City Council Chamber
735 Eighth Street South
Naples, Florida 34102

City Council Regular Meeting - **January 18, 2012** - 8:29 a.m.

Mayor Barnett called the meeting to order and presided.

ROLL CALL.....ITEM 1

Present:	**Council Members:**
Bill Barnett, Mayor	Douglas Finlay
John Sorey, III, Vice Mayor	Teresa Heitmann
	Gary Price, II
	Samuel Saad, III
	Margaret Sulick

Also Present:

William Moss, City Manager	Bob Foreman
Robert Pritt, City Attorney	Barbara Walker
Tara Norman, City Clerk	Alan Parker
Roger Reinke, Assistant City Manager	Larry Schultz
Vicki Smith, Technical Writing Specialist	Charles Thomas
Jessica Rosenberg, Deputy City Clerk	Sue Smith
Gregg Strakaluse, Streets & Stormwater Director	Jayne Skindzier
Adam Benigni, Planner	Astrid Maillard
David Lykins, Community Services Director	Sebastien Maillard
Thomas Weschler, Police Chief	Dan Summers
Michael Bauer, Natural Resources Manager	Jose Aragon
Robin Singer, Planning Director	Jacques Hennig
George Archibald, Traffic Engineer	Lise Sundria
John Dunnuck, Purchasing Manager	Lou Vlasho
Stephen McInerny	Trista Kragh
Richard Yovanovich	Theresa Bonness
John Passidomo	**Media:**
Matthew Kragh	Kristine Gill, Naples Daily News
Jon Igelhart	Other interested citizens and visitors

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

City Manager William Moss.

ANNOUNCEMENTS.....ITEM 3

(8:30 a.m.) Mayor Barnett presented proclamations designating February as Career and Technical Education Month and January 22 through 28 as Hazardous Materials Awareness Week.

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

MOTION by Sorey to SET THE AGENDA removing Items 6-g and 6-h (budget amendments regarding River Park Community Pool renovations) from the Consent Agenda for separate discussion. This motion was seconded by Price and unanimously carried, all members present and voting (Finlay-yes, Heitmann-yes, Price-yes, Saad-yes, Sorey-yes, Sulick-yes, Barnett-yes).

PUBLIC COMMENT.....ITEM 5

(8:37 a.m.) **Jon Igelhart, Florida Department of Environmental Protection (FDEP),** indicated that his comments address Item 14 (amendment of the Stormwater Master Plan / see Page 11) with regard to removal of beach outfalls. He explained that beach renourishment permitting statewide has included removal of beach outfalls, and that the FDEP recognizes the uniqueness of the City's configuration as a narrow peninsula which receives stormwater runoff from outside its boundaries. Therefore, it would not be prudent to divert the runoff from the Gulf of Mexico eastward to Naples Bay, he said. The resolution on that day's agenda recognizes the need for additional time for the City of Naples to develop a plan for the outfall removals, recognizing the City's ongoing aquifer storage and recovery (ASR) program as well as its installation of retention/detention areas, public/private partnership efforts, and a knowledgeable stormwater management staff. Therefore, the FDEP has been assured of the City's commitment and will no longer require the aforementioned outfall removal in conjunction with beach renourishment permits for the area. Additionally, Vice Mayor Sorey thanked Mr. Igelhart for his input with regard to habitat islands. **Larry Schultz, 408 16th Avenue South,** spoke on the recent extension of runway 5/23 at Naples airport, taking issue with the Naples Airport Authority (NAA) position that the construction had been necessary to attract commercial service. He cited documentation indicating that the reasoning behind the runway extension had actually been to allow larger, heavier aircraft which fly longer distances without refueling. He continued by saying that following the March 16, 2011, Council approval of the runway extension, the NAA altered its statement of purpose to the Federal Aviation Administration (FAA) to the effect that the extension would benefit corporate jets with no further reference to commercial service. Mr. Schultz then requested that Mayor Barnett acknowledge that the citizens who had attended the aforementioned hearing in opposition of the extension had been correct in their assessment of the issue and therefore deserved to receive an apology from those like Mayor Barnett who had voted in favor of the NAA's March request. **Alan Parker, 741-A Third Street South,** submitted four documents relating to the City's standing with regard to the proprietorship of the municipal airport (Attachment 1). He also reviewed the Citizen's Against Runway Extension (CARE) opinion that the City is in fact the proprietor of the airport and therefore its zoning regulations cannot be preempted by federal law. He stated that CARE continues to ask the City to retain an aviation law attorney for an opinion with regard to proprietorship, noting that CARE had done so prior to the aforementioned March 16 hearing, although Council had declined to support that opinion.

CONSENT AGENDA

APPROVAL OF MINUTES.....ITEM 6-a

November 14, 2011 Workshop and November 16, 2011 Regular Meeting; as submitted.

APPROVAL OF SPECIAL EVENTS.....ITEM 6-b

1) West Coast Muscle Car Show - West Coast Muscle Car Club, Inc. - 300 Goodlette-Frank Road - 02/04/12 (rain date 02/05/12).

2) Evening On Fifth - Fifth Avenue South Business Improvement District (FASBID) - Fifth Avenue South - 01/26/12, 02/09/12, 02/14/12, 02/18/12, 02/19/12, 03/01/12, 03/08/12, 03/15/12, 03/22/12 and 03/29/12.

3) Naples Backyard History Fundraiser Dinner - Naples Backyard History - 131 Broad Avenue South - 02/17/12.

4) Artists Hanging Paintings at the Construction Wall Fifth Avenue South and the Inn on Fifth - construction wall at Fifth Avenue South and Park Street - Month of January 2012.

RESOLUTION 12-13015.....ITEM 6-c
A RESOLUTION APPROVING AMENDMENT #3 TO THE COMMUNITY DEVELOPMENT BLOCK GRANT – RECOVERY FUNDING AGREEMENT BETWEEN COLLIER COUNTY AND THE CITY OF NAPLES TO REPROGRAM THE GRANT FUNDING FROM LANDSCAPING IMPROVEMENTS FOR ANTHONY PARK TO SIDEWALK INSTALLATION IN RIVER PARK; AUTHORIZING THE MAYOR TO EXECUTE THE AMENDMENT; AND PROVIDING AN EFFECTIVE DATE. Title not read.

RESOLUTION 12-13016.....ITEM 6-d
A RESOLUTION ACCEPTING A 2012 FLORIDA DEPARTMENT OF LAW ENFORCEMENT SUBGRANT AWARD UNDER THE EDWARD BYRNE MEMORIAL JUSTICE ASSISTANCE GRANT PROGRAM FOR AN ELECTRONIC TRAFFIC TICKET WRITER SYSTEM; AUTHORIZING THE MAYOR TO EXECUTE THE CERTIFICATION OF ACCEPTANCE; AND PROVIDING AN EFFECTIVE DATE. Title not read.

