



City Council Chamber
735 Eighth Street South
Naples, Florida 34102

City Council Regular Meeting – Wednesday, January 4, 2006 – 9:00 a.m.

Mayor Barnett called the meeting to order and presided.

ROLL CALLITEM 1

Present:

Bill Barnett, Mayor
Tamela Wiseman, Vice Mayor

Council Members:

William MacIlvaine
Johnny Nocera
Gary Price
John Sorey, III
Penny Taylor

Also Present:

Robert Lee, City Manager
Tara Norman, City Clerk
Robert Pritt, City Attorney
Victor Morales, Assistant to the City Manager
Steve Weeks, Technology Services Director
Robin Singer, Community Development Director
Steve Olmsted, Planning Administrator
Ben Copeland, Budget & Capital Proj. Manager
Ronald Wallace, Construction Mgt. Director
George Archibald, Traffic Engineer
Michael Bauer, Natural Resources Manager
Joseph Boscaglia, Parks & Parkways Supt.
Tony McIlwain, Planner II

Pastor Susan Rice
Ron Pennington
Sue Smith
Larry Mullins
Robert Blinn
William Hobgood
John White
Bryant Hyde
Willie Anthony
Jim Boula
Jerry Krecicki
Eileen Arsenault

Media:

Denise Zoldan, Naples Daily News

Other interested citizens and visitors

INVOCATION AND PLEDGE OF ALLEGIANCE.....ITEM 2

Pastor Susan Rice, Vanderbilt Presbyterian Church.

ANNOUNCEMENTSITEM 3

City Manager Robert Lee noted an earlier report to Council indicating that the City had ceased operation with one of its yard waste collection contractors. However, since a newspaper story had appeared that morning on this subject, he said that Public Works Director Dan Mercer would provide an update to reassure the public on service issues regarding post-hurricane tree and

stump removal. Mr. Mercer reported that virtually all right-of-way debris had been collected in the amount of some 190,000 cubic yards; remaining is removal of some limbs which are partially attached to trees and approximately 117 stumps, some 37 of which may be eligible for reimbursement from FEMA (Federal Emergency Management Administration). Twenty-eight trees have been totally removed, disposed and the soil leveled; however, Mr. Mercer noted, some utility coordination will also be necessary at various locations where lines are intertwined in tree roots.

Council Member Taylor requested clarification between the initially estimated trees damaged and those enumerated in the staff report (a copy of which is contained in the file for this meeting in the City Clerk's Office). Mr. Mercer indicated that 1,667 street trees had been affected, including those which had sustained only partial damage and would rebound; 356 trees would actually be removed. Miss Taylor reported community concern regarding the length of time before lost trees of substantial size would be replaced and asked for a progress report. City Manager Lee said that the Council would receive a plan and funding recommendations for approval after neighborhood tours with members of property owner associations as well as consultation with professional arborists for assistance in identifying types of trees most acceptable to the residents and most appropriate for the site.

Council Member Price, referring to the aforementioned news article, asked for clarification regarding application of FEMA regulations to the City's debris removal contract. Ben Copeland, Budget & Capital Projects Manager, explained that the City's approach to contracting for services differed from that of Collier County because of the greater hauling distance involved; however, the pricing obtained from contractors hired by the City had nevertheless been adjusted in accordance with FEMA requirements.

SET AGENDA.....ITEM 4

City Manager Robert Lee requested addition of a report on the upcoming beach renourishment project by Ron Pennington, City representative on the Collier Coastal Advisory Committee, (Item 16). He also noted that a deferral to January 18 of Agenda Item 6-a (approval of minutes) had been requested by the City Clerk.

Council Member Price questioned the appropriateness in a public forum of discussing the matter under Item 7 (involving the recent Airport Authority appointment) prior to the Council gathering full information on the matter. Mayor Barnett indicated that he had placed a reconsideration item on the agenda after having been presented with a large packet of information (from Robert Blinn) regarding the appointment of William Hobgood. He also pointed out that this is the only forum in which the Council could make its wishes known on the matter. However, after allowing Mr. Blinn to provide any additional information, Mayor Barnett said that he would determine whether to withdraw the request for reconsideration. Vice Mayor Wiseman received clarification from City Attorney Pritt that an Airport Authority Commissioner could be removed for cause, pursuant to the removal provisions contained in the City Charter. (It is noted for the record that the applicable Charter provision is contained in the file for this meeting in the City Clerk's Office.) However, Mr. Pritt also pointed out that the provision may not apply if the Airport Authority appointee had not yet received the oath of office. He also recommended that Council determine whether testimony would be accepted since Item 7 is not a public hearing concerning the reconsideration issue. Actual reconsideration would occur at a subsequent meeting, should the Council elect to proceed with the matter. Mayor Barnett confirmed with City Attorney Pritt that anyone intending to address the Council on Agenda Item 7 could make

statements under public comment (Agenda Item 5) if the Council determines that testimony would not be taken during the reconsideration issue. Mayor Barnett then received acknowledgement from both Robert Blinn and William Hobgood that they would make their comments during Item 5 (Public Comment).

MOTION by Nocera to SET AGENDA, adding Item 15 (Beach Renourishment Report) and continuing Item 6-a to January 18, 2006. This motion was seconded by Price and unanimously carried, all members present and voting (MacIlvaine-yes, Nocera-yes, Price-yes, Sorey-yes, Taylor-yes, Wiseman-yes, Barnett-yes).

**ADDED ITEM.....ITEM 15
REPORT ON BEACH RENOURISHMENT PROJECT BY RON PENNINGTON, CITY
REPRESENTATIVE ON COLLIER COASTAL ADVISORY COMMITTEE.**

Ron Pennington, City representative and Chairman, Collier Coastal Advisory Committee, described equipment deployment and announced the following beach renourishment schedule:

- Vanderbilt Beach to North Pelican Bay: Completion is expected by mid-February. Tourist Development Council (TDC) funds cannot be used to renourish Pelican Bay beaches because this area is not within one-half mile of public access; therefore 4,000 feet will be funded by Pelican Bay.
- North Moorings/Park Shore/Seagate: Completion is expected by mid-March. Sand supply pipe will be located in the 3400 block of Gulf Shore Blvd., North, with equipment and material access at the Horizon Way beach parking area, necessitating its closure to the public. Vegetation will be cleared and restored after the project moves from that location.
- Doctors Pass to 22nd Avenue South: Sand supply pipe will be located near the Naples Beach Hotel. Equipment and materials will be placed at Seventh Avenue South which was chosen over Lowdermilk Park because of improvements underway at that location. As with other areas, parking will be closed to the public and vegetation removed and replaced as needed. However, in order to more easily reach the southernmost point of this dredging area, the sand supply location may be moved to Eighth Avenue South.

