City Council Chamber
735 Eighth Street South
Naples, Florida 34102

City Council Regular Meeting – January 10, 2007 – 9:00 a.m.

Mayor Barnett called the meeting to order and presided.

ROLL CALL ..... ITEM 1

Present:	**Council Members:**
Bill Barnett, Mayor	William MacIlvaine
Johnny Nocera, Vice Mayor	Gary Price, II
	John Sorey, III
	Penny Taylor
	William Willkomm, III

Also Present:	
Robert Lee, City Manager	Clayton Hodge
Robert Pritt, City Attorney	Murray Hendel
Vicki Smith, Technical Writing Specialist	Teresa Heitmann
Tara Norman, City Clerk	Erika Henson
Stephen Weeks, Technology Services Director	Doug Finlay
Adam Benigni, Planner	William Whelan
Tony McIlwaine, Planner	Jerry Sanford
Robin Singer, Community Development Director	Robert Barrows
David Lykins, Community Services Director	Anne Barrows
Paul Bollenback, Building Official	Maryann Bitzer
Dan Mercer, Public Works Director	Sue Smith
Joe Boscaglia, Parks & Parkways Superintendent	James Elson
Ron Wallace, Construction Mgmt Director	Dave Eifert
Fred Coyle, Collier County Commissioner	Brad Kovacs
Norm Feder, Collier County Transportation Administrator	
Gerald Ladue	**Media:**
Henry Kennedy	Aisling Swift, Naples Daily News
Kippi Schank	
Spiro Zorbalas	Other interested citizens and visitors

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

Reverend Clayton Hodge, Bethel AMC Church.

ANNOUNCEMENTS ..... ITEM 3

Mayor Barnett proclaimed the week of January 14, 2007, as Purple Martin Week in the City of Naples.

SET AGENDA (add or remove items).....ITEM 4

MOTION by Nocera to SET THE AGENDA removing Item 8-b (landscape services) and Item 8-f (South Florida Water Management District/SWFMD funding) from the Consent Agenda for separate discussion; continuing Item 14 (anchorage ordinance) to 02/21/07; and adding the following: Item 17 (Naples Preserve roof repair), Item 18 (rezone petition at Fourth Street and Fourth Avenue South) for continuation from 01/17/07, and Item 19 (Kensington Garden Association administrative appeal) for continuation from 01/17/07. This motion was seconded by Price and unanimously carried, all members present and voting (MacIlvaine-yes, Nocera-yes, Price-yes, Sorey-yes, Taylor-yes, Willkomm-yes, Barnett-yes).

PUBLIC COMMENT.....ITEM 5

(9:06 a.m.) **Murray Hendel (no address given),** representing Gulf Shore Association of Condominiums, read into the record its resolution addressing the vessel speed litigation, urging Council not to pursue the matter further. Council Member Taylor presented Mr. Hendel with the City's response to Administrative Law Judge P. Michael Ruff (Attachment 1), asking that he distribute it to the members of the Association. **Teresa Heitmann (no address given), Aqualane Shores Association,** noted recent power outages in her area and asked whether citizens would be required to pre-sort recyclables in the future. City Manager Robert Lee said that the City had spoken with Florida Power & Light (FP&L) and had been informed that a transformer had failed. Public Works Director Dan Mercer also noted that no construction had been taking place in the area and would therefore not been a contributing factor. He also pointed out that the contractor and engineer in charge of the City's ongoing infrastructure installation are to notify the City and any other affected parties (residents) in the case of any contact with existing utilities. With reference to pre-sorting of recyclables, Director Mercer explained that sorting on-site by collection personnel is taking place around the City; however, if residents wish additional recycling bins in order to pre-sort materials, the City would provide them upon request. **Erika Henson (no address given),** voiced strong opposition to the diversion of commercial truck traffic onto Central Avenue, presenting Council with photographs (copies of which are contained in the file for this meeting in the City Clerk's Office) supporting her opinion that this is a residential area and that trucks are both too noisy and too large to travel safely on that roadway. **Doug Finlay, 3430 Gulf Shore Boulevard North,** gave a brief history of bicycle traffic on Pelican Bay Boulevard, noting that removal of bicycle lanes had followed aggressive behavior of a pace line by bicycle racing enthusiasts and complaints that areas of the roadway were too narrow to accommodate the bicycle lane. He stated that he had recently received communication that Pelican Bay intended to reinstall the lanes, stating his hope that an instance of unacceptable behavior would not affect the community's attitude toward responsible cyclists. He also urged that Council return truck traffic to Fifth Avenue South. City Manager Lee explained that the no-truck-traffic signs on Fifth Avenue South had been removed and staff was scheduled to give a presentation at the next workshop regarding citywide truck traffic and arterial routes; recommendations would then be given. Council Member Willkomm asked that the origin of the installation of the Fifth Avenue South signs be included in the aforementioned presentation.

CONSENT AGENDA

APPROVAL OF MINUTES.....ITEM 8-a

December 4, 2006 Workshop and December 6, 2006 Regular Meeting, as submitted.

RESOLUTION 07-11499.....ITEM 8-c
A RESOLUTION APPROVING AN AGREEMENT BETWEEN THE CITY OF NAPLES AND CAPRI ENGINEERING, LLC, TO PROVIDE TEMPORARY PLANS EXAMINER AND BUILDING INSPECTION SERVICES FOR THE CITY OF NAPLES; AUTHORIZING THE CITY MANAGER TO EXECUTE THE AGREEMENT; AND PROVIDING AN EFFECTIVE DATE. Title not read.

RESOLUTION 07-11500 .....ITEM 8-d
A RESOLUTION APPROVING AN AGREEMENT FOR PURCHASE AND SALE OF GOODS BETWEEN THE CITY OF NAPLES AND AIRGAS SPECIALTY PRODUCTS, INC., FOR THE ANNUAL PURCHASE OF ANHYDROUS AMMONIA FOR THE WATER TREATMENT PLANT; AUTHORIZING THE CITY MANAGER TO EXECUTE THE AGREEMENT; AND PROVIDING AN EFFECTIVE DATE. Title not read.

RESOLUTION 07-11501.....ITEM 8-e
A RESOLUTION APPROVING STATE FINANCIAL ASSISTANCE AGREEMENTS WITH THE FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION TO PROVIDE MATCHING GRANT FUNDS FOR WATER QUALITY AND FLOOD MITIGATION IMPROVEMENTS WITHIN STORMWATER DRAINAGE BASINS III AND V; AUTHORIZING THE MAYOR TO EXECUTE THE AGREEMENTS; AND PROVIDING AN EFFECTIVE DATE. Title not read.

RESOLUTION 07-11502.....ITEM 8-g
A RESOLUTION APPROVING A FOURTH AMENDMENT TO THE AGREEMENT WITH BONNESS, INC., FOR THE COVE LANE IMPROVEMENTS; AUTHORIZING THE CITY MANAGER TO EXECUTE THE FOURTH AMENDMENT TO AGREEMENT; AND PROVIDING AN EFFECTIVE DATE. Title not read.

***MOTION* by Nocera to *APPROVE CONSENT AGENDA* except Items 8-b and 8-f; seconded by Taylor and unanimously carried, all members present and voting (MacIlvaine-yes, Nocera-yes, Price-yes, Sorey-yes, Taylor-yes, Willkomm-yes, Barnett-yes).**

END CONSENT AGENDA

RESOLUTION 07-11503..... ITEM 8-b
A RESOLUTION APPROVING A FIRST AMENDMENT TO THE AGREEMENT BETWEEN THE CITY OF NAPLES AND VILA AND SON LANDSCAPE CORPORATION FOR ADDITIONAL SERVICES RELATED TO THE INSTALLATION OF LANDSCAPING, INCLUDING PLANTS AND SOD, ASSOCIATED WITH THE U.S. 41 NAPLESCAPE PROJECT FROM FLEISCHMANN BOULEVARD TO SEAGATE DRIVE; AMENDING THE FISCAL YEAR 2006-07 BUDGET AS ADOPTED BY ORDINANCE 06-11363; AUTHORIZING THE CITY MANAGER TO EXECUTE THE FIRST AMENDMENT TO THE AGREEMENT; AND PROVIDING AN EFFECTIVE DATE. Title read by City Attorney Robert Pritt (9:31 a.m.). Council Member Price asked whether his understanding was correct in that the additional $184,000 requested by staff was for landscaping, not irrigation infrastructure, and Parks and Parkways Superintendent Joe Boscaglia indicated that this was indeed for additional trees for planting in the medians. Mr. Boscaglia further explained that this project was to have been completed in the coming year and had been included within the Capital Improvement Program (CIP) for funding. Diseased plant material was however discovered and a decision was made to complete the project immediately instead of disrupting

traffic on two separate occasions, or in addition to taking the risk that the new sod would become infected from the grasses not removed. He assured Council Member Price that the requested $184,000 had been allocated in the following year's budget and would not necessitate amending that budget. Mr. Boscaglia also agreed with Council Member Taylor that agreements should be reached prior to construction so that any damage to existing infrastructure would be repaired or replaced by that contractor; Council Member Sorey said that he believed the contract executed by the Florida Department of Transportation (FDOT) for work on US 41 explicitly excluded any liability for damages such as these.

Public Comment: (9:37 a.m.) None.

MOTION by Sorey to APPROVE RESOLUTION 07-11503 as submitted; seconded by Nocera and unanimously carried, all members present and voting (MacIlvaine-yes, Nocera-yes, Price-yes, Sorey-yes, Taylor-yes, Willkomm-yes, Barnett-yes).

RESOLUTION 07-11504.....ITEM 8-f
A RESOLUTION APPROVING A SOUTH FLORIDA WATER MANAGEMENT DISTRICT 2006 – 2007 ALTERNATIVE WATER SUPPLY FUNDING PROGRAM AGREEMENT TO PROVIDE GRANT FUNDING THROUGH SENATE BILL 444 TO EXPAND THE CITY'S RECLAIMED WATER SYSTEM; AUTHORIZING THE MAYOR TO EXECUTE THE AGREEMENT; AND PROVIDING AN EFFECTIVE DATE. Title read by City Attorney Robert Pritt (9:37 a.m.). City Manager Robert Lee explained that the grants from the South Florida Water Management District (SFWMD) had been pursued for Phases I and II of the reclaimed water distribution system, but upon further review staff was recommending the funding be utilized entirely for Phase I, thereby equally subsidizing all residents in relation to the main trunk line that would be used by both areas. In response to Council Member Price, City Manager Lee said that recent discussion with residents in the Old Naples area had given rise to the possibility of charging the same rate for reuse and potable water, that a funding option for that area would be realized from user fees rather than a special assessment or loans, but that further review would be necessary. He also explained that if the reuse system is expanded to include additional areas of the City, another main trunk line would be necessary.

Public Comment: (9:41 a.m.) None.