RESOLUTION 12-13017.....ITEM 6-e
A RESOLUTION ACCEPTING A SOUTH FLORIDA WATER MANAGEMENT DISTRICT GRANT IN THE AMOUNT OF $3,000 TO THE CITY OF NAPLES FOR THE CONSTRUCTION OF A RAIN GARDEN AT THE COMMUNITY DEVELOPMENT BUILDING AT 295 RIVERSIDE CIRCLE; AND PROVIDING AN EFFECTIVE DATE. Title not read.

RESOLUTION 12-13018.....ITEM 6-f
A RESOLUTION AMENDING THE 2011-12 BUDGET ADOPTED BY ORDINANCE 11-12953 TO APPROPRIATE FUNDS FROM THE FUND BALANCE OF THE BUILDING PERMIT FUND TO ADD FOUR POSITIONS IN THE BUILDING DEPARTMENT; AND PROVIDING AN EFFECTIVE DATE. Title not read.

In response to Council Member Sulick's question regarding Item 6-b(2), Community Services Director David Lykins noted that the Evening On Fifth event does not involve closing of Fifth Avenue South; six closures of Fifth Avenue South occur per year in addition to the two City Fest events, he added.

MOTION by Saad to APPROVE CONSENT AGENDA except Items 6-g and 6-h; seconded by Finlay and unanimously carried, all members present and voting (Finlay-yes, Heitmann-yes, Price-yes, Saad-yes, Sorey-yes, Sulick-yes, Barnett-yes).

END CONSENT AGENDA

RESOLUTION 12-13019.....ITEM 6-g
A RESOLUTION AMENDING THE 2011-12 BUDGET ADOPTED BY ORDINANCE 11-12953 TO APPROPRIATE FUNDS FROM THE GENERAL FUND CONTINGENCY TO THE CAPITAL PROJECT FUND RELATING TO THE RIVER PARK AQUATIC CENTER PROJECT; AND PROVIDING AN EFFECTIVE DATE. Title read by City Attorney Robert Pritt (8:47 a.m.). Council Member Price maintained his opposition to the design of the new River Park Community Pool, explaining that while he supports replacement of the aged facility, thedesign had precipitated additional budgetary costs. He noted that he would therefore support neither this item nor Item 6-h. Council Member Saad nevertheless maintained that the design includes features requested by the River Park neighborhood and the intent is that the new pool will last another 50 years. Mr. Price contended that a pool deck had not been included in the original pricing. Vice Mayor Sorey, however, clarified that the pavers specified in the quote had been changed to concrete due to projected maintenance costs; a concrete deck had originally been planned, he added. Council Member Finlay agreed and further observed with regard to Item 6-h below that the River Park community had been the genesis of the redevelopment area and that funding should therefore be allocated to the pool as a neighborhood enhancement.

Public Comment: (8:53 a.m.) **Sue Smith, 11th Avenue South,** expressed her support of the pool, especially as an amenity for the children of the community.

MOTION by Sorey to APPROVE RESOLUTION 12-13019 as submitted;

seconded by Saad and carried 5-2, all members present and voting (Finlay-yes, Heitmann-no, Price-no, Saad-yes, Sorey-yes, Sulick-yes, Barnett-yes).

Council Member Heitmann explained that while she supports a new pool for the neighborhood, her negative vote was due to her belief that the design will result in a costly operational budget.

RESOLUTION 12-13020.....ITEM 6-h
A RESOLUTION AMENDING THE 2011-12 BUDGET ADOPTED BY ORDINANCE 11-12953 TO APPROPRIATE FUNDS FOR A TRANSFER FROM THE COMMUNITY REDEVELOPMENT AGENCY FUND (CRA) TO THE CAPITAL PROJECTS FUND RELATING TO A PORTION OF THE FUNDING FOR THE RIVER PARK AQUATIC CENTER PROJECT; AND PROVIDING AN EFFECTIVE DATE. Title read by City Attorney Robert Pritt (8:54 a.m.).

Public Comment: (8:54 a.m.) None.

MOTION by Sorey to APPROVE RESOLUTION 12-13020 as submitted; seconded by Saad and carried 6-1, all members present and voting (Finlay-yes, Heitmann-yes, Price-no, Saad-yes, Sorey-yes, Sulick-yes, Barnett-yes).

RESOLUTION 12-13021.....ITEM 13
A RESOLUTION NAMING PUBLIC PROPERTY LOCATED ALONG THE EAST SIDE OF 755 EAST LAKE DRIVE, INCLUDING A SMALL STORMWATER RETENTION LAKE OF 11,250 SQUARE FEET, AS "LOIS **SELFON** PARK"; **AND PROVIDING AN EFFECTIVE DATE.** Title read by City Attorney Robert Pritt (8:55 a.m.). Community Services Director David Lykins briefly introduced the proposal contained in his December 15 memorandum (Attachment 2), stressing t he honoree's years of service to the Community Services Advisory Board (CSAB). He further pointed out that the request meets the City's naming policy criteria and that staff recommended approval.

Public Comment: (8:58 a.m.) **Sue Smith, 11th Avenue South,** stated that while she respect s Mrs. Selfon as well as the time and effort she has given to the City, many others have given as well and are being excluded from such recognition; therefore she cautioned against approval without accounting for those other individuals.

MOTION by Sorey to APPROVE RESOLUTION 12-13021 as submitted; seconded by Price and unanimously carried, all members present and voting (Finlay-yes, Heitmann-yes, Price-yes, Saad-yes, Sorey-yes, Sulick-yes, Barnett-yes).

RESOLUTION 12-13022.....ITEM 7
A RESOLUTION DETERMINING EASEMENT VACATION PETITION 11-EV1 TO VACATE A CITY OF NAPLES EASEMENT, APPROXIMATELY 20 FEET BY 20 FEET, ALONG GOODLETTE-FRANK ROAD AT MOORINGS PARK, MORE FULLY DESCRIBED HEREIN; AND PROVIDING AN EFFECTIVE DATE. Title read by City Attorney Robert Pritt (9:00 a.m.). Planner Adam Benigni explained that, as use of the site expanded over the years, Moorings Park has granted easements to the City for access to various water meters. Following consolidation of water services, some meters were no longer needed and, in the instant case, the facilities were actually removed; staff recommended approval, he said.

Public Comment: (9:02 a.m.) None.

MOTION by Sorey to APPROVE RESOLUTION 12-13022 as submitted; seconded by Sulick and unanimously carried, all members present and voting (Finlay-yes, Heitmann-yes, Price-yes, Saad-yes, Sorey-yes, Sulick-yes, Barnett-yes).

