

City Council Chamber
735 Eighth Street South
Naples, Florida 34102

City Council Regular Meeting – March 15, 2000 – 9:00 a.m.

Mayor MacKenzie called the meeting to order and presided.

ROLL CALL **ITEM 1**

Present: Bonnie R. MacKenzie, Mayor
Joseph Herms, Vice Mayor
Council Members:
Gary Galleberg
William MacIlvaine
Fred Tarrant
Penny Taylor
Tamela Wiseman

Also Present:
Kevin Rambosk, City Manager
Kenneth Cuyler, City Attorney
Tara Norman, City Clerk
Bill Harrison, Asst. City Manager
Virginia Neet, Deputy City Clerk
Dr. Jon Staiger, Natural Resources Mgr.
Ron Lee, Planning Director
Anne Middleton, Budget & Invest. Mgr.
David Lykins, Recreation Manager
Jessica Rosenberg, Recording Secretary

See also Supplemental Attendance List,
Attachment 1

Media:
AnneElena Foster, Naples Daily News
Heather Dawson, WINK-TV

Other interested citizens and visitors

INVOCATION and PLEDGE OF ALLEGIANCE.....ITEM 2

Reverend Charles Lewis, Community Congregational Church

ANNOUNCEMENTSITEM 3

Recesses were announced for 10:30 a.m., 12:30 p.m. and 3:30 p.m. National Crime Victims Rights Week was proclaimed for April 9-15.

ITEMS TO BE ADDEDITEM 4

Item 12 *Consider approving a budget amendment to add a building inspector position to the Building Division construction staff, and approve a purchase order for a new vehicle for new staff's use. Vendor: Duval Ford \ Price: \$19,200.00 \ Funding (for both): Building Permit Revenues.*

Item 13 *Consider a resolution clarifying the non-applicability of the Commercial Building Height Charter Amendment to residential parcels within the Park Shore Planned Development.*

Item 14 *Consider a special event permit request by McCabe's Pub for amplified entertainment on March 17th until 7:00 p.m.*

Item 15 *Discuss non-applicability of Commercial Building Height Charter Amendment to First Presbyterian Church expansion.*

Item 16 *Continue discussion of Workshop topics.*

Item 17 *Discuss programming of City's government access channel.*

MOTION by Herms to **SET AGENDA ADDING ITEMS 12 THROUGH 17;**
seconded by Tarrant and unanimously carried, all members present and voting (Galleberg-yes, Herms-yes, MacIlvaine-yes, Tarrant-yes, Taylor-yes, Wiseman-yes, MacKenzie-yes).

CONSENT AGENDA

APPROVAL OF MINUTESITEM 5-a
February 2, 2000 Regular Meeting; February 2, 2000 Special Meeting; March 1, 2000 Workshop

..... **ITEM 5-b**
APPROVE AN AFTER-THE-FACT PURCHASE ORDER FOR THE INSTALLATION OF A PUMP AT THE PORT ROYAL TANK SITE \ CONTRACTOR: KYLE CONSTRUCTION COMPANY, NAPLES, FLORIDA \ COST: \$18,750.00 \ FUNDING: CIP #99K32.

..... **ITEM 5-c**
AUTHORIZE A BUDGET AMENDMENT IN THE AMOUNT OF \$43,068.00 FOR THE PURCHASE OF RADIO EQUIPMENT AS PART OF POLICE & EMERGENCY SERVICES DEPARTMENT'S CONVERSION TO A 800 MHZ COMMUNICATIONS SYSTEM.

MOTION by Herms to **APPROVE CONSENT AGENDA;** *seconded by Wiseman and unanimously carried, all members present and voting (Galleberg-yes, Herms-yes, MacIlvaine-yes, Tarrant-yes, Taylor-yes, Wiseman-yes, MacKenzie-yes).*

Continued.....ITEM 10
AUTHORIZE A BUDGET AMENDMENT IN THE AMOUNT OF \$57,327.04 IN ORDER TO ADJUST THE NAPLES BAY ACCOUNT TO THE YEAR-END AUDITED BALANCE.

Public Input: (On continuance) None (9:10 a.m.)

MOTION by Herms to **CONTINUE TO APRIL 5, 2000 REGULAR MEETING;**
seconded by Tarrant and unanimously carried, all members present and voting (Galleberg-yes, Herms-yes, MacIlvaine-yes, Tarrant-yes, Taylor-yes, Wiseman-yes, MacKenzie-yes).

Public Input (On continuance): None (9:10 a.m.)

Continued.....ITEM 11
CONSIDER AWARDED A BID, BASED UPON THE 3/8/00 BID OPENING, FOR
RESTORATION OF THE OUTER PORTION OF THE NAPLES FISHING PIER \
FUNDING: TOURIST DEVELOPMENT TAX.

*MOTION by Herms to CONTINUE TO APRIL 5, 2000 REGULAR MEETING;
seconded by Galleberg and unanimously carried, all members present and voting
(Galleberg-yes, Herms-yes, MacIlvaine-yes, Tarrant-yes, Taylor-yes, Wiseman-yes,
MacKenzie-yes).*

Public Input: (On continuance) None (9:11 a.m.)

First ReadingITEM 6-a
AN ORDINANCE REPEALING CITY OF NAPLES ORDINANCE 99-8544 WHICH
ADOPTED, SUBJECT TO A FUTURE EFFECTIVE DATE, SMALL SCALE
COMPREHENSIVE PLAN AMENDMENT PETITION 99-CPASS3, WHICH RELATED TO A
PROPOSED AMENDMENT TO THE FUTURE LAND USE MAP OF THE
COMPREHENSIVE PLAN FROM CONSERVATION TO WATERFRONT MIXED USE FOR
PROPERTY LOCATED ADJACENT TO AND SOUTH AND EAST OF BAYVIEW PARK,
SAID PROPERTY MORE PARTICULARLY DESCRIBED IN SAID ORDINANCE;
PROVIDING A REPEALER PROVISION, A SEVERABILITY CLAUSE AND AN
EFFECTIVE DATE.

First ReadingITEM 6-b
A RESOLUTION REPEALING RESOLUTION 99-8540 WHICH, SUBJECT TO A FUTURE
EFFECTIVE DATE, APPROVED DEVELOPMENT OF SIGNIFICANT ENVIRONMENTAL
IMPACT PETITION 99-DSEI1, RELATING TO 124 ACRES LOCATED ADJACENT TO
AND SOUTH AND EAST OF BAYVIEW PARK, SAID PROPERTY MORE
PARTICULARLY DESCRIBED IN SAID RESOLUTION; PROVIDING A REPEALER
PROVISION, A SEVERABILITY CLAUSE AND PROVIDING AN EFFECTIVE DATE.

First ReadingITEM 6-c
AN ORDINANCE REPEALING CITY OF NAPLES ORDINANCE 99-8545 WHICH
ADOPTED, SUBJECT TO A FUTURE EFFECTIVE DATE, PLANNED DEVELOPMENT
PETITION 99-R8 RELATING TO A PROPOSED REZONE OF 124 ACRES LOCATED
ADJACENT TO AND SOUTH AND EAST OF BAYVIEW PARK FROM “C”
CONSERVATION TO “PD” PLANNED DEVELOPMENT, SAID PROPERTY MORE
PARTICULARLY DESCRIBED IN SAID ORDINANCE; PROVIDING A REPEALER
PROVISION, A SEVERABILITY CLAUSE AND AN EFFECTIVE DATE.

The titles for Items 6-a, 6-b, and 6-c were read by City Manager Kevin Rambosk prior to the commencement of deliberations (9:15 a.m.). City Attorney Kenneth Cuyler noted that Attorney David Rynders had requested ex parte disclosures and that witnesses be sworn. However, Attorney Cuyler noted for the record that the City’s position is that the matters before the Council under Item 6 are legislative; nevertheless, he said that both of these requests could be accommodated. Mr. Cuyler recommended that Council Members be as expansive as possible including discussions, correspondence and any visits which may have been made to the property in question.

Ex parte disclosures were as follows: **MacIlvaine** - Receipt of written information from the Conservancy, receipt of the developer’s exposition of legal issues, and conversation with David Guggenheim of the Conservancy; **Galleberg** - Receipt of the various legal memoranda and letters from citizens to Council Members, conversations with David Guggenheim and others from the Conservancy, conversations with legal counsel for the Collier interests, and verbal inquiries from

various citizens concerning Hamilton Harbor; **Taylor** - Receipt of correspondence from the developer, correspondence from the Conservancy, conversation with Michael Simonik of the Conservancy, conversation with Attorney David Rynders, and conversation with Mr. Kessler (no given name provided); **Wiseman** - Receipt of various pieces of correspondence noted by other Council Members, conversations with Mimi Wallach, David Guggenheim and Michael Simonik of the Conservancy, and conversation with Attorney John Passidomo; **Herms** - Receipt of the legal memoranda heretofore referred to by other Council Members, conversation with Harry Timmins, conversation with Jim Kessler, receipt of correspondence from the Conservancy, receipt of correspondence from Wheeler Conkling, and conversation with Attorney David Rynders; **Tarrant** - Conversation with Wheeler Conkling, conversation with Attorney David Rynders, conversation with Mr. Kessler (no given name provided), conversations with David Guggenheim and Michael Simonik of the Conservancy, and receipt of legal memoranda and correspondence on each side of the issue previously referred to by other Council Members; and **MacKenzie** - Conversations with Messrs. Birr and Varnadoe (no given name provided) when Council discussed reconsideration of Hamilton Harbor, correspondence from developer's representatives, conversations with Mimi Wallach, Michael Simonik and David Guggenheim, receipt of correspondence from the Conservancy, and brief conversations with members of the public, some of whom, Mayor MacKenzie indicated, may actually be directors of Citizens to Preserve Naples Bay.

An oath was then administered by City Clerk Tara Norman to all present, including City staff, who indicated intent to speak, give testimony or present evidence on this matter. All answered in the affirmative.

Jeffrey Birr, representative of the property owner, deferred to Citizens to Preserve Naples Bay to make the initial presentation. **Wheeler Conkling, president of Citizens to Preserve Naples Bay**, introduced various presentations to be made in support of his organization's request for repeal of the ordinances authorizing development of Hamilton Harbor. He said that since the Council's workshop on the subject (Wednesday, March 1) additional information had been compiled in support of this position. He said that Dr. David Guggenheim, Harry Timmins, Dr. Fran Stallings and Attorney David Rynders would also address City Council. Mr. Conkling then noted a letter provided to the Council that morning (Attachment 2) and promised further explanation thereof.

Dr. David Guggenheim, President and CEO of the Conservancy of Southwest Florida, requested that documents submitted by the Conservancy and other plaintiffs in the Hamilton Harbor litigation be included in the record (see Attachment 2 and Attachments 3 through 6). He asserted that the approval process had been too rapid for such a complex issue, alleged what he described as statutory violations of Comprehensive plan, and maintained that Council did not have complete information before approving Hamilton Harbor. Dr. Guggenheim then displayed a poster containing comprehensive plan Policy 1-6: "No development shall be allowed in habitats of special concern." He said that the public correctly believes that no development should be allowed in these areas. Dr. Guggenheim then read into the record an excerpt from testimony of Planning Director Ron Lee before the state administrative hearing on Hamilton Harbor (Attachment 7) and alleged that the staff interpretation is a significant departure from public expectation of this policy. Staff also did not present a balanced picture, he said, because only advantages of the project were cited. He then reiterated prior comments (March 1, 2000, City Council workshop) to the effect that the language in the comprehensive plan is strengthened by prohibition of any development which potentially could damage environmentally sensitive areas. This interpretation, he said, is contrary to that espoused in Mr. Lee's memorandum to City Council of May 13, 1999, (contained in Attachment 4) which had

interpreted this language as equivocal. He also disagreed with assertions in the memorandum presented by attorneys for the Collier interests (see Attachment 3) relative to: legal premises and threats of litigation; the degree of participation afforded to the public; new information which has come to light; and vested rights and other estoppel arguments. He then displayed overhead transparencies depicting mangroves photographed on the Hamilton Harbor site to support his contention that much of the location contains a mature mangrove forest. (Copies of these photographs are contained in the file for this meeting in the City Clerk's Office.) No mitigation could replace a forest of this value, he said, particularly in the same area. He said that it is never permissible to impact mangroves, although he said that the Conservancy admittedly compromises occasionally on destruction of mangroves due to lack of resources to address each situation. Dr. Guggenheim predicted that Hamilton Harbor would eventually introduce thousands of homes and some 500 boats which will not only impact mangroves, but water quality of Naples Bay and Rookery Bay as well as endanger wildlife. He urged Council to repeal the Hamilton Harbor approvals.

While praising the Conservancy's work, Council Member Galleberg contrasted its position on Hamilton Harbor with its support of destruction/mitigation of mangroves in the North Road relocation at Naples Airport, reasoning that the organization merely did not concur with the Hamilton Harbor proposal. (He submitted for the record a letter from Michael Simonik of the Conservancy supporting the mitigation on the North Road project. (See Attachment 8) Dr. Guggenheim clarified that the Conservancy does not support destruction of mangroves but lacks the means to litigate in every instance. In addition, he said, that the North Road mangroves are a very small portion of the site and considered to have been degraded; the North Road project is also not of the magnitude of Hamilton Harbor, he said. Council Member MacIlvaine also pointed out that removal of mangroves near the airport was necessitated by FAA safety requirements on Runway #5, and also that the North Road mitigation, as opposed to Hamilton Harbor, was not a battle deemed winnable by the Conservancy. Then, in response to Mr. MacIlvaine, Dr. Guggenheim clarified that of the 5,500 member families in the Conservancy, approximately 1,800 families are in the City of Naples which equates to 3,500 to 4,000 individuals; Dr. Guggenheim also confirmed the unanimity of members' support for the Conservancy's position on Hamilton Harbor. Council Member Wiseman also received assurance from Dr. Guggenheim that the mangroves pictured were actually among those which would be destroyed on the Hamilton Harbor site. In response to Mayor MacKenzie, Dr. Guggenheim asserted that the Conservancy, in fact, does distrust safeguards in the permitting process to effectively protect the environment and reiterated his contention that there is also local responsibility through the comprehensive plan language which requires the City to consider environmental impacts. Vice Mayor Herms commented that in addition to not applying the comprehensive plan, the staff had selectively applied the City's ordinances over the last few years. In response to Council Member Wiseman, Dr. Guggenheim stated that no compromise had yet been proposed on Hamilton Harbor which would meet the Conservancy's stance that there be no net adverse environmental impact. She observed therefore that there could in fact be some position on which the Conservancy would compromise. In response to Council Member Galleberg, Dr. Guggenheim, however, declined to describe the content of negotiations which had occurred with the Collier interests.

Harry Timmins, Kings Town Drive, Vice President of Citizens to Preserve Naples Bay, indicated that his credentials include five years' service on the Naples Planning Advisory Board and recent membership on the Naples Bay Project Committee. He contrasted the staff report on Hamilton Harbor with others utilized by him in the aforementioned assignments, stating that the

Hamilton Harbor report had seemed more like a sales presentation. He noted his previous comments (March 1, 2000, workshop) regarding deficiencies in the petitioner's boat traffic study and the lack of staff analysis thereof. Mr. Timmins then addressed what he described as other incomplete or inaccurate information received by Council during its deliberations. Specifically, he disputed an assertion by Planning Director Ron Lee, during first reading of the Hamilton Harbor rezone ordinance, that marinas are conditional uses in "C" Conservation zoning and that the petitioner could choose between a conditional use and a PD rezone. Mr. Timmins said that this was not the case because marinas are not allowed as conditional uses anywhere in "C" Conservation districts. This is another example, he said, of a flawed process where Council was given inaccurate information and should therefore repeal the ordinances that resulted therefrom.

