



City Council Chamber
735 Eighth Street South
Naples, Florida 34102

City Council Special Workshop – Wednesday, December 1, 2010 – 1:00 p.m.

Mayor Barnett called the meeting to order and presided.

ROLL CALL..... ITEM 1

Present:

Bill Barnett, Mayor
John Sorey, III, Vice Mayor

Council Members:

Teresa Heitmann
Douglas Finlay
Gary Price, II
Samuel Saad, III
Margaret Sulick

Also Present:

William Moss, City Manager
Robert Pritt, City Attorney
Tara Norman, City Clerk
Roger Reinke, Assistant City Manager
Vicki Smith, Technical Writing Specialist

John Passidomo
Lou Vlasho
Charles Thomas
James Smith
Skip Quillen
Sue Smith
Val Prince
Wafaa Assaad
Beth Ressler

Other interested citizens and visitors.

SET AGENDA ITEM 2

MOTION by Price to SET THE AGENDA as submitted; seconded by Saad and unanimously carried, all members present and voting (Finlay-yes, Heitmann-yes, Saad-yes, Sorey-yes, Price-yes, Sulick-yes, Barnett-yes).

..... ITEM 3

AGREEMENT WITH NON-FOR-PROFIT CORPORATION TO ADMINISTER THE FIFTH AVENUE SOUTH BUSINESS IMPROVEMENT DISTRICT (BID). (1:01 p.m.) Council Member Heitmann asked whether the bylaws and articles of incorporation, of the third party entity with which the City is proposing to contract for business improvement activities, should be included in the resolution approving an agreement with that entity. Council Member Saad however said that he did not believe that this would be productive as the operative document is the agreement between the City and the entity, not the manner in which the entity itself operates. In response to Council Member Finlay, City Attorney Robert Pritt asserted that a determination of whether this entity is to be a public agency would be a policy decision on the part of Council. He said that the Supreme Court has established a totality of factors which would apply in this regard, not individual elements.

Mr. Pritt listed the aforementioned factors as follows:

- level of public funding;
- comingling of funds;
- whether activity was conducted on publicly-owned property;
- whether services contracted for were integral part of authority's chosen decision-making process;
- whether the corporation was performing a governmental function or a function which the authority would otherwise perform;
- the extent of the authority's involvement with regulation of, or control over, the corporation;
- whether the corporation was created by the authority;
- whether the authority had substantial financial interest in the corporation; and
- for whose benefit does the corporation function.

Should Council wish to fund an independent organization, however, it should not delve into the structure of that organization, which is one of the aforementioned factors, Mr. Pritt indicated. Council Member Finlay said that, due to competitive issues, the City would not wish to have the activities of the third-party entity subject to open meeting and public records requirements.

Council Member Sulick then called for consideration of the likelihood that the third-party entity would qualify as non-profit under the provisions of IRS Code Chapter 501(c)3. She noted that such organizations must be charitable or governmental in nature, particularly with regard to comingling of funds and promotion of private property. She also asked whether procedures were in place to enlarge the universe of properties as well as to identify impacts of a BID on the Downtown Naples Association (DNA). In addition, she requested a definition of criteria for evaluation of performance of the new third party entity absent base line figures. Mrs. Sulick also maintained that definitions are called for in regard to termination of the organization, i.e., termination with cause (immediate for flagrant violations such as fraud or embezzlement), termination with cause and cure (not flagrant and can be corrected), termination without cause (12 month termination period).

Council Member Sulick further said she believed the name should be changed since it was not organized under the applicable business improvement district (BID) statute. She equated the proposed relationship more closely to the arrangements the City has with the Naples Art Association and Naples Players. Although this is an important step for Fifth Avenue, she pointed out, other business groups, such as those surrounding Crayton Cove, are proceeding with a marketing plan without a formal organization such as that proposed.

Steering Committee Member Jim Smith said that the model proposed is the same as a Coral Gables organization which is also under Chapter 170, although the local group would be organized as a 501(c)3 corporation so that charitable donations can be acquired and the organization can achieve governmental grant eligibility. Attorney John Passidomo, representing the Steering Committee, said that an attorney with expertise in the area of IRS Chapter 501(c)3 had been engaged by the group, although no funds would be expended until the tax status is assured. Council Member Sulick sought clarification as to whether this would be a provisional or a permanent approval. Sixty to 120 days would be needed, Mr. Passidomo said, reiterating that specialized legal advice would be sought. Mrs. Sulick then asked whether City funds would be released based on a provisional approval status. Council Member Heitmann further ascertained that the City would hold funds during the aforementioned provisional status; therefore she questioned the legality of expending funds to engage the services of an attorney with regard to 501(c)3 filing. Lou Vlasho, Steering Committee Member, said that private

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donations had been collected for this purpose and donors had been informed that they would not be refunded for these legal services from the proceeds of the district.

