some overseeing. He asked what assurances the Town would have, although the contractor would be doing the bulk of the work, that the City would not hold the project up.

Mr. Dusey responded the contractor will be doing the work, and the Town will have the testing done and certified.

Mr. Bowser said consultants would be used. They hire independent labs to do the bacteriological testing in conformance with Health Department requirements, and they would be the ones that would give a release to operate the main. Mr. Bowser said a permit to do the work was issued to the City of West Palm Beach, and the Health Department's concern is that a permit was issued to replace the water mains—not to whom it was issued.

Mr. Shaw said he got the impression from Mr. Bowser that this project should not be delayed over an argument of reimbursement.

Mr. Dusey said he would recommend that the project go forward.

Mr. McDonald made a motion to specifically reject West Palm Beach's conditions and that they be notified in writing by Mr. Randolph. Mr. Shaw seconded the motion. On roll call, the motion carried unanimously.

Mr. McDonald said he liked the Mayor's comments very much, and if the Town Council accepted the Mayor's comments which were basically let the staff do some work and present the issue at the May 14th Town Council meeting; in the meantime let Mr. Randolph notify the City of West Palm Beach in writing of the 337.401 proceeding. Mr. McDonald said he basically made a motion to do two things: proceed with the 337.401, authorize Mr. Randolph to do that, and defer an answer on the other specific questions as to whether the Town will pay for the work and do it or not until the staff has more time to make some recommendations to the Town Council at the May 14th Town Council meeting.

Mrs. Smith said she would like to ask the question, because it was always that it was going to be that the Town would do the work and pay for it, it was a question of whether or not the City would reimburse the Town. Mrs. Smith said the City was never going to pay directly to the contractor. Mrs. Smith clarified that the Town would be paying for it, and the City would be reimbursing the Town.

Mr. Randolph said that under the notice the Town would give, if the Town Council separates the motion, that would be assumed that the Town would be doing the work and identify the cost to the City of West Palm Beach, and issue an order for the City to reimburse the Town.

Mr. McDonald said that this motion was just to authorize Mr. Randolph to give the notice and do what he needs to do to proceed under 337.401. The motion was seconded by Mr. Shaw.

Mr. Wyett said he was not quite clear on the motion, and traditionally, by agreement, the Town always opened the street, repaired the street and all the pipes in the street, and billed the City of West Palm Beach. He said the City is throwing a wrinkle in the project, and he thought the Town ought to pay attention to the wrinkle and what it means to the Town of Palm Beach. He said the City wants 100% reimbursement for any new pipe the Town puts in should the Town separate from the City. Mr. Wyett said if it is analyzed, it is not so terrible, because the Town

will certainly buy from West Palm Beach any young pipe rather than dig up the street and put a new pipe in that is only a couple of years old. He said they have taken the position that they are not going to bend another 25% and the Town has taken the position that if they are going to continue the 25% surcharge, the Town will be looking elsewhere. The Town is looking at a new pipe system, and he understood that the Town has made the City a little nervous. Mr. Wyett said what they are asking for is not under the code or 337.401 or any other code that the Town attorney comes up with, but it is not so terrible. He did not know why the Town Council would have to worry other than get an agreement to ratify their request and give them a reimbursement if the Town and the City separate. He said the Town would certainly use the pipe if the two separated.

Mr. McDonald said if things were that simple, the Town would have had an agreement with the City of West Palm Beach a long time ago, and he did not think the Town could just go get an agreement.

Mr. McDonald said he was changing the 347.401 to 347.404 in his motion and moved the question.

On roll call, the motion carried unanimously.

Mr. McDonald said his next motion was to proceed with doing the work as recommended by Public Works and the Town Engineer—proceed to go ahead and have the work done as the Town had planned to do. Mr. Shaw seconded the motion and asked that in the event that between this meeting and the Town Council meeting on Tuesday, May 14th, if there are some issues that concern Public Works and the Town Engineer that they be brought back to the Town Council for re-evaluation. If no issues come back to the Town Council, the work would proceed.

Mr. Elwell asked that the Town Council consider the incorporation into the motion of an appropriation from the designated reserves in the General Fund an amount of \$275,000.