Pedestrian crossings will be provided at sites where the pipe crosses the beach and screens will be installed in dredging equipment to prevent rocks from being deposited. Work areas will be cordoned off in 500 to 1,000 foot segments to protect the public. Although the operation will be conducted around the clock, work will cease while dredges move to the next location. Work must be completed by the end of April due to turtle nesting season; however, if the project is not completed as scheduled, remobilization must be done at the contractor's expense for completion after November 1. At the conclusion of the project, an artificial reef in excess of one acre will be installed approximately 800 feet offshore at Fourth Avenue North, but this work can be accomplished during turtle nesting season since work will be not be done from the beach.

PUBLIC COMMENT.....ITEM 5

Robert Blinn, 4874 West Boulevard Court, stated that he questioned whether William Hobgood had prepared the résumé supplied in conjunction with Mr. Hobgood's appointment to the Naples Airport Authority because of third-person phrasing of the text. He also pointed out that no supporting documentation such as certificates of achievement had been attached and questioned whether Mr. Hobgood's experience had been verified. He also cited disputes he had had with Mr. Hobgood in relation to a condominium homeowner association, documentation of these matters having been provided in a packet of information previously made available to Council Members. Mayor Barnett urged Mr. Blinn to bring forward any new information and pointed out that Council reviews résumés and interviews candidates for boards and committees

but does not perform background checks. Mr. Blinn then asserted that, at a December 30 pre-trial mediation hearing, Mr. Hobgood had made false statements as president of the homeowner association and that recordkeeping irregularities had occurred regarding the association. This, he said, would reflect on Mr. Hobgood's future conduct as a member of the Airport Authority. **William Hobgood, 4868 West Boulevard Court**, expressed his appreciation for an opportunity to serve on the Naples Airport Authority and conveyed his willingness to respond to any questions regarding the material that Mr. Blinn had provided. In response to Council Member Nocera, Mr. Hobgood explained that Mr. Blinn had filed suit against the condominium property manager for \$350 for replacement of screens based on an oral contract for post-hurricane repairs. Mr. Blinn, however, had refused to allow the contractor to work on his unit because Mr. Blinn wanted all the screens replaced, regardless of damage, Mr. Hobgood said.

Vice Mayor Wiseman apologized to Mr. Hobgood, pointing out that he had just tasted the worst in Naples politics. Mrs. Wiseman also said that incidents like this exemplify why she no longer represents condominium and homeowner associations in her law practice. Mr. Hobgood said that he had also decided not to run for another term as president of the condominium homeowner association.

CONSENT AGENDA

Prior to consideration of the Consent Agenda, Council Member Taylor received clarification with reference to Item 6-c. City Manager Robert Lee and Construction Management Director Ron Wallace explained that while the air conditioning systems in the Public Works and Community Services administration buildings were relatively new, repair expenditures had been recurrent. One of the issues is corrosion which could be attributable to the chemical makeup of reuse water which is pumped through the systems as a cooling mechanism. At the time the units were installed, there not only had been an abundant supply of reuse water, but it had also been deemed important to conserve potable water. Unlike other systems, however, the reuse water is not recirculated, necessitating continual retreatment via the wastewater system amounting to a volume of 1-million gallons per day for three buildings; the cost for this treatment is \$140,000 per year. The study requested will indicate whether conversion to recirculated potable water would be more cost-effective and also whether design and implementation flaws may have occurred.

Miss Taylor also received clarification that SCBA listed in Item 6-d stands for self-contained breathing apparatus which are used by firefighters entering burning buildings.

APPROVAL OF MINUTES **6-a**
Continued to January 18, 2006 (See Item 4).

APPROVAL OF SPECIAL EVENTS **6-b**
(1) Outdoor Fashion Show – Femme Fatale – Plaza Courtyard, 1170 Third Street South, March 10, 2006; and (2) St. Patrick's Day Parade – Naples St. Patrick's Day Committee, Third Street South and Fifth Avenue South, March 18, 2006.

RESOLUTION 06-11079.....**ITEM 6-c**
A RESOLUTION APPROVING A FIRST AMENDMENT TO THE AGREEMENT WITH CAMP, DRESSER AND MCKEE, INC., FOR THE EVALUATION AND REVIEW OF THE HVAC SYSTEMS LOCATED IN THE PUBLIC WORKS ADMINISTRATION BUILDING, THE COMMUNITY DEVELOPMENT BUILDING AND THE POLICE AND EMERGENCY SERVICES BUILDING; AMENDING THE 2005-06 BUDGET ADOPTED BY ORDINANCE 05-10962; AUTHORIZING THE CITY

MANAGER TO EXECUTE THE FIRST AMENDMENT; AND PROVIDING AN EFFECTIVE DATE. Title not read.

RESOLUTION 06-11080..... ITEM 6-d
A RESOLUTION OF THE CITY OF NAPLES, FLORIDA, AMENDING THE 2005-06 BUDGET AND CAPITAL IMPROVEMENT PROJECT FOR FIRE PROJECTS (FIRE STATION #2 RENOVATION AND SCBA REPLACEMENTS); AND PROVIDING AN EFFECTIVE DATE. Title not read.

RESOLUTION 06-11081..... ITEM 6-e
A RESOLUTION APPROVING AN AGREEMENT WITH NBS TO PROVIDE SPECIAL ASSESSMENT MANAGEMENT SERVICES FOR AQUALANE SHORES, WEST NAPLES BAY AND THE REUSE PHASE 1 PROJECT; AUTHORIZING THE CITY MANAGER TO EXECUTE THE AGREEMENT; AND PROVIDING AN EFFECTIVE DATE. Title not read.

RESOLUTION 06-11082..... ITEM 6-f
A RESOLUTION OF THE CITY OF NAPLES, FLORIDA, AMENDING THE 2005-06 BUDGET BY FUNDING THREE NEW POSITIONS; FIRE INSPECTOR, PLANS EXAMINER (ELECTRICAL) AND A CONSTRUCTION SITE COMPLIANCE INSPECTOR; AND PROVIDING AN EFFECTIVE DATE. Title not read.

RESOLUTION 06-11083..... ITEM 6-g
A RESOLUTION APPROVING A COLLIER COUNTY AREA OPEN ROADS POLICY REGARDING QUICK CLEARANCE FOR SAFETY AND MOBILITY BETWEEN THE CITY OF NAPLES, THE FLORIDA HIGHWAY PATROL AND THE STATE OF FLORIDA; AUTHORIZING THE CITY MANAGER TO EXECUTE THE AGREEMENT; AND PROVIDING AN EFFECTIVE DATE. Title not read.

RESOLUTION 06-11084..... ITEM 6-h
A RESOLUTION APPROVING AN AMENDMENT TO THE SOUTH FLORIDA WATER MANAGEMENT DISTRICT LOCAL GOVERNMENT AGREEMENT TO FUND PHASE 1 OF THE RECLAIMED WATER EXPANSION PROJECT; AUTHORIZING THE MAYOR TO EXECUTE THE AGREEMENT; AND PROVIDING AN EFFECTIVE DATE. Title not read.

