

MINUTES OF THE REGULAR MEETING OF THE NAPLES CITY COUNCIL HELD IN THE COUNCIL CHAMBERS,
NAPLES, FLORIDA, ON WEDNESDAY, MARCH 4, 1981, at 9:04 A.M.

Present: R. B. Anderson
Mayor

C. C. Holland
Harry Rothchild
Wade H. Schroeder
Randolph I. Thornton
Edward A. Twerdahl
Kenneth A. Wood
Councilmen

Also present: George M. Patterson, City Manager
David W. Rynders, City Attorney
Edward C. Smith, Assistant to the City Manager
Roger Barry, Community Development Director
Franklin Jones, Finance Director

Reverend J. Walter Cross
Charles Andrews
Baxter Kelly
Sam Aronoff
Roy Cawley
Gary Bates
Ed Ranney
Edward Hannam
Ken Lees
Bill Hibbard
Elizabeth Sita
Mr. & Mrs. William Brandt
Gilbert Weil
Lyle Richardson
William Shearston
Edward Kant
Robert Russell
Robert E. Lee Hall
Scott Foster

News Media: Ed Warner, TV-9
James Moses, Naples Daily News
Allen Bartlet, Fort Myers News Press
Brian Blanchard, Miami Herald
Jerry Arnold, WRGI
Bob Barber, TV-9
Tom Lowe, WEVU-TV

Other interested citizens and visitors

Mayor Anderson called the meeting to order at 9:04 a.m.; whereupon the Reverend J. Walter Cross of the North Naples United Methodist Church delivered the Invocation, followed by the Pledge of Allegiance to the Flag.

AGENDA ITEM 3. APPROVAL OF MINUTES

Mayor Anderson called Council's attention to the minutes of the Regular Meeting of February 18th, 1981; whereupon Mr. Thornton moved approval of the minutes as presented, seconded by Mr. Twerdahl. Mayor Anderson noted that on Agenda Item 13. his understanding of Council's discussion was that he was to write only to the Golf Drive Nursing Home, which he had done. Discussion followed covering the various interpretations of Council members regarding this discussion and it was the consensus of Council to concur with the action taken by the Mayor. Mayor Anderson asked that this matter be reflected in the approval of the minutes as noted. Mr. Thornton agreed with this request, seconded by Mr. Twerdahl and the minutes as amended were approved by consensus of Council.

AGENDA ITEM 4. First Reading of Ordinances.

AGENDA ITEM 4-a. An ordinance relating to the pension and retirement system for firemen of the City of Naples, amending Section 18-75 (a) of Code of Ordinances of the City of Naples to provide for normal retirement at age fifty-five with five years of credited service as a fireman and a member of the retirement fund; and providing an effective date. Purpose: To change the requirements for normal retirement from ten years of credited service to five years. Requested by Firemen's Pension Board.

Mayor Anderson referred the matter to City Manager Patterson who noted that the staff had received a Court of Appeals decision that stated in effect that changes or amendments to existing pension plans are appropriate subjects for negotiation and he, therefore, requested that Council remove Agenda Items 4-a and 4-b from the Agenda. Mr. Thornton moved that Agenda Items 4-a and 4-b be removed from the Agenda, seconded by Mr. Schroeder. Mr. Rothchild expressed his concern that any action of this sort might affect the third pension plan in the City and asked for a complete review of any ramifications involved in this type action. Motion carried on roll call vote, 7-0.

AGENDA ITEM 4-b. An ordinance relating to the pension and retirement system for police officers of the City of Naples, amending Section 18-106(a) of the Code of Ordinances of the City of Naples to provide for normal retirement at age fifty-five with five years of credited service as a police officer and a member of the retirement fund; and providing an effective date. Purpose: To change the requirements for normal retirement from ten years of service to five years. Requested by Police Officers' Retirement Board.

See above --Agenda Item 4-a

AGENDA ITEM 4-c. An ordinance authorizing the City Manager to advertise and accept bids for Public Works vehicles and equipment; providing for payment therefor to be made from the budget for the fiscal year 1981-82, pursuant to Section 8.14 of the City Charter; and providing an effective date. Purpose: To authorize the advertisement and acceptance of bids for Public Works vehicles and equipment prior to adoption of the 1981-82 budget.

City Attorney Rynders read the above titled ordinance by title for Council's consideration on First Reading. City Manager Patterson explained that this was necessary in order to obtain the desired equipment and vehicles prior to the next busy season. Mr. Schroeder moved approval of this ordinance on First Reading, seconded by Mr. Twerdahl and carried on roll call vote, 7-0.