RESOLUTION (Continued / see motion below).....ITEM 8
A RESOLUTION DETERMINING CONDITIONAL USE PETITION 11-CU9 PURSUANT TO SECTIONS 50-103(e) AND 50-107 OF THE CODE OF ORDINANCES, CITY OF NAPLES, TO GRANT APPROVAL OF A PARKING NEEDS ANALYSIS IN ORDER TO ALLOW LE LAFAYETTE RESTAURANT TO OPERATE WITH 20 PARKING SPACES WHERE THE CODE REQUIRES 45 PARKING SPACES, AMENDING THE PRIOR CONDITIONS OF

APPROVAL IN RESOLUTION 09-12486 FOR PROPERTY IN THE C1 RETAIL SHOPPING DISTRICT, OWNED BY PRATT SHOES, INC., LOCATED AT 375 13TH AVENUE SOUTH, MORE FULLY DESCRIBED HEREIN; AND PROVIDING AN EFFECTIVE DATE. Title read by City Attorney Robert Pritt (9:02 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: Saad and Finlay/visited the site, spoke with the petitioner and the petitioner's agent, and received various e-mails and telephone calls; Price and Barnett/visited the site, met with the petitioner, spoke with the petitioner's agent, and received various e-mails; Sulick/visited the site and received various e-mails and telephone calls; Heitmann/ familiar with the site, met with the petitioner and neighbors, and received various e-mails and telephone calls; and Sorey/met with the petitioner and neighbors, spoke with representatives of Neopolitan Enterprises, and received various e-mails and documents. Planning Director Robin Singer briefly reviewed the request as contained in the December 29, 2011, memorandum by Planner Erica Goodwin (Attachment 3), noting that the Planning Advisory Board (PAB) had recommended approval with certain conditions although staff recommends denial as reflected in the aforementioned memorandum. (It is noted for the record that a copy of the applicable staff report is contained in the file for this meeting in the City Clerk's Office.) She said that this was due to the fact that 20 parking spaces are available on site and, at a minimum, 27 are required.

Attorney Richard Yovanovich, agent for the petitioner, stated that the request to be considered d eals with his client's use of an adjacent parking lot and elimination of a requirement that no usage by the property owner be allowed past 5:00 p.m. He provided a brief history of the restaurant over the past ten years, focusing on the 2009 conditional use approval by the City for expansion with the operation of a valet parking service and the required reciprocal parking agreement with the aforementioned adjacent property owner (for use of 23 spaces during the evening hours). However, a reciprocal parking and easement agreement of long standing exists between the two property owners (since May 1984), Mr. Yovanovich explained, because the two building sites were at one time contained within the same parcel; this provides that patrons to the Aragon building may also park in the spaces for the Pratt building. Due to his support of the petitioner's 2009 request, Jose Aragon, owner of the Aragon building, executed the reciprocal parking agreement required by the City in 2009 for the valet parking service. The 1984 reciprocal parking and easement agreement between the two land owners would remain in effect.

Mr. Yovanovich then referenced the City's 2010 Third Street South parking study (a copy of which is contained in the file for this meeting in the City Clerk's Office), that had determined that peak utilization was generally around 63% of available parking and therefore no apparent shortage existed in the that district. Attorney Yovanovich continued by reviewing alternative parking calculations which had been utilized for other restaurants in the area, such as Handsom e Harry's, which, he observed, appears to be functioning as intended. The Handsome Harry's calculation (1 parking space per 100 square feet of dining area and 1 space to every 300 square feet for the remainder) had been utilized to determine the 27 spaces contained in the PAB -recommended valet service plan (see Attachment 3, Page 2), and furthermore, that methodology appears to be successful since no parking shortages in the district have been realized. In conclusion, Attorney Yovanovich reiterated that the PAB had recommended approval of his client's petition with the use of the alternative calculation and that these parking spaces would in fact still be available in the Aragon building's lot. He then confirmed for Council Member Price that the May 1984 agreement does in fact run with the land of both property owners and can only be terminated upon mutual agreement.

Public Comment: (9:20 a.m.) **Bob Foreman, 416 12th Avenue South,** representing the Cypress Club Condominium Association, requested that the petition be denied. He predicted

that due to the apparent recovery of the economy, the need for the restaurant's use of the Aragon parking spaces will continue in the future. He noted that the 2009 approval had in fact stipulated this use as well as the agreement being reflected in any lease agreement relative to the Aragon building. He further observed that the operation of the existing valet service was in need of improvement. Mr. Foreman then submitted two photographs (which are dated 5/22/09 and are contained in the file for this meeting in the City Clerk's Office) depicting parking along 12th and 13th Avenues South. Council Member Saad stated that having spoken with Mr. Foreman, he believed that the concern is however parking in general in the area, especially during special events; he requested that a workshop discussion be scheduled to address the signage applicable to parking, creation of tow-away zones, and development of a special event parking plan. **Jose Aragon, owner of the Aragon Building,** explained that, in his opinion, parking is not an issue in the district, noting that in fact visitors to the nearby condominiums actually use his parking lot. In response to Vice Mayor Sorey, Mr. Yovanovich clarified that Mr. Aragon had not requested the elimination of the condition of no evening hours for his tenants but that of the petitioner due to observation that it is not necessary; the reciprocal parking and easement agreement between the two property owners would remain in full force, he reiterated. Mr. Aragon confirmed this statement, saying that he had agreed to the condition in 2009 so that the restaurant could remain in operation, although is not necessary and should be removed. **Sue Smith, 11th Avenue South,** stated that while she appreciated the restaurant, she cautioned that the City's Code of Ordinances must be followed consistently while protecting private property rights of residential areas abutting commercial. She urged that staff's recommendations be followed and the petition be denied. **Jacques Hennig, 399 13th Avenue South,** stated that his business is located in the Aragon Building and that he has observed no major issues relative to adequate parking in the area. He further stated that the restaurant enhances his enterprise and that the issue is the fact that residential abuts commercial properties.

In response to Council Member Finlay, Director Singer confirmed that the City's parking requirements for restaurants are modeled after the Institute of Transportation Engineers (ITE) which utilizes gross square footage rather than seating capacity. She further stated that the above referenced parking utilization study had been in response to requests to use the alternative calculations. The results had revealed underutilized parking on the perimeter of this district during peak hours; should such requests by restaurants continue to be approved, eventually parking issues will arise, she predicted. Ms. Singer further explained that Third Street differs from Fifth Avenue South in that the majority of its parking is privately held and it does not lie within the redevelopment area, she said, observing that Neopolitan Enterprises is addressed differently due to the size of its holdings, which includes abundant parking. Requests such as the one under discussion must be considered on a case-by-case basis, she concluded. Mr. Finlay then inquired as to whether timed parking could be initiated in areas where parking is an issue. Director Singer stated that the public would then park in private spaces creating a different set of problems; any changes should be considered district-wide following additional study, she said.