Fran Stallings, representing Save the Manatee Club, Responsible Growth Management Coalition, and Environmental Confederation of Southwest Florida, noted that the Southwest Florida Regional Planning Council had not reviewed Hamilton Harbor because it had been represented as a small, site-specific development. He said his organizations based their decision making on whether to pursue litigation against development projects on ecological significance and whether they meet applicable standards; neither Hamilton Harbor nor its predecessor Sabal Bay meet these standards, he said. Mr. Stallings also took the position that many other ecological impacts are at stake which go far beyond loss of mangroves. This project would harm an already degraded bay and estuarine system where mangrove loss has made it very important to maintain the health of the remaining system. In conclusion, Dr. Stallings said that Hamilton Harbor also does not meet the intent of the City's comprehensive plan. Council Member Galleberg said that he had learned that the Southwest Florida Regional Planning Council, of which he is now a member had, in opposing Sabal Bay, in fact suggested an acceptable alternative which resembles the current Hamilton Harbor proposal.

Recess: 10:20 a.m. to 10:45 a.m.. It is noted for the record that the same members of City Council were present when the meeting reconvened.

Attorney David Rynders, representing Citizens to Preserve Naples Bay, Mr. Kessler (no given name provided), Save the Manatee Club, Environmental Confederation of Southwest Florida, and Responsible Growth Coalition, requested that a prior letter signed by Wheeler Conkling and Fran Stallings be made a part of the record (see Attachment 6). He also requested that his comments from the March 1, 2000, workshop be made a part of the record (Attachment 9). Being under oath, Mr. Rynders said, would require him to temper his remarks, which he would restrict to information not already provided. Nevertheless, he asserted that because of the complexity of the Hamilton Harbor issues and the applicable governmental regulations, there were a great many legal or factual matters which could continue to be discovered and cited for Council on an on-going basis. The Hamilton Harbor marina, he said, is required to undergo the Development of Regional Impact (DRI) process under Florida Statute 380.0651(3)(e), because, having a 450-boat dry storage capacity, it exceeds the 200-craft exception granted to dry storage facilities used for sport, pleasure or commercial fishing vessels. Mr. Rynders then displayed via overhead transparency the text of an interlocal agreement between the City and Collier County, dated April 13, 1999, citing requirements to obtain DRI approval from both entities. (A copy of this and other transparencies presented by Mr. Rynders are contained in the file for this meeting in the City Clerk's Office.) He then reviewed excerpts from applicable sections of Chapter 380 which appear as Attachment 10, contending that applicable law was not followed. Council Member Taylor received confirmation from Mr. Rynders of his position that approvals were granted by the City prior to the petitioner fulfilling the requirement for the DRI process. Mr. Rynders also asserted that contrary to the petitioner's application for Sabal Bay, which entailed first presenting DRI's to the County and City for review,

the developer had sought approvals for only small components of the area owned. In fact, Mr. Rynders noted, some 80% of the dry storage slips were set aside for future residents on the approximately 1,900 acres owned by the petitioner; the 16 acre marina DRI was also segmented so that the 5.5 acre portion in the City could be considered a small scale comprehensive plan amendment. This latter action, he noted, shifted the burden of proof and legal expense onto any parties objecting. Based on the above and additional factors relative to Chapter 380, which he said he would cite at the second reading of the ordinances of repeal, Mr. Rynders contended that the Council had been misled about the procedures required for approving the project.

Mr. Rynders then exhibited an overhead transparency of an order disqualifying a Collier Enterprises attorney who had formerly represented the City and other parties in its litigation relating to Collier's Sabal Bay project (Attachment 11). This was based, he noted, on the assertion that the two projects are substantially related. He said that it is not logical for the City to continue to support Hamilton Harbor when it could acquire the associated marine facilities and parking for a fraction of the expenditure already committed to contesting Sabal Bay and defending Hamilton Harbor. Another overhead transparency shown was a certified copy of a impact/benefit comparison provided by the City staff to Council in conjunction with the Hamilton Harbor approval process (Attachment 12), with Mr. Rynders disputing each of the assertions contained therein based on the premise that all benefits to the City could be realized for a fraction of past legal expenditures and enforcement of the current ordinances. To refute contentions that repeal was improper, Mr. Rynders exhibited a series of overhead transparencies citing the following cases:

- BERNARD J. PENN, Appellant, v. FLORIDA DEFENSE FINANCE and ACCOUNTING SERVICE CENTER AUTHORITY, etc., et al, Appellees, No. 81,201, SUPREME COURT OF FLORIDA, 623 So. 2d 459 (Fla. 1993)
- DEPARTMENT OF INS. v. DADE COUNTY, CONSUMER ADVOCATE'S OFFICE, No. 66,178, Supreme Court of Florida, 492 So. 2d 1032 (Fla. 1986)
- POE v. HILLSBOROUGH COUNTY, No. 90,233, Supreme Court of Florida, 695 So. 2d 672 (Fla. 1997)
- THE FLORIDA BAR, No. 53988, Supreme Court of Florida, 377 So. 2d 702 (Fla. 1979)
- TOWN OF RIVIERA BEACH v. STATE (no docket number), Supreme Court of Florida, Division B, 53 So. 2d 828 (Fla. 1951)
- TOWN OF BELLEAIR v. MORAN, No. 70-584, Court of Appeals of Florida, Second District, 244 So. 2d 532 (Fla. App. 1971)

Mr. Rynders' comments relative to these cases involved the right of citizens to express their disapproval of prior governmental actions at the ballot box. Copies of the above overhead transparencies are contained in the file for this meeting in the City Clerk's Office. Council Member Galleberg observed, however, that none of the cases involved the overturning of binding action. Nevertheless, Mr. Rynders predicted that by the nature of elected office, Mr. Galleberg, too, would find it desirable to undo agreements, repeal ordinances and make other changes in the actions of the former legislative body. Mr. Galleberg responded that he would, however, never propose abrogating an agreement and that the distinction in this case is that repeal would subject the City to millions in damages. Mr. Rynders expressed doubt that this would occur because the Hamilton Harbor developer would not expend funds on fighting repeal of ordinances which have not yet become effective, calling such litigation frivolous and that which would be disposed of with little difficulty. He further pointed out that the benefits to the City described in the Hamilton Harbor

project could be achieved at other locations where the City could profit from such operations as fuelling and commercial loading.

Mr. Rynders then recited from a 1927 decision by Supreme Court Justice Brandeis: “Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example.” Mr. Rynders credited the Hamilton Harbor developer with what he described as a brilliant strategy but one that nevertheless does not follow statutory provisions for approval, predicting that the developer would eventually return with a complete DRI for review. In response to a prior inquiry by Council Member Wiseman, Mr. Rynders asserted that a compromise on Hamilton Harbor is possible for access to Naples Bay and Dollar Bay if a similar strategy to that adopted for Pelican Bay condominium beach access is used. Regardless of the project’s legality, Mr. Rynders said, his group would have requested repeal on the basis of the long standing premise that the ballot box is a legitimate expression of dissatisfaction and expectation that new officials will fulfill campaign promises.

Council Member MacIlvaine indicated that he had served as an alternate on the Planning Advisory Board when Hamilton Harbor was considered and pointed out that the 450 slip dry storage facility had been shown as an integral part of the project. Mr. Rynders said that Chapter 380.06, Florida Statutes, requires that a facility of this size undergo a DRI approval process which he said had been ignored in both PAB and Council presentations. He then reviewed issues which he described as changed circumstances: deficiency in information provided by City Manager Richard Woodruff in staff report and comments at the May 15, 1999, City Council meeting; failure to bring to the public an unofficially adopted definition for Policy 1-6 of the conservation element of the comprehensive plan; violation of the small scale comprehensive plan amendment procedure; creation of internal inconsistencies in the comprehensive plan (which he said he had only partially enumerated); violation of Chapter 380.06, Florida Statutes, governing DRI’s which precludes vested rights, the developer not having undergone this process; failure to raise the issue of contract zoning to the City Council on May 15, 1999; and misapplication of the waterfront mixed use zoning in conflict with the comprehensive plan. He said he would provide further instances of changed circumstances when he again appeared before Council.

Council Member Galleberg asked Mr. Rynders why his clients had not instead pursued the administrative law process through which a decision is imminent, noting that such a process has been established for interest groups and the public who feel wronged. Otherwise, he said, that the City is being exposed to risk of substantial damages. Mr. Rynders responded that the City, his clients, and the Conservancy had already made extensive legal expenditures in the administrative law process. However, Mr. Galleberg countered that the action proposed would not halt litigation but expose the City to additional risk of costly damages. Mr. Rynders reiterated his position that because the Hamilton Harbor ordinances had not become effective and the project had not undergone the DRI approval process, any law suit would be frivolous because there would be no vested rights. He further contended that the administrative law proceeding is pointless because only a recommended order will result which then most likely will be heard by the Administrative Commission, consisting of the Governor and Cabinet, a process of which the developer, Mr. Rynders said, is fully aware. The Administrative Commission hearing will then require additional expenditure for legal fees at the conclusion of which, and regardless of the outcome, the Council

can still by resolution approve the project via a right which had been reserved in the original approval ordinance. Mr. Rynders predicted that a Council with a membership different from the current body would have in fact done just that.

Council Member Wiseman observed that the solutions proposed by Attorney Rynders appeared simple and straight forward, but that, being under oath, Mr. Rynders must in fact believe them as opposed to merely acting as an advocate. She asked, therefore, whether Mr. Rynders' clients would indemnify the City for damages suffered as a result of legal action based on a taking. Mr. Rynders responded that, other than attorney fees in the City's defense, it would be no problem to indemnify the City for any judgement awarded against it. He also noted that his comfort level with this position was in fact so high that he would advise his clients that they were at no risk whatsoever by holding the City harmless for any possibility of a future judgement being entered that a taking of property had occurred. Mr. Rynders also observed that the state of law on takings is such that federal courts are reluctant to hear cases which, even when a valid taking has occurred, view the process as protracted and tortuous. Mrs. Wiseman then noted, in light of cases cited by Mr. Rynders illustrating voters' rights, that no one during the recent election campaign had raised the issue to her relative to repeal of Hamilton Harbor approvals. She suggested that the issue nevertheless be the subject of a referendum. Mr. Rynders said that even non-binding queries of this nature are prohibited by Florida Statutes. He also reiterated his position that all decisions by a former elected body are reversible.

Wheeler Conkling further stressed the similarity between Sabal Bay and Hamilton Harbor, noting however that the City and groups with which it formerly acting in concert and now on opposing sides. He then read into the record the text of form letters addressed to the Council supporting repeal and thereupon presented 244 signed copies. These letters, Mr. Conkling said, had been sent by his organization the prior week to 450 on its mailing list asking for signature and return. (See sample as Attachment 13; the remaining letters are contained in the file for this meeting in the City Clerk's Office.) Projecting from this response, Mr. Conkling predicted that the majority of people the Council represents are opposed to Hamilton Harbor and look to the Council to abide by the City's comprehensive plan. Mr. Conkling indicated this to be the conclusion of his group's presentation but reserved the right of rebuttal.

Mayor MacKenzie then noted a letter from former City Council Member Fred Coyle (Attachment 14) in opposition to repeal which Mr. Coyle had asked to be entered into the record; she also noted letters from William Treat (Attachment 15) and the Collier County Audubon Society (Attachment 16) supporting repeal.

It is noted for the record that Item 6 was recessed at 12:00 p.m. in order to act on Item 7, scheduled for 11:45 a.m.; it was announced that discussion of Item 6 (Hamilton Harbor) would resume at 1:15 p.m. When the meeting reconvened at 1:20 p.m. the same Council Members were present.

**RESOLUTION 00-8795ITEM 7
A RESOLUTION ACCEPTING THE BID FOR AND AWARDED \$8,640,000 GENERAL
OBLIGATION BONDS OF THE CITY OF NAPLES, FLORIDA, TO THE SUCCESSFUL
BIDDER; PROVIDING FOR THE FISCAL DETAILS OF THE BONDS; APPROVING
THE PRELIMINARY OFFICIAL STATEMENT FOR THE BONDS AND AUTHORIZING
THE EXECUTION AND DELIVERY OF A FINAL OFFICIAL STATEMENT;
APPROVING THE EXECUTION AND DELIVERY OF A CONTINUING DISCLOSURE
CERTIFICATE; CANCELLING THE AUTHORIZATION FOR THE ISSUANCE OF THE**

BALANCE OF THE BONDS; APPOINTING THE BOND REGISTRAR AND PAYING AGENT FOR THE BONDS; AND PROVIDING AN EFFECTIVE DATE. Title read by City Manager Kevin Rambosk. Assistant City Manager William Harrison expressed pleasure that for the first time in his career he had participated in a bond issue for a city with a Triple-A rating and praised the Council leadership which allowed this to occur. He then indicated the presence of financial advisor Craig Dunlap and bond attorney Jack McWilliams. Mr. Dunlap then addressed the Council, also citing the rarity of Florida cities with a bond rating of this kind.

Mr. Dunlap reported that nine bids had been received with the successful bidder being Hanafin Imhoff which promised to also advertise the bond availability locally. True interest cost rate bid by this firm was 5.1245% which, Mr. Dunlap said, is extremely attractive, being 18 basis points under the national average. He confirmed for Council Member MacIlvaine that this is an uninsured bond. Council Member Taylor congratulated past Councils, and Mayor MacKenzie congratulated the voters for approving the acquisition of the Fleischmann property which will be funded by this bond issue.

Assistant City Manager Harrison then noted the entry into the above resolution of the successful bidder's name, the bid amount of \$8,420,612.95 and the bond rating of AAA; the original of all bids will be filed with the City Clerk.

Public Input: None.

MOTION by Herms to APPROVE RESOLUTION 00-8795, as presented, seconded by MacIlvaine and unanimously carried, all members present and voting (Galleberg-yes, Herms-yes, MacIlvaine-yes, Tarrant-yes, Taylor-yes, Wiseman-yes, MacKenzie-yes).

Recess: 12:15 p.m. to 1:20 p.m. See notes above.

Continuation Item 6
John Passidomo, of Cheffy, Passidomo, Wilson & Johnson, attorney representing Collier Enterprises, the affected land owner, indicated that co-counsel is Young, VanAssenderp, Varnadoe and Anderson, Attorney George Varnadoe being present at that time. He also introduced Jeffrey Birr, president of Collier Enterprises Real Estate Division. Mr. Birr listed his residence address as 2322 Pinewood Circle. He said he had been actively involved in the Hamilton Harbor proposal since inception and could not have imagined that he would be addressing proposed repeal of past Council actions. It was City's initiative, not Collier's, he said, which began the process based on the need for a southern vessel fuelling location and commercial loading dock. Considerable amounts of time and money had been expended based on the City's actions, Mr. Birr noted, in order to develop a plan which he said provided substantial public benefits while still being financial feasible. Mr. Birr said that the company took comfort in the fact that the Hamilton Harbor site was the same site proposed by the Conservancy during the Sabal Bay proceedings as having less impact on wetlands than other alternates. Mr. Birr said that after working with City staff and Council Member Coyle, a draft proposal was presented to City Council at a workshop where they were encouraged to move forward, seeking as much public input as possible. He said that numerous meetings were then held with Citizens to Preserve Naples Bay, many other civic groups, the Naples Bay Project Committee, Planning Advisory Board and City Council after which changes were made in order to create a plan acceptable to a majority of the citizens. He described the public-private effort as unprecedented and noted approvals on two occasions by a super-majority of Council. Nevertheless, Mr. Birr said, there was vocal opposition from a minority who had participated in and commented throughout the process and who, when they did not agree with the vote, sued the City of Naples. Mr. Birr then noted that his organization believed that they had explicitly followed the

City's requirements, so Collier Enterprises participated with the City in defense requiring a substantial investment. Collier Enterprises, he said, will suffer extraordinary damages if the Hamilton Harbor ordinances are repealed, although the organization is prepared to take whatever action is necessary to protect its interests. Mr. Birr then cited questions which he said he believed were key to the issue: whether it was appropriate to invite investment of extensive time and funds, approve the project and then arbitrarily repeal it; and whether such action is a desirable precedent for future City Councils. He said that he believed no Council Member would condone this in his or her own business dealings. The action being contemplated, he said, is wrong, unfair and unethical.