RESOLUTION 06-11085..... ITEM 6-i
A RESOLUTION WAIVING COMPETITIVE BIDDING; APPROVING AN AGREEMENT BETWEEN THE CITY OF NAPLES AND R.C. BEACH & ASSOCIATES, INC., FOR THE REPLACEMENT OF AN EFFLUENT TRANSFER PUMP FOR THE WASTEWATER TREATMENT PLANT; AUTHORIZING THE CITY MANAGER TO EXECUTE THE AGREEMENT; AND PROVIDING AN EFFECTIVE DATE. Title not read.

RESOLUTION 06-11086..... ITEM 6-j
A RESOLUTION OF THE CITY OF NAPLES, FLORIDA, URGING MEMBERS OF THE FLORIDA LEGISLATURE TO SUPPORT THE FOLLOWING ISSUES DURING THE 2006 LEGISLATIVE SESSION; AND PROVIDING AN EFFECTIVE DATE. Title not read.

MOTION by Sorey to APPROVE CONSENT AGENDA, except Item 6-a; seconded by MacIlvaine and unanimously carried, all members present and voting (MacIlvaine-yes, Nocera-yes, Price-yes, Sorey-yes, Taylor-yes, Wiseman-yes, Barnett-yes).

DISCUSSION OF REQUEST FOR RECONSIDERATIONITEM 7

Although Mayor Barnett withdrew his request, City Attorney Pritt noted that the City's reconsideration policy states that the Council is to vote on whether to reconsider an item. (It is noted for the record that no public comment was taken on this matter; see Item 5 above.)

MOTION by Wiseman NOT TO RECONSIDER; seconded by Sorey and unanimously carried, all members present and voting (MacIlvaine-yes, Nocera-yes, Price-yes, Sorey-yes, Taylor-yes, Wiseman-yes, Barnett-yes).

ORDINANCE 06-11087.....ITEM 8

AN ORDINANCE ADOPTING THE 2004 LEVEL OF SERVICE REPORT; DIRECTING STAFF TO TRANSMIT SAID REPORT TO THE STATE OF FLORIDA DEPARTMENT OF COMMUNITY AFFAIRS; AND PROVIDING AN EFFECTIVE DATE. (Title read by City Attorney Robert Pritt (9:45 a.m.).

Public Comment: None (9:46 a.m.).

MOTION by Wiseman to ADOPT ORDINANCE 06-11087 as submitted on second reading; seconded by Price and unanimously carried, all members present and voting (MacIlvaine-yes, Nocera-yes, Price-yes, Sorey-yes, Taylor-yes, Wiseman-yes, Barnett-yes).

ORDINANCE (First Reading).....ITEM 9

AN ORDINANCE AMENDING SECTION 94-142 OF THE CODE OF ORDINANCES OF THE CITY OF NAPLES FOR THE PURPOSE OF ADOPTING A RIGHT-OF-WAY CONSTRUCTION STANDARDS HANDBOOK; PROVIDING A SEVERABILITY CLAUSE; PROVIDING A REPEALER PROVISION; AND PROVIDING AN EFFECTIVE DATE. Title read by City Attorney Robert Pritt (9:46 a.m.). City Manager Robert Lee pointed out that this item had been discussed with City Council in a workshop setting and cited a memorandum (contained in the file for this meeting in the City Clerk's Office) which addressed requested changes. Council Member Sorey said he believed that the ordinance had been significantly improved but urged that a storm damage policy be developed to address post-hurricane restoration; he also asked that staff examine the issue of alley vegetation and the placement by condominiums of reserved parking signs on spaces in the right-o-way.

Public Comment: None (9:48 a.m.).

MOTION by Sorey to APPROVE ON FIRST READING as submitted; seconded by MacIlvaine and unanimously carried, all members present and voting (MacIlvaine-yes, Nocera-yes, Price-yes, Sorey-yes, Taylor-yes, Wiseman-yes, Barnett-yes).

It is noted for the record that Items 10-a and 10-b were considered concurrently; titles were read by City Attorney Robert Pritt (9:48 a.m.).

RESOLUTION 06-11088.....ITEM 10-a

A RESOLUTION DETERMINING LIVE ENTERTAINMENT PETITION 05-LE10 FOR BLU SUSHI LOCATED AT 1170 3RD STREET SOUTH, SUITE F-105, MORE FULLY DESCRIBED HEREIN, SUBJECT TO THE CONDITIONS LISTED HEREIN; AND PROVIDING AN EFFECTIVE DATE.

RESOLUTION 06-11089.....ITEM 10-b

A RESOLUTION DETERMINING A RESIDENTIAL IMPACT STATEMENT FOR PETITION 05-RIS15 TO ALLOW LIVE ENTERTAINMENT AT BLU SUSHI, LOCATED AT 1130 THIRD STREET SOUTH, SUITE F-105, MORE FULLY DESCRIBED HEREIN; AND PROVIDING AN EFFECTIVE DATE. This being a quasi-judicial proceeding, City Clerk/Notary Public Tara Norman administered an oath to those intending to offer testimony; all responded affirmatively. Council Members disclosed no ex parte

communications except Council Member Sorey who reported a discussion with Eileen Arsenault (an individual residing in the area of the Blu Sushi Restaurant; see public comment below).

Planning Administrator Steve Olmsted introduced this petition which he indicated involves a request for a disc jockey inside the restaurant on Thursday, Friday and Saturdays from 9:00 p.m. to 1:00 a.m. This petition had been denied when considered on September 21, 2005, due to code violations at the establishment; the applicant had been asked to demonstrate a record of compliance before submitting another request. In the interim, no complaints had been received or violations noted, Mr. Olmsted said, and indicated that approval is recommended however with hours of operation being limited to 9:00 p.m. to 11:00 p.m. due to residential uses to the north and west. He cited letters of objections (contained in the file for this meeting in the City Clerk's Office) which relate primarily to the requested 1:00 a.m. entertainment cessation time.

Public Comment: Eileen Arsenault, 1188 Gordon Drive, described the evolution of the site now occupied by Blu Sushi, which had once been a vacant parcel zoned for a hotel to a complex, to restaurants featuring outdoor seating and live entertainment and closing at approximately 11:00 p.m. Therefore, she expressed concern that the area was becoming a nightclub district not only negatively affecting residential uses but even more disturbing to the occupants of nearby historic homes whose dwellings do not contain the insulation and soundproofing of modern structures. She said she would not oppose the petition if the music remained indoors and was not of a volume that disturbed surrounding residents; she asked that a provision be included that the use would be curtailed if complaints are received. In conclusion, Ms. Arsenault cautioned that uses such as this would erode the integrity of the historic district.

Brian DeMartinis, general manager of Blu Sushi, stressed that his intent was not to disrupt the surrounding community by generating noise outside the restaurant, but that he was instead seeking to entertain his patrons who are served until 11:00 p.m. Mr. DeMartinis suggested that instead of 1:00 a.m. he be allowed to offer entertainment until midnight. Council Member Nocera suggested amplified sound until 11:00 p.m. and non-amplified until midnight, and made a motion to this effect; however no second was heard at that time.