Ms. Singer explained that while the alternative method of calculation could in fact be applied as it had to Handsome Harry's, all square footage must be accounted for and the petitioner had failed to include restrooms and circulation areas when arriving at the initial 20 parking spaces submitted to the PAB. She confirmed for Vice Mayor Sorey that the petitioner's request has been so fluid over the course of its submittal that staff had not provided its own calculations of the square footage per use.

Petitioner Astrid Maillard explained in response to Council Member Heitmann that valet parking is used only when necessary, not daily, noting that their patronage had decreased due to the economy; this, she said, also makes the agreement with Mr. Aragon regarding evening hours of

his tenants moot. Director Singer pointed out that Code Enforcement is involved in monitoring such conditional uses but the City does not regulate the valet parking service. City Manager William Moss added that the right-of-way permit may have additional conditions which are addressed with the petitioner, but not the valet parking company.

City Attorney Pritt recommended that reference to Section 50-107(d) of the Code of Ordinances be included within the resolution should Council decide to approve the request. This would allow the City Manager to address any complaint of insufficient parking even though the conditional use was approved via Council as well as lessen the need for the parking agreement with the owner of the Aragon Building, Mr. Pritt said. Mr. Yovanovich reiterated that the condition imposed on Mr. Aragon had been in response to the City's concern that there would be insufficient parking available for the valet service and that this concern had provenunfounded, thus the petitioner's request for removal. In conclusion, Mr. Yovanovich noted that businesses in the district currently share their after hours parking successfully without any written/formal agreement and would continue to do so unless owners begin cordoning off their lots.

Recess: 10:24 a.m. to 10:37 a.m. It is noted for the record that the same Council Members were present when the meeting reconvened and consideration of Item 8 continued.

Council Member Price indicated that his concern involves staff applying different standards to various applicants and unless staff changes its recommendations, the request will in fact be denied. Mr. Yovanovich asserted that a decision by Council is needed indicating that the 1 space per 100 square feet for dining area and 1 to 300 for the remainder of the restaurant is appropriate, following which the actual use of the square footage of the restaurant may be ascertained should staff disagree with the petitioner's allocation. Mr. Price agreed, pointing out that should insufficient parking become an issue then the Code contains provisions to identify and remedy such situations; the law should be applied consistently, he said. City Attorney Pritt further clarified that the provision stated in Section 50-107(d) clearly demonstrates that a parking plan resulting from the use of an alternative parking needs analysis does not equate to a vested right, although litigation may result from the use of that section, he cautioned. Vice Mayor Sorey recommended that should Council wish to approve the petition, language reviewed by the City Attorney should be added to the resolution referencing pertinent sections of the Code. Referencing Section 50-107(b)3, regarding a statement of remedies, City Manager Moss advised that staff could recommend language for the resolution outlining those remedies should they be needed in the instant case.

In response to Council Member Saad, Attorney Yovanovich confirmed that Section 3 of the subject resolution contains the PAB's conditions for approval. Section 3-2 limits operations to the number of spaces available on site and does not include the seven additional spaces available due to the valet service during evening hours as it addresses daytime operations; Section 3-1 requires the petitioner to obtain a right-of-way permit which is to include the valet parking operational plan. Mr. Saad then pointed out that Code Section 50-107 is in fact cited in the resolution. During further conversation, Petitioner Maillard acknowledged to Mr. Saad that patrons are seldom seated at the bar area and Mr. Yovanovich added that this had been included within the calculations under the dining area allocation of square footage.

In further discussion, Director Singer clarified for Council Member Sulick that the 2010 study by staff had been a utilization review and not a parking requirement study and that staff had not researched the number of restaurants in that district currently using the alternative parking analysis now being requested by the petitioner. Mrs. Sulick cautioned that pending development near the subject restaurant, which includes another restaurant and retail, will in fact impact parking needs in the near future. The Third Street South area directly abuts

residential and parking requirements must be closely monitored to avoid creating a situation similar to that of Fifth Avenue South prior to the construction of two parking garages, she said, although a parking garage in the Third Street area is not a foreseeable solution, she concluded. Agreeing with Mrs. Sulick's concerns, especially intensity of use, Vice Mayor Sorey observed that if approved, the conditional use should apply only to the subject restaurant and not future tenants of the space; this could be added as a condition within the resolution, Mr. Pritt stated.

In response to Council Member Heitmann, Traffic Engineer George Archibald (sworn separately), confirmed that the Code of Ordinances does provide for vehicles to back into alleyways, commercial and multi-family areas (Section 50-103(a)6 and (b)). Following further considerable discussion of potential amendments to the resolution and required parking calculations, the item was continued as reflected in the motion below.

MOTION by Sorey to CONTINUE THIS ITEM TO THE FEBRUARY 15, 2012 REGULAR MEETING AT A TIME CERTAIN; seconded by Price and unanimously carried, all members present and voting (Finlay-yes, Heitmann-yes, Price-yes, Saad-yes, Sorey-yes, Sulick-yes, Barnett-yes).

RESOLUTION 12-13023.....ITEM 9
A RESOLUTION DETERMINING WAIVER OF DISTANCE PETITION 12-WD1 FOR OLDE CHURCH 811, LLC, TO OBTAIN AN ALCOHOLIC BEVERAGE LICENSE TYPE 4COP WITHIN 400 FEET OF AN ESTABLISHED CHURCH ON PROPERTY OWNED BY OLDE CHURCH 811, LLC, AND LOCATED AT 811 SEVENTH AVENUE SOUTH, MORE FULLY DESCRIBED HEREIN; AND PROVIDING AN EFFECTIVE DATE. Title read by City Attorney Robert Pritt (11:54 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 ex parte disclosures to the effect that all were familiar with the site. Vice Mayor Sorey stated that he had spoken with the petitioner as had Council Member Saad, who said he had also spoken with the petitioner's agent. Planner Adam Benigni provided a brief overview as contained in his December 20 memorandum (Attachment 4), noting that staff recommended approval. He confirmed for Vice Mayor Sorey that while the waiver of distance was necessary due to a church located on an adjacent property, no contact from the church had been forthcoming although it had been noticed as to this hearing as well as that for Item 10 (see below).

Public Comment: (11:56 a.m.) None.

MOTION by Sorey to APPROVE RESOLUTION 12-13023 as submitted; seconded by Saad and unanimously carried, all members present and voting (Finlay-yes, Heitmann-yes, Price-yes, Saad-yes, Sorey-yes, Sulick-yes, Barnett-yes).