Attorney Passidomo alleged that the land owner had received no notice of these proceedings and that no attempt had been made to inform the land owner as to the factual or legal bases of the proposed action. Their presence, he said, is simply based on reading Naples Daily News accounts of the Council's intent to repeal ordinances and other approvals which had created substantial rights in the land owner. He contended, therefore, that the proceedings are illegal with no basis in the Naples Comprehensive Development Code or other law; he cited a legal memorandum to this effect which had been furnished to Council. Mr. Passidomo requested that that memorandum be made a part of the record (see Attachment 3). He also alleged a lack of jurisdiction on the part of the Council to even address the ordinances while administrative and legal appeals are pending. Courts of law and equity are the proper forums to address legal rights, responsibilities and grievances, not the City Council, it being a policy-making body, he said, noting that his clients would not present arguments on what he termed legal technicalities but would instead focus on the practicalities of the impending decision. Attorney Passidomo asserted that, despite representations to the contrary, no new factual information had in fact been presented, noting that the majority of those now serving on City Council had not been in office when Hamilton Harbor was acted upon. He said he had reviewed the correspondence by Citizens to Preserve Naples Bay of February 22 and 29, 2000; had viewed the video tape and read the transcript of the March 1, 2000, City Council workshop; and reviewed the City Clerk's record of the proceedings when Hamilton Harbor had been approved in 1999. He then submitted into the record of this meeting the aforementioned Clerk's record which he noted is comprised of thousands of pages of text, evidence and testimony. (This material is appended to the minutes of this meeting as Minute Books 107-a, 107-b, 107-c and 107-d.) Mr. Passidomo estimated that 25 hours had been devoted to public workshops and meetings/hearings on Hamilton Harbor before City Council and advisory boards. He invited those Council Members not in office for these sessions to review the above submittal to confirm that no new information has been submitted.

Attorney Passidomo then listed the following to support his contention that no new information had come forward:

- The proceedings were not fast-tracked as alleged, but actually slowed, since the approval process encompassed some 90 days, a longer time than provided in the City's Comprehensive Development Code.
- The Circuit Court rejected the argument presented by Attorney David Rynders that statutory authority was abused by the Council in adopting the small scale comprehensive plan amendment procedure, and the Second District Court of Appeal refused to overturn the trial court allowing the second reading of the Hamilton Harbor ordinances to commence at the June 2, 1999, public hearing.

- The Florida Department of Community Affairs which is responsible for interpreting and approving DRI's and growth management laws, advised the City that it could utilize the small scale amendment process for the 5.5 acres of Hamilton Harbor within the City of Naples. The DCA then subsequently intervened in support of this.
- The record provided shows that some conservation areas may be suitable for development either because of moderate resource benefits or their being less susceptible to adverse effects of alternation. Also required prior to commencing development is detailing of special habitats/communities, typography, hydrology and mitigation of environmental impacts. The City's Natural Resources Manager testified during Council's 1999 proceedings that the DSEI statement accompanying the Hamilton Harbor comprehensive plan amendment and rezone demonstrates that environmental impacts have been minimized and adequately mitigated. The Planning Advisory Board voted unanimously to approve the DSEI statement.

Attorney Passidomo then placed in the record what he described as a 1999 memorandum (Attachment 17) to City Council providing an overview of circumstances under which the comprehensive plan and Comprehensive Development Code allow development in conservation areas. He asserted that the comprehensive plan must be read in its entirety and noted that in approximately six instances in the last 10 to 15 years, development had been approved by the City in conservation areas with DSEI assessment and mitigation. He also said that he knew of no instance where Policy 1-6 had been interpreted by City staff or Council as absolutely prohibiting development in conservation areas, including during the tenure of David Rynders as City Attorney; he also noted that opponents of Hamilton Harbor have on prior occasions promoted development in conservation areas. Attorney Passidomo, therefore, asserted that if the City were to repeal the Hamilton Harbor ordinances on the basis that Policy 1-6 absolutely prevents development in conservation areas, it would constitute unequal protection under the federal and state constitutions and a violation of the land owner's civil rights under federal law.

Mr. Passidomo then disputed the assertion by Attorney Rynders that repeal would not result in vested rights for the land owner because the ordinances cannot be effective while administrative appeals are pending. These ordinances nevertheless constitute final Council action, he noted, and no other action is required, their automatically becoming effective once pending appeals are concluded. However, Mr. Passidomo cited a point made by Mr. Rynders to Council on May 19, 1999, from page 212 of a transcript of that meeting: "The second issue is that if you take this land as the developer has proffered it to you what you do is give him vested rights in the development or regional impact. Provisions of Florida Statutes, that's 380.06, and they specifically define for the purpose of this Act that the conveyance, or even the agreement to convey property to local government as a prerequisite to zoning change approval shall be construed as an act of reliance, excuse me, to vest rights as determined under this subsection. So when they give you land they're not giving away anything, they're getting vested rights to the approval that you give them. And you can't subsequently, like, change or take that away if you find, for instance, that the County later on wants to do something in the unincorporated area that you're not real happy about."

Mr. Passidomo then expressed the view that rather than a land use hearing, these deliberations represented a "high stakes craps game," and if repeal of the Hamilton Harbor is ultimately sustained in the courts, the obligation for payment of attorney fees will be shifted to Naples taxpayers. The City could also be subject to substantial damages. He cited the failure of Attorney Rynders to

prevail either in court or with the DCA to halt approvals of Hamilton Harbor, and further questioned whether it would be a prudent exercise of the Council's fiduciary to risk the possible consequences of Hamilton Harbor repeal.

Mr. Passidomo also quoted statements of Attorney Rynders from a transcript of the March 1, 1999, workshop as follows: "Good afternoon, Mayor and Members of Council, it's always a privilege for me to be here. My name is David Rynders. I represent Citizens to Preserve Naples Bay and we've come before you really to talk about a mistake, and mistakes are something we come across every now and then. I make mistakes all the time, and if you don't believe me, you can ask Ken Cuyler, he'll tell you. And if you don't believe Ken, ask my wife. She's got a list, you know, longer than I can bring in here. Everybody makes mistakes. And, if you ask my wife, when I make my most severe mistakes it's when I get enthusiastic about something. You know, get carried away by an idea. I don't look at the details, and I don't really ..." At this point, Council Member MacIlvaine interjected that he did not feel that the argument being made by Mr. Passidomo was either persuasive or ethical. Ceasing the quote, Mr. Passidomo reiterated that the text was from the record and that the Council is being asked to assume an imprudent risk. In conclusion, Mr. Passidomo urged the Council to reject the request to repeal the Hamilton Harbor ordinances.

Council Member Tarrant observed that he had been astonished that in response to the City's approaching Collier Enterprises for assistance in establishing a fuelling station, such extensive concessions as boat storage, boat slips, dredging, paving, restaurant and mangroves destruction would be involved. He said he wished therefore to make it clear that this was not the original intent. Mayor MacKenzie asked Attorney Passidomo to state his client's reasoning in not pursuing the DRI process prior to the comprehensive plan amendment, as Attorney Rynders and his clients had indicated is required. Mr. Passidomo responded that although the law prescribes no order of priority, the determination of appropriate land use had been sought so as to avoid the situation encountered with the Sabal Bay development wherein local government rejected the proposal after a DRI and permitting process had been undertaken. The second reason for selecting this order, Mr. Passidomo explained, was to secure local land use and public benefit determination on the items which were sought by the City, none of which would generate a DRI impact, which was exclusively generated by the dry storage facility. Mr. Passidomo also pointed out that Mayor MacKenzie had been instrumental in ensuring that if, for any reason, the balance of the development did not proceed, the public benefits would still accrue, Phase I being the wet slips, parking, commercial docking, fuelling, etc., and Phase II the dry storage facility. Mr. MacIlvaine indicated that his impression as a member of the Planning Advisory Board had been that the entire project was being presented as a whole, not in phases. Mr. Passidomo noted however that the PD document expressly identifies two phases, again pointing out that the City had wished to expedite the public benefits in the south bay area.

Miss Taylor said that despite empathizing with the land owner's position, Attorney Rynders had asserted that the entire ordinance passage procedure had been illegal because everything connected with the project should be presented at the same time. She said she was accusing the City staff, however, of placing Collier Enterprises in their current position because the staff was not forthcoming with the correct procedure and did not inform Council. While acknowledging this point, Mr. Passidomo nevertheless said that when Attorney Rynders sought to enjoin the Council from acting on second reading of the Hamilton Harbor ordinances, the DCA, which is the state's planning agency, intervened in favor of the City to defend the City's action to entitle the development on a small scale basis.

Vice Mayor Herms contended that the City and Collier Enterprises has been negotiating a project separate from Sabal Bay for at least the past 5-6 years, and as early as the tenure of former Mayor Paul Muenzer. Mr. Passidomo responded that while every prudent land owner such as Collier Enterprises assesses with various regulatory agencies the viability of development on an ongoing basis, no plan had been developed beyond a feasibility analysis prior to the Council's approach to Collier through Council Member Coyle. Council Member Tarrant confirmed with Mr. Passidomo that he recalled these discussions as having been attended by him, Jeffrey Birr of Collier Enterprises, Attorney George Varnadoe, and the City Manager.

In questioning by Vice Mayor Herms, Collier Enterprises representative Birr indicated that prior to his approximately ten-year service with the organization, his predecessor, Doug McNeil, had met with former Mayor Muenzer relative to ongoing negotiations during the Sabal Bay legal process. Prior to the City's December 1998 letter regarding developing public benefits, he said, discussions centered around a 1989 proposal by the City and the Conservancy for marina location on a spoil site; however, the Hamilton Harbor proposal accrued to even less wetland damage than this proposal. Mr. Birr confirmed that these meetings most likely took place within six months to one year prior to meetings with Council Member Coyle. Vice Mayor Herms asked City Manager Rambosk to examine former City Manager Richard Woodruff's schedule to determine meeting frequency. Council Member Galleberg also received confirmation from Mr. Birr that a variety of other topics were also discussed in prior meetings with City representatives.

Vice Mayor Herms ascertained from Planning Director Ron Lee that he had become aware of the Hamilton Harbor development concept only when presented at a Council workshop by former Council Member Coyle. Natural Resources Manager Jon Staiger indicated that he, too, had not been privy to any information prior to that time.

Mayor MacKenzie then recognized Wheeler Conkling of Citizens to Preserve Naples Bay who had earlier in the meeting reserved the right of rebuttal. This rebuttal began with comments by Dr. David Guggenheim of the Conservancy who addressed the reference by Messrs. Birr and Passidomo to an item which had been identified as a Conservancy plan. This, he said, did not exist with regard to Sabal Bay, a fact the Conservancy asked former City Manager Woodruff to place on the record in June of 1999. Dr. Guggenheim, however, described what he called rough internal notes which had, by unknown means, resulted in drawings by the firm of Wilson Miller. Nevertheless, all those notes were rejected by the Conservancy Board of Directors, he said. Dr. Guggenheim further explained that since the Sabal Bay proposal, the Conservancy's knowledge of the site had increased to the point that what had been described as a spoil island is now understood to be an archeological site known as the Hamilton Miden and not suitable for mitigation or development.

Other speakers introduced by Mr. Conkling are shown below:

William Treat, 1000 Spyglass Lane, member of Citizens to Preserve Naples Bay, praised the decision to hold that day's hearing and asserted that any public body had the right to correct mistakes of the past; otherwise, the Council would be abusing its oath of office, he said. He also predicted that environmental damage in conjunction with the Hamilton Harbor would be irreversible and urged preservation for future citizens. **Allan Slaff, 3101 Green Dolphin Lane**, stated that as a Navy captain he had become expert in navigation and had testified in the Sabal Bay

proceedings. He stressed that the Hamilton Harbor site and Naples Bay are precious resources and that a prior boating study had found seamanship and navigation in Naples Bay to already be hazardous at many days during the week which was opposed to the findings of the survey presented by the developer. Mr. Slaff said that Collier Enterprises needs the marina in order to market the 4,500 homes which could be built on the remainder of its property. **Gordon Kinder, 1285 Gulf Shore Blvd., N.**, said he felt that Collier Enterprises had come into the proposal reluctantly and pointed out that governments have the right to appeal bad laws. He also asserted that Hamilton Harbor would take away his right to view this unspoiled frontage. However, he took issue with attempts earlier in the meeting to bring into the record discussions which had taken place during negotiations. **Bill Blaikie, 1950 Gulf Shore Blvd., N.**, who indicated he was speaking as a former member of the Conservancy Environmental Committee, related the Conservancy's challenge to address the many environmental issues considered critical. He cited personal experience with local government in New Jersey where passage and repeal of laws took place as required and urged repeal of the Hamilton Harbor approval ordinances. **Kirk Materne, 1976 Galleon Drive**, stated that his residence is directly opposite the Hamilton Harbor site and, prior to purchasing the property, he had ascertained that the Hamilton Harbor site was zoned non-developable. He said he had however become concerned upon learning that the defeated Sabal Bay project had been replaced with another, and urged that the area be preserved as a legacy for the future. **John Scott, 1150 Galleon Drive**, cited his view that Hamilton Harbor is the most important decision of this Council's term. In light of waterways development and introduction of nearly 500 watercraft from Hamilton Harbor into Naples Bay, he said, not only will the community be disappointed, but will be overlooking a facility comparable in size to a Wal-Mart, much more offensive even than the new dry storage near Tin City. He predicted 80% opposition to Hamilton Harbor in any referendum. The prior Council, Mr. Scott said, had a pro-development Mayor and City Manager, and regardless of being well intentioned, had failed to consider the impact of potential development on the Collier Enterprises acreage adjoining Hamilton Harbor.

Mayor MacKenzie then called additional registered public speakers:

Susan Grove, 626 Third Street North, waived, and **John Burnham, 1120 Spyglass Lane**, not present when called. **Randy Ward, 4600 Mystic Green, President of the Marine Industries Association of Collier County**, noted that he represents the enterprises which repair citizens' boats and homes. Therefore, he said, his group's point of view was directed at the following public benefits: the commercial loading dock which would serve to remove debris from waterways in emergencies and would replace Naples Landing for this purpose; Hamilton Harbor will be properly designed, located on the opposite side of the Bay from Naples Landing, and closer to supply sources to the east, eliminating truck traffic on City streets and reducing the cost of home repairs; there is a need for fuelling in the lower Bay to replace the Keewaydin Dock; and there is a need to relieve overcrowding at Naples Landing through additional parking for access to Bayview Park boat ramp. Mr. Ward also explained that dry storage facilities normally launch on any given day only approximately 7% to 10% of the vessels stored; that dry storage also eliminates pollutants associated with wet dockage; and that the proposed structure is designed to withstand hurricane force winds. In order to assure availability of the marine industry to serve the public, proper facilities are needed, especially if the two commercial marinas now accommodating marine contractors cease to provide this service. Mr. Ward said that Hamilton Harbor was given a set of rules which the City should abide by and avoid litigation. **Ernest Allgrove, 4455 Gordon Drive**, also speaking for Mrs. D. H. Hamilton, 4444 Gordon Drive, and the Staiger family, 1599 Galleon Drive, expressed opposition to Hamilton Harbor, which is a potentially very large complex, due to

what he described as a definite impact upon the environment; alternative locations should be sought. Mr. Allgrove also cited a need to control growth. **Ronnie Poplock, 599 Third Street North**, not present when called. **Eileen Arsenault, 1188 Gordon Drive**, endorsed earlier comments by Harry Timmins relative to the comprehensive plan and pointed out that Naples Bay, being the center of community from the early days, is a definitive natural feature which has suffered from various sources of degradation, especially influx of fresh water from Golden Gate Canal. She cited the danger from loss of mangroves, the loss of manatees, and hazards from increased boat traffic. In conclusion, she thanked the Council for its efforts in preserving the community's resources.

Mayor MacKenzie then ascertained that there were no more members of the public present wishing to address this issue.

Vice Mayor Herms cited a recent indication of support of four Council Members to institute referenda on various subjects, including conservation zoning.