Council Member Heitmann then echoed Council Member Sulick's concerns regarding growth of the boundaries of the district. Mr. Passidomo characterized the public/private nature of the organization however as a seminal issue at that time, stating that it is anticipated that the Fifth Avenue South Special Overlay District would be the initial area although certain fluidity should be anticipated. Steering Committee volunteer manager Charles Thomas said that an Attorney General's Opinion had indicated that the district could be expanded through the same process undertaken for the organization of the original district. Nevertheless, Mrs. Sulick maintained that boundary expansion must be in accordance with special assessment district criteria. City Attorney Pritt said that there must be the same findings, i.e. that the additional properties would also be specially benefitted.

Council Member Saad said he shared many of Council Member Sulick's issues, also noting a need for immediate termination of the arrangement with the third party entity in the case of fraud or embezzlement. Attorney Passidomo said that due process would however be required in this regard. Mr. Saad then asked what criteria would be employed to measure the success of the effort, suggesting that statistics from individual businesses be submitted anonymously. Mr. Vlasho said that the primary way to measure success would be the reaction of the district property owners; however, he also suggested that the performance measures applied to the district manager be utilized. Mr. Saad asked that a matrix with such measures be added to the agreement, and City Attorney Pritt cited Section 3.4 of the agreement which requires measurable objectives which are consistent with the purpose of the district.

Council Member Heitmann pointed out that just 45 notices had been dispatched by the City to property owners announcing that day's workshop, although there were over 400 folio numbers identified by the property appraiser as being within the special assessment district. Mr. Thomas indicated that numerous folio numbers are contained within a single commercial property, offering as an example the 780 Building which has several hundred, 10 X 10 foot commercial condominium units, owned by a single entity. Nevertheless, he said, regardless of whether measured by individual folio numbers or level of assessment, over 70% approval had been established via the petition presented to Council during a prior discussion.

Council Member Heitmann continued by saying that the City could not approve an agreement with a corporate entity that was not yet in place. Mr. Pritt also said that while the corporation could have business improvement district/BID in its name, to alleviate confusion, another name should be utilized to differentiate it from Chapter 163.511, the statute under which business improvement districts are organized. Mr. Thomas also assured Mrs. Heitmann that all notifications to property owners had been couched in terms of it being a special assessment district, including within the initial brochure. (It is noted for the record that a copy of the aforementioned brochure is contained in the file for this meeting in the City Clerk's Office.)

Council then discussed whether the third party entity should be regulated by open meeting and public records laws. Council Members Saad and Price said the entity should not be created so as to be regulated. Mr. Price also confirmed that, as a Fifth Avenue South tenant, he had always been aware in the various meetings held that this would be an activity to which property owners would contribute financially. Mr. Vlasho said that while some minor questions regarding the execution of petitions were being addressed, no one had requested withdrawal of a petition which, he said, was evidence that no one was unclear as to how the assessment district would operate. Council Member Heitmann however pointed out that the petition submitted did not state that the entity would be managed under a 501(c)3 organization. Council Member Sulick

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stated that she believed the third-party entity should be private; Mrs. Heitmann said it should be public only if property owners did not agree. Vice Mayor Sorey indicated that it should be a private entity, as did Mayor Barnett

In further discussion, Council Member Heitmann said that her primary concern was that no referendum had been held as would have been required by organization under Chapter 163, Florida Statutes, as a business improvement district/BID, and questioned the benefits of not using 163. Jim Smith said that the millage rate is limited under Chapter 163, and under a BID the board of directors can be made up of no more than three individuals; local merchants wanted more members on the board so as to achieve greater due process. City Manager William Moss stressed that registered voters are required under Chapter 163 and there are few, if any, registered voters in the Fifth Avenue South Special Overlay District. Mrs. Heitmann then said that should this be the case, residential properties should in fact be included if it is to be an assessment district. Vice Mayor Sorey observed that including residences would however bring the organization closer to a public entity which he did not favor. Mr. Pritt reiterated that the City should avoid dealing with the structure of the entity and focus on the circumstances under which the City provides funding.