RESOLUTION 12-13024.....ITEM 10
A RESOLUTION DETERMINING WAIVER OF DISTANCE PETITION 12-WD2 FOR FLAVA RESTAURANT TO OBTAIN AN ALCOHOLIC BEVERAGE LICENSE TYPE 4COP WITHIN 400 FEET OF AN ESTABLISHED CHURCH ON PROPERTY OWNED BY FONTANA, LLC, AND LOCATED AT 849 SEVENTH AVENUE SOUTH, SUITE 101, MORE FULLY DESCRIBED HEREIN; AND PROVIDING AN EFFECTIVE DATE. Title read by City Attorney Robert Pritt (11:56 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 ex parte disclosures to the effect that while none had had contact, all were familiar with the site, and Vice Mayor Sorey indicated that he had visited the site. Planner Adam Benigni reviewed his December 20 memorandum (Attachment 5) which provides a synopsis of the request, noting that staff recommended approval. The waiver of distance is necessary due to the location of a church within the same building although, as noted in Item 9 above, no response was forthcoming from the church following notice of this hearing.

Public Comment: (11:58 a.m.) None.

MOTION by Barnett to APPROVE RESOLUTION 12-13024 as submitted; seconded by Saad and unanimously carried, all members present and voting (Finlay-yes, Heitmann-yes, Price-yes, Saad-yes, Sorey-yes, Sulick-yes, Barnett-yes).

Recess: 11:58 a.m. to 12:47 p.m. It is noted for the record that the same Council Members were present when the meeting reconvened.

RESOLUTION 12-13025.....ITEM 11
A RESOLUTION DETERMINING SITE PLAN WITH DEVIATIONS PETITION 11-SPD3 TO ALLOW AN ENCLOSED RESTAURANT FACILITY TO BE LOCATED APPROXIMATELY 16.5 FEET FROM THE REAR PROPERTY LINE, AND A CONDITIONAL USE FOR A PARKING NEEDS ANALYSIS TO ALLOW INTERIOR IMPROVEMENTS AND THE EXPANSION TO THE BAYFRONT INN RESTAURANT, TO ALLOW THE RENTAL OF MOTOR VEHICLES AND VESSELS AS ACCESSORY TO THE PRIMARY PERMITTED USE, AND TO ALLOW THE MODIFICATION OF PRIOR CONDITIONS OF APPROVAL IN RESOLUTION 96-7699 FOR PROPERTY OWNED BY GORDON RIVER HOTEL ASSOCIATES, LOCATED IN THE C2-A WATERFRONT COMMERCIAL DISTRICT AT 1221 FIFTH AVENUE SOUTH, MORE FULLY DESCRIBED HEREIN; AND PROVIDING AN EFFECTIVE DATE. Title read by City Attorney Robert Pritt (12:47 p.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 ex parte disclosur es to the effect that all had received e-mails regarding the petition as well as the following: Saad, Price and Barnett/familiar with the site and had spoken with the petitioner; Finlay/familiar with the site but no contact; Sulick/visited the site but no contact; Heitmann/familiar with the site and reviewed the Planning Advisory Board (PAB) meeting video; and Sorey/visited the site and spoke with Bayfront residents. Planning Director Robin Singer provided a brief overview of the request as contained in the December 29, 2011, memorandum by Planner Erica Goodwin (Attachment 6), noting that the PAB and staff recommended approval with the condition as cited regarding the 12 electric street-legal vehicles.

Architect Matthew Kragh, agent for the petitioner, utilized an electronic presentation in providing details of the proposal (a printed copy of which is contained in the file for this meeting in the City Clerk's Office). He explained that the boutique hotel, formerly a Comfort Inn, would be decreasing the number of units from 93 to 86, adding full kitchen services and indoor/outdoor restaurant space; also proposed is amending the use of some vessel slips from charter to patron. Additionally, meeting rooms, a fitness center and spa will also be added. Balconies are to be constructed for the upper floor units and well as improved aesthetics, Mr. Kragh explained. The updated parking needs analysis is based upon the aforementioned reduction of rooms and the altered use of some of the existing boat slips, he reported.

Mr. Kragh then addressed the proposed rental of street-legal electric vehicles to the hotel's patrons, noting that the speed limit near the southern terminus of Goodlette-Frank Road (including the ingress/egress openings to the subject property) had been reduced by Collier County from 45 to 35 miles per hour (mph) sometime in the past but was subsequently restored to the 45 mph speed limit. Because electric vehicles can be legally operated only on streets designated 35 mph or under, the petitioner is endeavoring to ascertain from the County the speed limit of Goodlette-Frank Road, from Third Avenue South, south to US 41, as it is currently not posted. Should it prove to be 35 mph, he explained, the petitioner has offered to fund the appropriate signage. An alternative is to obtain a right of entry temporary use agreement with the owners of the vacant property directly across Goodlette from the Bayfront Inn to achieveaccess to downtown across the unimproved right-of-way of Third Avenue South which bisects that property. One further alternative would be the use of electric vehicles street-legal at

45 mph. Addressing concerns of Council, he noted that a map depicting allowable routes and other citable restrictions is to be posted in each vehicle. In response to Council, City Attorney Pritt clarified that the City could not legislate the use of the vehicles, merely whether the hotel would be allowed to rent them to its patrons; he proposed the amended language to Section 2-1 reflected in the motion below.

Referencing the Parking Calculations on Sheet SK0 found in the resolution, Council Member Price received clarification from Mr. Kragh regarding the amended number of spaces and their location as found in the motion below; Sheet SK0 would also be amended for the public record, he added. Addressing parking concerns voiced by Bayfront residents to Vice Mayor Sorey, Director Singer pointed out that the petitioner was replacing one conditional use with another and voluntarily increasing the parking requirement from 0.93 spaces per unit to 1.0 space per unit.

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

> ***MOTION by Price to APPROVE RESOLUTION 12-13025 amended as follows: Section 2-1:*** "~~***The***~~ ***Up to 12 electric street-legal*** cars…"; ***and Parking Calculations (and Sheet SK0):*** "Off-Site ***At Grade Parking (Bayfront)***…", "Off-Site ***(Bayfront*** Garage)… ~~***22***~~ ***23*** Spaces", ***and*** "Total… ~~***119***~~***120*** Spaces". ***This motion was seconded by Saad and unanimously carried, all members present and voting (Finlay-yes, Heitmann-yes, Price-yes, Saad-yes, Sorey-yes, Sulick-yes, Barnett-yes).***

It is noted for the record that Items 12-a and 12-b were read and considered concurrently.