Council Member Tarrant said he had learned that 160,000 people per year move into the State of Florida which equates to eight cities similar in size to Naples; he cited dangers to the environment throughout the world. He disputed the propriety of Hamilton Harbor being a small scale comprehensive plan amendment on the grounds that it would be a priceless access to the Gulf of Mexico for development involving thousands of additional housing units, equating it to General Sherman's march to the sea. Mr. Tarrant also cited comments by Chief Seattle in 1855 as development moved toward the western United States: "You are like strangers who come here in the night. You take from the land whatever it is you want. The Earth is not your brother. The Earth, the sky, the water, the forests are not your friend. They are your enemy. You set about not to live with these but to conquer them and for what, and to what end? For a handful of gold?" Mr. Tarrant contended that the focus of Hamilton Harbor is money. He urged Council Members to ask themselves whether an additional 500 boats, other facilities, and added vehicular traffic would benefit Naples Bay and the surrounding community, and urged them to vote to prevent the occurrence of what he described as a disaster.

Council Member Herms noted that a motion to approve the actions under Item 6 would actually constitute repeal.

MOTION by Herms to APPROVE Agenda Item 6-a as presented, seconded by MacIlvaine, and carried 4-3, all members present and voting (Herms-yes, Galleberg-no, Tarrant-yes, Wiseman-no, Taylor-yes, MacIlvaine-yes, MacKenzie-no).

During the vote the following comments were made: Council Member Wiseman expressed her respect and appreciation for those who had expressed their views. She said that during the recent campaign she had told voters that not having been present for prior discussion on Hamilton Harbor, she did not at that time have complete information; however, even after the March 1 workshop and that day's meeting, she said she continued to lack information. Mrs. Wiseman pointed out that Attorney Rynders had provided legal citations on overhead transparencies which the Council had no opportunity to review in advance and questioned accepting views espoused by him as, she indicated, he had been wrong in the past. She noted the existence of other avenues of appeal for those opposing the project, that the Hamilton Harbor ordinances represented the City's word, and that she had heard nothing to indicate that those prior decisions were in error. While predicting extensive legal fees to be expended by the City, Mrs. Wiseman nevertheless expressed the hope that

Attorney Rynders' statement on behalf of the opposition parties and individuals was sincere in that they would indemnify the City for claims under the Bert Harris Act. Council Member Taylor noted that the staff's deliberate withholding information from the former Council and the news media is as bad as falsification. Therefore, she said that, with the City's legal counsel and staff, the Council proceeded improperly into the DRI process. Council Member MacIlvaine however said that he had received information from the staff during his tenure on the Planning Advisory Board from which he could conclude that Hamilton Harbor was ill advised and had heard nothing to the contrary since that time. Mayor MacKenzie said that she opposed the motion as she believed the action being taken by Council to be premature in light of the imminent opinion from the administrative law judge which would indicate whether charges on withholding information are valid.

Prior to the motion on Item 6-b, City Attorney Cuyler said that he had intentionally remained outside the discussion on Hamilton Harbor, but any other comments directed toward him relative to withholding information from Council, would engender his comments at the next hearing. He then recommended that the resolution under Item 6-b be carried over to the time of final action on the two ordinances due both to past practice and to indication from Attorney Rynders that additional information would be presented. However, he noted that there were no legal prohibitions against voting on the resolution at that time.

MOTION by Herms to CONTINUE Item 6-b to the next City Council meeting, seconded by Galleberg and unanimously carried, all members present and voting (Galleberg-yes, Taylor-yes, Tarrant-yes, Wiseman-yes, Herms-yes, MacIlvaine-yes, Mayor MacKenzie-yes).

MOTION by Herms to APPROVE Item 6-c as presented, seconded by MacIlvaine and carried 4-3, all members present and voting (Wiseman-no, Herms-yes, MacIlvaine-yes, Taylor-yes, Tarrant-yes, Galleberg-no, MacKenzie-no).

Prior to the vote on the above motion, Council Member Wiseman confirmed with City Attorney Cuyler that receipt of the administrative judge's ruling prior to second reading of the ordinances under Item 6 should have no effect since various legal processes would continue to run concurrently. However, during the vote, Council Member Galleberg asserted that the City would be entering what he described as a quagmire by overthrowing an established administrative process, turning its back on obligations, and risking damages resulting in a tax increase on citizens.

Recess: 3:16 p.m. to 3:34 p.m. It is noted for the record that the same Council Members were present when the meeting reconvened.

RESOLUTION 00-8796.....ITEM 13
A RESOLUTION INTERPRETING AND CLARIFYING THE COMMERCIAL HEIGHT CHARTER AMENDMENT NOT TO BE APPLICABLE TO RESIDENTIAL PARCELS OR STRUCTURES WITHIN THE PARK SHORE PD; AND PROVIDING AN EFFECTIVE DATE. Title read by City Manager Kevin Rambosk (3:36 p.m.) City Attorney Cuyler explained that, based on prior Council discussion, this resolution was intended to clarify that purely residential tracts which are in the Park Shore Planned Development are not affected by the recent Charter amendment limiting commercial building heights. Council Member Galleberg, however, noted that it had been his impression that the Council would address all residential PD's, not just those in Park Shore.

Public Input: None (3:40 p.m.)

MOTION by Herms to APPROVE RESOLUTION 00-8796 AS SUBMITTED; seconded by Wiseman and unanimously carried, all members present and voting (Wiseman-no-yes, Herms-yes, MacIlvaine-yes, Taylor-yes, Tarrant-yes, Galleberg-yes, MacKenzie-yes).

First Reading.....ITEM 8
AN ORDINANCE ADOPTING TEXT AMENDMENT PETITION 00-T1, AMENDING ARTICLE V, RESIDENTIAL IMPACT STATEMENT, OF CHAPTER 110 OF THE CODE OF ORDINANCES; PROVIDING A SEVERABILITY CLAUSE, A REPEALER PROVISION AND AN EFFECTIVE DATE. Title read by City Manager Kevin Rambosk (3:42 p.m.) who noted that the staff would review changes represented by this ordinance, using a particular business to illustrate its importance. Planning Director Ron Lee noted that, based on a prior Council review, additional revisions had been made to the proposed ordinance; namely, to require a residential impact statement for a list of commercial activities within 300 feet of a residential use, and to require Council approval for residential impact statements for restaurants, cocktail lounges, live entertainment or extended hours. City Manager Rambosk noted that further research would be devoted to possible need to address businesses which may have intensified their use in some way without having changed the nature of the business. Also with reference to GDSP's (General Development & Site Plans) requiring a residential impact statement, Mr. Lee said that the Council had expressed a desire to then review both. **(See the motion proffered at this time by Council Member Herms, seconded by Council Member Taylor, which appears below after further discussion.)**

City Manager Rambosk then noted that the staff had been working with residents, specifically relative to concerns about open air dining at the rear of Annabelle's Restaurant (Fifth Avenue South), which pre-dated the residential impact statement requirements. There had also been concerns about development of other similar uses in the rear of Fifth Avenue businesses which are in close proximity to residential neighborhoods.

Public Input: (3:35 p.m.) **Phil DePasquale, 681 West Lake Drive**, demonstrated by hitting two drinking glasses together the sound which he said was approximately half amplification caused by the lake between his residence and Annabelle's Restaurant (see Item 9). He said that the City had not lived up to its assurances that residents would be buffered from downtown redevelopment by alleyway and other improvements. He criticized the Staff Action Committee (SAC) for the extent of its power and its lack of concern for residents' interests. In addition to sound, Mr. DePasquale said that residents of his neighborhood are fearful that lighting from Annabelle's Restaurant will be intrusive and that patrons will be able to see into the windows of nearby homes. Mr. DePasquale also noted that because of other night time noise now emanating from Fifth Avenue South, most of the residents in his neighborhood close doors and windows. He told Council that 95% of these residents oppose Annabelle's in its proposed configuration and that the only reasonable solution to potential disturbance is to require that the open air dining area be enclosed.

Vice Mayor Herms recommended that this project not be allowed without a solution that will protect the neighborhood, citing prohibitions in the comprehensive plan of commercial encroachment into residential. Mayor MacKenzie said she believed that as redevelopment area revenues become available, the City would in fact be able to deliver on promises to improve alleys adjacent to Fifth Avenue South. Citing a prior City Attorney's opinion that SAC is merely advisory, Council Member Tarrant asked City Attorney Cuyler to determine the extent of its power. It was noted that this information would be prepared for a future Council workshop discussion on the status of SAC.

Douglas Clark, owner of Annabelle's Restaurant, noted meetings with neighbors, his intent to work with them, and the fact that he had followed all requirements to legally open his

establishment. Therefore, he urged that he be allowed to proceed but suggested that a type of roll-down awning be considered as an alternative. He estimated that an enclosure would cost in the range of \$150,000. Mr. DePasquale, however, disputed the effectiveness of such an awning in blocking sound. Mr. Clark said that the owner of his building was intending to install landscaping at the lakefront and would accept input from residents. **Juergen Tessarzik, 641 West Lake Drive**, also disputed the effectiveness of plastic awnings to reduce noise and noted that noise would be projected onto the lake from the back wall of the restaurant. He predicted significant loss of residential property values, intrusion of privacy from restaurant patrons who would have a clear view inside residences, and overflow parking into the neighborhood. (This was disputed by the restaurant owner.) Mr. Tessarzik also asked the City to look into the building owner's contention of ownership of land to the lake's edge. **Alan Wright, 590 East Lake Drive**, supported dealing with issues before, not after, the restaurant is opened and opposed proposal to install a bench at the rear of the restaurant on the lake to encourage diners to linger after their meal.

MOTION by Herms to APPROVE this resolution as submitted; seconded by Taylor and unanimously carried, all members present and voting (MacIlvaine-yes, Taylor-yes, Tarrant-yes, Galleberg-yes, Herms-yes, Wiseman-yes, MacKenzie-yes).

MOTION by Herms to DIRECT STAFF to work with Annabelle's Restaurant owner and nearby residents to solve potential noise, lighting, landscaping, privacy and other concerns which would have been included in the residential impact statement review; seconded by Taylor and unanimously carried, all members present and voting (Galleberg-yes, Taylor-yes, Tarrant-yes, Wiseman-yes, Herms-yes, MacIlvaine-yes, MacKenzie-yes).

Continued **ITEM 9**
A RESOLUTION APPROVING SAC WAIVER 00-2 FROM SECTION 102-1095 (f) (2) AND (f) (5) OF THE CODE OF ORDINANCES WHICH REQUIRES THAT SIGNS CONSIST OF LETTERS APPLIED DIRECTLY TO THE FAÇADE OF THE BUILDING AND THAT EXTERNAL SIGNS NOT BE TRANSLUCENT, IN ORDER TO PERMIT A TRANSLUCENT GLASS PANEL SIGN FOR ANNABELLE'S RESTAURANT, 494 FIFTH AVENUE SOUTH; AND PROVIDING AN EFFECTIVE DATE. Title read by City Manager Kevin Rambosk (4:45 p.m.). Mr. Rambosk suggested that this item be continued until the April 5, 2000, regular meeting. Petitioner Doug Clark displayed a template which would be lighted from the rear. It was established that translucent signage of this type is not allowed in the Fifth Avenue Overlay District; although a total of 260 square feet of signage is allowed, the proposed sign would cover just five square feet.

Public Input (On continuance): None (4:48 p.m.)

MOTION by MacIlvaine to CONTINUE THIS ITEM TO THE APRIL 5, 2000, REGULAR MEETING, making it a part of the negotiation process cited in the second motion on Item 8 above; seconded by Herms and carried 6-1, all members present and voting (Galleberg-yes, Taylor-yes, Tarrant-yes, Wiseman-no, Herms-yes, MacIlvaine-yes, Mayor MacKenzie-yes).

A prior motion by Herms, seconded by Taylor, to merely continue to the next meeting was withdrawn.

..... **ITEM 14**
CONSIDER A SPECIAL EVEN PERMIT REQUEST BY McCABE'S PUB FOR AMPLIFIED ENTERTAINMENT ON MARCH 17 UNTIL 7:00 P.M. City Manager Rambosk explained that he had requested that this special event be added to the agenda because it includes

amplified music and the event would take place prior to the next City Council meeting. Recreation Manager David Lykins noted the event would include continuation of food and beverage service in and around the Fifth Avenue Plaza area until approximately 10:00 p.m. on St. Patrick's Day with live entertainment (amplified sound) until 7:00 p.m. The sponsor, he said, had reviewed the plans with the Police & Emergency Services and all other criteria except Council approval, had to date been met; in addition, a ten-foot wide barricaded aisle for entrance to the adjacent Sugden Theater will be maintained for patrons of the performance also scheduled for that evening. **Phil McCabe, 699 Fifth Avenue South**, petitioner, indicated that because of the theater performance beginning at 8:30 p.m., he had agreed to terminate music at 7:00. **Susanna Hallston, representing Naples Players**, urged the re-activation of the committee which was intended to regulate and coordinate events in the Fifth Avenue Plaza and consisted of theater representatives and City representatives. Otherwise, she said, information from the Fifth Avenue Association and Staff Action Committee about upcoming events is incomplete and therefore does not allow the theater to plan to accommodate its patrons. While expressing support for restaurants and other activities surrounding the theater, Ms. Hallston nevertheless cited concern that sufficient police monitor the crowds and assist audiences in exiting the theater. Council Member Tarrant complimented Mr. McCabe on the quality of his hotel and restaurant operations. Vice Mayor Herms, however, expressed concern that permitting this event was comparable to allowing someone to hold a party at the front door of the Naples Philharmonic. Ms. Hallston said that she believed that with planning the interests of all parties would be taken into consideration in this case; however, she reiterated her concern that other events on Fifth Avenue be coordinated with the theater before completion of the various approval processes. Vice Mayor Herms, however, observed that when this event had been reviewed by the Staff Action Committee, the proposal had been for McCabe's to continue music until 10:00 p.m., his vote having been the only one on SAC against it. **Ted Tobye, also representing Sugden Theater**, pointed out that under the theater's use agreement with the City, there was to be cooperation so that nothing would occur in the Fifth Avenue Plaza detrimental to theater patrons, many of whom are elderly. However, the working relationship with the City has not occurred, Mr. Tobye said, and cited intoxicated patrons from the various area restaurants requiring police control. City Manager Rambosk indicated that anyone intoxicated in public can be taken into protective custody or even arrested for disorderly conduct when appropriate; nevertheless, this type of incident is infrequent in that area.

Public Input: None

MOTION by Wiseman to APPROVE this event as stipulated with direction to the staff to reinstate the Plaza Committee in order to address logistics relative to this and future Fifth Avenue events; seconded by MacIlvaine and carried 6-1 (Galleberg-yes, Herms-no, MacIlvaine-yes, Tarrant-yes, Taylor-yes, Wiseman-yes, MacKenzie-yes).

.....**ITEM 12**
CONSIDER APPROVING A BUDGET AMENDMENT TO ADD A BUILDING INSPECTOR POSITION TO THE BUILDING DIVISION CONSTRUCTION STAFF, AND APPROVE A PURCHASE ORDER FOR A NEW VEHICLE FOR NEW STAFF'S USE. VENDOR: DUVAL FORD \ PRICE: \$19,200.00 \ FUNDING (FOR BOTH): BUILDING PERMIT REVENUES. City Manager Kevin Rambosk cited significant increase in the demand for building inspections due largely to redevelopment (13,000 inspections in 1996 and 22,000 in 1999) as the need for additional staff and vehicle. Funding is from building permit fees.

Public Input: None

MOTION by Herms to ***APPROVE***; seconded by Tarrant and carried 6-0 (Galleberg-yes, Herms-no, MacIlvaine-yes, Tarrant-yes, Taylor-yes, Wiseman-absent, MacKenzie-yes).

.....ITEM 16

CONTINUE DISCUSSION OF WORKSHOP TOPICS.

MOTION by Herms to ***CONTINUE TO 4/3/00 WORKSHOP***; seconded by Tarrant and unanimously carried, all members present and voting (Galleberg-yes, Herms-yes, MacIlvaine-yes, Tarrant-yes, Taylor-yes, Wiseman-yes, MacKenzie-yes).