Council Member MacIlvaine noted requirements for compliance with noise regulations contained in the Code of Ordinances and asked whether the request for a volume of 50 db at the disc jockey's stand would translate to compliance at the property line. In response to Mayor Barnett, Mr. DeMartinis clarified that the entertainment in question could also be a performer such as a guitarist. Planning Administrator Olmsted indicated that the petition had however been specifically for a disc jockey. Planner Tony McIlwain said that the staff had proceeded under the assumption that the current petition was merely a resubmittal of the prior petition which had cited a disc jockey.

In response to Council Member Price, Mr. DeMartinis clarified that while decibel testing at the property line had been conducted, no written report had been generated. Mr. Price questioned the validity of the test, noting that a prior request for live entertainment at this establishment had indicated that speakers were mounted on the outside of the building; Mr. DeMartinis said that these speakers had been removed. Council Member Sorey pointed out that should the guidelines in the Code of Ordinances be violated, the permit for live entertainment would nevertheless be revoked. City Attorney Pritt also noted that the noise provision is cited in resolutions so as to make petitioners aware of the requirements in the Code which cannot be violated and are measured and enforced by Police & Emergency Services (PESD).

After further discussion, it was determined that a disc jockey or other individual performer would be permitted and that the hours recommended by staff would be cited in the resolutions under consideration. Vice Mayor Wiseman also pointed out that Council might on the occasion of a future permit renewal consider an application for later hours of entertainment at this establishment if no complaints had been logged.

MOTION by Wiseman to **APPROVE RESOLUTION 06-11088 (Item 10-a), AS AMENDED:** *in the first Whereas clause, “... consisting of ~~an~~ one amplified performer ...” and in Section 2, “That live entertainment shall be indoors, limited to one performer, and limited to the hours ...” This motion was seconded by Sorey and unanimously carried, all members present and voting (Taylor-yes, MacIlvaine-yes, Wiseman-yes, Sorey-yes, Price-yes, Nocera-yes, Barnett-yes).*

MOTION by Wiseman to **APPROVE RESOLUTION 06-11089 (Item 10-b), AS AMENDED:** *in Section 2-1, “That live entertainment shall be indoors, limited to one performer, and limited to the hours ...” This motion was seconded by Sorey and unanimously carried, all members present and voting (MacIlvaine-yes, Nocera-yes, Price-yes, Sorey-yes, Taylor-yes, Wiseman-yes, Barnett-yes).*

Council Member MacIlvaine confirmed with Planner McIlwain that the City would work with operators of establishments to check noise levels to verify compliance. Council Member Nocera also noted that random checks of noise levels are also performed by City personnel.

RESOLUTION 06-11090.....ITEM 11
A RESOLUTION WAIVING SECTION 106-239 OF THE CODE OF ORDINANCES, CITY OF NAPLES, PERTAINING TO THE CITY’S NOISE ORDINANCE REGARDING ACTIVITIES ASSOCIATED WITH THE RENOURISHMENT OF THE CITY’S BEACHES; AND PROVIDING AN EFFECTIVE DATE. (Title read by City Attorney Robert Pritt (10:13 a.m.).

Public Comment: None (10:13 a.m.)

MOTION by Sorey to **APPROVE RESOLUTION 06-11090** *as submitted; seconded by MacIlvaine and unanimously carried, all members present and voting (MacIlvaine-yes, Nocera-yes, Price-yes, Sorey-yes, Taylor-yes, Wiseman-yes, Barnett-yes).*

RESOLUTION (Continued)ITEM 12
A RESOLUTION RANKING THE TOP THREE (3) CONSULTING ENGINEERING FIRMS TO PROVIDE PROFESSIONAL SERVICES ASSOCIATED WITH THE ACQUISITION OF AN ENVIRONMENTAL RESOURCES PERMIT FROM THE FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION AND A SUBMERGED LANDS LEASE FROM THE STATE OF FLORIDA BOARD OF TRUSTEES INTERNAL IMPROVEMENT TRUST FUND; APPROVING AN AGREEMENT WITH THE TOP RANKED FIRM, TURRELL AND ASSOCIATES, INC.; AUTHORIZING THE CITY MANAGER TO EXECUTE THE AGREEMENT; AND PROVIDING AN EFFECTIVE DATE. Title read by City Attorney Robert Pritt (10:14 a.m.). City Manager Robert Lee noted that the City had received notification to the effect that the mooring field must be properly permitted in order for it to continue; however, a temporary operation had been authorized with the understanding that the City would pursue the formal application process. Due to the complexity of this process, an RFQ (Request for Qualifications)

had been issued for this work; those firms having been ranked, a recommendation is before Council that Turrell & Associates be positioned first.

Natural Resources Manager Michael Bauer confirmed for Vice Mayor Wiseman that the mooring field had been utilized during Hurricane Wilma under the aforementioned temporary agreement with the Florida Department of Environmental Protection (DEP) which called for its removal after hurricane season. Mr. Bauer also pointed out that it is uncertain whether DEP would again convey such an approval for a subsequent hurricane season. While Mrs. Wiseman said that she believed that DEP would be inclined to again allow use in emergency situations, she said she did not believe an expenditure of \$93,000 for the work proposed in conjunction with the mooring field permitting process was a prudent expenditure in light of there being just 12 anchors available. Council Member Sorey concurred and also pointed out that it was uncertain whether all 12 or any portion thereof would be approved by DEP; therefore he made a motion to deny, seconded by Vice Mayor Wiseman. Prior to final action on the matter, however, additional discussion took place which ultimately resulted in a continuance.

Public Comment: Jim Boula, 702 Broad Avenue South, indicated that, as an advocate of the mooring field, he remains concerned that the permissible configuration at the anchorage should be determined prior to undertaking an investigatory process, particularly at the cost quoted. He also took issue with the fact that an individual who had neglected to pursue permitting while a City employee would now be paid by Turrell & Associates to do so. A consultant should not be hired until finite requirements are conveyed by DEP, he concluded.

Council Member Taylor proposed a continuance in order to verify that a former City employee in fact would work on this project at Turrell and to address Mr. Boula's other comments; she however noted her support for the mooring field. Council Member Sorey nevertheless maintained that a denial was in order so that staff could re-examine the project, including contact with DEP; Vice Mayor Wiseman agreed, pointing out that future investigation of the mooring field would not be precluded by denial. Council Member Nocera said he believed an earlier estimate of the work by Coastal Engineering had been significantly less, in the \$60,000 to \$70,000 range.