AGENDA ITEM 6. Purchasing:

AGENDA ITEM 6-a. Bid award - Tennis court resurfacing - Parks and Recreation

City Attorney Rynders read the below titled resolution by title for Council's consideration.

A RESOLUTION AWARDDING BID FOR RESURFACING THREE (3) TENNIS COURTS AT CAMBIER PARK COMMUNITY CENTER; AUTHORIZING THE MAYOR AND CITY CLERK TO EXECUTE A CONTRACT THEREFOR; AND PROVIDING AN EFFECTIVE DATE.

Mr. Twerdahl moved adoption of Resolution 3731, seconded by Mr. Schroeder and carried on roll call vote, 6-0 with Mr. Rothchild being absent from the Council table.

AGENDA ITEM 6-b. Bid award - Sewer main material - Wastewater Collection Div. - Public Works Department.

City Attorney Rynders read the below captioned resolution by title for consideration by Council.

A RESOLUTION AWARDDING BIDS FOR SEWER MAIN MATERIALS; AUTHORIZING THE CITY MANAGER TO ISSUE PURCHASE ORDERS THEREFOR: AND PROVIDING AN EFFECTIVE DATE.

Mr. Schroeder moved adoption of Resolution 3732, seconded by Mr. Twerdahl and carried on roll call vote, 6-0 with Mr. Rothchild being absent from the Council table.

CORRESPONDENCE AND COMMUNICATIONS

Mayor Anderson noted receipt of a letter from Senator Scott asking him to make the public aware that the Daily Journal of the Florida Senate will be available in the City Clerk's office. The Mayor noted that Senator Scott made these arrangements each year.

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Mayor Anderson noted that since the last Council meeting City Manager Patterson had to authorize emergency repairs to a grader in the amount of \$4000.00. Mr. Schroeder moved and Mr. Twerdahl seconded and it was the consensus of the Council to concur with the Mayor's subsequent approval of this expenditure.

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Mr. Twerdahl noted the reports in the press regarding the meetings with D.O.T. and he was pleased with their apparent preference for a fly-over at U.S. 41 and Davis Boulevard as opposed to a second bridge over the Gordon River.

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Let the record show that Mr. Rothchild returned to the Council table at 11:05 a.m. Discussion followed. City Manager Patterson indicated that he had written a memorandum summarizing the meeting and would further discuss the matter with anyone who wanted more information.

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Mr. Rothchild noted a copy of a letter from Representative "Skip" Bafalis regarding mass transit. He further noted trips of the City Attorney and the City Manager to Tallahassee and Ft. Lauderdale regarding mass transit and he asked for reports on these trips in memoranda form. City Manager Patterson noted that there was not much to report.

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Mr. Thornton asked if it would speed things up on the proposed program to reduce the City's contribution of pollution of Naples Bay if the proposed program was funded locally rather than waiting on a federal grant to which City Manager Patterson responded in the affirmative. Mr. Holland noted another view that deep well injection was not appropriate in this area. After further discussion, Mr. Thornton asked that the City Manager arrange to have Ted Smallwood, Consulting Engineer, come to Council for a review and up-date of the situation and also to have someone from DER appear before Council. It was the consensus of Council to have the City Manager arrange this.

Mr. Wood inquired about planned participation in a Law Enforcement Seminar to be held in Ft. Myers sponsored by the League of Cities.

Discussion returned to the pollution of Naples Bay and the amount contributed by the City's sewage treatment facilities. City Manager Patterson outlined sources of pollution to Naples Bay other than caused by the City and alternatives that were being studied to correct them.

In answer to a question from City Manager Patterson, it was the consensus of Council that he and the City Attorney were to continue to conduct their activities as needed to carry out Council policy.

There being no further business to come before this Regular Meeting of the Naples City Council, Mayor Anderson adjourned the meeting at 11:42 a.m.

Janet Cason
Janet Cason
City Clerk

Ellen P. Marshall
Ellen P. Marshall
Deputy Clerk

R. B. Anderson
R. B. Anderson, Mayor

These minutes of the Naples City Council were approved on 03/18/81



City of Naples

735 EIGHTH STREET, SOUTH - NAPLES, FLORIDA 33940

OFFICE OF THE CITY ATTORNEY

February 24, 1981

M E M O

TO: Hon. Mayor and Members of Council
 FROM: David W. Rynders, City Attorney
 RE: Planning Advisory Board

The intention of this memorandum is to point out certain problems arising when members of Council attempt to affect the decisions of the Planning Advisory Board. Because I expect that these matters may be controversial, I have set forth my views at some length.