RESOLUTION 12-13026.....ITEM 12-a
A RESOLUTION DETERMINING PETITION 11-SD6 FOR FINAL (RECORD) PLAT APPROVAL OF THE SIXTH STREET PLAT, A REPLAT OF 560 CENTRAL AND LOTS 14-16, BLOCK 20, TIER 6, PLAN OF NAPLES, TOGETHER WITH THE EAST ½ OF A 20 FOOT NORTH/SOUTH VACATED ALLEY ABUTTING LOTS 14 THROUGH 16, BLOCK 20, TIER 6, CONTAINING APPROXIMATELY 51,185 SQUARE FEET IN THE R3-12, MULTIFAMILY RESIDENCE DISTRICT, CREATING 7 SEPARATE LOTS LOCATED AT 12-52 SIXTH STREET SOUTH, OWNED BY ROBERT C. FULLER, MORE FULLY DESCRIBED HEREIN; AND PROVIDING AN EFFECTIVE DATE.

RESOLUTION 12-13027.....ITEM 12-b
A RESOLUTION DETERMINING Site plan with deviationS PETITION 11-spd4 TO ALLOW FOR THE CONSTRUCTION OF 7 TWO-STORY, SINGLE FAMILY HOMES IN THE R3-12, MULTIPLE FAMILY RESIDENCE DISTRICT, WITH 7.5 FOOT INTERIOR SIDE SETBACKS (15 FOOT SEPARATION BETWEEN STRUCTURES) WHERE 10 FEET IS REQUIRED FOR PROPERTY OWNED BY ROBERT C. FULLER, LOCATED AT 12-52 SIXTH STREET SOUTH, MORE FULLY DESCRIBED HEREIN; AND PROVIDING AN EFFECTIVE DATE. Titles read by City Attorney Robert Pritt (1:35 p.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 ex parte disclosures to the effect that all were familiar with the site. Council Member Price also indicated that he had spoken with the petitioner while Vice Mayor Sorey stated that he had spoken with the petitioner's agent. Planning Director Robin Singer provided a brief overview of the requests as contained in the December 29 memorandum by Planner Erica Goodwin (Attachment 7); the Planning Advisory Board (PAB) and Design Review Board (DRB), as well as staff, recommend approval, she added.

Architect Matthew Kragh, agent for the petitioner, explained that the existing development had

proven so successful that two additional lots were being proposed, bringing the total to seven single family homes on a site which could accommodate up to 13 under local zoning regulations.

Public Comment: (1:42 p.m.) None.

MOTION by Sorey to APPROVE RESOLUTION 12-13026 as submitted; seconded by Sulick and unanimously carried, all members present and voting (Finlay-yes, Heitmann-yes, Price-yes, Saad-yes, Sorey-yes, Sulick-yes, Barnett-yes).

MOTION by Price to APPROVE RESOLUTION 12-13027 as submitted; seconded by Finlay and unanimously carried, all members present and voting (Finlay-yes, Heitmann-yes, Price-yes, Saad-yes, Sorey-yes, Sulick-yes, Barnett-yes).

RESOLUTION 12-13028.....ITEM 14
A RESOLUTION AMENDING THE CITY OF NAPLES' **STORMWATER MASTER PLAN TO SATISFY THE PERMIT CONDITION OF THE FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION JOINT COASTAL PERMIT NO. 0222355-001-JC REQUIRING THE REMOVAL OF THE** CITY'S **STORMWATER BEACH OUTFALLS; AND PROVIDING AN EFFECTIVE DATE.** Title read by City Attorney Robert Pritt (1:43 p.m.). Streets & Stormwater Director Gregg Strakaluse explained the need for this item as contained in his December 21 memorandum (Attachment 8), noting that staff had been working closely with Jon Igelhart, FDEP (Florida Department of Environmental Protection) and Collier County to address a provision contained within beach renourishment permits regarding the removal of beach outfalls. (See also Mr. Igelhart's comments under Item 5 above). He then reviewed the three conditions to be contained in the City's Stormwater Master Plan to satisfy the FDEP provision aforementioned. Vice Mayor Sorey then thanked staff, Mr. Igelhart and Collier County for their efforts in this matter.

Mr. Strakaluse assured Council Member Heitmann that he would provide the documentation that had been sent to the FDEP in support of this issue and Mrs. Heitmann expressed her disappointment in not addressing the beach outfall problem and indicated that she would not support the resolution. Council Member Sulick disagreed, emphasizing that this action merely recognizes the fact that the community has been a leader in the state in addressing stormwater and water quality issues; the City has made a commitment and will in fact take action with regard to the removal of the beach outfalls. This resolution merely allows the City to do so in a reasonable and cost effective manner using common sense and further research, Mrs. Sulick added.

In response to Council Member Finlay, Vice Mayor Sorey confirmed that the FDEP is mainly concerned with water quality and local authorities agree although removing the structures will also prolong the life of the beaches and necessitate fewer costly renourishment projects. Shoul d the City's pilot program prove successful in capturing the water from the outfalls and storing it underground via ASR (aquifer storage and recovery) wells, the means of addressing the issue of some of the outfalls may have been found. Council Member Price added that while he is supportive, he would recommend that more specifics be identified, and Mr. Sorey stated that at the current time, a feasible, economic way of handling the stormwater routed to the outfalls is as yet unknown.

Public Comment: (2:01 p.m.) None.

MOTION by Sorey to APPROVE RESOLUTION 12-13028 as submitted; seconded by Finlay and carried 5-1, (Finlay-yes, Heitmann-no, Price-yes, Saad-absent, Sorey-yes, Sulick-yes, Barnett-yes).

It is noted for the record that Items 15-a and 15-b were read and considered concurrently.

(Continued / see motion below).....ITEM 15-a
AWARDING A CONTRACT FOR THE PURCHASE OF A NEW STREET SWEEPER AND FIVE-YEAR TURN-KEY MAINTENANCE PLAN: \ VENDOR: ENVIRONMENTAL PRODUCTS OF FL CORPORATION, APOPKA, FLORIDA \ COST: $288,156 \ FUNDING: CIP 12V05 - STREET SWEEPER.
RESOLUTION (Continued / see motion below).....ITEM 15-b
A RESOLUTION AMENDING THE 2011-12 BUDGET ADOPTED BY ORDINANCE 11-12953 TO APPROPRIATE FUNDS FROM THE FUND BALANCE OF THE STREETS FUND TO INCREASE THE BUDGET OF THE STREET SWEEPER PROJECT; AND PROVIDING AN EFFECTIVE DATE. Titles read by City Attorney Robert Pritt (2:01 p.m.). Streets & Stormwater Director Gregg Strakaluse provided a summary of his January 3 memorandum detailing the research by staff relative to the purchase of a new street sweeper versus outsourcing the service (Attachment 9), noting that staff recommended approval. Council Member Finlay then stated that he would support outsourcing the service for at least one year, disclosing his contact with Precision Cleaning regarding the bid submitted by that company for vacuum street sweeping. Mr. Strakaluse stated that the company did not provide all of the requested information, and that it was his understanding that the vacuum equipment utilized by Precision is not of the quality used by the City for municipal needs; this could create issues with the heavy use in maintaining City streets, he added. While that company does service Pelican Bay, no commercial uses exist along the streets it maintains. He further said that should Council wish to pursue outsourcing, additional research would in fact be needed, including speaking with the references provided by the bidders. Council Member Price expressed concern that the reference checks had not been done.