After further discussion, however, a continuance was agreed upon because it would be necessary to reinstitute the RFP process, resulting in further delays despite the fact that DEP had extended a year-end deadline to accommodate the City's efforts to select an engineering firm. It was also clarified that because of the extent of the work to be done, it could not be accommodated by existing City staff. City Manager Lee advocated approval of the ranking only so that staff could seek further clarification on questions raised. City Attorney Pritt concurred that the Council could in fact establish its own ranking of firms, but also noted that ideally the ranking should first be approved, followed by negotiations with the top ranked firm. Only if those negotiations fail, are negotiations entered into with the second ranked firm and so forth. However, in this case, he said, those two steps had been combined in the interest of expediency which also allows the cost to prematurely be a factor. Therefore from a legal standpoint Mr. Pritt recommended that the Council either establish a ranking without approval of a contract or deny the resolution so that staff could again commence the process in accordance with Council's direction. He later indicated that a third option open to the Council is continuance to allow the staff to perform further research.

Natural Resources Manager Bauer also pointed out that since the consultant selection committee had met, other factors had changed, such as information on key personnel in the first ranked firm and further indications of experience with mooring field permitting with reference to another.

Council Member Sorey therefore amended his motion to continue until the January 18 regular meeting. However, Vice Mayor Wiseman, the seconder of the prior motion, disagreed, stating that it is not only unlikely that the cost would be significantly different, but the Council must make a policy decision as to whether an expenditure of this magnitude and additional staff work is warranted.

Jim Boula then reported his understanding that the DEP was in the process of rewriting the consent order issued with reference to the City's mooring field. Because DEP is also reacting to hurricane recovery, Mr. Boula said that he did not believe that time for Council's decision on the matter was therefore critical; he also suggested that a time limit and penalties be incorporated into any consultant agreement so that the work is completed in a timely manner. To substantiate his assertion of possible DEP flexibility, Mr. Boula noted that some 70 anchors were installed in a Fort Myers mooring field with just two bathrooms as opposed to the requirement imposed upon Naples for one bathroom for every five boats. In conclusion, he urged use of City Dock enterprise funds for expenditures relative to the mooring field.

City Manager Lee indicated that staff had in fact been in touch with DEP throughout the process and stressed that this matter is not a permit renewal but an initial permitting, as though the mooring field had been a new installation. He concurred with Vice Mayor Wiseman regarding the need for a policy decision which would communicate to DEP the City's intent; DEP had extended the permit submission deadline based on the belief that it was the City's intent to move forward, he added.

In contrast to the anticipated cost of the mooring field permitting, Council Member Taylor cited other significant expenditures such as decorative lighting north of Seventh Avenue North for some \$500,000, \$200,000 for a greenway project, or \$65,000 for trees in Naples Preserve.

MOTION by Sorey to DENY RESOLUTION; seconded by Wiseman. This motion failed 3-4 (Price-yes, Sorey-yes, Nocera-no, Wiseman-yes, Taylor-no, MacIlvaine-no, Barnett-no).

City Attorney Pritt noted that the Council could direct staff to reopen the process due to new information alluded to by Natural Resources Manager Bauer; however, he suggested that a date certain for reconsideration not be set so as to allow the necessary public meetings of the committee to occur.

MOTION by Barnett to CONTINUE this matter (without noting a date certain for staff to return to Council with further information). This motion was seconded by MacIlvaine and unanimously carried, all members present and voting (Price-yes, Sorey-yes, Nocera-yes, Wiseman-yes, Taylor-yes, MacIlvaine-yes, Barnett-yes).

During the above vote various Council Members stressed the fact that the purpose of maintaining a mooring field is for the safety of the boating public as well as that of waterfront properties surrounding Naples Bay. City Attorney Pritt also asserted that when this matter is again before Council it will be merely a ranking of firms and not accompanied by a contract proposal; negotiations with the top ranked firm would subsequently take place. Vice Mayor Wiseman however requested that Council be provided with the individual committee member rankings.

**ORDINANCE (First Reading).....ITEM 13
AN ORDINANCE OF THE CITY OF NAPLES, FLORIDA, AMENDING THE CITY OF
NAPLES CODE OF ORDINANCES; CHAPTER 50; ARTICLE VI POLICE OFFICERS'**

PENSION AND RETIREMENT SYSTEM, REPEALING SECTION 50-432(9) AS OBSOLETE; AMENDING AND CLARIFYING SECTION 50-434(a)(2) TO LIMIT AMOUNT PAYABLE TO SURVIVOR ONLY UPON DEATH OF POLICE OFFICER; AMENDING AND CLARIFYING SECTION 50-434(c) BY INCORPORATING BY REFERENCE THE PROVISIONS OF SECTION 415(b) OF THE INTERNAL REVENUE CODE; PROVIDING FOR CONFLICTING PROVISIONS, SEVERABILITY AND APPLICABILITY; PROVIDING AN EFFECTIVE DATE AND FOR ADOPTION.

Title read by City Attorney Robert Pritt (10:43 a.m.).

Public Comment: None (10:44 a.m.).

MOTION by **MacIlvaine** to **APPROVE THIS ORDINANCE** as submitted on first reading; seconded by **Sorey** and unanimously carried, all members present and voting (**Taylor**-yes, **MacIlvaine**-yes, **Wiseman**-yes, **Sorey**-yes, **Price**-yes, **Nocera**-yes, **Barnett**-yes).

.....**ITEM 14**
DISCUSSION AND CONSIDERATION OF POTENTIAL PUBLIC IMPROVEMENT PROJECTS TO BE FUNDED THROUGH THE COMMUNITY DEVELOPMENT BLOCK GRANT PROGRAM (CDBG).

City Manager Robert Lee indicated that this was an annual process which currently deals with a \$137,000 allocation from Collier County; Council was being asked to approve the list of priorities for projects to be conveyed to the County for use of these funds. Planning Administrator Steven Olmsted also explained that the projects selected must meet certain national criteria in accordance with the rules of U.S. Department of Housing and Urban Development (HUD) and that several meetings had been held with residents of the River Park neighborhood to establish the list presented (Attachment #1). Council Member Taylor noted that costly projects, such as canal maintenance, could also be supplemented by Tax Increment Finance (TIF) funds. Council Member MacIlvaine concurred.

Public Comment: (10:52 a.m.) **Bryant Hyde, 1381 Fifth Avenue North**, indicated that he had recently relocated to River Park from Cincinnati and expressed concern that funds should not be spent on Fun Time Early Childhood Academy which he said he believed to be a private organization. Instead, he said, expenditures should be for such projects as landscaping and overall improvements in River Park East. However, it was clarified by Council Member Sorey that Fun Time is, in fact, a non-profit organization. Mr. Olmsted also confirmed that the majority of those attending the River Park neighborhood meetings had supported providing some assistance to Fun Time, although it would not be in the area of staff salaries and the like. **Jerry Krecicki, 1032 11th Street North**, said that he resides in Lake Park, owns homes in River Park and also plans on building there in the future. While supporting a contribution for the children of the area, he also pointed out that since the River Park canals had been dredged in 2000, clean-up would entail largely removal of debris although some seawalls had also failed. He urged that the Council continue to focus on neighborhood improvements both with CDBG and other funding sources. **Willie Anthony, 559 14th Street North**, noted the long and successful history of Fun Time and urged that assistance not be diminished. He also said that while he supported canal improvements, the Council should examine various other issues in the River Park community which are being identified in a needs assessment process then underway.