The Planning Advisory Board was created pursuant to Sec. 14.2 of the Naples City Charter for the purpose of carrying out the aims of council in an advisory capacity. One should conclude from this that the PAB was intended to give advice to the Council, not the reverse. Its specific duties in regard to zoning are set forth in Sec. 11(F) of Appendix "A" - Zoning, of the City Code: i.e., to "submit its recommendation... to the city council." The Council is required to consider the "recommendation of the Planning Advisory Board" and may thereafter take whatever action it may deem appropriate. Sec. 11(G) et seq.

Several comments are appropriate here about the value of advice from the PAB. It seems clear that the value of advice has a direct relationship to its originality. One gains little who merely hears the echos of his own thoughts. For example, top executives and good managers are said to disdain "yes-men" for reasons clear to all of us. Professionals little value that advice which merely repeats back their own earlier expressions.

To the extent that a council member is successful in persuading the PAB of the correctness of his own views, the value of the PAB's recommendations to the Council deteriorates. The Council member who has completely persuaded the PAB will hear nothing new; while the other council members will simply hear their fellow council member's views twice (once from the PAB and again, to be sure, from that council member.) A true vindication of a council member's views can

Page 2
February 24, 1981

only occur if the PAB agrees independently. I therefore believe that the PAB's independence was an unstated assumption underlying the Charter and City Code provisions cited above.

There is hardly any need for Councilmen to express their views to the PAB in any case since they are privileged not only to discuss, but to decide all of these matters at Council meetings.

The actions of the PAB and Council have broader implications, however. The City exercises zoning authority as a portion of its police power to promote the health, safety and welfare of the public. The restrictions imposed by zoning are lawful but must not "deprive any person of his property without due process of law." U.S. Constitution, Amendment XIV, Section 1.

The key to this statement is the concept of "due process". The term essentially requires that a property owner be given a right to be heard "at a meaningful time and in a meaningful manner." See Armstrong v. Manzo, 380 U.S. 545, 14 L Ed 2d 62, 85 S.Ct. 1187 (1965). The following are some general comments that the U. S. Supreme Court has issued recently about due process:

"The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision-making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to ... minimize substantially unfair... deprivations of property..." Fuentes v. Shevin, 407 U.S. 67, 32 L Ed 2d 556, 92 S. Ct. 1983 (1972) (Emphasis added)

In another case it is stated that due process was:

"... designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy..." Stanley v Illinois, 405 U.S. 645, 31 L Ed 2d 551, 561, 92 S. Ct. 1208 (1972)

The reason I have set forth these provisions is to demonstrate that the decision-making process which the City establishes in rezoning property must be a fair process. Whether it is fair - or fairly carried out - can be measured in some degree by the

Page 3

February 24, 1981

extent to which efforts to pre-order or manipulate the results are discouraged. I can say without any hesitation that seeking independent advice from the PAB and consideration of that advice meets the highest standards of fairness that could be asked by any petitioner. When that independence is lost, however, the possibility of manipulation, and in turn, injustice multiplies.

Several of you have already expressed concern about the recent appearance of Councilman Rothchild before the PAB.⁽¹⁾ I believe that concern is well founded, and that we should be even more concerned about other actions connected with this which will be related below. Before relating those matters, however, let me make it clear that it is not intended here to impugn anyone's motives in connection with these actions. In particular, I am not suggesting that Councilman Rothchild did not always feel that he was acting in the public's best interests. The problem is simply that the end does not always justify the means.

Also, I want to point out that I had advised Mr. Rothchild against appearing before the PAB at least five or six months ago, at which time I indicated to him that such testimony could create "due process" problems and would ultimately operate to the disadvantage of the City as well as the property owner. Mr. Rothchild quickly responded with the statement that he understood those things and certainly would not involve himself in that way. His subsequent appearance would be inexplicable, except perhaps for the following:

During the PAB meeting, Park Shore Resort Club's representative stated for the record that he doubted the propriety of Mr. Rothchild's appearance and statements before the Board. Mr. Rothchild responded that he had seen on television the fact that U.S. Senators testified before the Senate Foreign Relations Committee

(1) At the February 5th meeting of the PAB, Councilman Rothchild appeared and gave approximately fifteen minutes of negative comments about the Park Shore Resort Complex. Although those comments were preceded by a statement that Mr. Rothchild did not know whether he was for or against the project, the negative comments (as well as the history of his outspoken opposition to the project) could leave no doubt in anyone's mind about his position. In fact, one week later, on the evening of February 12th on WNOG's Page Two program, Mr. Rothchild stated that he had "indicated before the Planning Advisory Board that I intend to oppose it."