Discussion regarding the maintenance costs over the past four years followed during which Mr. Strakaluse cited $65,632.50 (January 2008 through December 2011), which had been included in the maintenance contract with Environmental Products at that time. Council Member Price then questioned the cost of maintenance performed in-house, and Director Strakaluse stated that this cost increases with the age of the equipment.

Vice Mayor Sorey advised that whether the service is outsourced or not, he recommended that vacuum, not mechanical, equipment be used due to the City's commitment to improving water quality; Council agreed.

Director Strakaluse then agreed that more information was needed and that he would attempt to contact Precision again. Further direction from Council included the need for information regarding the following: costs for outsourcing with the use of vacuum equipment, a cost estimate of maintenance for the City's existing sweeper for an additional two to three years; and the number of street miles maintained by Precision within Pelican Bay. The motion to continue the item was then proffered as reflected below.

City Attorney Pritt then reviewed the bid process, cautioning Council Members not to contact vendors directly as this could be challenged as an irregularity. Purchasing Manager John Dunnuck clarified that two separate bids had been sought, one for services and one for the equipment, including performance specifications.

Public Comment: (2:29 p.m.) None.

MOTION by Price to CONTINUE ITEMS 15-a AND 15-b TO FEBRUARY 15, 2012 REGULAR MEETING; seconded by Barnett and unanimously carried, all members present and voting (Finlay-yes, Heitmann-yes, Price-yes, Saad-yes, Sorey-yes, Sulick-yes, Barnett-yes).

It is noted for the record that Items 16-a and 16-b were read and considered concurrently.

CLERK'S TRACKING #12-00000 **.....ITEM 16-a**

AWARDING A PROFESSIONAL SERVICES AGREEMENT TO DESIGN, ENGINEER AND PERMIT DREDGING OF DESIGNATED CANAL AREAS WITHIN THE PORT ROYAL SPECIAL ASSESSMENT DISTRICT: \ VENDOR: ERICKSON CONSULTING ENGINEERS, INC., SARASOTA, FLORIDA \ COST: $355,270 \ FUNDING: CAPITAL PROJECTS FUND (TO BE REIMBURSED BY SPECIAL ASSESSMENT PAYMENTS).

RESOLUTION 12-13029.....ITEM 16-b
A RESOLUTION AMENDING THE 2011-12 BUDGET ADOPTED BY ORDINANCE 11-12953 TO APPROPRIATE FUNDS FOR A TRANSFER IN THE AMOUNT OF $355,270.00 FROM THE CAPITAL PROJECT FUND TO THE PORT ROYAL SPECIAL ASSESSMENT DISTRICT FUND RELATED TO THE DESIGN, ENGINEERING AND PERMITTING RELATED TO DREDGING OF THE PORT ROYAL CANALS; AND PROVIDING AN EFFECTIVE DATE.

Titles read by City Attorney Robert Pritt (2:31 p.m.). Streets & Stormwater Director GreggStrakaluse provided a brief review of the items as contained in his January 3 memorandum (Attachment 10), pointing out that the City would be reimbursed from the special assessment to the Port Royal property owners whose payments begin in November 2013. He also noted that staff has approached the Florida Department of Environmental Protection (FDEP) with regard to the possible use of habitat islands for disposal of the dredged material, and Vice Mayor Sorey clarified for Council Member Heitmann that the state moratorium on habitat islands would not apply to this project. Mr. Sorey indicated that he had planned to meet with the Governor and Cabinet to discuss the moratorium but had been instructed that the City should submit its design for the island with its dredge permit and that approval would be based upon the merits of that application; Mrs. Heitmann requested that staff provide her with a copy of the submittal. Mr. Strakaluse explained that testing of the spoil material would be performed by the engineering firm engaged for the project.

Public Comment: (2:36 p.m.) None.

MOTION by Sulick to APPROVE ITEM 16-a as submitted; seconded by Saad and unanimously carried, all members present and voting (Finlay-yes, Heitmann-yes, Price-yes, Saad-yes, Sorey-yes, Sulick-yes, Barnett-yes).

MOTION by Price to APPROVE RESOLUTION 12-13029 as submitted; seconded by Sulick and unanimously carried, all members present and voting (Finlay-yes, Heitmann-yes, Price-yes, Saad-yes, Sorey-yes, Sulick-yes, Barnett-yes).

RESOLUTION 12-13030.....ITEM 17
A RESOLUTION APPROVING RIGHT-OF-WAY PERMIT APPLICATION 2012-38 OF THE FIFTH AVENUE SOUTH BUSINESS IMPROVEMENT DISTRICT, INC. FOR THE PLACEMENT OF DECORATIVE LIGHTING IN THE RIGHT-OF-WAY ON FIFTH AVENUE SOUTH BETWEEN THIRD Street and NINTH Street; AUTHORIZING THE CITY MANAGER TO EXECUTE THE RIGHT-OF-WAY PERMIT APPLICATION; AND PROVIDING AN EFFECTIVE DATE. Title read by City Attorney Robert Pritt (2:37 p.m.). Planning Director Robin Singer briefly reviewed the request by the Fifth Avenue South Business Improvement District (FASBID) as contained in the January 9 memorandum by Assistant City Manager Roger Reinke (Attachment 11), noting the conditions contained in the special right-of-way permit (a copy of which is contained in the file for this meeting in the City Clerk's Office). City Attorney Pritt then stated that as the item concerns a permit, it should be considered quasi-judicial, following which Notary Public Vicki Smith administered an oath to those intending to offer testimony; all responded in the affirmative. City Council Members then made ex parte disclosures to the effect that all were familiar with the site and Council Members Finlay, Sulick, Heitmann and Sorey also indicated that they had had contact with either members of the FASBID and/or merchants in the area.

FASBID Executive Director Lise Sundria confirmed for Council that the request does not include the draped lighting over Sugden Plaza and clarified that the trees wrapped with lighting create

the much needed gateway entry identification onto Fifth Avenue South. She then detailed the additional trees to be wrapped with lighting and maintained by the FASBID and Vice Mayor Sorey stated that he believed that the currently displayed spheres are more in the spirit of holiday lighting and proffered the motion below; Council Member Heitmann agreed, providing a second to the motion.