Charles Thomas displayed the initial brochure distributed with the petition, explaining that it described the variety of activities which might be undertaken by the corporation. Council Member Heitmann maintained that the petition did not indicate consideration of a special assessment district and that it would be governed by a 501(c)3 corporation. In response to Vice Mayor Sorey, City Attorney Pritt said he believed that the initial petition process was sufficient to identify a majority of those in favor.

Council Member Price said that his concern continued to be that approvals were being based on approximately seven actual signatures rather than the possessors of folio numbers. Therefore, a very few number of people would be in control, affording little representation to the many tenants, he said. Attorney Passidomo said that the composition of the board of directors could include one member who owns a very small property. Mr. Price further asserted that individual tenants would not have a voice in this process and it is unlikely that complaints would be received until the first special assessment bills are dispatched. Taxation without representation is therefore a concern, Mr. Price said, and questioned the charitable purposes that could be indentified in order to qualify as a 501(c)3. Steering Committee Member Skip Quillen equated this structure to a shopping center where individual tenants do not have a say. Mr. Price nevertheless said that the proposal is using the City's taxing authority to collect the funds, but Mr. Quillen said that the only means to achieve their goal is through the assessment district as proposed.

Council Member Price received additional clarification from Mr. Thomas that charitable status of the organization could allow receipt of federal grants and allow cooperation with charitable organizations in fundraising activities. Mr. Price said that in 501(c)3 requires assets to be dedicated to charitable purposes which does not comport with the proposed organization; Council Member Sulick pointed out that the funds must be for marketing, promotion, etc., and not for charitable giving. Council Member Saad said that this would be known by the IRS and that following review, it would rule accordingly. Mr. Thomas also noted that the IRS application would state that special assessment funds will not be utilized for charitable purposes.

Council then discussed the advisability of allowing a semi-annual rather than annual audit of the thir- party entity and Mr. Thomas said that, to be cost effective, a bi-annual audit should be required and merely a financial report in the off year. Council Member Saad said that he could accept this in light of inclusion of the clause in the agreement providing for immediate

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termination in case of fraud. Council Member Finlay nevertheless questioned the manner in which due process would be provided when immediate termination may occur as a result of embezzlement even of a minor nature.

Citing the extent of support and the efforts of the members of the Steering Committee, Council Member Finlay said he had confidence in the potential for success of this effort and continues to fully support the proposal. It was the consensus that a bi-annual audit be required (6-1 Sulick dissenting). However Vice Mayor Sorey nevertheless recommended that the audit be required to cover compiled data from the prior year.

PUBLIC COMMENT

(2:46 p.m.) **Sue Smith, 11th Avenue South**, a Fifth Avenue South property owner, asked for the name of the entity which had empowered the steering committee. Mayor Barnett said that the Steering Committee did not need such an authorization. She also received clarification that City Attorney Pritt's involvement stemmed from the City being his client. She said that as a 55 year resident of the City she was distressed that there had not been more complete scrutiny of the documents and the powers that will be conveyed to the proposed third party entity. She said that although pertinent, the questions posed by Val Prince (Fifth Avenue South property owner) had not been addressed. She expressed the view that the Council had not allowed public scrutiny and had also given the rights of property owners to an entity that would not afford access to its workings. **Val Prince, 1485 Osprey Avenue**, a property owner to be assessed, said that he had identified many concerns, including that benefits will accrue to property owners not included in the special assessment district boundary. He further criticized the sufficiency of the bylaws and articles of incorporation, pointing that there is no opportunity for property owners to opt out of an organization which he said was not property constituted. In addition, an MSTU (municipal services taxing unit) procedure could be more beneficial to the taxpayers because there is no overhead for the administration of an organization as proposed. **Skip Quillen, 837 Fifth Avenue South**, a restaurateur, urged Council to provide the vehicle which will achieve improvement in the district. **Wafaa Assaad, 649 Fifth Avenue South**, Steering Committee member and Fifth Avenue South property owner, said that the goals cannot be achieved without the combined efforts described. He said that the proposers should be allowed an opportunity to prove themselves. **Beth Ressler, 857 Fifth Avenue South**, owner of Wind in the Willows Shop and member of the Steering Committee, commended the group for its effort and urged Council's support.

ADJOURN

2:57 p.m.

Bill Barnett, Mayor

Minutes prepared by:

Tara A. Norman, City Clerk

Minutes Approved: 12/15/10