Page 4

February 24, 1981

on behalf of Alexander Haig. He concluded from this that if senators could testify before their own committees, so could he testify to the PAB. While I might gently suggest that difficulties invariably seem to arise when politicians contemplate the perquisites of higher office, there are concrete reasons for distinguishing between the two situations:

- (1) The Senate owes Alexander Haig no duty of due process in giving advice and consent to the President on his appointment. In fact, the Senate owes due process to no one when it votes except to the President when tried after impeachment. The City, as we have seen, owes a strict duty of due process to land-owners when it acts on their zoning petitions.
- (2) The decisions of the Senate are completely political. In consenting to political appointments no standards of reasonableness are required to be met (with occasional unfortunate results). The City, on the other hand, is bound by standards of reasonableness which will be enforced by the courts on the basis of whether its decisions bear a substantial relation to the health, safety, morals or general welfare. Euclid v. Ambler Realty Co. 272 U.S. 365, 71 LEd 303, 47 S.Ct. 114 (1926) See also 7 Fla. Jur. 2nd, Building, Zoning and Land Controls, Section 103. The Council is simply not free to zone exclusively based on political considerations.

In any event, a somewhat more sinister distortion of the recommendation of the PAB was attempted subsequent to the February 5th meeting. As related by Mr. Clayton Bigg of the PAB, who approached me immediately prior to the February 18th Council meeting, Mr. Rothchild had contacted him before and after the PAB meeting and urged him to change his vote on the Park Shore matter from "for" to "against" and to so advise the Council. (2) At the time of these contacts, it is clear

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(2) Mr. Rothchild even pursued Mr. Bigg to the shuffleboard courts at Cambier Park. Essentially, Mr. Bigg related that Mr. Rothchild told him that the City Attorney had given Mr. Bigg a "snowball" and since that formed the basis of Mr. Bigg's opinion, that he should revise his views and so address the City Council. Since the PAB's recommendation was based on a 3-2 vote, the fact of Mr. Bigg's changing his vote would have the effect of reversing the recommendation, thus apparently giving the City Council a basis on which to deny the Park Shore Resort development.

Page 5
February 24, 1981

that the public hearing by the PAB had closed. Mr. Bigg was, as you can imagine, deeply troubled at Mr. Rothchild's actions. Quite rightly so, since these subsequent urgings of Mr. Rothchild, if successful, would have resulted in the property owner being suddenly surprised with a negative recommendation without having been given an opportunity to refute or dispute the matter. Anyone familiar with the emotionally charged atmosphere of public hearings before City Council on controversial zoning items can easily see how overwhelming this could be. Moreover, if Mr. Rothchild had been successful, discussion of these incidents would have been even more delicate since Park Shore Resort Club's loss would have given rise to a claim against the City under Title 42, 1983 of the Civil Rights Act for a deprivation of civil rights.(3) However, aside from any threatened liability, we must ask ourselves is this conduct acceptable? I think not. A council member's manipulation of the PAB to get a desired recommendation does not comport with a "fair process of decision-making." Nor does it "protect the fragile values of a vulnerable citizenry from overbearing concern" of government officials. Quite the opposite.

It therefore behooves the City to insure that its officials refrain from activities tending to deprive persons of their constitutional rights. In discussing the problem of city liability in the very recent and important case of Owen v. City of Independence, Mo., 100 S. Ct. 1398, ___ U.S. ___, 63 L Ed 2d 674 (1980) Justice Brennan, speaking for the majority, said:

"The threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights. Such procedures are particularly beneficial in preventing those 'systemic' injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith."