Mayor Barnett suggested that River Park canals either be included in the Naples Bay Days cleanup program or another similar volunteer effort. Mr. Olmsted noted that such activities would preserve funds for other purposes. Council Member MacIlvaine also urged that the CRAAB (Community Redevelopment Agency Advisory Board) discuss the CDBG priority list

so that recommendations for TIF funding could be transmitted to the Community Redevelopment Agency (CRA). City Manager Lee pointed out that the award of the contract for River Park needs assessment would be on the next CRA agenda with completion of the project expected in the spring.

Recess: 11:02 to 11:16 a.m. It is noted for the record that all Council Members were present when the meeting reconvened.

.....**ITEM 15**
DISCUSSION OF SOD REPLACEMENT IN RIGHTS-OF-WAY FOR PROPERTY DAMAGED DUE TO FALLEN TREES AND RECOVERY EFFORTS CAUSED BY HURRICANE WILMA. City Manager Robert Lee noted that the City had removed trees and stumps after Hurricane Wilma and backfilled impressions in the earth. He also noted an opinion by City Attorney Robert Pritt regarding the City's liability in this regard (Attachment 2). The question remains, he said, whether the City should replace damaged sod in public rights-of-way and, if so, the fiscal impact is estimated in excess of \$57,000. (It is noted for the record that specifics in this regard, as well as sidewalk, curb and gutter repair, are contained in the file for this meeting in the City Clerk's Office.) Nevertheless, he said, City requirements state that property owners are responsible for adjacent rights-of-way, although the City Council may wish to depart from this to some extent due to the fact that restoration was prompted by a storm event.

City Attorney Pritt said that the City is not responsible for trees which fall on private property due to an act of God such as a hurricane, and there is also the consideration of the extent to which the City may go to correct a problem for which it is not legally responsible. The Florida Constitution, he said, states that public funds can only be used for public purposes, and reminded Council of the dialogue which had occurred when private individuals requested public funds for relief efforts in conjunction with Hurricane Katrina. Nevertheless, he said, it is within the City Council's purview to determine whether a public purpose is being served in restoring areas surrounding where a City tree has fallen, he said. Mayor Barnett urged that the Council make such a determination as well as establishing policies to address any future emergencies; he said he supported the City funding certain work such as sod replacement in the right-of-way.

Council Member Taylor said that many citizens are gravely concerned about the size of trees which would be planted to replace those removed due to hurricane damage. Therefore, she urged that the Council be very clear that replacement of sod and restoration after tree removal is totally separate from the tree replacement program. She also urged that, instead of using an arborist to assist with tree replacement as previously noted, a landscape architect be engaged for this purpose. In addition, Miss Taylor recommended that the Council address the handling of incidents wherein property owners have already replaced sod in the right-of-way. City Attorney Pritt, however, recommended caution when considering reimbursement to property owners for actions that are their responsibility.

During further discussion, Council Member Sorey called attention to the need to address the order in which irrigation, driveway repair, sodding and tree planting would occur. Vice Mayor Wiseman, concurring that there are Constitutional constraints involved, however suggested that the City consider a program similar to that used to reimburse homeowners for installation of water sensors on their irrigation systems. Homeowners could apply for a type of grant for work already accomplished, thus providing an incentive to complete repairs, she added. Council Member MacIlvaine agreed, stressing that the responsibility for this work must remain with the property owner. City Attorney Pritt concurred that this could be done and recommended that any

such program exclude work where there might have other sources of reimbursement, such as insurance. Council Member Price recommended that the City approve swale grading as a condition of the grant so that drainage systems are not compromised. City Manager Lee said that staff would at the next meeting provide Council with a recommendation for accomplishing such a program, however stressing that considerable preliminary work must be done in working with the individual neighborhoods involved. It was the consensus of Council that an afternoon session on Wednesday, January 18, be scheduled for this purpose so that members of the public may attend with specific notification to property owner associations. Council Member Price also mentioned the need for the City to collect information from those property owners who have already accomplished restoration in the right-of-way.

Public Comment: (11:37 a.m.) **John White, 2485 Crayton Road**, commended the City for efficiency in post-hurricane restoration. He also expressed appreciation for the program which Council had outlined and urged that coordination be a primary component, particularly in expediting restoration of irrigation systems to avoid loss of undamaged landscaping.

CORRESPONDENCE AND COMMUNICATIONS.....

Mayor Barnett sought Council concurrence to direct staff to aggressively pursue a program to place electric utilities underground, including obtaining a cost from Florida Power & Light (FPL) for the entire City, as well as funding mechanisms. Council Member Taylor raised the issue of providing streaming video of meetings via the City's website; Technology Services Director Steve Weeks reported that a proposal for such a system would be brought to Council in March. Council Member Sorey noted an informational meeting regarding the Gordon River Greenway project on Friday, January 13, 8:00 a.m. at the Conservancy and invited the public to attend. Council Member Taylor received a recommendation from City Attorney Pritt that Council Members not make public statements regarding the vessel speed ordinance currently in litigation, regardless of whether it is in the context of a candidate forum or other public gathering.

PUBLIC COMMENT.....

Larry Mullins, 3885 Wuelva Court, President of the Challenge Foundation, spoke to Council with reference to assistance in locating temporary classroom space in order to implement a new charter school in the fall.

It is noted for the record that Vice Mayor Wiseman left the meeting at 11:56 a.m., advising Council of her support for the City assisting Mr. Mullins with his request.

Mr. Mullins reported that although space had been anticipated at the new Fun Time Early Childhood Academy, the project would not be completed in time to accommodate the charter school, necessitating the need for temporary space. This is particularly important, he said, because of sizeable grant funds which would be lost if not utilized for the charter school, as well as the need to coordinate enrollment with the Collier County School System for the upcoming school year. Council Member Taylor suggested that the Foundation may want to consider the vacant Florida Power & Light Company (FPL) building on Tenth Street.

In response to Council Member Nocera, City Attorney Pritt said that unless the City operated the school in some way, the standard liability insurance requirement would apply as in any other rental of a City facility should one be found for this purpose.

It was the consensus of Council that City staff work with the Challenge Foundation in locating a temporary facility for its charter school.