MOTION by Taylor to APPROVE RESOLUTION 07-11504 as submitted; seconded by Sorey and unanimously carried, all members present and voting (MacIlvaine-yes, Nocera-yes, Price-yes, Sorey-yes, Taylor-yes, Willkomm-yes, Barnett-yes).

RESOLUTION 07-11505.....ITEM 9
A RESOLUTION DETERMINING CONDITIONAL USE PETITION 06-CU11 TO ALLOW FOR THE FREEDOM MEMORIAL MONUMENT TO BE ERECTED ON THE SITE OF THE PROPOSED GORDON RIVER WATER QUALITY PARK LOCATED EAST OF GOODLETTE-FRANK ROAD AND NORTH OF GOLDEN GATE PARKWAY, MORE FULLY DESCRIBED HEREIN, SUBJECT TO THE CONDITION LISTED HEREIN; PROVIDING FOR THE CITY CLERK TO RECORD SAID CONDITIONAL USE; AND PROVIDING AN EXPIRATION DATE AND AN EFFECTIVE DATE. Title read by City Attorney Robert Pritt (9:41 a.m.). This being a quasi-judicial proceeding, Notary Public Vicki Smith administered an oath to those intending to offer testimony; all responded in the affirmative. City Council Members then made the following ex

parte disclosures: Willkomm and Nocera/spoke with Collier County Commissioner Fred Coyle and Collier County Transportation Administrator Norm Feder; Barnett/spoke with Commissioner Coyle; Price and MacIlvaine/spoke with Commissioner Coyle and reviewed Design Review Board (DRB) 01/04/07 minutes; Taylor/spoke with Commissioner Coyle and reviewed DRB and Planning Advisory Board (PAB) minutes; and Sorey/spoke with Commissioner Coyle, reviewed DRB meeting video and visited the site. Planner Tony McIlwain introduced the item, noting staff recommendation for approval.

Commissioner Coyle gave an electronic presentation (a printed copy of which is contained in the file for this meeting in the City Clerk's Office) during which he explained that the Freedom Memorial had been proposed to honor those who lost their lives in the terrorist attack of September 11, 2001. The original location had been the Collier County Government Center, but with the designation of September as Freedom Month, it was believed that a quieter location, more suited to reflection was called for. The proposed Gordon River Water Quality Park, to be located at the northeast corner of the intersection of Goodlette-Frank Road and Golden Gate Parkway, was then designated as the site for the installation. He reviewed the selection process which he said had, as closely as possible, replicated the selection process followed for the World Trade Center memorial in New York City. The selected design, which had been submitted by Gerald Ladue, includes a billowing 13 foot high and 40 foot long flag made of granite, placed on a platform depicting the United States, with 50 surrounding stones with the name of each state. Mr. Coyle then reviewed the available parking and access to the park, Collier County Transportation Administrator Norm Feder assured Council that no traffic light except a left turn directional (for east bound traffic from Golden Gate Parkway into the park) would be installed at the proposed location. Mr. Coyle concluded that this location is considered ideal for the memorial and approval would allow fund raising for the $2-million memorial to begin.

In response to Council Member Price, Commissioner Coyle confirmed that the proposed commercial development to the north of the park had been a consideration in placing the memorial nearer the Golden Gate Parkway entrance; in addition, the PAB recommended that location and it had been deemed the place which would afford the desired quiet, reflective atmosphere. During a brief discussion of the materials to be used in construction of the monument, Commissioner Coyle stated that artist Gerald Ladue had worked closely with the granite industry during the planning and development, noting a drainage system along the top surface of the structure to aid in preserving the look and integrity of the stone. Artist Gerald Ladue clarified that the measurement from side to side of the monument is 40 feet and that the height is 13 feet with an extension at the flagpole to 18 feet.

Council Members commended Commissioner Coyle and Collier County for the proposed memorial, stating that the City considered it a privilege to house it. Council Member MacIlvaine moved approval of the resolution.

Public Comment: (10:16 a.m.) **James Elson, William Whelan, Dave Eifert, Jerry Sanford, and Gerald Ladue,** waived comment. **Henry Kennedy (no address given),** stated strong support of the project and announced his intent to donate $1,000 to the project. City Attorney Robert Pritt noted the letter of opposition received that day (a printed copy of which is contained in the file for this meeting in the City Clerk's Office) and City Manager Robert Lee said that

review by the DRB and the Public Arts Advisory Committee (PAAC) of the final design would most likely take place due to the fact that the memorial is considered a work of art.

MOTION by MacIlvaine to APPROVE RESOLUTION 07-11505 as submitted; seconded by Barnett and unanimously carried, all members present and voting (MacIlvaine-yes, Nocera-yes, Price-yes, Sorey-yes, Taylor-yes, Willkomm-yes, Barnett-yes).

RESOLUTION 07-11506.....ITEM 10
A RESOLUTION DETERMINING PETITION 06-EV2 TO VACATE PART OF THE EXISTING CITY OF NAPLES WATER AND SEWER EASEMENTS AND CREATE NEW REPLACEMENT EASEMENTS TO ACCOMMODATE THE RENOVATION OF THE COASTLAND MALL ON THE WEST SIDE OF THE PROPERTY LOCATED AT 1900 9TH STREET NORTH, MORE FULLY DESCRIBED HEREIN; AND PROVIDING AN EFFECTIVE DATE. Title read by City Attorney Robert Pritt (10:16 a.m.). Council Member Price asked whether the City would incur any costs in this matter, and City Attorney Pritt stated that recording fees would be expended. Mr. Pritt also noted, as explained in Section 2 of the resolution, that no easement would be vacated until the replacement easements are recorded and returned to the City.

Public Comment: (10:20 a.m.) None.

MOTION by Taylor to APPROVE RESOLUTION 07-11506 as submitted; seconded by Nocera and unanimously carried, all members present and voting (MacIlvaine-yes, Nocera-yes, Price-yes, Sorey-yes, Taylor-yes, Willkomm-yes, Barnett-yes).

RESOLUTION 07-11507.....ITEM 11
A RESOLUTION DETERMINING PETITION 06-EV3 TO VACATE PART OF THE EXISTING CITY OF NAPLES WATER AND SEWER EASEMENTS AND CREATE NEW REPLACEMENT EASEMENTS TO ACCOMMODATE THE RENOVATION OF THE COASTLAND MALL ON THE WEST SIDE OF THE PROPERTY LOCATED AT 2000 9TH STREET NORTH, MORE FULLY DESCRIBED HEREIN; AND PROVIDING AN EFFECTIVE DATE. Title read by City Attorney Robert Pritt (10:20 a.m.).

Public Comment: (10:21 a.m.) None.

MOTION by Taylor to APPROVE RESOLUTION 07-11507 as submitted; seconded by MacIlvaine and unanimously carried, all members present and voting (MacIlvaine-yes, Nocera-yes, Price-yes, Sorey-yes, Taylor-yes, Willkomm-yes, Barnett-yes).

RESOLUTION 07-11508.....ITEM 12
A RESOLUTION DETERMINING APPEAL OF PETITION 06-AA4 FROM THE ADMINISTRATIVE DECISION OF THE CITY MANAGER THAT THE WALLS FOR A NEW SINGLE FAMILY RESIDENCE CANNOT BE REBUILT IN THE PREVIOUS NON-CONFORMING LOCATION WITHOUT APPROVAL OF A VARIANCE ON PROPERTY LOCATED AT 22 4TH AVENUE SOUTH, MORE FULLY DESCRIBED HEREIN; AND PROVIDING AN EFFECTIVE DATE. Title read by City Attorney Robert Pritt (10:21 a.m.). This being a quasi-judicial proceeding, Notary Public Vicki Smith administered an oath to those intending to offer testimony; all responded in the affirmative. City Council Members then made the following ex parte disclosures: Taylor and Sorey/met the petitioner and contractor at the site and reviewed the Planning Advisory Board (PAB) 12/13/06 meeting video; Barnett/met the petitioner and contractor at the site; Willkomm/visited the site,

spoke with the petitioner and reviewed the aforementioned PAB video; Price/met the petitioner at the site and reviewed the PAB video; and MacIlvaine and Nocera/spoke with the petitioner and visited the site.

Community Development Director Robin Singer, using an electronic presentation, explained that the home on the site had been demolished; the subject walls had been removed during the construction stage, therefore a variance was needed to rebuild them according to Code of Ordinances, Section 46-35. She said that the appeal centered around the petitioner's position is that the stem walls are still in place and that the walls could be rebuilt in their previously existing location.

Petitioner Spiros Zorbalas utilized photographs of the site (copies of which are contained in the file for this meeting in the City Clerk's Office) and explained that approval to partially modify the subject walls had been part of the original architectural plans submitted to the City, however, during the demolition process, the north and south walls were found not to be structurally sound and had to be partially removed. Mr. Zorbalas stressed that the non-conforming walls were taken down to a point that the contractor felt they could be safely repaired; therefore the appeal due to the fact that the petitioner believes that the stem wall, the non-conformities, still exist and can be repaired at their present location. If the non-conformity is however deemed to have been removed, a variance process would indeed be necessary, Mr. Zorbalas added. He further reported that the present plans had been approved by the Department of Environmental Protection (DEP), necessitated by the fact that one side of the structure lies within the Coastal Construction Setback Line (CCSL), and taking some two years to accomplish. Should the incident administrative appeal be denied, newly drafted plans would again be required for DEP review.

City Attorney Pritt explained that the decision before Council at that time was only the administrative appeal and that variance criteria would be considered only during hearing on a petition of that nature. In the discussion that followed, Council Member Willkomm expressed the view that eight feet of the ten foot stem wall had been removed and with it the non-conformity. Council Member Price however questioned whether a repair can be made to make a non-conformity safer if a portion of the non-conformity still exists.

Contractor Brad Kovacs displayed a drawing (a copy of which is contained in the file for this meeting in the City Clerk's Office) to illustrate the manner in which he had planned to alter the north wall prior to discovery that the north and south stem walls were unsafe. He also pointed out that the new slab does not bear on the outer stem wall, it being an in-fill type. Council Member Price questioned how the north wall could stand with the areas labeled for removal although, he said that he believes that a portion of both walls does in fact remain. The petitioner explained that structurally, the walls were left in place to comply with the City's codes, but reiterated that they were found to be in such poor condition that they had to be removed to allow repair in the interest of safety.

Council Member Willkomm characterized it as a common practice to partially retain walls to allow a non-conformity to continue. In response to Council Member Price, he explained that in this case he however believes the walls had been removed; therefore a variance should be sought.

Community Development Director Singer noted her opinion that the subject repair of the stem walls should actually be considered expansions, not maintenance, improvement or repair; therefore a variance petition is necessary to rebuild these walls. She said that her interpretation that the non-conforming stem walls are gone, not diminished, is based upon the City's code; they could not be replaced in the same location since the setbacks must be honored.