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(3) Ironically, individual councilmen under recent Supreme Court decisions enjoy absolute immunity under the Civil Rights Act for their actions. The courts have found that such immunity is warranted for the reason, among others, that the City can pay any damages resulting from such activities, thereby guaranteeing or insuring a means of relief to the property owner. The City on the other hand, is absolutely liable for any damages resulting from activities of even a single Council member which result in unlawful deprivation of property under the color of City action. Owen v. City of Independence, Mo., 100 S.Ct.1398, ___ U.S. ___, 63 L Ed 2d 673 (1980)

Page 6
February 24, 1981

As a footnote to that statement, the Court said:

"...The need to institute system-wide measures in order to increase the vigilance with which otherwise indifferent municipal officials protect citizens' constitutional rights is, of course, particularly acute where the front-line officers are judgment-proof in their individual capacities." (4)

The present case is a classic example of this problem. While Mr. Rothchild's actions alone do not determine anyone's constitutional rights, his interaction with the PAB at the public meeting and his subsequent efforts with Mr. Bigg, if successful, could have diverted the course of events and caused a violation of constitutional rights. Since these efforts were clearly intended to succeed, it is apparent that only Mr. Bigg's strong sense of personal justice prevented this problem.

From this we can see that it is important to be as thorough as we can be in attempting to protect the due process rights of our citizens. In the words of Justice Brennan:

"The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." Owen v. City of Independence, Mo., supra.

Consequently, I recommend to the City Council that it consider adopting a body of rules directing that no City Council member should present testimony to the PAB unless that Council member has sufficient interest in the subject of its deliberations as to constitute a conflict of interest under the Florida Public Ethics Law, Florida Statutes Chapter 112, and further, that Council members be prohibited from any attempt to persuade PAB members to change their votes at any time before, during or after the PAB considers its agenda. In this way both the independence of the PAB and the due process of our citizens are protected.

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(4) The Owen v. City of Independence, Mo. case, supra, decided last spring, enormously expanded municipal liability for civil rights violations. Almost as important, the court found there that a single councilman's statement or actions could in some cases impose liability on the entire city government.

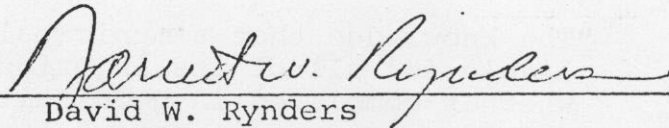
February 24, 1981

While it is arguable that a City Council member should have as much right to speak to the PAB as anyone else, the City Council can easily justify its restriction based on the overriding need for the independent conclusions of the PAB and the danger of a deprivation of due process to our citizens. Moreover, the Council members will have the right to speak - and vote - on the matter when it comes before Council. Clearly, the alternative is for the present decision-making process to become a farce.

In preference to that end, I have attached an ordinance embodying such rules for your consideration. By this means, the City might more closely resemble a government which is:

"the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct."
Owen v. City of Independence, Mo., supra.

Should any member of Council wish to take action on this matter, he should request that it be placed on the agenda for either consideration or for first reading of the ordinance.



David W. Rynders
City Attorney

DWR:bh

COPY OF PREPARED STATEMENT READ BY MR. ROTHCHILD AT REGULAR MEETING OF THE NAPLES CITY COUNCIL HELD ON MARCH 4, 1981.

Sometime after the February 5th meeting of the PAB and prior to the City Council meeting of February 18th, I had a chance meeting with Mr. Clayton Bigg near the City Hall. We had a friendly discussion similar to many such discussions we have had in the past.

We did discuss the subject of the Park Shore Resort Club which was one of the items discussed at the PAB meeting of February 5th, but at no time did I suggest or urge Mr. Bigg to change the vote he had cast at that meeting. Even if the thought had occurred to me to make such an outrageous suggestion, I would have rejected it because I am keenly aware of the fact that there is no provision in the rules of the PAB for the changing of such votes.

In America a person is considered to be innocent until proven guilty. Apparently this concept is not shared by City Attorney David Rynders and Mayor Roland Anderson for they did not consider it necessary to confront me with Mr. Bigg's alleged charges. Instead they were apparently willing and anxious to consider me guilty and proceeded to prepare a lengthy legal dissertation which in their minds would justify preparing an ordinance designed to restrict the right of members of the City Council to express their opinions at opening meetings of the PAB.

The ordinance is ill-conceived and in all probability is illegal since, among other faults, it tries to abridge the freedom of speech guaranteed to us by the First Amendment to the Constitution of the United States.

I repeat, I categorically deny that I ever urged Mr. Clayton Bigg to change his vote on the Park Shore Resort Club matter or any other matter which had been passed upon by the P.A.B.

Harry Rothchild
March 4, 1981