Mr. McDonald said he would incorporate that request into the motion. Mr. Shaw seconded the incorporation of \$275,000 for the designated reserves in the General Fund into the motion.

Mr. Wyett said he understood the City of West Palm Beach was willing to reimburse the Town now as long as the Town would guarantee payment for the pipe should the Town and the City separate. Mr. Wyett asked why the Town should put out its own money for three to five years, interest value of money, at little disturbance to the budget when the Town could meet that when the Town decides to buy the pipes. Mr. Wyett said let the Town go like it always has with the only thing really different being that the City has asked the Town to reimburse should they separate.

Mr. Randolph said that was an option that was mentioned earlier.

Mr. Wyett asked why should the Town pay for them and take it out of the General Fund when West Palm Beach is not refusing to pay for it—they are refusing to pay for it if the Town will not give them a special agreement to reimburse.

Mr. McDonald said the Town may never buy the pipes.

Mr. Wyett said if it is assumed that there is nothing wrong in the street, the pipes could last another three or four years. If the Town would install new pipes, the Town would have to dig up the streets and take it out anyway at the same cost.

Mrs. Smith said the Town may not put in a whole new pipe system. The Town may have paid the City of West Palm Beach more money than the Town would pay for the system if the Town accepts their condition.

Mr. Wyett said the big problem accepting their condition was the next three to four years their condition would go forward as Mr. Randolph pointed out, and it is not terrible.

Mr. McDonald said the Town Council has already rejected the condition.

Mr. Wyett said he thought the Town could get itself in a tight situation where staff will come to the Town Council, and the Town has to start construction and get the roads open.

Mr. Elwell said the motion, as it was framed, would actually facilitate the Town going full steam ahead and hopefully avoid the kinds of confusions and problems as described.

Mr. McDonald asked to move the question.

Mr. Elwell said that the \$275,000 figure that was incorporated into the motion was \$258,000 plus a contingency to address some re-engineering that may be required. Mr. McDonald said he incorporated the \$275,000 as part of the motion.

Mr. McLendon said he was against paying for it without some assurance from the Town Attorney that the Town will not have to pay for it again with the system.

Mr. McDonald replied that Mr. Randolph said he could not make that assurance.

Mr. McLendon said he was not willing to pay for it then. Mr. Wyett said he agreed.

On roll call, the motion carried 3-2 with Mr. McDonald, Mr. Shaw, and Mrs. Smith casting affirmative votes. Mr. McLendon and Mr. Wyett cast negative votes.

Mr. Wyett said he was very concerned that the Council was not clear—the Town pays for the pipes, and the Town has rejected the City of West Palm Beach’s offer. He said the only alternative the Town has is to pay for the pipes again, and there is nothing wrong with that except Mr. Randolph pointed out that he would have to look up to make sure, but under the old contract, anything attached to their system belongs to West Palm Beach. Mr. Wyett gave the example of Phipps Development that has two brand new streets and when the pipes were installed they automatically became part of the Water Department of West Palm Beach. Mr. Wyett said he could not see how any street, being torn up and replaced, is any different from a brand new street.

Mr. Shaw said that the purpose of section 404 is basically to mandate that the City does what the City is obligated to do, and that is why the Town Council approved it so, if need be, the Court could mandate that the City reimburse the Town, and the Town would be right where it was before.

Mr. Wyett said he would like to authorize Mr. Randolph to try to get an agreement with the City that the Town accept their 100% replacement and they accept the fact that they do not own the pipe.

Mrs. Smith said she recommended that everyone look at the video and listen to the tape of the Monday meeting. She said the City is not going to agree to anything—nothing—there is no negotiating going on with them. Mrs. Smith said the City has tied it into the law suit, and they are furious about the law suit. The City wants the Town to withdraw the law suit; agree to the surcharge; and they will not agree to anything. Mrs. Smith said the Town could not go back and ask the City to agree—they will not.

V. ANY OTHER MATTERS

There were none.

VI. ADJOURNMENT

The meeting was adjourned at 2:45 p.m.

Mary A. Pollitt, Town Clerk