Building Official Paul Bollenback reviewed his memo dated January 5, (Attachment 2) which addressed the new Federal Emergency Management Agency (FEMA) building elevations effective November 17, 2005, as they pertain to this particular construction. He explained that the architect had designed the plans according to the FEMA elevations in effect on the date of permit application, November 16, 2005, and that an additional six inches in elevation would be necessary if the administrative appeal is approved. Director Singer concluded staff's presentation by asking Council to qualify its decision to the extent that, if granted, the reasoning behind Council's decision could be utilized by staff in making similar determinations in the future. Council Member Willkomm stated that he agreed that this construction should be decided by a variance petition, not an administrative appeal.

Mr. Zorbalas said that he appreciated staff's efforts in working with him during this construction, but that his intent had been to avoid building a megahouse (structure built to extent of allowable lot coverage) at the new FEMA elevations thereby continuing the aesthetics of the surrounding neighborhood. He assured the Council of his belief that granting this appeal would not represent a precedent since decisions of this type are made on a case-by-case basis.

City Attorney Pritt stated that he agreed with staff's interpretation of Section 45-35(2) of the Code of Ordinances and reiterated that the merits of granting a variance were not before Council at that time. Council Member Price and Vice Mayor Nocera voiced disagreement, saying that they believed that the stem wall still existed, that the new construction would be built in a safer manner, and Council Member Price proffered the following motion.

Public Comment: (11:31 a.m.) None.

> ***MOTION by Price to OVERRULE ADMINISTRATIVE DECISION OF CITY MANAGER; seconded by Nocera and failed 3-4, all members present and voting (Price-yes, Sorey-no, Nocera-yes, Willkomm-no, Taylor-no, MacIlvaine-no, Barnett-yes).***

Council Member MacIlvaine then expressed the view that the wall was no longer in existence and the following motion was made.

> ***MOTION by MacIlvaine to APPROVE RESOLUTION 07-11508 SUSTAINING ADMINISTRATIVE DECISION OF CITY MANAGER, appeal denied based upon Section 49-35(a)(2), proposed wall deemed an expansion of a non-conformity. This motion was seconded by Willkomm and carried 4-3, all members present and voting (Price-no, Sorey-yes, Nocera-no, Willkomm-yes, Taylor-yes, MacIlvaine-yes, Barnett-no).***

Recess: 11:38 a.m. to 11:53 a.m. It is noted for the record that the same Council Members were present when the meeting reconvened, except Council Member Willkomm who arrived at 11:55 a.m.

It is noted for the record that Items 13-a and 13-b were read and considered concurrently.

RESOLUTION 07-11509.....ITEM 13-a
A RESOLUTION DETERMINING LIVE ENTERTAINMENT PETITION 07-LE1 FOR LIVE ENTERTAINMENT AT CJ'S BOARDWALK BAR AND GRILL LOCATED AT 1100 6TH AVENUE SOUTH #10, MORE FULLY DESCRIBED HEREIN, SUBJECT TO THE CONDITIONS LISTED HEREIN; AND PROVIDING AN EFFECTIVE DATE.
RESOLUTION 07-11510..... ITEM 13-b
A RESOLUTION DETERMINING A RESIDENTIAL IMPACT STATEMENT FOR PETITION 07-RIS1 TO ALLOW LIVE ENTERTAINMENT AT CJ'S BOARDWALK BAR AND GRILL LOCATED AT 1100 6TH AVENUE SOUTH #10, MORE FULLY DESCRIBED HEREIN; AND PROVIDING AN EFFECTIVE DATE. Titles read by City Attorney Robert Pritt (11:53 a.m.). This being a quasi-judicial proceeding, Notary Public Vicki Smith administered an oath to those intending to offer testimony; all responded in the affirmative. City Council Members then made the following ex parte disclosures: Willkomm/familiar with the site and spoke with other tenants; Price, Nocera and Taylor/familiar with the site, received letters of opposition, but no additional contact since the October 4, 2006, meeting at which this item was last considered; Barnett/spoke with Ann Barrows, President of Marina Manor; and MacIlvaine and Sorey/visited the site, received letters of opposition, but no further contact since the above referenced meeting. Planner Adam Benigni explained that a previous request had been denied without prejudice due to staff recommendations and failure by the petitioner's agent to respond. The petitions presently before Council contain amended requests and staff recommended approval with the conditions set forth in the applicable resolutions. Planner Benigni said that the request for holiday live entertainment was not included within the aforementioned resolutions due to the fact that staff considered it within the purview of Council to designate the holidays to be approved.

Kippi Schank, agent for the petitioner, characterized the live entertainment requested as easy listening music and that the doors of the establishment would remain closed. She also pointed out that the police calls referenced by staff were service calls, not noise complaints, and that in fact she had placed one of the calls herself due to an unruly customer from a nearby establishment.

Public Comment: (12:08 p.m.) **Robert Barrows, 1100 Eighth Avenue South,** representing Marina Manor, expressed opposition to the proposed petition, questioning the safety of pedestrians along the boardwalk with the tables and chairs allowed on the perimeter of the walkway; he also noted the expansion of the establishment into an adjoining area. Council Member Price urged that if the petitions are approved and noise becomes a problem, complaints under the City's noise ordinance be reported for follow-up. **Ann Barrows, 1100 Eighth Avenue South, President of Marina Manor,** read into the record a letter regarding opposition to this item (Attachment 3). **Maryann Bitzer, 1100 Eighth Avenue South,** urged protecting what she termed the Old Naples atmosphere and voiced opposition to the petitions due to excessive noise. Council Member Taylor also urged residents to register complaints if noise becomes an issue with the establishment. Ms. Schank said that CJ's encouraged monitoring of noise levels outside the establishment if necessary, and in response to Mayor Barnett, explained that the petitioner would have appeared at that meeting if necessary. Ms. Schank summarized that the establishment is a dedicated restaurant and wishes a quieter clientele; therefore, the acceptance of hours from 6:00 p.m. to 10:00 p.m. on Thursday night and until 11:00 p.m. on Friday and Saturday nights, as set forth in the resolution.

***MOTION** by Willkomm to **APPROVE RESOLUTION 07-11509 with conditions set forth in resolution**; seconded by Taylor and carried 6-1, all members present and voting (Taylor-yes, MacIlvaine-no, Willkomm-yes, Sorey-yes, Price-yes, Nocera-yes, Barnett-yes).*

***MOTION** by Willkomm to **APPROVE RESOLUTION 07-11510 with conditions set forth in resolution**; seconded by Taylor and carried 6-1, all members present and voting (MacIlvaine-no, Nocera-yes, Price-yes, Sorey-yes, Taylor-yes, Willkomm-yes, Barnett-yes).*

EXECUTIVE SESSION.....ITEM 6

(12:31 p.m.) Mayor Barnett advised that Council would enter into an executive session pertaining to Joseph A. Biasella vs. City of Naples and Russell Ayers, United States District Court, Middle District of Florida, Ft. Myers Division, Case No. 2:06-CV-00258-UA-SPC.

Executive Session: 12:31 p.m. to 12:57 p.m. It is noted for the record that all Council Members were present when the meeting reconvened.

***MOTION** by Sorey to **APPROVE SETTLEMENT OF BIASELLA vs. CITY OF NAPLES and RUSSELL AYERS, United States District Court, Middle District of Florida, Ft. Myers Division, Case No. 2:06-CV-OO258-UA-SPC, in accordance with the proposal made by the City's Attorney in response to the request for settlement made by plaintiff Joseph Biasella's attorney in that it contain the elements as follows: 1) a dismissal of the Federal Court claim with prejudice by Mr. Biasella; 2) the City would waive its request for attorney's fees; 3) the settlement would include releases by both parties, the releases to include a release of any attorney fees by either party; and 4) the case is dismissed without prejudice with respect to the City and Police Officer Russell Ayers.** This motion was seconded by Taylor and unanimously carried, all members present and voting (MacIlvaine-yes, Nocera-yes, Price-yes, Sorey-yes, Taylor-yes, Willkomm-yes, Barnett-yes).*

EXECUTIVE SESSION.....ITEM 7

(12:59 p.m.) Mayor Barnett advised that Council would enter into an executive session pertaining to Collier County Board of County Commissioners, et al, Petitioners vs. Florida Fish and Wildlife Conservation Commission and the City of Naples, Respondents, and Citizens to Preserve Naples Bay, Inc., and the Conservancy of Southwest Florida, Inc., Intervenors – State of Florida Administrative Hearings – Case No. 05-2034, 05-2035, 05-2036, and 05-2037.

Executive Session: 12:59 p.m. to 1:32 p.m. It is noted for the record that all Council Members were present when the meeting reconvened except Council Member Willkomm who left the meeting at 1:32 p.m. There was no action taken on this item.

ORDINANCE (Continued – see Item 4 above).....ITEM 14

AN ORDINANCE PERTAINING TO WATERWAYS; AMENDING SECTION 42-81, DEFINITIONS; SECTION 42-141, DEFINITIONS; SECTION 42-142(a), PROHIBITIONS ON MOORING AND ANCHORING; SECTION 42-143(5), (6), AND (7) RULES AND REGULATIONS; SECTION 42-144, MOORING RENTAL RATE; SECTION 42-145, MOORINGS SIGNAGE; OF THE CODE OF ORDINANCES, CITY OF NAPLES, FOR THE PURPOSE OF AMENDING RULES AND REGULATIONS FOR WATERWAYS FACILITIES AND RESOURCES; PROVIDING A SEVERABILITY CLAUSE, A REPEALER PROVISION AND AN EFFECTIVE DATE. Title not read.

ORDINANCE (First Reading).....ITEM 15
AN ORDINANCE RELATING TO BUSINESS TAXES (FORMERLY OCCUPATIONAL LICENSE TAXES); AMENDING ARTICLE III OF CHAPTER 34 OF THE CODE OF ORDINANCES OF THE CITY OF NAPLES FOR THE PURPOSE OF AMENDING THE CITY'S BUSINESS TAX REGULATIONS; AND PROVIDING A SEVERABILITY CLAUSE, A REPEALER PROVISION AND AN EFFECTIVE DATE. Title read by City Attorney Robert Pritt (1:32 p.m.).

Public Comment: (1:33 p.m.) None.

MOTION by Taylor to APPROVE THIS ORDINANCE at First Reading; seconded by MacIlvaine and unanimously carried (MacIlvaine-yes, Nocera-yes, Price-yes, Sorey-yes, Taylor-yes, Willkomm-absent, Barnett-yes).

ORDINANCE 07-11511.....ITEM 16
AN ORDINANCE REGARDING ADDITIONAL HOMESTEAD EXEMPTION; AMENDING SECTIONS 34-141, APPLICABILITY, AND 34-143, AMOUNT, INCREASING THE ADDITIONAL HOMESTEAD EXEMPTION FOR SENIORS FROM $25,000 TO $50,000 PURSUANT TO A FLORIDA CONSTITUTIONAL AMENDMENT APPROVED BY REFERENDUM ON NOVEMBER 7, 2006; PROVIDING A SEVERABILITY CLAUSE, A REPEALER PROVISION AND AN EFFECTIVE DATE. Title read by City Attorney Robert Pritt (1:34 p.m.).