Sue Smith, 11th Avenue South, expressed concern that 81 workers had left City employ in the past year. She characterized this as distressing, citing the additional burden on existing employees in order to maintain service levels, and expressed dismay that there is an apparent lack of respect for workers by the administration. Salary studies to compare Naples salaries with

City Council Regular Meeting – January 4, 2006 – 9:00 a.m.

other cities in the state, she said, are not appropriate since the City of Naples considers itself different from other areas due to the wealth of its population. In addition, Mrs. Smith contrasted expenditures on beautification programs with employee salary levels and urged that salary studies be done in-house with funds instead paid to employees and identified undesignated surplus funds which had been referred to earlier in the meeting. In conclusion, she described a lack of vision among the three Council Members who had supported annexation of Pelican Bay without having an understanding of the situation within the City's own workplace. Mayor Barnett said he would provide Mrs. Smith with a chart showing a history of City employee turnover (a copy of which is contained in the file for this meeting in the City Clerk's Office.)

ADJOURN
12:13 p.m.

Bill Barnett, Mayor

Minutes prepared by:

Tara A. Norman, City Clerk

Minutes Approved: 2/8/06

**City of Naples
Community Development Block Grant Program
FY 2006-2007**

Allocation: \$137,000.00

Potential Projects

1. Fun Time Nursery Educational Programming
2. River Park Canals – Dredge and debris removal
3. Anthony Park improvements – Completion of ROW improvements along the western portion of 5th Avenue North approaching park to support parking, landscape improvements and passive open space enhancements.
4. Signage program – Set aside a portion of funding for design and installation of appropriate themed neighborhood directional signage throughout River Park neighborhood, to include an interpretive monument sign describing the history and culture of River Park.
5. 5th Avenue North lighting and landscape extension – Continue decorative lighting and landscape improvements currently observed along 5th Avenue North adding same or similar improvements along 13th St. N. and 14th St. N.
6. Rip rap replacement and/or reinforcement along canals where needed
7. Construct a lighted, landscaped walkway between Fun Time Nursery and the River Park Community Center

Note: Any potential projects must be approved by the City of Naples City Council and meet eligibility requirements of the federal Department of Housing and Urban Development.



A LEGAL PROFESSIONAL ASSOCIATION

MEMORANDUM

ITEM 15
850 PARK SHORE DRIVE
TRIANON CENTRE - THIRD FLOOR
NAPLES, FL 34103
239.649.2705 DIRECT
239.649.6200 MAIN
239.261.3659 FAX

TO: Lori Parsons, Risk Manager
CC: Bill Barnett, Mayor & Naples City Council
Dr. Robert E. Lee, City Manager
FROM: Robert D. Pritt, City Attorney and James D. Fox, Esq.
DATE: December 28, 2005
RE: Damage Resulting from Fallen Trees

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You have asked whether the City is liable for the damage resulting from trees belonging to the City or on the City's right-of-way falling on to adjoining property owners' property and causing damage or at least the need to be cleaned up, whether the City is liable for damage caused by the City's efforts to clean up such trees, and whether sovereign immunity protects the City from claims. Since these are substantially different questions they will be treated separately:

Short Answer:

1. The City has no legal responsibility for the clean-up or damage caused when a tree on City property falls on the property of another if the tree fell due wholly to an Act of God.
2. The City would be liable for damages to private property caused by City employees cleaning up damage from the hurricane *if* the City employee did not act as a reasonably prudent person under the circumstance would have acted.

Analysis:

Damage Caused by Tree Falling On Adjoining Property Due to an Act of God or Nature

You have asked whether the City has any legal responsibility for damage and clean-up costs of a tree that was on City property, or the City's right of way, but was knocked onto the property of another by a hurricane. There is no reported case in Florida involving damage caused by a tree blown over by wind. However, Florida's well-settled negligence law concerning acts of God and its equally well-settled nuisance law regarding trees, when considered together, make it clear that the City does not have any liability for the damage caused when a hurricane knocks over its trees onto private property, or for the clean-up of those trees on the property of another, if the hurricane and not some negligence on the part of the City caused the damage.

CLEVELAND TOLEDO AKRON COLUMBUS CINCINNATI WASHINGTON, D.C. TALLAHASSEE FORT MYERS NAPLES

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Where an injury is due to an act of God, the general rule is that there is no liability in negligence. *Davis v. Ivey*, 112 So. 264 (1927); see generally, 38 Fla. Jur. 2d Negligence § 10 (Act of God). An act of God is only those “events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them.” *Id.* at 409. A tropical hurricane has been considered an Act of God. *City of West Palm Beach v. Pittman*, 62 So.2d 27, 27 (Fla. 1952).

However, the act of God must have been the sole cause of the damage, otherwise “the defendant is liable notwithstanding the act of God.” *Atlantic Coast Line R. Co. v. Hendry*, 150 So. 598, 598 (Fla. 1933); *Florida East Coast Ry. Co. v. U.S.*, 519 F.2d 1184, 1198-9 (5th Cir. 1975); see also, 1 Am. Jur. 2d Act of God § 15. “[W]here an act of God and negligence of a person combine to injure another, namely, that the defendant will be liable for the whole loss if his negligence proximately caused it.” *City of West Palm Beach v. Pittman*, 62 So.2d 27, 27 (Fla. 1952).

In *Pittman*, the plaintiff contended that careless and negligent excavation of a street by the City caused his building to collapse during a hurricane. The Court of Appeal approved the trial judge’s instruction to the jury that if the damage was caused in any part by the city’s negligence in excavating the street, it was liable for the entire damage. *Id.*

Also instructive is a line of cases construing Florida’s nuisance law with respect to trees. The general rule is that a landowner is not liable to persons not on his land for nuisance caused by natural vegetation growth on his land and the sole remedy for the adjoining property owner is self-help. *Gallo v. Heller*, 512 So.2d 215 (Fla. 3rd DCA 1987); see generally, 54 ALR 4th 530 (tree or limb fall onto adjoining private property); c.f., *Sullivan v. Silver Palm Properties, Inc.*, 558 So.2d 409 (Fla. 1990)(landowner did not have duty to retard subterranean root growth of trees). The rationale for this “well-settled law” is to avoid “innumerable and, in many instances, purely vexatious” litigation. *Id.*

In *Gallo* the complainant claimed damages for nuisance allegedly created by trees growing on adjoining land, including that tree branches had damaged a roof on a house, that tree roots caused a cement walkway to crack, that fallen leaves caused a pet Afghan hound to contract a severe allergy, and that trees’ branches shaded property causing vegetation to die. The District Court of Appeal held that a complaint failed to state a cause of action. This is the rule in most jurisdictions.¹

Applying the above cases, the rule with respect to trees is as follows: If the City carelessly or negligently was responsible for the tree falling over it could be liable. For example, if the City planted a tree that clearly would be unstable given the soil conditions, or knew that a

¹ The exception is Louisiana, which has the distinction of being the only state in the nation to not follow the common law of England but rather follows the old Roman civil law. For a thorough discussion of the nuances in other jurisdictions see *Melnick v. C.S.X. Corp.*, 540 A.2d 1133 (Md. 1988).

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tree was rotting, severely cracked, or suffered other damage and posed a clear threat, but the City did nothing about it, then the City could be held liable for the independent act of negligence and the damage caused therefrom. *See, e.g., Klein v. Weaver*, 593 S.E.2d 913 (2004). If, on the other hand, the tree was blown over purely because of the hurricane, the City is not liable.