.....ITEM 15

DISCUSS APPLICABILITY OF COMMERCIAL BUILDING HEIGHT CHARTER AMENDMENT ON FIRST PRESBYTERIAN CHURCH EXPANSION. Planning Director Ron Lee explained that the church property had been rezoned from PS Public Service to PD Planned Development to accommodate various improvements; however, some of the heights such as the bell tower (44 feet high) and the spire (72 feet high) exceed the recently approved 42 foot height limitation. Therefore, he said, in anticipation of submission of final site plans, staff was seeking Council determination on whether the amendment applies to a church PD. Council Member MacIlvaine stated that he believed that the amendment applied to commercial and that the church is not a commercial building. Council Member Herms agreed, indicating that although there were circumstances which would preclude returning to the PS zoning, PS was nevertheless omitted from the charter amendment intentionally to accommodate uses such as churches.

MOTION to ***DIRECT STAFF TO PREPARE A RESOLUTION*** for April 5, 2000 regular meeting which clarifies that the charter amendment does not apply to this property and to allow staff to move forward (with remaining steps in approval process); seconded by MacIlvaine and unanimously carried, all members present and voting (Galleberg-yes, Herms-yes, MacIlvaine-yes, Tarrant-yes, Taylor-yes, Wiseman-yes, MacKenzie-yes).

.....ITEM 17

DISCUSS PROGRAMMING ON CITY'S GOVERNMENT ACCESS CHANNEL. Vice Mayor Herms clarified that he intended this discussion to apply to the City's current programming. Citing a recent request of staff to prepare a Request For Proposal (RFP) for programming, he urged newspaper advertising and letter writing to determine the level of interest, particularly since in January, 2001, the City will be required to program its own separate channel. Mayor MacKenzie clarified that the currently produced program (Naples Report) airs on Channel 10 rather than the government access channel (54) with production assistance donated by WEVU; Carl Loveday is the volunteer moderator.

With reference to the new channel, Council Member Tarrant expressed concern both about cost and the danger of advocacy programming which may be contrary to the viewpoints of taxpayers. Miss Taylor predicted that experts would come forward with suggestions. Regardless of direction decided upon, City Manager Rambosk said, an item would be budgeted the following year. Council Member MacIlvaine questioned the benefit to taxpayers from this channel. While requesting a more in-depth discussion at a later date, Mr. Rambosk indicated that the main goal was to bring government to the people, largely in the form of televising various meetings; in addition, with the current cable system, interactive programming could be featured. Vice Mayor Herms stressed the importance of the public having more ready access to Council agendas and graphics of various upcoming projects and issues as well as data on members' votes.

Council then discussed the date for a planned excursion to Vero Beach; the date announced was March 21. Council Members Galleberg and Wiseman indicated that their schedules would not allow them to participate. City Manager Rambosk indicated that transportation would be provided from City Hall and that some information would be forthcoming from the City Attorney on the Sunshine Law (Chapter 286, Fla. Stat.); news media will be invited as well as staff and members of the Planning Advisory Board. Video production work will be sought so that a program can be presented later to the public. In a discussion of the need to obtain releases, City Attorney Cuyler indicated that there should be no need to do so for the purposes so far stated. Vice Mayor Herms also urged other Council Members to submit their lists of favorite buildings so that they could be photographed and enable him to include them in his planned presentation to the Old Naples Association on March 29.

CORRESPONDENCE and COMMUNICATIONS

City Manager Kevin Rambosk explained that the **700 Building** had been redesigned to comply with the 42 foot height limit imposed by the recent Charter amendment. However, the towers at the ends of the building still exceed 42 feet, and at a subsequent Council discussion it had been determined that embellishments were to be included in the 42 foot limits. Therefore, Mr. Rambosk said, he was seeking Council direction before acting on the building permit request. A drawing was distributed, a copy of which is contained in the file for this meeting in the City Clerk's Office. Council Member MacIlvaine recommended amnesty in this situation since the building owner had complied with explicit instructions by Council.

MOTION by MacIlvaine that A BUILDING PERMIT BE ISSUED for the 700 Building, pursuant to revisions made in height at a prior direction of City Council; seconded by Tarrant and carried 5-2 (Galleberg-yes, Herms-no, MacIlvaine-yes, Tarrant-yes, Taylor-no, Wiseman-yes, MacKenzie-yes).

OPEN PUBLIC INPUT

Walter Giel, 2258 Eighth Avenue South, indicated that the new Council had corrected many of the issues he had intended to address but cautioned against their being hypocritical.

City Attorney Cuyler suggested that Council make a determination regarding vesting with reference to unbuilt Planned Developments (PD's), noting that several inquiries had been received in the Planning Department. Mayor MacKenzie reported that she had also received several contacts from the public in this regard. It was noted by various members of Council that, based on a prior discussion, no vested rights claims would be heard. **Therefore, City Attorney Cuyler stated that staff would not process any building permits in excess of 42 feet in height in any PD, regardless of whether any portion that PD has been constructed; owners must then seek determination of any rights they may have through the courts.**

OPEN PUBLIC INPUT (cont.)

Betty Pennington, 3430 North Gulf Shore Blvd., asked Council Member Taylor to identify the administrative and legal staff members she had referred to earlier in the meeting as having deliberately withheld information relative to Hamilton Harbor. Mrs. Pennington said that citizens deserved a further explanation. Council Member Taylor said that she was not yet familiar with which staff members create reports, but noted that she believed that legal advice relative to the DRI process had been lacking and that the Hamilton Harbor ordinances are procedurally illegal. City Attorney Cuyler said that he found statements that he had withheld information offensive, that he had not withheld information, that the City had been fully advised, and that such conduct would constitute malpractice. Vice Mayor Herms also observed that it would not have been the City

Attorney's responsibility to interpret whether a project meets the DRI requirement which was more in the purview of the administrative staff. Mr. Cuyler also observed that while Council Member Taylor may have taken the comments of Attorney David Rynders at face value, he said he questioned whether some of the arguments asserted by Mr. Rynders that day and at various other times had been raised in the appropriate forum. Mr. Cuyler indicated that he would nevertheless investigate any issues that the Council believes may have been overlooked. Council Member Tarrant said he did not feel the Council was taking Mr. Rynders' arguments at face value. Vice Mayor Herms pointed out that some of the new information brought to light indicated that former City Manager Richard Woodruff had held meetings with the Hamilton Harbor developers for several months before telling the Council.

CORRESPONDENCE and COMMUNICATIONS

City Manager Kevin Rambosk requested that, because staff is attending to many **projects and requests**, Council Members notify him should they experience delays in receiving responses. Various Council Members expressed appreciation to the staff for its efforts. Council Member MacIlvaine asked whether the four volumes of **City documents** placed into the record by Hamilton Harbor attorney John Passidomo had been provided free of charge. City Clerk Tara Norman responded that charges had been assessed to the statutory limit per page for duplication as well as for staff time after the first half hour; total charge was approximately \$1,000. Council Member Tarrant asked whether any assistance could be rendered to an individual who had written letters to the editor recently about her older, **small home being impacted by construction of a much larger home** next door. City Manager Rambosk explained that some assistance could be rendered through Building & Zoning within existing codes, water runoff being a widespread concern. Vice Mayor Herms said he had written for information on a **directional speaker system** which restricts sound within designated areas such as commercial establishments. At the request of Council Member Taylor, staff will provide information on utilizing the Art in Public Places Committee relative to the sculpture to be placed in conjunction with the Gordon River Bridge rebuilding (**Gateway Committee**). Mayor MacKenzie reminded Council Members to review lighting examples in place along the alley on the north side of **Cambier Park** in order to provide staff with input on wattage. Mayor MacKenzie also noted that the **Naples Report** TV show would in April be devoted to the art in public places program; however, there is a need for Council's input on future programs well in advance in order to schedule guests. Vice Mayor Herms proposed that the Council consider someone to replace Naples Report moderator Carl Loveday because Mr. Loveday, as an employee of Naples Community Hospital, has a conflict of interest in what he termed extreme zoning approvals being sought by that institution. Mayor MacKenzie clarified that the City, as one of the local governments, had responded to a request of Media One for a half-hour program. Mr. Loveday was subsequently interviewed and selected by the Council, his time being donated as is the case with other community projects, Mayor MacKenzie noted. She also explained that there is no quid pro quo for Mr. Loveday's services, that he is not paid by NCH for the time he spends on the Naples Report, that his employer has nevertheless approved his work on the Naples Report, and that there is also no charge for program production or airing. Council Member Tarrant, while praising Mr. Loveday's abilities, stated that the public may perceive that there is indeed a conflict of interest. However, Council Member Wiseman said she saw no conflict of interest; however, Council Member Taylor asked City Attorney Cuyler to comment. Mr. Cuyler said that he did not feel there to be a conflict of interest under the circumstance described if Mr. Loveday does not approach the Council, and if his services are given to the government as a whole, it is not considered a gift. However, in response to Mayor MacKenzie, City Attorney Cuyler said that it could be considered a conflict of interest on the part of the television production and air time if the company comes to the City for franchise approval, although the services as outlined would also not be considered a gift

City Council Regular Meeting – Wednesday, March 15, 2000 – 9:00 a.m.

since it is given to the City and not individual Council Members. Council Member Galleberg said he saw no conflict of interest and said that he was embarrassed by this discussion. Council Member MacIlvaine declined comment noting that he wished to give the issue further thought. Mayor MacKenzie suggested that a decision be held in abeyance until the next workshop.

ADJOURN
6:45 p.m.

Bonnie R. MacKenzie, Mayor

Minutes prepared by:

Tara A. Norman, City Clerk

Minutes Approved: 5/17/00

Supplemental Attendance List

Jeffrey Birr
Harry Timmins
Fran Stallings
David Rynders
Wheeler Conkling
David Guggenheim
John Passidomo
William Treat
Allan Slaff
Gordon Kinder
Bill Blaikie
Kirk Materne
John Scott
Reverend Charles Lewis
Peggy Smith

Douglas Clark
Juergen Tessarzik
Alan Wright
Phil MacCabe
Susannah Hallston
Ted Tobye
Betty Pennington
Arlene Guckenberger
James Dean
Barbara Drescher
Charles Kessler
Michael Simonik
Craig Dunlap
Amy Rego
George Varnadoe

Susan Grove
John Burnham
Randy Ward
Ernest Allgrove
Eileen Arsenault
Ronnie Poplock
Phil DePasquale
Nancy Lindsey
Richard Yavonivich
Walter Giel
William Harvey
George Williams
Tom Morgan
Jack Wasmer
Barbara Drescher



THE CONSERVANCY Of Southwest Florida

1450 Merrihue Drive • Naples, Florida 34102
941.262.0304 • Fax 941.262.0672
www.conservancy.org

March 14, 2000

Honorable Mayor
Honorable City Council
City of Naples
735 Eighth Street South
Naples, FL 34102

Re: Response to documents submitted in Hamilton Harbor issue

Dear Mayor and City Council:

This is a response to the letter from Young, Van Assenderp, Varnadoe & Anderson dated February 29, 2000 regarding repeal of Ordinance Nos. 99-8544 and 99-8545 and Resolution No. 99-8540 ("Letter"). Please incorporate this response into the record for the hearing to be held on the Hamilton Harbor issue tomorrow. The vast majority of the Letter contains hollow, unsupportable legal terminology designed merely to obfuscate the real issues. The Letter is an affront to the integrity of the City Council and an unethical attempt to intimidate individual City Council members.

Public participation

The Letter asserts that public participation occurred prior to passage of the 1999 Hamilton Harbor ordinances, and therefore the public repeal process would be inappropriate. Following the Letter's logic, if repeal of imprudent laws were never allowed to occur, slavery would still be a viable institution today. Prohibition would still be in effect. Both issues received serious public attention prior to enactment of laws, yet both were wrong.

The City Council has a historic opportunity to undo the harm that will be done to Naples Bay and the Naples community if Hamilton Harbor is allowed to proceed. Of course, The Conservancy is requesting that the City Council employ procedures that are completely open to the public during the repeal process.

Additionally, the Letter's emphasis on the fact that these issues were fully determined and open to the public is misleading. The public was not invited to several meetings between city staff and the landowner, nor was it invited to give meaningful input into the landowner's planning process. Furthermore, The Conservancy and others requested vociferously during the process leading up to passage of the ordinances that the "fast-tracked" process slow down to enable the public to fully evaluate the Hamilton Harbor proposal. Those requests were not honored by City Council.

Changed circumstances

The Letter's repeated emphasis on the fact that there are no changed circumstances or new information is misplaced. There is no such requirement for repeal of a previously approved but not effective ordinance, and the Letter fails to assert any law or ordinances so requiring.

The case of *Shannon Development Co., Inc. v. City of Naples* is cited often in the Letter. The case stands for the proposition that attempts by the City Council to rescind a previously approved ordinance which had *become effective* and *which bound the City contractually*, without placing evidence in the record supporting the reversal, could not stand.

The ordinances at issue in the present instance have not become effective and are therefore not binding on the City. The City of Naples and Collier Enterprises *admitted exactly this* in their motion to dismiss the circuit court case now pending regarding Hamilton Harbor (copy enclosed). Furthermore, competent and substantial evidence has been and will continue to be placed in the record as to why the ordinances and resolution should be repealed.

"Takings"

Federal law. The 5th Amendment to the U.S. Constitution states that the government cannot take private property for public use without just compensation. That means if a governmental entity "takes" private property for public purposes, it must pay the landowner the fair market value. A "taking" might occur when a claimant proves that governmental action removes "all economically viable beneficial uses" of the property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003(1992). If economically viable uses for the property remain, a taking has not occurred. The landowner would have great difficulty proving in court that having to follow the DRI procedures instead of the abbreviated small-scale amendment procedures would constitute a taking under the *Lucas* standard. Furthermore, the landowner is not precluded from developing the vast majority of its property not containing mangroves, if the proper permits are approved.

The Letter cites the Naples Landing case again in an attempt to demonstrate that a taking would occur if the ordinances are repealed. The Letter quotes the case:

Whether the original 1996 and 1997 decisions by a prior City Council were palatable to the City's residents or not, the decisions were legal and binding. [Emphasis provided by Letter]

Yet Collier Enterprises asserts that neither ordinance is binding (see motion to dismiss, attached). The Naples Landing case does not apply to Hamilton Harbor.

State law. According to state law, relief is proper when a governmental action has "inordinately burdened" an existing use of real property or a "vested right" to a specific use of real property." Section 70.001, *Florida Statutes*. "Inordinately burden" means that the governmental action has "directly restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of real property. . . ."

Whether the landowner has acquired "vested rights" in the subject property is a matter of equitable estoppel and substantive due process. A governmental action does not violate due process if it has "a rational relationship with a legitimate general welfare concern." *Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208 (11th Cir. 1995), quoting *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1388 (11th Cir. 1993), *cert. denied*, 511 U.S. 1018, 114 S. Ct. 1400 (1994). There can be no argument that protection of mangroves, boat traffic concerns, water quality degradation in Naples Bay and protection of endangered manatees would qualify as legitimate general welfare concerns, and repeal of the ordinances which would conflict with those concerns is rationally related to those concerns.

The arguments presented in support of an equitable estoppel argument are untenable. Spending money on litigation is not considered a change in position in reliance on adoption of the subject ordinances. Either is a shift in attitude from "readiness to go forward" to "suspending its planning and permitting operations in order to actively defend" the development project in court. The Letter does not, and cannot, cite any law supporting this position. Furthermore, the City has not taken a position on which the landowner could rely because, again, the ordinances are not effective.

The landowner does not have vested rights to destroy the mangroves on its property. If it did, the landowner would not have sought a PD ordinance change and Plan Amendment to accommodate such destruction of a habitat of special concern. And the ordinances are not yet effective because their approval has been appealed.

The specific reason that the ordinances have not become effective, whether the City or a third party is responsible, probably is irrelevant. A separate legal memorandum on this topic is planned before the second reading occurs.

The Letter's threat on page 9 that Policy 1-6 itself, which prohibits development in habitats of special concern, constitutes a taking is absurd, directly conflicts with the U.S. Supreme Court and is unsupported in fact or law.

Res judicata and collateral estoppel

Such big Latin words. They mean nothing in the context of a city council decision to repeal an ordinance.

Res judicata means that a final judgment entered by a court is absolute and puts to rest every justiciable and *actually litigated* issue. *Albrecht v. State*, 444 So.2d 8, 11-12 (Fla. 1983).