Public Comment: (1:35 p.m.) None.

MOTION by Sorey to ADOPT ORDINANCE 07-11511 as submitted; seconded by Taylor and unanimously carried (MacIlvaine-yes, Nocera-yes, Price-yes, Sorey-yes, Taylor-yes, Willkomm-absent, Barnett-yes).

DISCUSSION OF NAPLES PRESERVE ROOF REPAIR (Added Item) .....ITEM 17
City Manager Robert Lee explained that staff had presented this item to the Design Review Board (DRB) per Council's request and it was the consensus of the Board that the Dura Loc process be employed for roof repair of the Naples Preserve visitor center. Construction Management Director Ron Wallace further pointed out that this process would not alter the unique architectural appearance of the roof. He however suggested that seriously damaged sections of the tiles themselves be first replaced, in some areas requiring work down to the plywood covering the rafters, and then reforming the tile, thereby maintaining its appearance. In response to Council Member Price, Director Wallace explained that the process is guaranteed for five years, that Dura Loc is also a roofing contractor and is qualified to maintain the roof.

Public Comment: (1:43 p.m.) None.

MOTION by Sorey to APPROVE DURA LOC PROCEDURE; seconded by MacIlvaine and unanimously carried (MacIlvaine-yes, Nocera-yes, Price-yes, Sorey-yes, Taylor-yes, Willkomm-absent, Barnett-yes).

It is noted that Items 18-a and 10-b were considered concurrently.

ORDINANCE (Added Item).....ITEM 18-a
AN ORDINANCE DETERMINING REZONE PETITION 06-R7 FOR PROPERTY LOCATED AT THE SOUTHEAST CORNER OF 4TH AVENUE SOUTH AND 4TH STREET SOUTH, MORE FULLY DESCRIBED HEREIN, IN ORDER TO PERMIT REZONING FROM R3-12 TO PD, PLANNED DEVELOPMENT; APPROVING THE PLANNED DEVELOPMENT DOCUMENT FOR FOURTH AND FOURTH ASSOCIATES, LLC; PROVIDING A SEVERABILITY CLAUSE, A REPEALER PROVISION AND AN EFFECTIVE DATE. Title not read.

RESOLUTION (Added Item)..... ITEM 18-b
A RESOLUTION DETERMINING A RESIDENTIAL IMPACT STATEMENT FOR PETITION 06-RIS9 IN ORDER TO CHANGE THE ZONING FROM R3-12 TO PD, PLANNED DEVELOPMENT, IN ORDER TO CONSTRUCT A 12-UNIT, MULTI-FAMILY DEVELOPMENT AND MULTI-LEVEL PARKING FACILITY LOCATED AT THE SOUTHEAST CORNER OF 4TH AVENUE SOUTH AND 4TH STREET SOUTH, MORE FULLY DESCRIBED HEREIN; AND PROVIDING AN EFFECTIVE DATE. Title not read. City Attorney Robert Pritt explained that the City had received a request from the applicant to continue this matter to a date yet to be determined, thereby necessitating further newspaper notifications; the petitioner for Item 19 had also requested a similar continuance in conjunction with the item under consideration presently.

Public Comment: (1:44 p.m.) None.

MOTION by MacIlvaine to CONTINUE ITEMS 18-a AND 18-b TO DATE UNCERTAIN; seconded by Taylor and unanimously carried (MacIlvaine-yes, Nocera-yes, Price-yes, Sorey-yes, Taylor-yes, Willkomm-absent, Barnett-yes).

RESOLUTION (Added Item).....ITEM 19
A RESOLUTION DETERMINING AN APPEAL IN ACCORDANCE WITH SECTION 2-571 OF THE CODE OF ORDINANCES FILED BY KENSINGTON GARDENS CONDOMINIUM ASSOCIATION, INC. OF APPROVALS GIVEN TO FOURTH AND FOURTH ASSOCIATES BY THE FIFTH AVENUE SOUTH ACTION COMMITTEE, SAID PROPERTY LOCATED AT THE SOUTHEAST CORNER OF 4TH AVENUE SOUTH AND 4TH STREET SOUTH, MORE FULLY DESCRIBED HEREIN; AND PROVIDING AN EFFECTIVE DATE. Title not read (see Item 18 above).

Public Comment: (1:45 p.m.) None.

MOTION by Taylor to CONTINUE ITEM 19 TO DATE UNCERTAIN; seconded by Price and unanimously carried (MacIlvaine-yes, Nocera-yes, Price-yes, Sorey-yes, Taylor-yes, Willkomm-absent, Barnett-yes).

Following the above vote, Council Member Sorey asked that CRA Manager Chet Hunt review the parking needs assessment and Council Member MacIlvaine said that parking needs should be considered during the visioning process. City Manager Robert Lee explained that Manager Hunt is currently undertaking the above referenced review and that a proposed lease for the Fourth Street and Fourth Avenue South parking lot was to be presented to Council for approval the following week. Council Member Taylor asked whether existing infrastructure would support complete build-out of the Fifth Avenue South area and City Manager Lee said that Mr. Hunt would address that issue also.

PUBLIC COMMENT.....

(1:48 p.m.) **Sue Smith, 11th Avenue South,** criticized the City's ethics policy regarding the acceptance of gifts by employees during the holiday season, stating that she felt it unfair if citizens wished to express their appreciation in such a manner. She also suggested that town hall meetings be held in various locations during the visioning process thereby enabling citizens to attend and make known their opinions. Ms. Smith noted the upcoming retirement of City employee Molly Reed, saying she felt Ms. Reed would be sorely missed.

CORRESPONDENCE AND COMMUNICATIONS.....

(1:56 p.m.) Council Member Price requested an update on the request for proposals (RFP's) regarding the proposed parking garage on Eighth Street and Sixth Avenue South. He also noted purported discrepancies between the Naples Sailing and Yacht Club dock permit, the dredging

application to the State of Florida, and approvals conveyed by Council and the Planning Advisory Board (PAB). Mr. Price also requested a timeline for the presentation of the first annual Sam Noe Award. Council Member Taylor gave a brief history of the policy regarding City employee acceptance of gratuities in response to public comment above. Council Member Sorey proposed the City's involvement in efforts by the Collier County Sheriff's Department to obtain state approval to utilize cameras to detect red light violations and other safety issues (see consensus below). Mr. Sorey also requested a review of the criteria for granting of a variance and for staff to develop language for clearer definitions regarding walls, stem walls, monolithic slabs, etc. (see Item 12 above). Vice Mayor Nocera requested the status of compliance with the trash container enclosure ordinance, and Mayor Barnett requested an update on the computerized traffic signalization system installation.

Consensus for City involvement with Collier County Sheriff's Department effort to obtain state approval for utilizing cameras in detecting traffic violations and other safety issues.

Consensus to conduct workshop as soon as possible regarding review of criteria for granting of variances.

ADJOURN.....
2:05 p.m.

_____
Bill Barnett, Mayor

_____
Tara A. Norman, City Clerk

Minutes prepared by:

_____
Vicki L. Smith, Technical Writing Specialist

Minutes Approved: 2/7/07

ROETZEL & ANDRESS
A LEGAL PROFESSIONAL ASSOCIATION

850 PARK SHORE DRIVE
TRIANON CENTRE - THIRD FLOOR
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January 8, 2007

Ken Haddad
Executive Director Fish and Wildlife
Conservation Commission
Bryant Building
620 South Meridian Street
Tallahassee, Florida 23299-1600

Re: *Collier County Board of County Commissioners vs. Florida Fish and Wildlife Conservation Commission, The Citizens To Preserve Naples Bay, Inc., and The Conservancy of Southwest Florida, Inc.*; DOAH Case Nos. 05-2034; 05-2035, 05-2036, and 05-2037.

Dear Mr. Haddad:

Enclosed is the Respondents, the City of Naples ("City"), the Conservancy of Southwest Florida, Inc., and Citizens to Preserve Naples Bay, Exceptions to the Recommended Order of Administrative Law Judge P. Michael Ruff in the above referenced case.

As required by Subsection 120.57(1)(k), Florida Statutes, we respectfully request that the Commission considered the enclosed Exceptions and incorporated memorandum of law and specifically rule on each exception.

If you should have any question, please let me know.

Sincerely,

ROETZEL & ANDRESS, LPA

James D. Fox

Enclosures
cc: James V. Antista, General Counsel
Frank E. Matthews, Esquire
Douglas Finlay
Jeffrey A. Klatzkow, Esquire
Allen Walburn
Eric Alexander
Jack Hail

James Pergola
Dave Sirkos
Mimi S. Wolok, Esquire
Robert G. Menzies, Esquire
Colleen M. Greene, Esquire
Ralf G. Brookes, Esquire
Alan S. Richard, Captain
Michael R. N. McDonnell, Esquire

JDF

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516096 v .01 \ 016763.0143

STATE OF FLORIDA
FISH AND WILDLIFE CONSERVATION COMMISSION

COLLIER COUNTY; MARINE INDUSTRIES ASSOCIATION OF COLLIER COUNTY, INC.; DOUGLAS FINLAY; CAPTAIN ERIC ALEXANDER; CAPTAIN JACK HAIL; DAVE SIRKOS; JAMES PERGOLA; and CAPTAIN ALLEN WALBURN,
Petitioners,

vs.

FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION and CITY OF NAPLES,

Respondents,

DOAH Case Nos. 05-2034
05-2035
05-2036
05-2037

and

CITIZENS TO PRESERVE NAPLES BAY, INC. and THE CONSERVANCY OF SOUTHWEST FLORIDA, INC.,

Intervenors.

/

EXCEPTIONS TO RECOMMENDED ORDER

Pursuant to Section 120.57, Florida Statutes (2006), and Rule 28-106.217, Florida Administrative Code, Respondents, the City of Naples ("City"), the Conservancy of Southwest Florida, Inc., and Citizens to Preserve Naples Bay (collectively the "Respondents"), file with the Florida Fish and Wildlife Conservation Commission ("FWC" or the "Commission") these exceptions and incorporated memorandum of law to the Recommended Order filed on December

22, 2006, by Administrative Law Judge P. Michael Ruff of the Division of Administrative Hearings (the "ALJ"), and state as follows:

1. The Respondents except a number of the ALJ's conclusions of law in the Recommended Order. Almost all of the exceptions flow from one fundamental mistake: the ALJ's interpretation of the governing statutes and rules. Therefore, the Respondents will address that fundamental error in depth first. Thereafter, the Respondents will address specific exceptions flowing therefrom.