Damage Caused by City Employees When Cleaning Up Damage from a Hurricane

You have asked whether the City has any legal responsibility for damages its employees inflict while cleaning up after a hurricane. There is no case in Florida involving damage caused by a City employee to the property of another while cleaning up after a hurricane. Even though there is no case in Florida with precisely these facts, Florida's well-settled negligence law makes it clear that the City could have liability for damage its employees caused, if those employees did not act with the reasonable care, which is defined as what a prudent person under the circumstance would have done.

Traditionally, municipalities enjoyed sovereign immunity from negligence claims, but that immunity has now been partially waived by the Florida legislature. That waiver is found in §768.28(5), Fla. Stat. (2005), which states that municipalities "shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances." The amount in damages that the City must pay is limited to \$100,000 per person or \$200,000 per occurrence. *Id.*

This waiver of sovereign immunity applies only to operational functions, *Trianon Park Condominium Ass'n v. City of Hialeah*, 468 So.2d 9112 (Fla. 1985), unless the employee acts willfully or maliciously. *Smith v. State, Bd. of Regents, For and on Behalf of Florida A&M University*, 701 So.2d 348, 349, (Fla. 1st DCA 1997). An "operational" function "is one not necessary to or inherent in policy or planning, that merely reflects a secondary decision as to how those policies or plans will be implemented." *Kaisner v. Kolb*, 543 So.2d 732, 737 (Fla. 1989). Sovereign immunity is not waived for discretionary or planning functions. *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010 (Fla. 1979).

Whether a function is operational or a planning function is evaluated on case-by-case basis and there is no reported Florida case regarding removal of trees after a hurricane. However, a four-part test may generally be employed with "some assurance" to classify a function as a discretionary or planning function. *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010 (Fla. 1979): (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective? (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?

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Thus for example, the maintenance of a traffic signal light which is in place does not fall within that category of governmental activity that involves broad policy or planning decisions. This is operational level activity. So too is the proper maintenance of a traffic sign at an intersection and the proper maintenance of the painted letters "STOP" on the pavement of a highway. *Commercial Carrier Corp.*, 371 So.2d at 1022.

A thorough element by element analysis of this test is unnecessary as it is clear that the removal of hurricane debris fails the third element. Removal of trees and hurricane debris is more akin to maintenance of traffic signs and is not an "act, omission, or decision require[ing] the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency."

Having determined that removal of trees and hurricane debris is not protected by sovereign immunity, we turn to the test for when the City may be held liable. It is not possible to predict every factual situation that may arise, but some general principles should be instructive.

The test in negligence is whether a City employee had a duty, breached that duty, and that that breach was the proximate cause of the damage to another. We will look at each element briefly.

The duty of a City employee is to exercise reasonable care, which is "that degree of care which a reasonably careful person would use under like circumstances." Fla. Std. Jur. Inst. 4.1; see also, *Palm Beach County Bd. of County Com'rs v. Salas*, 511 So.2d 544, 547 (Fla. 1987)(city employees had the duty to carry out its maintenance responsibilities in a non-negligent manner).

Generally, the circumstances could include the proximity to the hurricane itself, the necessity for safety reasons for quick action, and the particular circumstances associated with the particular action itself. Fla. Std. Jur. Inst. 4.8 (imposing no additional standard beyond reasonable care under the circumstances in an emergency). Thus, for example, a City employee acting to free a person from underneath a tree who was in a pool of gasoline next to a sparking power line would not be required to take every conceivable precaution before removing the tree safely. "In other words, one who is confronted with a sudden and unexpected danger is only required to exercise such judgment as would a person of ordinary reason and prudence under similar extraordinary circumstances." FLJUR NEGLIGENCE§ 52 (citing *Loftin v. Wilson*, 67 So.2d 185 (Fla. 1953)). This is referred to as the sudden emergency doctrine. "The presence or absence of a sudden emergency situation is a question of fact ordinarily to be decided by the jury." *Wallace v. National Fisheries, Inc.*, 768 So.2d 17, 18 (Fla. 3rd DCA 2000).

"The requisite factual requirements in considering the application of the sudden emergency doctrine are (1) that the claimed emergency actually or apparently existed; (2) that the perilous situation was not created or contributed to by the person confronted; (3) that alternative courses of action in meeting the emergency were open to such person; and (4) that the action or course taken was such as would or might have been taken by a person of reasonable

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prudence in the same or similar situation.” *Wallace v. National Fisheries, Inc.*, 768 So.2d at 18. If this test is not met, i.e., where there is no immediate urgency for health and safety reasons – as opposed say to aesthetics – to remove debris, the lowered standard of care does not apply. *Kreiger v. Crowley*, 182 So.2d 20 (Fla. 2d DCA 1965).

Proximate cause has been defined as “a legal cause of [loss] [injury] [or] [damage] if it directly and in natural and continuous sequence produces or contributes substantially to producing such [loss] [injury] [or] [damage], so that it can reasonably be said that, but for the negligence, the [loss] [injury] [or] [damage] would not have occurred.” See Fla. Std. Jur. Inst. 5.1. The issue of proximate cause is a mixed question of fact and law, which turns on the particular facts of the case. A full explanation of proximate cause is well outside the purposes of this memo. See, e.g., *Hewitt v. Avis Rent-A-Car System, Inc.*, 912 So.2d 682 (Fla. 1st DCA 2005)(saying that if reasonable persons could disagree, then the question is one for the jury). Suffice it to say that in most circumstances if common sense tells one that the damages were caused by the employee, this element will have been met. *Id.*

Whether the duty has been breached or whether damage resulted are also usually purely questions of fact unique to each circumstance that are decided by a jury. *Marriott International, Inc. v. Perez-Melendez*, 855 So.2d 624 (Fla. 5th DCA 2003).

The measure of such damage to property is the difference between the value of the property immediately before the incident and its value immediately afterward, including the reasonable cost of repair, if it was practicable to repair the property, with due allowance for any difference between its value immediately before the incident and its value after repair. See Fla. Std. Jur. Inst. 6.2(h).

Therefore, depending on the particular facts and circumstances, an employee of the City who removes a fallen tree or other hurricane debris in a negligent manner, may incur liability for the City for any damages caused.² However, it is unlikely that negligence would be found where damage to the property was such as is incidental to the emergency situation and the need for prompt removal of the fallen trees throughout the City.

Notwithstanding the fact that the City is not required to come onto private property to remove the trees that have fallen from the City’s rights-of-way, the City has done so where a Right of Entry has been granted by the property owner. The standard Right of Entry form

² The individual employee does not face legal liability. Sect. 768.28 (9)(a), Fla. Stat.(2005)(“No officer, employee, or agent of the state or of any of its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.”)

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provides for a waiver of liability and indemnification from the property owner. This is supported by consideration (City's doing the work or paying for it, although it is on private property).

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