Collateral estoppel also is strictly a judicial doctrine prevents identical parties from relitigating the same issues that have already been decided. *Mobil Oil Corp. v. Shevin*, 354 So.2d 372, 374 (Fla. 1977). The parties and issues must have been identical, and the matter must have been fully litigated and determined in a contest, which results in a final decision of a court of competent jurisdiction. *Id.* Collateral estoppel precludes relitigation of issues *actually litigated* in a prior proceeding. *Hochstadt v. Orange Broadcast*, 588 So.2d 51 (Fla. 3d DCA 1991).

Rule 4-4.1 of the Florida Rules of Professional Conduct, governing the conduct of Florida's attorneys, states that "in the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person." The Preamble to these Rules states: "A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and *public officials*." [Emphasis added]

The drafters of the Letter are seasoned members of the Florida Bar. They know that res judicata and collateral estoppel are terms reserved for the courtroom and have no place in the context of the repeal of municipal ordinances. In fact, the Florida Supreme Court held that the comprehensive plan amendment process is legislative, and that rezoning issues are either legislative or "quasi-judicial." Either way, no court in Florida or elsewhere has applied these specialized terms to a municipal decision, whether it is a legislative or quasi-judicial decision, or to a matter that has yet to be actually litigated in court. The Letter presents false statements of law by failing to inform the City Council that these legal arguments have no application in this situation.

Equal protection

Likewise, the Letter's equal protection argument is unsupported by any law and is so weak that the drafters must know it could not possibly prevail in court. "Singling out" the Hamilton Harbor project for enforcement of Policy 1-6 is lawful unless the landowner can prove that adherence to the policy is not rationally related to a legitimate governmental interest. Most clearly, protection of mangroves and water quality in Naples Bay are legitimate interests, and prohibiting development of a marina in mangroves along the edge of the bay most certainly is rationally related to these interests!

Other arguments

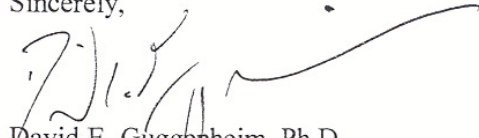
New interpretation of the Comp Plan, especially Policy 1-6 as saying "no development as of right," which was elicited during direct examination at the administrative hearing and which did not hold up against cross examination, is outlandish.

The Letter's arguments concerning contract zoning, unlawfulness of the Plan Amendment and other specific legal points are fully set forth in administrative hearing and circuit court records, as cited in the Letter. Furthermore, the Letter's discussion regarding the appropriate use of the DRI and small scale amendment processes is strained, is fully refuted in The Conservancy's litigation documents, contains wrong interpretations of the law and wrong application of the facts to the law.

The Conservancy has never supported the removal of mangroves in any Habitat of Special Concern, or elsewhere. Repeated references to the North Road realignment are misplaced. The Conservancy protected over 60 acres of mangrove and other wetland habitats surrounding the airport by insisting that if the Collier County Airport Authority was required by law to move the road, The Conservancy would request that it be a party to a perpetual conservation easement over the surrounding habitat. It is highly inappropriate for landowner's counsel to continually reiterate this issue when it has no relevance to the issue of whether the future water quality of Naples Bay will be impacted by the development known as Hamilton Harbor and the planned residential development of the adjacent 2,000 acres.

We appreciate this opportunity to comment for the record regarding this very important issue to The Conservancy and the citizens of the City of Naples.

Sincerely,



David E. Guggenheim, Ph.D.
President & CEO

encl: Motion to Dismiss

cc: F. Wheeler Conkling, President
Citizens to Preserve Naples Bay
Harry H. Timmons, Vice-president
Citizens to Preserve Naples Bay
Brad Cornell, President
Collier County Audubon Society
James K. Kessler
Emmett F. Stallings
The Save the Manatee Club
Responsible Growth Management Coalition
Environmental Confederation of Southwest Florida

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR
COLLIER COUNTY, FLORIDA
CIVIL ACTION

THE CONSERVANCY OF
SOUTHWEST FLORIDA,

Plaintiff,

vs.

THE CITY OF NAPLES, et al.,

Defendants.

CASE NO. 99-2809-CA

Attachment 2
3/15/00 Regular Meeting
Page 6 of 8

**DEFENDANTS' MOTION TO DISMISS OR,
IN THE ALTERNATIVE, TO STAY PROCEEDINGS**

Defendant Collier Enterprises, Ltd. moves to dismiss the Plaintiff's "Verified Complaint" on the grounds that it fails to state a cause of action upon which relief may be granted. Plaintiff does not attach to the Verified Complaint a copy of the ordinance being challenged as required by Rule 1.130, Florida Rules of Civil Procedure, and Plaintiff does not allege (and could not properly allege) that the ordinance being challenged has become effective. As explained below, the ordinance does not become effective until an amendment to The Naples Comprehensive Plan becomes effective, and the Verified Complaint does not allege the satisfaction of that condition precedent. Accordingly, this action should be dismissed or, in the alternative, it should be stayed until the ordinance in question becomes effective.

MEMORANDUM IN SUPPORT

In Paragraphs 6 through 9 of the Verified Complaint, titled "Nature of the Action," Plaintiff explains that "The Conservancy seeks invalidation of the City's approval of Ordinance No. 99-8545" (hereafter referred to as "the Rezoning Ordinance") because it is

allegedly inconsistent with The City of Naples Comprehensive Plan. A copy of the Rezoning Ordinance being challenged is not attached to the Verified Complaint, as required by Rule 1.130, Florida Rules of Civil Procedure, and, therefore, the claim must be dismissed.

This is not merely a technical or procedural deficiency. If a copy of the Rezoning Ordinance had been attached, it would have shown that this case is not ripe for adjudication. Section VI of the Rezoning Ordinance (a copy of which is attached to the Complaint in a companion case, Kessler v. Naples, Case No. 99-2812-CA) provides that it "shall take effect . . . only upon" the "effective date" of "an ordinance adopting Small Scale Comprehensive Plan Amendment Petition 99-CPASS3, amending the Future Land Use Map of the Comprehensive Plan" (hereafter referred to as "the Amendment").


Thus, the Rezoning Ordinance, which is the subject of Plaintiff's Complaint, does not take effect until the effective date of the Amendment. Section 163.3187(3)(c), Florida Statutes, explains when the Amendment may become effective. Specifically, the statute provides that if a small scale development amendment to a Comprehensive Plan is properly and timely challenged, it does not become effective "until the state land planning agency or the Administration Commission . . . issues a final order determining the adopted small scale development amendment is in compliance."

Plaintiff has not pleaded that the Amendment in this case has become effective (and could not properly make such an allegation since the Amendment has been challenged and is currently subject to administrative proceedings). If the Amendment never becomes effective, the Rezoning Ordinance being challenged by Plaintiff's Verified Complaint shall

never become effective, and there will be no need for a court to determine its validity. If, on the other hand, the Amendment does become effective, Plaintiff's claim that the Rezoning Ordinance is inconsistent with The Naples Comprehensive Plan would need to be determined in light of the Amendment.

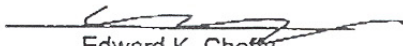
For all of these reasons, this case is not ripe for adjudication. It should be dismissed for failure to comply with Rule 1.130, Florida Rules of Civil Procedure, and failure to state a claim or, in the alternative, it should be stayed until the Rezoning Ordinance becomes effective, which cannot happen until the validity of the Amendment has been determined in pending administrative proceedings.

CHEFFY PASSIDOMO
WILSON & JOHNSON
821 Fifth Avenue South, Suite 201
Naples, Florida 34102
(941) 261-9300
Attorneys for Defendants The City of
Naples and Collier Enterprises, Ltd.

By: 
Edward K. Cheffy
Florida Bar No. 393649

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Steve Pfeiffer, Esquire, David A. Theriaque, Esquire, P.A., 837 East Park Avenue, Tallahassee, Florida 32301 and Frederick Hardt, Esquire, Roetzel & Andress, 850 Park Shore Drive, Naples, Florida 34103, this 18th day of October, 1999.


Edward K. Cheffy

YOUNG, VAN ASSENDERP, VARNADOE & ANDERSON, P. A.
ATTORNEYS AT LAW

REPLY TO:

Naples

R. BRUCE ANDERSON
TASHA O. BUFORD
DANIEL H. COX
TIMOTHY S. FRANKLIN
DAVID P. HOPSTETTER*
C. LAURENCE KEESEY
KENZA VAN ASSENDERP
GEORGE L. VARNADOE
ROY C. YOUNG

*BOARD CERTIFIED REAL ESTATE LAWYER

OF COUNSEL
DAVID B. ERWIN
A.J. JIM SPALLA

February 29, 2000

GALLIE'S HALL
225 SOUTH ADAMS STREET, SUITE 200
POST OFFICE BOX 1833
TALLAHASSEE, FLORIDA 32302-1833
TELEPHONE (850) 222-7206
TELECOPIER (850) 561-6834

SUNTRUST BUILDING
801 LAUREL OAK DRIVE, SUITE 300
POST OFFICE BOX 7907
NAPLES, FLORIDA 34101-7907
TELEPHONE (941) 597-2814
TELECOPIER (941) 597-1060

The Honorable Bonnie R. MacKenzie, Mayor
and Members of the City Council
City Hall
735 8th Street South
Naples, FL 34102

COPY

Dear Mayor MacKenzie and Members of City Council:

This firm represents Hamilton Harbor, Inc. (Collier Enterprises), and is in receipt of a copy of the correspondence to you dated February 22, 2000 from opponents of the Hamilton Harbor project, encouraging you to direct your staff to take the actions necessary for the Council to reconsider and repeal the ordinances adopted by the City approving the Hamilton Harbor Marina project. As you may be aware, there are presently pending three different legal challenges to these ordinances which the City and our client have vigorously defended. This new attempt to subvert the pending legal proceedings through political manipulations is both unlawful and a tacit admission that legal arguments advanced by the project's opponents are on a weak legal foundation. Simply stated, Hamilton Harbor's opponents do not want to have their legal challenges determined in either a court of law or in an administrative hearing. Every one of the arguments in the opponents' recent correspondence was raised at the prior City Council hearings and in the legal pleadings which were filed in challenges to the City's approvals.

The opponents of the Hamilton Harbor project would have City Council ignore the many public benefits derived from the project, void the integrity of the public participatory process that culminated in the approval of Hamilton Harbor, and deny public participation by simply repealing the implementing ordinances.

LEGAL IMPEDIMENTS TO A REVERSAL OF THE CITY'S POSITION

Prior to adopting the Ordinances approving the Hamilton Harbor project, the City held properly noticed public hearings, heard factual and legal arguments, received facts and expert

The Honorable Bonnie MacKenzie
City Council Members
February 29, 2000
Page 2

Attachment 3
3/15/00 Regular Meeting
Page 2 of 21

opinions into evidence from all sides, and on the basis of the competent, substantial evidence considered, made a determination on all issues sought to be recycled and reconsidered by the project opponents. The City is prohibited from reversing its prior approval by the following legal principles:

1. The opponents' request is nothing more than a request for reconsideration, which is untimely, and therefore invites the City Council to violate its own rules and regulations. The request flies in the face of the City Council's reconsideration procedures set forth in Resolution 98-8218, as well as the procedures for voter initiated reconsideration and repeal of ordinances established by Article VIII of the City Code of Ordinances. Neither the City Council nor any voter can properly cause a reconsideration or repeal of an ordinance adopted under the City's Land Development Code more than thirty days after the date the ordinance was adopted. The policy reasons for such ordinances are clear. Citizens have a right to rely on the finality of actions of City Council after a defined period of time, and a property owner has a right to rely on the procedural due process requirements established by the City Council's Resolutions and Ordinances.

As Mayor (then Councilwoman) MacKenzie noted regarding the Naples Landing issue (quoted in the attached court opinion):

Ms. MacKenzie: There have been times when previous Councils have voted an extended use that I personally did not think was good. And I always felt that it was, because it was the word of the City that it was important, whether I personally approved of it or not, to keep that word.

It should be noted that there is no procedure for repeal contained in the City's Land Development Code. The reason is simple - zoning and land use decisions, especially those involving the City's Comprehensive Plan, require careful public scrutiny and open public participation. The process culminating in the approval of Hamilton Harbor provided that public participation. The proposed repeal does not. It is a blatant heavy handed attempt to deny the citizens of Naples material public benefits and any meaningful opportunity to be heard on a significant land use matter.

2. The Court's opinion in Shannon Development Company, Inc. et al vs City of Naples, a/k/a The Naples Landing Case, a copy of which Court opinion is attached, clearly states that the City cannot reverse a prior approval simply because a new City Council has been seated with members holding a different opinion than that held by their predecessors as to the efficacy of that prior Council's actions. Paragraph 16 of the opinion, set forth below, should serve as a clear alarm bell ringing to this new Council not to engage in the same legal folly on Hamilton Harbor as a prior Council did on Naples Landing. It should be even more alarming in light of the

fact that the Naples Landing involved City owned property. Hamilton Harbor, Inc. is a private land owner with property interests which would be destroyed by the City's repeal of the Ordinances, resulting in substantial takings damages. The Court's opinion states in pertinent part:

"16. Whether the original 1996 and 1997 decisions by a prior City Council were palatable to the City's residents or not, the decisions were legal and binding. Subsequent and differently constituted City Councils may not abrogate prior government actions without impunity, whether the subsequent Council believes that there is now a different political agenda or, in the alternative, whether the government just believes that it made a bad deal. Clearly, all persons and entities are entitled to contractually bind themselves to courses of action which they thereafter realize may not have constituted such a good bargain." (Emphasis added.)

3. The doctrine of res judicata prohibits the City from reversing its prior determination on Hamilton Harbor unless there has been a substantial change of circumstances relating to the project approval sufficient to cause a different determination, and none have been shown. Res judicata means that the City Council's decision in a matter that has been previously adjudged by the City Council is conclusive, and absent an order from a court of competent jurisdiction, serves to prohibit the parties to the matter from rearguing, and the City Council from rehearing, the matter decided. Opponents have merely realleged the same old arguments, and have not identified any changed circumstances that would allow reconsideration.

4. The doctrine of equitable estoppel prohibits action by the City that would affect the rights of Hamilton Harbor, Inc. Under Florida law, equitable estoppel occurs whenever a property owner in good faith, relying upon some act of the government, has made a substantial change in position or incurred expenses such that it would be inequitable and unjust to allow the government to change its position. That test is certainly met here. Hamilton Harbor, Inc. relied on the enactment of the ordinances and shifted from a position of readiness to go forward with the project, to one of necessarily suspending its planning and permitting operations in order to actively defend the public benefits and assert its rights by participating in the defense of the Ordinances along with the City. Further, it incurred substantial litigation expenses assisting with the City's defense of the Ordinances in legal and administrative challenges instituted by the opponents to the project. These facts demonstrate a reasonable, material alteration of its position resulting from actions taken by the City. Under such circumstances, application of the rules of fair play will not permit the City to lead Hamilton Harbor, Inc. into a position based on the actions of the City, only to have the City then take actions contrary to that position and to the detriment of the rights of Hamilton Harbor, Inc.

5. The principle of collateral estoppel operates to prohibit the City from adopting legal arguments and positions in any new proceedings that are contrary to legal arguments and positions it has adopted in proceedings before the Circuit Court, the Division of Administrative Hearings, and the Second District Court of Appeal concerning the same subject matter.

6. The City Council validly adopted the Ordinances permitting the Hamilton Harbor project when it determined, based on competent, substantial evidence, and after consideration of public protests against the project presented during the Council's deliberations, that the change was in the public interest. Hamilton Harbor, Inc. has expended substantial amounts of money in the planning of the project and in working with the City, as well as opponents of the project, to develop a plan for the property that recognizes the interest of the citizens of the City, while protecting its reasonable, investment backed expectations. In spite of these planning efforts, legal challenges were raised, resulting in the extensive litigation expenses incurred by Hamilton Harbor, Inc. There has been no demonstrable change in circumstances, other than political caprice, that would explain a shift in the official mind. Therefore, unilateral reversal by the City of its prior approval would constitute an arbitrary and capricious action which would violate the substantive due process rights of Hamilton Harbor, Inc.