Construction of the Statutes and Administrative Code Authorizing an Administrative Usurping Judicial Power and Nullifying Municipal Home Rule

Exception One: Usurping Judicial Power and Nullifying The City's Home Rule Powers

2. The Respondents except paragraphs 109-110, 114, and 119-122, because the ALJ's interpretation of Chapter 327, Florida Statutes, and Rule 68D-23.105, Florida Administrative Code, departs from the essential requirements of the law and, if adopted, would constitute usurp judicial power, and would constitute an unlawful delegation of authority to the Commission, which would divest municipalities of their legislatively granted home rule power over waterway speed limits.

3. The ALJ says that the City "confuses a review of the permit application at issue with a review of the validity of the ordinance." (RO at ¶ 121) It is the ALJ, not the City, who is confused. Denying the permit because you disagree with the wisdom of the ordinance, nullifies the ordinance and the City's home rule power over vessel speeds.

Usurping Judicial Power

4. The recommended order, if adopted, would violate the separation of powers clause by depriving the Judiciary of its sole power to review the validity of legislative enactments. See, Art. II, § 3, Fla. Const..

5. The ALJ has no power and cannot be give power to invalidate, directly or indirectly, a duly adopted legislative enactment, including local ordinances. "While an administrative agency may exercise quasi-judicial power when authorized by statute, it may not exercise power which is basically and fundamentally judicial." Biltmore Const. Co. v. Fla. Dept. of Gen. Serv., 363 So.2d 851, 854 (Fla. 1st DCA 1978); see also Dept. of Revenue of Fla. v. Young Am. Builders, 330 So.2d 864 (Fla. 1st DCA 1976).

Nullification of Home Rule Power

6. The City's home rule powers are guaranteed by the Florida Constitution, Chapter 166, Florida Statutes, and Chapter 327, Florida Statutes, the governing statutes at issue in this case.

7. Article VIII, Section 2(b), Florida Constitution, provides that:

> Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law.

8. The Supreme Court of Florida has stated that this constitutional provision "expressly grants to every municipality in this state authority to conduct municipal government, perform municipal functions, and render municipal services." State v. City of Sunrise, 354 So. 2d 1206, 1209 (Fla. 1978). The only limitation on the power of municipalities under this constitutional section is that such power must be exercised for a valid municipal purpose. Id. Thus, the Court has determined that statutes are only relevant to determine the limitations on

municipal authority and cities need no further authorization from the Legislature to conduct municipal government. Id. n. 3 at 1209.

9. Generally, a municipality has civil and criminal jurisdiction over property within its corporate boundaries and may regulate and restrict certain activities reasonably calculated to protect the public health, safety, and welfare. The power of municipalities to regulate in this area is, however, subject to the State's paramount power to regulate and control the use of its sovereign waters and lands. To the extent that any such regulation is preempted by the State or is inconsistent with general law or with regulations adopted by the State, any municipal regulation would be invalid. See § 166.021, Fla. Stat. (2006); City of Miami Beach v. Forte Towers, Inc., 305 So. 2d 764 (Fla. 1974); Ops. Att'y Gen. Fla. 78-141 (1978), 75-167 (1975), & 73-463 (1973).

10. Pursuant to Section 166.021(1), Florida Statutes, municipalities are granted "the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law." The term "express," as used in Section 166.021, Florida Statutes, has been construed to mean a reference that is distinctly stated and not left to inference. See Edwards v. State, 422 So. 2d 84, 85 (Fla. 2d DCA 1982).

11. The authority of local governments to regulate vessels has been specifically recognized by the courts. See Lee County v. Lippi, 662 So.2d 1304, 1306 (Fla. 2d DCA 1995).

Exception Two: Interpretation of Chapter 327

12. The Respondents except paragraphs 109-110, 114, and 119-122, because the ALJ's interpretation of Chapter 327, Florida Statutes, is clearly erroneous.

13. The clear intent of the Legislature in adopting Chapter 327 was to preserve municipal power to regulate vessel speeds. This is clear from the statute's actual language and by contrasting the statutes at issue in the case with statutes expressly granting FWC independent powers to review municipal ordinances.

Sections 327.40, 327.41, and 327.60 Expressly Preserve Municipal Power

14. Nothing in Sections 327.40, 327.41, expressly limits the power of municipalities to regulate vessel speeds, and the express language of Section 327.60, Florida Statutes (2006), expressly preserves municipal power.

15. Section 327.40, prevents municipalities from placing markers without a permit and provides what must be in a permit application package:

> (1) Waterways in Florida which need marking for safety or navigation purposes shall be marked under the United States Aids to Navigation System, 33 C.F.R. part 62. Until December 31, 2003, channel markers and obstruction markers conforming to the Uniform State Waterway Marking System, 33 C.F.R. subpart 66.10, may continue to be used on waters of this state that are not navigable waters of the United States.
> ***
> (2)(b) 1. No person or municipality, county, or other governmental entity shall place any safety or navigation markers in, on, or over the waters or shores of the state without a permit from the division.

16. Section 327.41(2), states:

> Any county or municipality which has been granted a restricted area designation, pursuant to s. 327.46, for a portion of the Florida Intracoastal Waterway within its jurisdiction or which has adopted a restricted area by ordinance pursuant to s. 327.22, s. 327.60, or s. 370.12(2)(p), or any other governmental entity which has legally established a restricted area, may apply to the commission for permission to place regulatory markers within the restricted area.

17. Sections 327.40 ("Uniform waterway markers for safety and navigation") and 327.41 ("Uniform waterway regulatory markers") contain no express language giving FWC power to "independently" determine whether a municipal ordinance speed zones is needed, but

rather give FWC the power to ensure that the signs a municipality erects to enforce those speed zones are uniform in appearance.

18. The ALJ does not expressly state which statutory words in Section 327.40 limit the City's authority and give FWC the power to nullify City ordinances. He appears to find express legislative authority for a limitation of the City's authority from two lines in Section 327.40. First, in Paragraph 112, he quotes from the statute underlining the word "need" "Waterways in Florida which need marking for safety or navigation." Second, also in Paragraph 112, the ALJ underlines the section of 327.40 that says the Commission is to "make such investigations as needed." The ALJ then, in Paragraph 114, states that the "rule sets forth the circumstances when waterways need marking for safety or navigational purposes." In other places, he talks about the duty of FWC to make an "independent" analysis of the need for safety on waterways. Taken in the context of the rest of his Recommended Order, the ALJ appears to argue that markers may be permitted only when FWC independently determines that they are needed for safety.

19. However, the statute does not say that markers may be erected only "when waterways need marking for safety." Section 327.40 actually says "waterways *which* need marking for safety." Grammatically, "which" calls for a proceeding comma, is non-restrictive, and is distinct from the restrictive "waterways *that* need marking for safety." (emphasis added) See Strunk and White, The Elements of Style, p. 59 (4th ed. 2000). Here the comma is missing, rendering the statute's meaning somewhat obscure. Nevertheless, the best reading of this section of the statute is that permits are required for erection of safety and navigation markers to ensure that they are uniform, but not for other signs.

20. This construction is borne out by reading Section 327.40(2)(b)(2), which expressly exempts a plethora of signs from the permitting requirements:

> The placement of informational markers, including, but not limited to, markers indicating end of boat ramp, no swimming, swimming area, lake name, trash receptacle, public health notice, or underwater hazard and canal, regulatory, emergency, and special event markers, by counties, municipalities, or other governmental entities on inland lakes and their associated canals are exempt from permitting under this section. Such markers, excluding swimming area and special event markers, may be no more than 50 feet from the normal shoreline.

21. The ALJ also misapplies Section 327.40(2)(a), where the statute says the FWC shall "make such investigations as needed." This Section deals primarily with the placement of markers to ensure that the markers themselves are not a hazard to navigation. The "investigations" therefore are logically for marker placement, not for city ordinance review. Indeed, this very Section 327.40(2)(a) expressly requires the applicant provide no more than a "statement of the purpose for the marking." There is simply no language whatsoever in this or any other part of Section 327.40 that requires the Applicant must demonstrate to FWC the need for safety, or that requires FWC to second guess the judgment of the City.

22. Indeed, Section 327.60(1), Florida Statutes (2006), which is referenced in Section 327.41, expressly preserves the power of municipalities to adopt vessel speed ordinances saying "[n]othing in these sections shall be construed to prevent the adoption of any ordinance or local law relating to the operation and equipment of vessels.") It states:

> The provisions of ss. 327.01-327.11, 327.13-327.16, 327.18, 327.19, 327.28, 327.40, 327.44-327.50, 327.54, 327.56 and 327.65 shall govern the operation, equipment, and all other matters relating thereto whenever any vessel shall be operated upon the waterways or when any activity regulated hereby shall take place thereon. *Nothing in these sections shall be construed to prevent the adoption of any ordinance or local law relating to operation and equipment of vessels*, except that no such ordinance or local law may apply to the Florida Intracoastal Waterway and except that such ordinances or local laws shall be operative only when

> they are not in conflict with this chapter or any amendments thereto or regulations thereunder. (emphasis added)

23. These statutes in Chapter 327 must be construed so as to give the fullest possible effect to the legislative intent of ensuring local regulation of vessels and a uniform marker system. "It is well settled that a statute should be construed in its entirety and as a harmonious whole. Further, where two laws appear to be in conflict, courts should adopt an interpretation that harmonizes the laws, for the Legislature is presumed to have intended that both laws are to operate coextensively and have the fullest possible effect." Palm Beach County Canvassing Board v. Harris, 772 So.2d 1273 (Fla. 2000). Section 327.41 expressly states that the provisions of Section 327.60 preserving municipal power apply to it.

24. Given the absence of "express" statutory language, the Legislature did not grant the Commission authority to "independently" judge the wisdom and necessity of vessel speed and wake regulations nor substitute its judgment for that of the City's elected representatives and thereby preempt, veto, render ineffectual, or overturn the City's vessel speed ordinance. Lee County v. Lippi, 662 So.2d 1304, 1306 (Fla. 2d DCA 1995).

25. Nevertheless, the ALJ concludes that if FWC was not required to "independently make a determination of confirmation" of the need for safety regulations then these statutes would be rendered "meaningless". (RO at §120) This conclusion, adopted verbatim from Petitioners' Proposed Recommend Order (Petitioner's PRO at ¶ 158), is without merit. The statutes will still perform their expressed purpose of ensuring uniform makers conforming to the U.S. Coast Guard regulations, which vessel operators can readily recognize and understand.

26. Also, there is no statutory language establishing any standards regulating boat speeds and waterway access in Chapter 327, Florida Statutes, by which the Commission or a

court can determine if the will of the Legislature regarding the vessel speeds is being carried out. "When legislation is so lacking in guidelines that neither the agency nor the courts can determine whether the agency is carrying out the intent of the Legislature in its conduct, then, in fact, the agency becomes the lawgiver rather than the administrator of the law." Bush v. Schiavo, 885 So. 2d 321, 332 (Fla. 2004).

27. Sections 327.40 and 327.41 quite simply do not require to permit FWC to conduct an "independent investigation" of municipal ordinances and effectively nullify a city's vessel speeds ordinance whenever its judgment differs from that of elected city officials.

Section 370, Florida Statutes, Demonstrates that the Legislature Could Have Preempted Municipal Power, but Did Not

28. Section 370.12(2)(p), Florida Statutes (2006), demonstrates that if the Legislature had wanted to preempt municipal power over vessel speeds, it knew how to do so.

29. Section 370.12(2)(p) says:

> Except in the marked navigation channel of the Florida Intracoastal Waterway as defined in s. 327.02 and the area within 100 feet of such channel, a local government may regulate, by ordinance, motorboat speed and operation on waters within its jurisdiction where the best available scientific information, as well as other available, relevant, and reliable information, which may include but is not limited to, manatee surveys, observations, available studies of food sources, and water depths, supports the conclusion that manatees inhabit these areas on a regular basis. However, such an ordinance may not take effect until it has been reviewed and approved by the commission. If the commission and a local government disagree on the provisions of an ordinance, a local manatee protection committee must be formed to review the technical data of the commission and the United States Fish and Wildlife Service, and to resolve conflicts regarding the ordinance.

30. Section 370.12(2)(p) says "[a manatee protection] ordinance may not take effect until it has been reviewed and approved by the commission." It goes on to say that the Commission is to use "the best available scientific information, as well as other available,

relevant, and reliable information" for this review. Then it expressly provides for creation of a manatee protection committee "[i]f the commission and a local government disagree on the provisions of an ordinance."

31. No such language is found in Sections 327.40, 327.41 and 327.60.[1] Therefore, because "the legislature has included a specific provision in one part of [the] statute and omitted it in another part, [the FWC] must conclude that it knows how to say what it means, and its failure to do so is intentional." Paragon Health Serv, Inc. v. Cent' Palm Beach Cmty. Mental Health Ctr., Inc., 859 So. 2d 1233, 1235-1236 (Fla. 4th DCA 2003).

32. Therefore, it must be inferred, under the time-honored principle of statutory construction, *experssio unius est exclusion alterious*, that the legislature did not intend to grant the Commission power to "independently" review City ordinances. "Where a statute enumerates the things on which it is to operate [it is] to be construed as excluding from its operation all those not expressly mentioned." Thayer v. State, 335 So. 2d 815, 817 (Fla. 1976). This principle applies in Administrative hearings. See, *Fla. Eng'rs Mgmt Corp., v. The Pool People, Inc.*, Case No. 05-0382; and, *Fla. Eng'rs Mgmt Corp. v. Ming Zen Huang, P.E., Respondent*, Case No. 06-1581PL, 2006 WL 3468757, 10 (Fla. Div. of Admin. Hrgs. November 29, 2006).

FWC's Interpretation of Chapter 327

33. FWC gives these statutes and regulations their only reasonable interpretation: The Commission may only examine the face of a municipal ordinance to determine if its purpose conforms to Chapter 327 when determining whether to issue a uniform marker permit. (T. 2/23/06, pp. 138-139, 146). The Commission does not independently weigh or evaluate the

[1] Likewise it should be noted that FWC has been granted rather unique preemptive constitutional powers to protect wildlife. But, no such constitutional grant of power has been extended to boating safety matters.

accident reports, vessel traffic studies, or accident data that are submitted with and in support of a City's permit application. (T. 2/23/06, p. 168-169, 174, 182). The City's uniform marker Application met the criteria established in the rule. (T. 2/23/06, p. 183).

34. FWC's full interpretation of Chapter 327 is eloquently stated in its excellent Proposed Recommended Order. For the sake of brevity, that interpretation will not be repeated here and is adopted in full by reference. (See FWC PRO at "Preliminary Statement"). In sum, it says that the clear intent of Sections 327.40 and 327.41 was to establish a system of uniform markers throughout the state, to "provide for uniformity in design, construction, and coloring of markers," and to allow all law enforcement officers to "determine with reasonable certainty which boating areas are lawfully restricted," not to "regulate waterway ordinances adopted for safety and navigation." (See FWC PRO at "Preliminary Statement".)

Exception Three: Interpretation of Rule 68D-23.105, Florida Administrative Code

35. Respondents except paragraphs 116 and 118-120 as the ALJ's interpretation of Rule 68D-23.105, Florida Administrative Code, conflicts with the governing statutes.

36. Pursuant to Section 327.41(6), FWC adopted rules for placement of uniform markers. See Chapter 68D-23, F.A.C. Florida Administrative Code, Rule 68D-23.105, states in relevant part as follows:

(b) For a Slow Speed Minimum Wake boating restricted area if the area is:

1. Within 300 feet of any bridge fender system.
2. Within 300 feet of any bridge span presenting a vertical clearance of less than 25 feet or a horizontal clearance of less than 100 feet.
3. Within 300 feet of a confluence of water bodies presenting a blind corner, a bend in a narrow channel or fairway, or such other area where an intervening obstruction to visibility may obscure other vessels or other users of the waterway.
4. Subject to unsafe levels of vessel traffic congestion.
5. Subject to hazardous water levels or currents, or containing other navigational hazards.

> 6. An area that accident reports, uniform boating citations, vessel traffic studies, or other creditable data demonstrate to present a significant risk of collision or a significant threat to public safety.

FWC's Interpretation of Rule 68D-23.105

37. Paul Ouelette, FWC's representative at the hearing, succinctly stated FWC's interpretation of Rule 68D-23.105: "The City of Naples requested us to approve permission to post markers, not permission to enact regulation." (T. 2/23/06, p. 192.)

38. "[S]ince the year 1984 the Department staff has consistently construed the statues and related rules governing applications for marking waters of the state to not require an independent review and determination by the Department as to the fairness or adequacy of the claims of a governmental applicant that its underlying ordinance validly serves legitimate navigational or safety interests." (FWC PRO at ¶ 68 quoting Ventura v. Dept. of Env'l Prot., DOAH No. 93-5964, 1996 WL 1059798, at ¶ 28, per curiam Aff., 693 So. 2d 984 (1997); see also Walburn v. Dept. of Natural Res., 1992 Fla. ENV LEXIS; 92 ER FALR 105 (DNR Final Order April 30, 1992) (stating in relevant part that "[t]he permit to mark waters of the state as provided in Section 327.40, F[la.].S[tat.]., is not the authority to regulate or establish restrictions for the operation of vessels in those waters but to regulate the marking of waterways for safety or navigation purposes upon application of persons or entities provided by law")).

39. Indeed, the courts have found no language in Sections 327.40 or 327.41 that requires or permits the Commission to conduct an "independent analysis" of whether vessel speeds zones are necessary. The Commission must "leav[e] to the courts the issues of the legality of underlying ordinances and the extent to which such ordinances serve navigational and safety interests." Ventura, DOAH No. 93-5964, 1996 WL 1059798, at ¶ 28, per curiam Aff., 693 So.2d 984 (1997); c.f., Lee County v. Lippi, 662 So. 2d 1304 (Fla. 2d DCA 1995).

40. The Commission should not now take a position that is "[i]nconsistent with officially stated agency policy or a prior agency practice." Nordheim v. Dept. of Env't Prot., 719 So. 2d 1212, 1214 (Fla. 3d DCA 1998).

The ALJ's Interpretation of Rule 68D-23.105

41. Respondents strongly except the ALJ's conclusions of law in Paragraphs 119, 120, and 122 where he states that under the statutes and rules FWC "has the obligation" to "make its own independent analysis."

42. The word "independent" is not found in the governing statutes, the rules, or in the case law construing the statute and rules. The Petitioners fabricated this word for their Proposed Recommended Order (Petitioners' PRO at ¶ 155), inserted into their interpretation of statutes and rule, and then the ALJ adopted their fabrication verbatim.

43. The addition of any criterion to the statutes through a rule interpretation requiring the FWC to "make its own independent analysis" (RO at ¶¶ 119 and 120) is invalid. The executive and judicial branch is "not at liberty to add words to statutes that were not placed there by the Legislature." Hayes v. State, 750 So. 2d 1, 4 (Fla. 1999). Further, it is "axiomatic that an administrative rule cannot enlarge, modify or contravene the provisions of a statute" and that "a rule which purports to do so constitutes an invalid exercise of delegated legislative authority." Bd. of Optometry v. Fla. Soc'y of Ophthalmology, 538 So. 2d 878 (Fla. 1st DCA 1988).

44. In light of Sections 327.22, 327.40, 327.41, and 327.60, the Commission's interpretation (that FWC may only look at the face of the City's Ordinance to determine if the Ordinance was passed for one of the enumerated purposes in Florida Administration Code, Rule 68-23.105(1)(6), is the only reasonable interpretation of the statutes and rule.

45. The Recommend Order struggles and ultimately fails to reconcile its own internal logical inconsistency in opposing FWC's interpretation of the statutes and rule. In Paragraph 114, the ALJ states that the "rule sets forth the circumstances when waterways need marking for safety or navigational purposes." But then, contradictorily, the ALJ in Paragraph 123 says "[m]aking the bay safer is not the factual or legal standard that the Rule requires in order to for a determination that the waterway maker permit should be issued."

46. In other words, according to the ALJ, under the statute, markers may only be erected if they are needed for safety, but under the rule, the legal standard is not whether the markers will make the waters safer. FWC should avoid such contradictory conclusions.

47. The power to determine whether or not a municipal ordinance on its face is a safety or navigation ordinance is precisely the only power FWC has ever had with respect to municipal ordinances regulating vessel speeds under the statutes in question. Therefore, the final order should only examine whether the purposes on the face of the City's ordinance are for safety or navigation.

48. The only substantial competent evidence of the Ordinance's purpose as a matter of law is the Ordinance itself, and that Ordinance states on its face that it was passed for "safety." (See City's Ex. 1).[2] "A municipal corporation speaks only through its records, not through opinions of individual officers." Beck v. Littlefield, 68 So. 2d 889, 892 (Fla. 1953).

49. Finally, the ALJ's Recommended Order would require FWC to conduct an "independent investigation" of every local government's vessel speed ordinance. This would result in a wholesale shift of power over vessel speeds from cities to the FWC staff, which was

[2] It is worth noting that the Ordinance does not facially purport to regulate vessel traffic "for the protection of shoreline, shore-based structures, or upland property from vessel wake or shoreline wash." Fla. Admin. Code R. 68D-23.101(2).

not contemplated by Legislature, not expressly found in the statutory language, and therefore contrary to the homerule powers secured by the Florida Constitution. The ALJ should not have done this, because administrative rules should be construed, if at all possible, to avoid conflict with statutes and the constitution. Waste Mgmt., Inc. v. Mora, 940 So. 2d 1105, 1108 (Fla. 2006); City of Boca Raton v. Gidman, 440 So. 2d 1277 (Fla. 1983).