7. Hamilton Harbor has acquired vested rights in relation to the City: (i) by virtue of the City's approval of the project and Hamilton Harbor's agreement to convey lands to the City; and (ii) by virtue of Hamilton Harbor's consent to the City's extra-territorial exercise of jurisdiction over Hamilton Harbor's lands outside the City which were the subject of prior approved land uses by another governmental entity, and the City's subsequent approval of different land uses for those lands. Taking action in detriment to these vested rights would expose the City to a claim for damages based on established regulatory takings doctrine, as well as under the Bert J. Harris, Jr., Private Property Rights Protection Act.

8. To single out the Hamilton Harbor project for application of a strict reading of the Conservation and Coastal Management Element's Policy 1-6 would violate the state and federal constitutional guarantees of equal protection of the law. The interpretation promoted by the proponents of reconsideration flies in the face of the precedent set by the City's approval of other developments in habitats of special concern, such as Windstar, the Airport's North Road project and, most recently, the unanimous approval of the development plan for the Fleischmann (old Chamber site) property. The criteria and requirements of the comprehensive plan must be applied equally to all citizens, regardless of political alliances or animosities.

Based on the foregoing legal principals and the procedural requirements established by City Resolution 98-8218 and Chapter VIII of the City Code of Ordinances, the undersigned respectfully submits that the City is not empowered to properly reconsider or repeal the Ordinances adopted approving the Hamilton Harbor Marina project. Therefore, the City Council

The Honorable Bonnie MacKenzie
City Council Members
February 29, 2000
Page 5

should not entertain a motion to direct staff to take the unlawful actions requested by the February 22 correspondence.

REBUTTAL OF ARGUMENTS CONTAINED IN CORRESPONDENCE
DATED FEBRUARY 22, 2000

The opponents' correspondence recycles arguments that were considered and rejected at the prior hearings conducted by the City Council, and in some instances considered and rejected by the State Department of Community Affairs and the courts. Nonetheless, for the benefit of the members of the Council who were not present for the Hamilton Harbor hearings, we will address each of these recycled and rejected arguments sought to be resurrected by the losing side.

The letter suggests five "grounds" for the City Council to reverse its June 2, 1999, approval of Hamilton Harbor. The letter demands reconsideration by the City for the following reasons: (1) the City illegally entered into "contract zoning" with Collier Enterprises; (2) the City "abused" the statutory provision authorizing small scale development activity amendments to the Future Land Use Map; (3) the City's Plan Amendment created internal conflicts with other provisions in the Comprehensive Plan; (4) "false information" was presented; and (5) the City Staff Reports omitted information.

Initially, it must be recognized that all of the above allegations have been raised before in one or more of the following venues:

A. The opponents, or their representatives, appeared at Planning Advisory Board ("PAB") and City Council meetings. David Rynders, attorney for the opponents, appeared before the City Council and raised these same issues prior to the City's final approval on June 2, 1999. The City Attorney and planning staff did not concur with or support any of the points or objections raised by Mr. Rynders as a basis for denying approval for the Hamilton Harbor Plan Amendment or PD zoning.

B. In May, 1999, the opponents filed a Complaint for Declaratory and Injunctive Relief in the Circuit Court in and for Collier County, which raised the contract zoning and "abuse" of statutory plan amendment procedures issues. The Complaint (Case No. 99-1743-CA) was dismissed by the Circuit Court and is now on appeal (Second DCA Case No. 99-2132).

C. The opponents' challenges to the City's rezoning of Hamilton Harbor remain pending in Circuit Court (Case Nos. 99-2812 CA and 99-2809 CA).

D. The opponents petitioned for a formal administrative hearing to challenge the compliance of the plan amendment with Chapter 163, Florida Statutes. The opponents

The Honorable Bonnie MacKenzie
City Council Members
February 29, 2000
Page 6

participated in a five day formal administrative proceeding held in December, 1999, before Administrative Law Judge Stevenson (DOAH Case Nos. 99-2599 GM and 99-2600 GM). A Recommended Order from the Administrative Law Judge is expected to be issued during the week of March 6, 2000.

The issues raised in the letter are not new. All of their issues are addressed in, and should properly be resolved by, the Circuit Court, Appellate Court, and Administrative cases listed above. However, a brief response to each of the five points raised in the letter is provided below.

1. The City Did Not Engage in Contract Zoning.

The essence of an illegal "contract zoning" in Florida is an ancillary contract or agreement between the City and property owner that was related to, but isolated from, the public zoning decision. The letter admits that under Florida Law, "contract zoning" involves a "zoning ordinance subject to various covenants and restrictions in a collateral deed or agreement to be executed between the City and the property owner." (Letter, Page 2).

In the case of Hamilton Harbor, there simply is no ancillary contract. All of the public benefits that accrue to the City from the Hamilton Harbor project (e.g. the required dedication of 103 acres of land) were thoroughly discussed at two PAB meetings, two City Council meetings, and are required to occur before building permits for the Marina are issued. There simply are no "various covenants and restrictions in a collateral deed or agreement to be executed" in the future between the City and Collier Enterprises.

Developer commitments and mitigation of environmental impacts are accepted and encouraged aspects of the development review and zoning processes throughout Florida. With regard to Hamilton Harbor, the plan amendment and PD zoning ordinances speak for themselves; there is no private contract or subsequent agreement between the City and Collier Enterprises. There is no merit to the opponents' contention that the City's approvals of the Hamilton Harbor Plan Amendment and PD rezoning amount to contract zoning. The City Attorney refuted this allegation at the Council meetings and the Circuit Court Judge dismissed the Complaint that raised this allegation. The Second District Court of Appeal will determine whether the position taken by the City and the Circuit Court Judge is correct.

2. The City Did Not "Abuse" Section 163.3187(1)(c) Florida Statutes, Which Authorizes Adoption of Small Scale Development Activity Amendments.

This issue was also presented at the City Council meetings, was raised in the opponents' Circuit Court complaint that was dismissed and is now on appeal, and was a subject in the administrative hearing held in Naples in December. It is anticipated that the Administrative Law

Judge will issue his Recommended Order ruling on this case in early March, 2000.

The letter accuses the City Council of abusing the statutory procedures and illegally adopting the Hamilton Harbor Comprehensive Plan Amendment as a "small scale development activity amendment".

The statements in the letter concerning this issue are inaccurate and not supported by the law. Section 163.3187(1)(c), Florida Statutes, authorizes local governments to adopt small scale development amendments under the following conditions pertinent to Hamilton Harbor:

- (1) the proposed amendment involves a use of 10 acres or fewer, and;
- (2) the proposed amendment does not involve a text change to the goals, policies and objectives of the Comprehensive Plan, but only proposes a land use change to the Future Land Use Map.

The City's approval of a plan amendment for Hamilton Harbor was entirely consistent with Section 163.3187(1)(c), Florida Statutes, for the following reasons:

- A. It is a fact, as the letter admits (Page 5, last paragraph), that "the only change made to the Plan was a redesignation of 5.5 acres of land on the Future Land Use Map.
- B. There is nothing in the Growth Management Act's Section 163.3187, Florida Statutes, that prohibits the City's adoption of a small scale development activity amendment for land (so long as it is 10 acres or less) that happens to be part of an existing or proposed Development of Regional Impact (DRI).
- C. The Department of Community Affairs, the "State land planning agency" responsible for interpreting and enforcing both the DRI law and the Growth Management Act, advised the City that it could utilize the small scale development amendment process for the map change for 5.5 acres of land within the City of Naples. The Department intervened in the formal DOAH proceeding solely for the purpose of supporting the Department's position that the City's utilization of the small scale development activity amendment process did not violate the law.
- D. All proposed physical development activity at Hamilton Harbor within the City's jurisdiction is limited to the 5.5 acre plan amendment parcel. This 5.5 acre parcel will contain the 36 wet slips and restaurant facility, which are appropriate uses within a "Waterfront Mixed Use" designation. The 103 acres to the south are already designated "Conservation" and will not be disturbed by any development. This land will be dedicated to the

The Honorable Bonnie MacKenzie
City Council Members
February 29, 2000
Page 8

City for preservation in perpetuity. The Phase II development at Hamilton Harbor, a dry storage facility for 450 boats, is not located within the City limits and is already properly designated for this use on both the Collier County Comprehensive Plan and PUD zoning ordinance. Therefore, the 5.5 acres covered by the plan amendment for Hamilton Harbor, is the only City land that will be developed or that could have been a part of a Comprehensive Plan Amendment by the City of Naples.

3. The City's Plan Amendment Did Not Create Internal Inconsistencies With Other Provisions In The Plan.

The allegations in the letter concerning inconsistencies between the 5.5 acre Future Land Use Map amendment and other goals, objectives and policies of the City's plan were also raised by Mr. Rynders and others at the PAB and City Council meetings that considered the Hamilton Harbor proposal. In addition, the five day administrative hearing held in Naples in early December 1999, thoroughly addressed all of these points. The City of Naples Planning Director and Natural Resources Director were recognized as expert witnesses at the DOAH hearing. They both refuted these contentions, as did the expert witnesses offered by Collier Enterprises.

The question whether the plan amendment is internally consistent with other provisions of the City of Naples Plan is a legal question that will be determined, after due consideration of the facts and law, by the Administrative Law Judge. His decision will follow his review of the massive amount of evidence and expert witness testimony the parties presented at the final hearing. However, as a general response to the letter's allegations concerning the map amendment's internal consistency with the remainder of the plan, Collier Enterprises offers the following points:

(A) The letter attempts to focus attention on one policy (Policy 1-6) in the Conservation and Coastal Management Element. Read alone, out of context, and with no understanding of its history or interpretation, this policy indicates that no development shall be allowed in habitats of special concern. First, it should be noted that the City's Planning Director testified under oath that the meaning of Policy 1-6 is that "no development as of right" shall be allowed in such habitats. The City's expert witnesses all agreed that the Plan authorizes "development" to be approved in "Conservation" areas, after undergoing the City's DSEI review process. A full understanding of the Plan's meaning and intent can only be gained through a comprehensive reading of its goals, objectives and policies, rather than focusing on one policy, taken out of context.

(B) For years the City has reviewed development proposals within conservation areas in conjunction with City ordinances and Comprehensive Plan provisions establishing the DSEI review process. The very term "Development of Significant Environmental Impact"

conveys the plain meaning and intent of the City's Plan: some development impacts in environmentally sensitive areas may be approved, after thorough review.

The City Council recently considered a development proposal for the Fleischmann property next to Coastland Mall which directly involved a Habitat of Special Concern located on site. During the City Council debate about the Fleischmann property, Councilman Herms raised the question of whether the City allowed development in Habitats of Special Concern, given the wording of CCME Policy 1-6. After a thorough discussion by Council including advice from its staff on the history and intent of this provision of the Comprehensive Plan, the City Council voted unanimously to approve the proposal for the Fleischmann property. The City also recently approved, with the support of The Conservancy, the removal of mangroves (a Habitat of Special Concern) in connection with the North Road realignment at the City of Naples Airport. These actions were appropriately reviewed and approved pursuant to the same DSEI review process applied to the Hamilton Harbor proposal.

(C) The literal application of CCME Policy 1-6 alone, prohibiting any development in Habitats of Special Concern, would likely constitute an unconstitutional taking of private property for which compensation would have to be paid by the City to land owners whose property happens to contain Habitat of Special Concern. A change in the City's policy to adopt the interpretation of the Plan urged by the letter, would have serious fiscal and legal ramifications for the City Council for a long time to come.

(D) The letter argues that the CCME's "Classification of Land Development Suitability" lists permitted uses for "Conservation" land. The letter notes marinas are not specified as a permitted use in "Conservation" and claims that marinas are not authorized in Class II waters. It must be pointed out that the Table of Permitted Uses Cited by the letter only applies to permitted uses (i.e., permitted as of right) for lands designated "conservation". The result of the City's plan amendment was to change the designation from "Conservation" to "Waterfront Mixed Use". The "Waterfront Mixed Use" designation clearly authorizes the construction of marinas. Furthermore, the letter fails to point out that Section 782-784 of the City's Code of Ordinances identifies "marinas" as a "conditional use" in Class II waters, and goes on to state that they may be permitted subject to the DSEI review process. Since all of Naples Bay is and has been classified as Class II waters, under the theory of the letter, there should be no marinas today in Naples Bay.

(E) The letter omits any mention of the fact that Collier Enterprises has committed to the creation, as a minimum, of 5 acres of mangroves within the Naples Bay watershed, for mitigation of the loss of 2.5 acres of mangroves shown in the Conceptual Plan for Hamilton Harbor. The review of future permit applications by regulatory agencies may significantly increase the acres of mitigation required, or could result in a reduction of the

mangrove acreage impacted by the Hamilton Harbor Marina. The point is that the 5 acres of mangrove mitigation is the minimum amount that will be provided by Collier Enterprises and the 2.5 acres of conceptual mangrove loss is the maximum that can occur consistent with the City's approval. Extensive regulatory agency reviews, triggered by permit applications, must occur before any impacts or development may occur on the Hamilton Harbor site. In addition, the letter fails to mention other numerous significant public benefits accruing to the City of Naples, such as the public fueling facility, a marine construction loading dock, the dedication of approximately one and one half miles of shoreline, the clearing of exotics from the conservation land, the additional parking for Bayview Park, and preservation of archeological sites.

4. The City Did Not Receive "False Information".

The letter's assertions that the City received "false information" are inflammatory, incredible and contain no merit. The size and scope of the old Sabal Bay proposal, rejected by the City more than ten years ago, is a matter of historical record. The size and impacts of the Hamilton Harbor proposal were, at all times, presented fully, factually and accurately by the City staff, City Manager and Collier Enterprises. The rejected Sabal Bay Marina proposal contained up to 600 wet slips, whereas Hamilton Harbor proposes 36. The mangrove and wetlands impacts also have been dramatically reduced from 32 acres to 2.5 acres. Although all hotels, wet and dry slips and other uses previously proposed for the Sabal Bay project would have been located in Collier County, and the 36 wet slips proposed for Hamilton Harbor are physically within the City limits, no one has ever denied that both projects involve marinas and their locations are within the same general geographic area. However, the letter asserts that it would be "incorrect to present Hamilton Harbor as, in any meaningful way, substantially different from Sabal Bay." In our opinion, any reasonably objective person would readily agree that the Hamilton Harbor's reductions in size, uses and wetland impacts, in comparison to Sabal Bay, are meaningful and quite substantial.

The letter contends that the PD zoning ordinance conflicts with the Comprehensive Plan. The question whether the zoning ordinance is consistent with the City's Plan is the core legal issue addressed by Plaintiff's Kessler, et al, and The Conservancy in two Complaints filed with the Circuit Court in and for Collier County which are currently pending. (Circuit Court Cases 99-2812-CA and No. 99-2809-CA, respectively). These two cases were filed pursuant to Section 163.3215, Florida Statutes, and name the City of Naples and Collier Enterprises as Defendants.) The state statute gives the Circuit Court sole jurisdiction to determine this legal issue. The opponents will have their day in court to determine whether the City's PD zoning ordinance is consistent with the City of Naples Comprehensive Plan.

5. No Relevant Information Was Omitted.

The City of Naples Comprehensive Plan contains hundreds of pages and numerous goals, objectives and policies. The City staff conducted a professional and thorough review of the Hamilton Harbor proposal, as well as the City's Plan before writing their conclusions and findings in the Staff Report on the proposed Comprehensive Plan Amendment, PD rezoning and DSEI application. The Staff Reports on the Plan Amendment and applications for PD zoning and DSEI approvals were thoroughly reviewed and discussed at the four PAB and City Council public meetings.

The letter fails to present any significant fact or issue that was not considered by City staff or presented to the City at the PAB and City Council hearings on Hamilton Harbor. The letter does not present any newly discovered evidence, additional facts or "changed circumstances" that were not known to the City Council or available to it on June 2, 1999.