50. FWC is not required to follow the ALJ's interpretation of its statutes and rules, because, as has already been shown, its interpretation is "as or more reasonable than" the ALJ's. § 120.57(l), Fla. Stat. (2006). FWC should resist the extra-statutory and extra-constitutional power grab recommended by the ALJ.

Exception to The Standing of the Petitioners

Exception Four: No Competent Substantial Evidence that Petitioners Safety or ability to Navigate was "Substantially Affected"

51. The Respondents except paragraph 91 through 95 and 101 through 106 because MIACC and the Pro Se Petitioners did not present competent substantial evidence that anyone's safety or ability to navigate was "substantially affected." Rather they put on evidence that their commercial interests or their pleasure to go faster on Naples Bay might be minimally affected at best.

52. To be entitled to pursue and administrative hearing under Section 120.57, Florida Statues, a party must show a substantial interest in the outcome of the proceeding. Friends of the Everglades, Inc. v. Bd. of Tr. of the Internal Improvement Trust Fund, 595 So. 2d 186 (Fla. 1st DCA 1992); Agrico Chem. Co. v. Dept. of Env't Regulation, 406 So. 2d 478 (Fla. 2nd DCA 1981).

53. Section 120.52(12)(b), Florida Statute (2006), defines a "party" to include "[a]ny person *** whose substantial interests will be affected by proposed agency action ****"

"[B]efore one can be considered to have a substantial interest in the outcome of the proceeding he must show (1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and (2) that his substantial injury is of a type or nature which the proceeding is designed to protect." Agrico, 406 So. 2d at 482 (Fla. 2nd DCA 1981)\; see also Ameristeel Corp. v Clark, 691 So. 2d 473 (Fla. 1997) (upholding the Agrico test).

54. The "type or nature" prong requires that the injury in fact be within the zone of interest protected by the applicable statute under which the permit would be issued. Ameristeel, 691 So.2d at 473 (Fla. 1997); Fla. Socy of Ophthalmology, 532 So. 2d at 1285 ("[T]he alleged economic injury does not fall within the zone of interest intended to be protected by the applicable statute.").

55. Therefore, economic injury is insufficient where the regulatory scheme addresses matters other than competitive economic considerations. City of Sunrise v. S. Fla. Water Mgmt. Dist., 615 So. 2d 746, 748 (Fla. 4th DCA) ("It is undisputed that Sunrise's only arguments are economic. Its claims were unrelated to the consumptive use permit for the Floridian Aquifer.); see generally, Ellis, Richard M., Standing in Florida Administrative Proceedings, V. 75 No.1, Fla. B. J. 50 (2001).

56. Likewise, injury to the pleasure of speeding is insufficient where the regulatory scheme addresses matters other than the pleasures of speeding.

57. Even if economic interests and the pleasures of speeding were within the zone of interest protected by the statute, the Petitioners failed to present substantial competent evidence that the effect of the permit on these interests would be substantial.

Exception Five: No Substantial Competent Evidence of an Injury In Fact By Permitting of Uniform Markers

58. The Respondents except paragraphs 91-93 and 101-106 on the grounds that there was no substantial competent evidence of an injury by permitting uniform markers.

59. Petitioners' testimony that they may lose customers to other waterways is not an injury in fact. Fla. Soc'y of Ophthalmology, 532 So.2d at 1285 (Fla. 1st DCA 1988) (saying that possible future business losses from issuance of permit to competitors did not meet the "immediacy" requirement). At best, Petitioners speculated about future economic impacts, which does not meet the standing requirements. The "injury in fact" prong contains an immediacy requirement, Id., that is not met by potential economic injury in the future, Id. at 1285, and that cannot be based on speculation and conjecture. Int'l Jai-Alai Players Ass'n, 561 So. 2d 1224; Village Park Mobile Home Ass'n, Inc. v. State, 506 So. 2d 426 (Fla. 1st DCA 1987).

60. Finally, Petitioners claims that they will have to traverse Naples Bay more slowly will result if at all from the subsequent enforcement of the ordinance, not from the issuance of the permit. An "injury in fact" cannot be based on subsequent action by the government. Village Park, 506 So. 2d at 433 ("Thus, in the event that any harm is suffered, it will result from the implementation of the provisions contained in the prospectus and not the agency approval of the prospectus."); Walburn v. DNR, 92 ER F.A.L.R. 105 (1992).

61. The Petitioners do not have standing, because they did not provide competent substantial evidence of any immediate injury in fact to their safety or ability to navigate by the permitting of markers that are uniform.

Exception Six: The Nature of the Injury Not Within the Zone of Interest Protected by Statute

62. The Respondents except paragraphs 91, 92, 93, and 94 as the statute and regulations are designed to ensure a uniform system of markers for safety and navigation and not to protect the maximization of commercial profits.

63. Contrary to the conclusions of the ALJ, Sections 327.40 and 327.41 and Code 68D-23 are not designed to protect the maximization of commercial profits and the pleasures of speeding.

64. The Respondents except Paragraph 102, where the ALJ says the statute and regulations "protect the interest of navigation, safety, and commerce" and "protect against needless and unwarranted regulations of waterways."

65. The word "commerce" appears nowhere in the relevant statutes and rules.

66. The words to "protect against needless and unwarranted regulations of waterways" are also not found anywhere in the statutes and regulations. Nor are they in any case law construing the statute.

67. Rather these words were inserted into the statutes and rule by Petitioners in their Proposed Recommend Order (Petitioners PRO at ¶ 198) and were included verbatim in the Recommended Order.

68. As noted above, the express purpose of Sections 327.40 and Section 327.41 is to ensure that waterway markers throughout the state are uniform, "for safety and navigation."[3]

69. The statutes and regulations are manifestly not designed to protect public enjoyment from traveling fast in a boat, nor are they designed to further the maximization of commercial profits. Admittedly, every health and safety regulation has some effect on personal pleasures and commercial profits, but mere incidental impact on personal pleasure and commercial profits does not make the regulation one governing commercial profits and personal

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3 The statute does not define "navigation". The American Heritage Dictionary of the English Language, (4th Ed. 2000), defines "navigation" as: "The theory and practice of navigating, especially the charting of a course for a ship or aircraft"; and defines "navigate" as: "To plan, record, and control the course and position of (a ship or aircraft)." See S.W. Fla. Water Mgmt. Dist. v. Charlotte County, 774 So.2d 903, 915 (Fla. 2d DCA 2001) ("The general rule is that where the legislature has not defined words or phrases used in a statute, they must be "construed in accordance with [their] common and ordinary meaning.").

pleasures and thereby extend the zone of interest protected by these regulations to every matter they affect.

70. For this very reason, Captain Walburn was found not to have standing by FWC's predecessor, the Department of Natural Resources, in a similar case. Walburn v. DNR, 92 ER FALR 105. The department's final order states in relevant part: "The permit to mark waters of the state as provided in Section 327.40, Florida Statute, is not the authority to regulate or establish restrictions for the operation of vessels in those waters but to regulate the marking of waterways for safety or navigation purposes upon application of persons or entities provided by law." Id.[4]

71. Petitioners did not put on any competent substantial evidence that the markers being permitted are not uniform, or that the markers contemplated will be unsafe. In fact, all the Petitioners, with the exception of Mr. Pergola, went to some length to state that their safety will not be adversely affected at all. Nor did Petitioners put on substantial competent evidence that the permit will adversely affect their ability to navigate the restricted waters.

72. Economic injury is insufficient where the regulatory scheme addresses matters other than competitive economic considerations. City of Sunrise, 615 So.2d at 748 ("It is undisputed that Sunrise's only arguments are economic. Its claims were unrelated to the consumptive use permit for the Floridian Aquifer); Ellis, Richard M., Standing in Florida Administrative Proceedings, V. 75 No.1, Fla. B. J. 50 (2001). Nothing in the regulatory scheme providing for uniform markers gives Petitioners a protected economic interest, nor is the statute designed to ensure Petitioners' pleasure in traversing the bay faster.

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[4] The City filed this DNR case with DOAH.

73. Therefore, Petitioners have no standing, because they did not provide competent substantial evidence of any immediate injury in fact to their safety or ability to navigate the bay by the permitting of a uniform marker.

Exception Seven: Collier County's Standing

74. The Respondents except paragraphs 96-100, because Collier County has not shown that any effect on its safety or navigation is greater than its citizens.

75. Collier County's interest are no greater than its citizens. The government has no standing as *Parens Patriae*. City of Panama City v. Bd. of Tr., 418 So.2d 1132 (Fla. 1st DCA 1982); Hamilton County v. TSI Southeast, Inc., and Dept of Environmental Reg., 12 F.A.L.R. 3774; 1990 WL 282353 (DER 1990); aff'd 587 So. 2d 1378 (Fla. 1st DCA 1991); see also, Berger v. Dept. Env't Regulation, DOAH Case No. 93-264; 1993 WL 943746, *19 (1994).

76. Collier County did not present competent substantial evidence that its safety interests or interests in uniform makers exceed that of it citizens. The only County official to testify for the County admitted he was unfamiliar with the proposed speeds zones, (T. 6/26/06, p. 100), and that he had no idea how the speed zones would affect Naples Bay or the income of Bayview Park (T. 6/26/06, p. 202).

77. Therefore, Collier County does not have standing, because it did not provide competent substantial evidence that the permit would substantially effect its safety or ability to navigate the bay.

Exception Eight: The Admission of Dr. Baker's Studies and Expert Testimony.

78. The Respondents except paragraphs 49-56 and 61, which rely on Dr. Baker's testimony and studies, because he was not competent to offer expert opinions about the matters of safety and navigation and his studies are too novel to be accepted into evidence.

79. The admission of Dr. Baker's studies and his testimony nicely demonstrates the hazards of replacing the safety judgment of the local citizens as expressed through their elected representatives with those of a paid statistician with admittedly no expertise in vessel traffic safety.

80. Dr. Baker's work failed to meet the evidentiary standard set forth in Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923). See Ibar v. State, 938 So. 2d 451, 467 (Fla. 2006) (saying "Florida courts do not follow *Daubert,* but instead follow the test set out in *Fyre*"); see also U. S. Sugar Corporation v. G.J. Henson, 823 So. 2d 104 (Fla. 2002) (applying *Frye* to administrative hearings). *Frye* requires that scientific studies be "based on that method's general acceptance within the relevant scientific community at the time of the hearing." See Brim v. State, 695 So. 2d 268, 275 (Fla. 1997).