CONCLUSION

In conclusion, the allegations made in the letter are the same arguments that were presented to the PAB and City Council at hearings held during 1999, culminating with the City's approval of the Hamilton Harbor Plan Amendment and PD rezoning on June 2, 1999. The arguments were not supported or deemed meritorious by either the City Attorney or support staff, and they were ultimately rejected by a majority (plus one) of the City Council.

The opponents' letter does not present, or claim to present, any new information or evidence of changed circumstances differing from that which existed on June 2, 1999. All of the issues mentioned in the letter are the subject of ongoing litigation in Collier County Circuit Court, the Second District Court of Appeal, and the Florida Division of Administrative Hearings. These legal proceedings are the proper venues for a determination of the rights of the respective parties regarding the issues addressed in the letter.

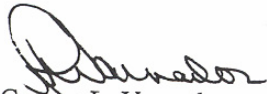
Representatives of the City of Naples, at the Council's direction, initiated contacts with Collier Enterprises to encourage Collier to provide a public fueling facility in south Naples Bay. Responding to the Council's initiative in good faith, Collier has provided numerous public benefits to the City, in addition to a fueling station, as part of its proposal for a small marina facility. Principles of fairness and responsible government speak loudly in favor of the City continuing to honor its prior approvals of Hamilton Harbor. In addition, the law clearly warns against a precipitous reversal of position on patently political grounds, and provides recourse to Collier Enterprises in the event of such an action.

I respectfully urge the City Council to honor the City's prior decisions approving the Hamilton Harbor plan amendment and rezoning.

The Honorable Bonnie MacKenzie
City Council Members
February 29, 2000
Page 12

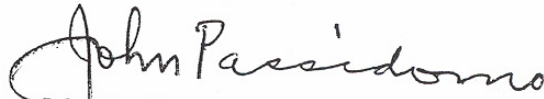
Attachment 3
3/15/00 Regular Meeting
Page 12 of 21

Sincerely Yours,



George L. Varnadoe
Young, van Assenderp, Varnadoe
& Anderson, P.A.
801 Laurel Oak Drive, Suite 300
Naples, Florida 34108

Sincerely Yours,



John Passidomo
Cheffy, Passidomo, Wilson & Johnson
821 Fifth Avenue South, Suite 201
Naples, Florida 34102

cc: Kenneth B. Cuyler, City Attorney

G:\users\dhc\rba\Hamilton Harbor\Letter to City Council2.wpd

xtacopy

94

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR
COLLIER COUNTY, FLORIDA CIVIL DIVISION

2486434 OR: 2554 PG: 1901

SHANNON DEVELOPMENT
COMPANY, INC., a Florida corporation
KEEWAYDIN ISLAND LIMITED
PARTNERSHIP, a Delaware Limited
Partnership,

RECORDED in OFFICIAL RECORDS of COLLIER COUNTY, FL
6/21/1999 at 07:52AM DWIGHT E. BROCK, CLERK
RRC FEE 42.00
Petn:
CIVIL

Petitioners,

vs.

CASE NO. 98-2554-CA-0

CITY OF NAPLES, a Florida Municipal
Corporation,

Attachment 3
3/15/00 Regular Meeting
Page 13 of 21
FLORIDA
JUN - 4 10:51
CLERK OF COURTS
D.C.
FILED IN COMPUTER
C. MARTINEZ

JUDGMENT ON PETITION FOR CERTIORARI

SHANNON DEVELOPMENT COMPANY, INC., and KEEWAYDIN ISLAND LIMITED
PARTNERSHIP, Plaintiffs/Petitioners, hereinafter referred to as Petitioners, bring this Petition for
Certiorari against the CITY OF NAPLES, a Florida Municipal Corporation, hereinafter referred to
as the Respondent.

THE CHARTER CLUB OF NAPLES BAY OWNERS ASSOCIATION, INC., CHARTER
CLUB PROPERTIES, L.C., STANLEY HOSTLER, ROBERT JEPSON, ROBERT NOBLE,
RICHARD NESLINE, AND BAYSIDE VILLAS CONDOMINIUM ASSOCIATION, INC.,
hereinafter identified as the Intervenors, were allowed to intervene in this proceeding in support of
the actions taken by the Respondent, CITY OF NAPLES.

The Petitioners, pursuant to Fla. R. App. P. 9.100 (c)(2), filed a Petition for Writ of Certiorari
asking this Court to review the quasi judicial proceedings of the Respondent taken on the 17th of June,

1998.

The Court, based upon the findings of fact and conclusions of law recited herein, does find that the Petitioners have clearly and convincingly established their claim for relief, that the essential requirements of law have not been followed by the Respondent, and that the administrative findings and judgment of the Respondent are not supported by competent and substantial evidence.

Therefore, it is

ORDERED, ADJUDGED AND DECREED that the actions of the Respondent taken on the 17th of June, 1998, in which it rescinded it's permission for the Petitioners' use of the Naples Landing, is hereby reversed.

FINDINGS OF FACT:

1. The Petitioner's property was initially rezoned by the Respondent on January 3, 1996, pursuant to City of Naples Ordinance No. 96-7606 and the Planned Development Narrative was adopted as part of the Ordinance.

The Planned Development Narrative included subsection xvi, the "Construction Management Plan", which required that the Petitioner present a construction management plan to the City Manager, and that the plan provide in detail the construction methodology, as well as a schedule for transportation, equipment, machinery, and the time frames for construction.

The purpose of said construction management plan was to guarantee that the Respondent would be able to adequately determine that the processes utilized would not create adverse impacts to the City of Naples.

2. On the 5th of March, 1997, the City of Naples, pursuant to its Resolution 97-7930, granted a conditional use to permit a city park at the Naples Landing to be used for commercial loading and

OR: 2554 PG: 1902

unloading activities.

While the language of the resolution is not an example of absolute clarity, the resolution granted a conditional use subject to certain conditions. (In particular, subpart (e) and subpart (g) created some initial confusion).

Resolution 97-7930, Section 2 (e) states:

The commercial loading and unloading facility shall be limited to existing usage which is for rip rap projects, boat dock construction, maintenance and repair, seawall projects, public purpose projects and emergency projects;

Whereas, subsection (g) states:

City Council approval is required for the intensification of the use of the commercial loading and unloading facility.

3. While there may have been some initial confusion generated by Resolution 97-7930, the actions of the parties clearly reflected their understanding of the resolution when the Staff Report was presented by the City Manager to the City Council on the 2nd of June, 1997.

In said meeting of June 2, 1997, the Staff Report stated that the City Council had previously approved the planned unit development for Keewaydin Island and that there had been a requirement that the developers (Petitioners) submit to the City Manager a construction staging plan for review and approval, and that by Resolution 97-7930, the Mayor and Council had approved a conditional use for the Naples Landing.

A bolded and separate heading on page two of the Staff Report was entitled *Use of Naples Landing*, and in the bolded recommendation by the City Manager, it is abundantly clear that "it is the recommendation of the Management that the Naples Landing be approved for the construction staging for Keewaydin Island under the following conditions. . ." and the City Manager established

OR: 2554 PG: 1903

Attachment 3
3/15/00 Regular Meeting
Page 16 of 21

nine specific criteria for the Petitioners to meet.

4. The workshop meeting of the City Council scheduled for June 2, 1997, included an agenda specifically identifying in item #3 a discussion of the Naples Landing as a staging area for the Key Island Development Project. The agenda was published, and in bolded letters at the bottom of said agenda was a notice which stated that formal action may be taken on any items discussed or added to the agenda.

5. At the meeting on June 2, 1997, the then constituted members of the Naples City Council were Councilmen Barnett, Prohlman, Tarrant, Van Arsdale, Sullivan, Nocera and MacKenzie.

Also in attendance were the City Manager, City Attorney, Attorney Pires for the Intervenors, Attorney Eckert for the Intervenors, and Attorney Goodlette for the Petitioners. Additionally, there were several professional expert witnesses who spoke on behalf of the Petitioners, and various members of the general public spoke on behalf of the Intervenors.

The City Manager pointed out to the Council that the Petitioners were back before the Council because Resolution 97-7930 required that any intensification uses had to be brought back to the City Council, and that the document placed before the council members on that day (June 2, 1997) was the staging plan.

Mr. Hermanson, an engineer for the Petitioners, addressed the Council stating that the objective of the presentation was to request that the Council approve a construction management plan, and he specifically stated on page four of the transcript of the hearing:

There are two reasons why we are requesting your approval. Doctor Woodruff mentioned one. City Resolution 97-7930 back in March required that any intensification of use of the Naples Landing requires City Council approval.

OR: 2554 PG: 1904

The second reason is that the approved PD document for Key Island requires that a construction management plan be approved by the City, City Council -- City Manager, but we are asking that you approve this plan as a fulfillment of both of those conditions.

Clearly, and unequivocally the parties operated under the understanding that the Naples Landing was subsumed into the Resolution 97-7930 Construction Management Plan.

6. The Council held a lengthy public discussion on the merits of accepting the proposed management plan and heard from various opponents to said plan, including Attorney Pires for the Intervenor, and then citizen-candidate Herms, who would within the next year be City Councilman Herms. Mr. Herms (on page 69 of the transcript) stated:

And in the next election if this gets passed today, I guarantee you it will become a very large campaign issue for those residents. They are going to want to make sure that whoever is elected overturns this decision.

7. The initial motion to deny the Petitioners request lost on a four to three vote and Councilman McKenzie thereafter made a motion to approve the City Manager's recommendation with additional criteria, not the least important of which was a condition that the permit would be renewable annually and that the Council's permission would not be unreasonably withheld. (Page 126 of Transcript). This motion passed four to three.

8. On the 3rd of June, 1998, essentially all of the role players from the previous year (June 2, 1997) were present at the Naples City Council meeting, except, there were two new councilmen: Mr. Coyle and Mr. Herms.

Mr. Cuyler, Acting City Attorney, advised all participants that the Council meeting was a quasi judicial proceeding due to the fact that a rezone petition was before the Council. After much discussion among council members as well as the general public, it was apparent that the rezone

petition would change some uses in the Keywaydin Island Project. However, with regard to the Naples Landing parcel, the record clearly reflected that its usage would be decreased.

9. After much discussion, the record reflects that primarily due to a change in the membership of the City Council, it was highly likely that a new four to three vote rescinding prior Council's action might occur. All parties concerned elected to continue the issue for a two week period in order for the attorneys for all parties concerned to meet and try to reach an accommodation by settlement and compromise.

10. It is not the province of this Court to pass upon the political soundness or correctness of this government's decision. The requisite review by this Court is with regard to the legal rights of the parties. In that regard, a very prescient comment made by Councilwoman MacKenzie portended the future of the entire proceeding: (Page 80 of Transcript of June 3, 1998 Council Meeting):

Ms. MacKenzie: Yes. There have been many times when previous Councils have voted an extended use that I personally did not think was good. And I always felt that it was, because it was the word of the City that it was important whether I personally approved of it or not, to keep that word.

11. On the 17th of June, 1998, essentially the same parties met to review this issue, except the City was now receiving legal advice from Attorney Hartsell.

Essentially, a new four to three majority sought to rescind the City's earlier approval contained in Resolution 97-7930 and Resolution 97-8000 (the latter being only a legal description), and after receiving cautionary advice from Attorney Hartsell that this would probably generate another lawsuit against the Respondent, but this time by the Petitioners, the Council proceeded to withdraw their consent.

The action of rescission was contrary to the advice that the City received from its attorney, Mr. Hartsell, who advised the City (on page 29 of the transcript) that even though this was an annual review, that the City may be unreasonably withholding its consent. Additionally, the City Manager (on page 29 of the transcript) stated: "My recommendation to you is that you don't rescind the use, because of what I believe, not as a legal opinion, but a managerial opinion, is going to expose the taxpayer to significant financial exposure."

12. Councilwoman MacKenzie (on page 57 of the transcript) again reiterated her concerns that once the government had given its word, that following Councils were obligated to uphold those decisions and that to now change the Council's vote was an act of irresponsibility.

Even though the Council staff had recommended approval, the Planning Advisory Board had recommended approval, and there was a reduction in the intensity of the use being contemplated, the City Council, after much soul searching still voted four to three to rescind its prior 1997 approval.

CONCLUSIONS OF LAW:

13. Rezoning actions which have an impact on a limited number of persons or property owners, on identifiable parties and interests, where the decision is contingent on a fact or facts arrived at from distinct alternatives presented at a hearing, and where the decision can be functionally viewed as policy application, rather than policy setting, are in the nature of a quasi judicial action. *Park of Commerce Associates v. City of Delray Beach*, 636 So. 2d 12 (Fla. 1994).

14. The Circuit Court's scope of review by Petition for Writ of Certiorari is limited to determining whether procedural due process was accorded, whether the essential requirements of law have been observed, and whether the government's findings and judgment were supported by competent substantial evidence. *Orange County v. Seay*, 649 So. 2d 343 (Fla. 5th DCA 1995).

Attachment 3
3/15/00 Regular Meeting
Page 19 of 21

OR: 2554 PG: 1907

The Circuit Court may not reach beyond the government's stated reasons or rely upon a basis not raised before the government. *G.B.V. International, Ltd. v. Broward County*, 709 So.2d 155 (Fla. 4th DCA 1998).

This is why the Respondent's supplemental brief filed on December 11, 1998, cannot be relied upon in those areas where it attempts to raise issues which were either not presented to the original quasi judicial body or, were based upon information acquired after the date of the original quasi judicial hearing, i.e., the former mayor's supplemental affidavit of December 11, 1998.

15. While the Petitioners raised some facially competent arguments with regard to procedural due process, and the fact that a part of the quasi judicial body stated prior to the proceeding, both by verbal and written commentary, that the purpose of the proceeding was to rescind the Respondent's prior approval, a clearly dispositive breakdown in the Respondent's quasi judicial process occurred because the record reflects not only a failure to provide competent and substantial evidence to support the body's ruling. . . in this case, there is absolutely no evidence found in the official record which can be used to support the Respondent's ruling.

In fact, the Petitioners' request appeared to seek a diminished use and density rather than an increased use. Because the City had previously obligated itself to an annual review, and to not unreasonably withhold its consent, there must have been some evidence to support the City's findings. . . and there was none.

16. Whether the original 1996 and 1997 decisions by a prior City Council were palatable to the City's residents or not, the decisions were legal and binding. Subsequent and differently constituted City Councils may not abrogate prior government actions without impunity, whether the subsequent Council believes that there is now a different political agenda or, in the alternative,

Attachment 3
3/15/00 Regular Meeting
Page 20 of 21

OR: 2554 PG: 1908

whether the government just believes that it made a bad deal. Clearly, all persons and entities are entitled to contractually bind themselves to courses of action which they thereafter realize may not have constituted such a good bargain.

THEREFORE, The Court finds that the action of the Respondent, the CITY OF NAPLES, on the 17th of June, 1998, rescinding the use of the Naples Landing by the Petitioners constituted an unreasonable refusal to renew the Construction Staging Plan and was a departure from the essential requirements of law, not supported by competent or substantial evidence, and therefore, it is **REVERSED.**

DONE AND ORDERED this 01st day of June, 1999, at Naples, Collier County, Florida.

Hugh D. Hayes
HUGH D. HAYES, CIRCUIT COURT JUDGE

COPIES TO: *OK Jan 6/01/99*

Kenneth B. Cuyler, Esquire
735 Eighth Street South
Naples, FL 34102

Robert P. Diffenderfer, Esquire
1700 Palm Beach Lakes Boulevard, Suite 100
West Palm Beach, FL 33401

Dudley Goodlette, Esquire
3301 E. Tamiami Trail East, Suite 203
Naples, FL 34112

Steven C. Hartsell, Esquire
1833 Hendry Street
P. O. Drawer 1507
Fort Myers, FL 33902

Anthony P. Pires, Jr., Esquire
801 Laurel Oak Drive, Suite 710
Naples, FL 34108

William G. Povlitz, Esquire
1207 Third Street South, Suite 5
Naples, FL 34102

Attachment 3
3/15/00 Regular Meeting
Page 21 of 21

OR: 2554 PG: 1909 ***

Due to the extent of the remaining attachment pages, please refer to City Council Minute Book #107 for Attachments 4 through 17.