81. Dr. Baker's work is novel, (T. 2/23/06, p. 19), in that it attempts to apply highway traffic analysis to vessel traffic analysis. Dr. Baker has only limited experience in highway traffic studies. (T. 2/23/06, p. 19.) Dr. Baker was aware of only two other similar such studies. (T. 2/23/06, p. 21.) Dr. Baker's himself admitted that he did not study vessel "congestion." (T. 2/23/06 p. 80). His studies make a number of questionable assumptions, such as that boats travel in only two lanes, and that traffic flows evenly, despite Dr. Baker's acknowledgement that traffic on Naples Bay flows in "pulses" (T. 2/23/06, pp. 74) or with some "randomness" (T. 2/23/06, p. 79). He was unaware of any such study of this novel approach that has been subject to peer review of experts in vessel traffic safety and navigation. (T. 2/23/06, pp. 22, 33, and 110).

82. Dr. Baker does not profess to be a boating safety expert (T. 2/23/06, p. 15) and said he would have to defer to others on safety. (T. 2/23/06, p. 75.) He is not an expert in analyzing boating accidents. (T. 2/23/06, p. 26.) Dr. Baker did not specifically look at

congestion in the studies. (T. 2/23/06, p. 80.) Rather, he looked at the number of boats going in and out of the bay, which according to the City's expert is not the relevant inquiry for making determinations of congestion and safety. (T. 2/22/06, p. 244.) Dr. Baker did not examine boating safety issues on Naples Bay. (T. 2/23/06, p. 80, 101.) Dr. Baker did not examine what affect new speed zones would have on traffic flows in Naples Bay. (T. 2/23/06, p. 83.) Dr. Baker did not account for the effects of tidal currents in his studies. (T. 2/23/06, p. 89.) Dr. Baker did not analyze the effects of passing boats on safety. (T. 2/23/06, p. 89.) Dr. Baker did not analyze the effects of wakes, of channel depths, maneuverability, or acceleration and deceleration differences betweens highway and vessel traffic. (T. 2/23/06, pp. 79-80, 89.) Indeed, Dr. Baker had no opinions about the new speed zones. (T. 2/23/06, pp. 104-105.)

83. Therefore the opinions of a statistician should not have been admitted into evidence regarding vessel traffic safety and congestion and cannot be considered competent substantial evidence. Frankly his opinions are irrelevant to whether the proposed markers are uniform and any other issue to be considered when determining whether to issue the requested permit.

Exception Nine: No Substantial Competent Evidence that the Bay Would Not be Made Safer by the Proposed Speed Zones.

84. The Respondents except Paragraphs 123, saying that whether the speeds zones would make the bay safer is irrelevant. Even if the statutes and rule require that markers only be placed "when they are needed," then the relevant inquiry must be whether the City's Ordinance will make the bay safer. The only substantial competent evidence in the record on this point is that the bay would indeed be made safer by the City's ordinance. See RO at ¶ 123 (saying the City elicited testimony from its expert witness as well as a number of other witnesses to the general effect that slower speeds on Naples Bay would make the bay "safer.")

Exception To Whether the Criteria of Section 68D-23.105 Have Been Met

Exception Ten: "Subject to unsafe levels of vessel traffic congestion." 68D-23.105(1)(b) (4).

85. The Respondents except paragraphs 124-125 of the Recommended Order, because the Ordinance and Application state on their face that Naples Bay is subject to unsafe levels of vessel traffic congestion.

Exception Eleven: "Subject to hazardous water levels or currents, or containing other navigational hazards." 68D-23.105(1)(b)(5).

86. The Respondents except paragraphs 126 of the Recommended Order, because the Ordinance and Application state on their face that Naples Bay is subject to hazardous water levels or currents, or contains navigational hazards.

Exception Twelve: "An area that accident reports, uniform boating citations, vessel traffic studies, or other creditable data demonstrate to present a significant risk of collision or a significant threat to public safety." 68D-23.105(1)(b)(6).

87. The Respondents except paragraphs 67, 127-130 of the Recommended Order, because the Ordinance and Application state on their face that Naples Bay is an area where accident reports, uniform boating citations, and other creditable data demonstrate a significant risk of collision and threat to public safety.

WHEREFORE, City respectfully requests that that the Florida Fish and Wildlife Conservation Commission consider the foregoing exceptions and that the Final Order reflect those exceptions.

Respectfully submitted,

The Conservancy of Southwest Florida, Inc.

s/Mike McDonnell

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. Mail, postage prepaid, on this 8th day of January, 2007, to **FRANK E. MATTHEWS, ESQ.**, Hopping Green & Sams, P.A., P.O. Box 6526, Tallahassee, FL 32314, **D. KENT SAFRIET, ESQ.**, Hopping Green & Sams, P.A., 123 South Calhoun Street, Tallahassee, FL 32301, **ALAN RICHARDS, ESQ.**, Florida Fish and Wildlife Conservation Commission, 620 South Meridian Street, Tallahassee, FL 32399-1600, **JEFFREY A. KLATZKOW, ESQ.**, and **COLLEEN GREEN, ESQ.**, Collier County Attorney's Office, 3301 East Tamiami Trail, Naples, FL 34112-4902, **DOUGLAS FINLAY**, 3430 Gulf Shore Blvd., North, No 5H, Naples, FL 34103-3681, **ALLEN WALBURN**, 678 14th Avenue So., Naples, FL 34102-7116, **ERIC ALEXANDER**, 654 Squire Circle, Naples, FL 34104-8352, **JAMES PERGOLA**, 1830 Kingfish Road, Naples, FL 34102-1533.

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James D. Fox

TO: Robert E. Lee, City Manager

FROM: Paul Bollenback, Building Official

COPY: Robin Singer, Community Development Director

DATE: January 5, 2007

SUBJECT: 22 4th Avenue South – Agenda Item 12

The property located at 22 4th Ave. S. is zoned R1-15 and was originally constructed in the 1960's. On November 16, 2005 the contractor of record made application to this office for a Single Family Addition/Alteration permit (#05-504423). At the time of the application, the required elevation of a structure was 11' NGVD. The existing concrete slab is at approximately 10.5' NGVD. In order to be compliant, the slab would require a "cap" be poured to achieve this new elevation.

On November 17th, 2005 new building elevations as required by FEMA went into effect. This would have required a home built on this property to be built at an elevation of 12' NGVD. It was common knowledge that the new FEMA maps would go into effect on this date. Many contractors and owners elected to apply on or before the November 17th date in order to avoid having to design at the new elevation. The Building and Zoning Division received a large number of permit applications in the week prior to the November 17th, 2005 date. Our department has a policy of accepting a permit application if the application is deemed to be complete and has all of the required data/drawings required. In the case of this application, it was required that the architectural drawings be signed and sealed by the architect of record. They met this requirement. We require this to prevent contractors and owners from making application to receive a permit when in fact they do not have a bona fide application. I distinctly recall turning away several builders/plans on November 17th for that very reason.

In order for this permit application to be approved, it was required that the existing concrete slab be brought up to the FEMA required elevation in effect as of the date of application. The plans clearly indicate that this would occur as part of the construction documents. It should also be understood that by bringing the concrete slab up to the new elevation, the builder is not restricted to the "50%" rule that applies to structures located below the required elevation.

December 21, 2006

City of Naples
Planning Division
295 Riverside Circle
Naples, FL 34102

Colleen B. Carter
1100 8th Ave South
Naples, FL 34102

RE: Live Entertainment Petition 07-LE1 and Residential Impact Petition 07-RIS1 for Property Located at 1100 6th Avenue South

Planning Division:

We stand firmly **against approval** CJ's Boardwalk Bar and Grill most recent request for live entertainment. Their most recent request is for live entertainment of a 2-4 piece ensemble which would play from 6:00pm to 10:00pm on Thursday nights and from 6:00pm to 11:00pm on Friday and Saturday nights. The petitioner is also requesting additional nights on holidays or special occasions.

First, we are not prudes, and certainly want to keep our arguments logical vice personal; but feel compelled to state that we do not even believe the Boardwalk is an appropriate venue for such an entity with its type of business plan. Perhaps, a restaurant, or bar and grill, that attracts a less dichotomous clientele may be more suitable. Very simply, food service does not appear to be a priority mission of their establishment. It appears the restaurants and shops of Tin City have managed to develop symbiotic and generally successful relationships. Why can't the shops of the Boardwalk? However, with that said, CJ's is there, marginally acceptable, and so we embrace it. But to approve this latest request, one must first answer, what is their long-term vision for the Boardwalk? Very simply, we believe, approval of this request would strip the wholesome, family atmosphere of the Boardwalk, the area, and quite possibly, destroy the earning potential of nearby shops. Very simply, we believe the requested environment would ultimately chase visitors/shoppers away, and in time, be the demise of the Boardwalk.

Presently, CJ's patrons are not limited to the confines of the Bar and Grill and stumble out onto the Boardwalk. Often, a stroll down the Boardwalk has us and visitors, dodging drinking and smoking patrons, without even crossing the bar and grill threshold. Currently, we feel self-conscience, simply taking a walk with our daughter, through the maze of patrons gathered on the Boardwalk. And since CJ's presently tends to cater to a younger, mostly male crowd, as with many bars; make no mistake, this will probably **not be** easy-listening music. In our opinion, an "ensemble" is simply legalese for a "band". So very simply, we agree with CJ's and believe live entertainment **will** bring more (and possibly unsavory) patrons. In effect, they promise to be even more intrusive. But the Boardwalk is simply too narrow for both more CJ's patrons and Naples tourists. Further, we contend the environment they request, would not attract shoppers as they may argue; because their clientele is not the true target demographic of the other trendy Boardwalk shops. As a result, we contend the tourists will go elsewhere. Why would families of the spending public choose to put up with that environment and possible risk, to purchase souvenirs, trinkets, clothing or crafts from local artisans? We contend they wouldn't.

Already, as a nearby homeowner, we can easily hear and must presently endure the current patrons talking, yelling and laughing. So we do. But bear in mind, **there are no sound barriers as CJ's is an open air bar and grill.** So music until 11:00 p.m. is an **unreasonable burden** on nearby working residents. Remember, the tourist driven Naples economy is not solely made up of Monday through Friday, 8 to 5'ers. Some of my neighbors work early on Saturdays and Sundays too. And, the last time I checked, nearly every sunset is a special occasions or holiday in Naples. So shop owners who presently stay open on some holidays, may find it more cost-effective to close, rather than endure family less evenings and the likelihood of throbbing headaches.

So then, another question must be answered; which environment do you want to promote and invite visitors of the Old Naples and the Boardwalk to partake?

As a nearby resident, we counter-propose; if CJ's requires booze and live entertainment to remain solvent, then maybe they should consider relocating to a more appropriate location for their type of establishment and clientele…, then smack dab in the heart of wholesome touristy storefronts, of a trendy shopping mall, in a mostly residential community, right in the heart of old Naples.

In conclusion, the space limitations can not suitably contain more CJ's patrons. Moreover, we contend the introduction of intrusive music and more noise in that small storefront will erode the ambiance of the Boardwalk, thereby chasing shoppers away, as well as place an unnecessary burden on local residents.

Thank you for the opportunity to respond and voice our **disapproval of this request**.

Respectfully,

Colleen B. Carter

Colleen B. Carter