Additional discussion of the lighting followed during which Council Member Saad indicated that he did not support display of the spheres and Council Member Price stated that he believed the lighting of Fifth Avenue was, in general, too plentiful; Mr. Price nevertheless said that he would support the FASBID's recommendations.

Public Comment: (2:57 p.m.) None.

MOTION by Sorey to APPROVE RESOLUTION 12-13030 (amending ROW Permit #2012-38 to allow currently displayed spheres to January 31, 2012 and from November 1, 2012 to January 31, 2013); seconded by Heitmann and FAILED 3-4, all members present and voting (Finlay-no, Saad-yes, Sorey-yes, Sulick-no, Heitmann-yes, Price-no, Barnett-no).

Following the failure of the above motion, Ms. Sundria reiterated the FASBID's belief that the spheres create the ambience being sought by the group and Mayor Barnett proffered the motion below.

MOTION by Barnett to APPROVE RESOLUTION 12-13030 (amending ROW Permit #2012-38 to allow currently displayed spheres to April 15, 2012 and from November 1, 2012 to April 15, 2013); seconded by Finlay and carried 5 -2 (Finlay-yes, Sulick-yes, Heitmann-no, Price-yes, Sorey-no, Saad-yes, Barnett-yes).

In response to Council Member Heitmann, staff noted that the FASBID is to assume all costs of the electricity and maintenance for the lighting.

Recess: 3:04 p.m. to 3:17 p.m. It is noted for the record that the same Council Members were present when the meeting reconvened.

RESOLUTION 12-13031.....ITEM 18
A RESOLUTION DETERMINING OUTDOOR LIVE ENTERTAINMENT PETITION 12-LE2 FOR BARBATELLA LOCATED AT 1290 THIRD STREET SOUTH, MORE FULLY DESCRIBED HEREIN; AND PROVIDING AN EFFECTIVE DATE. Title read by City Attorney Robert Pritt (3:17 p.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: Finlay, Price and Heitmann/visited the site but no contact; Barnett/familiar with the site but no contact; Sulick/visit ed the site and spoke with the petitioner's agent; Sorey/visited the site and spoke with the petitioner; and Saad/visited the site and spoke with the petitioner and the petitioner's agent. Planner Adam Benigni provided an overview of the request as contained in his memorandum dated December 19, 2011, and that of Planning Director Robin Singer dated January 17, 2012 (Attachments 12 and 13, respectively), noting that staff recommended approval. Following a motion for approval by Vice Mayor Sorey, which was seconded by Council Member Heitmann, Council Member Sulick questioned the concurrence of the hours for live entertainment with a nearby establishment (see Attachment 13). Director Singer observed that this would be addressed by the two business owners for the hours of 6:00 p.m. to 8:00 p.m. and Mr. Benigni added that the location of the subject petition's entertainment is not along the common walkway with the other business providing entertainment.

Public Comment: (3:23 p.m.) None.

MOTION by Sorey to APPROVE RESOLUTION 12-13031 as submitted; seconded by Heitmann and carried 6-1, all members present and voting (Finlay-no, Heitmann-yes, Price-yes, Saad-yes, Sorey-yes, Sulick-yes, Barnett-yes).

Council Member Finlay attributed his negative vote to his ongoing opposition to outdoor live entertainment beyond 10:00 p.m. on Thursdays.

RESOLUTION 12-13032.....ITEM 19
A RESOLUTION DETERMINING VARIANCE PETITION 11-V6 FROM SECTION 58-176 OF THE CODE OF ORDINANCES, CITY OF NAPLES, TO REBUILD A HOUSE AND AN ADDITION TO THE HOUSE AND RELOCATE AND RAISE THE EXISTING GUEST COTTAGE AT THE REAR OF THE PROPERTY TO BASE FLOOD ELEVATION, SAID PROPERTY BEING IN THE R1-10 RESIDENCE DISTRICT, OWNED BY ANTHONY M. AND KARLENE M. MARGOLIS, AND LOCATED AT 163 10th Avenue South, MORE FULLY DESCRIBED HEREIN, SUBJECT TO THE CONDITIONS LISTED HEREIN; AND PROVIDING AN EFFECTIVE DATE. Title read by City Attorney Robert Pritt (3:23 p.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: Price and Barnett/familiar with the site but no contact; Sulick and Heitmann/visited the site but no contact; Finlay/visited the site and spoke with the petitioner's agent; Sorey/met with the petitioner's agent on the site; and Saad/visited the site, spoke with the petitioner's agent and members of the community. Planning Director Robin Singer briefly reviewed the petition as contained in her January 6 memorandum (Attachment 14), noting that the Planning Advisory Board (PAB) as well as staff recommended approval. She clarified for Council Member Finlay that the current proposal for the front porch of the main structure does reflect the historical character of the neighborhood and therefore Section 56-54(c) of the Code of Ordinances *(Modification of front yard requirements for lots on streets with existing development.)* would be applicable (see Attachment 14, Page 1).

Architect Dan Summers, agent for the petitioner, utilized an electronic presentation to review the proposal, the intent of which is to in fact maintain the historical ambience, scale, and character of the original structure and the neighboring properties. (It is noted for the record that a printed copy of the presentation is contained in the file for this meeting in the City Clerk's Office.) He pointed out that all of the non-historic structures on the site have now been demolished, noting that the main house had in fact largely been renovated except for some interior flooring and paneling, and the front porch; the guest house will merely be elevated to meet Federal Emergency Management Agency (FEMA) floodplain requirements and then restored as needed.

Public Comment: (3:34 p.m.) None.

MOTION by Sulick to APPROVE RESOLUTION 12-13032 as submitted; seconded by Finlay and unanimously carried, all members present and voting (Finlay-yes, Heitmann-yes, Price-yes, Saad-yes, Sorey-yes, Sulick-yes, Barnett-yes).

RESOLUTION 12-13033.....ITEM 20
A RESOLUTION DETERMINING VARIANCE PETITION 11-V7 FROM SECTION 58-296 OF THE CODE OF ORDINANCES IN ORDER TO ALLOW A PARCEL (APPROXIMATELY 14,250 SQUARE FEET) WITH AN EXISTING DUPLEX TO BE SUBDIVIDED FOR PROPERTY OWNED BY LIBERTY BANK, FSB AND LOCATED AT 697-699 FAIRWAY TERRACE, MORE FULLY DESCRIBED HEREIN; AND PROVIDING AN EFFECTIVE DATE.
Title read by City Attorney Robert Pritt (3:35 p.m.), who then cautioned that matters discussed during the November 16, 2011, hearing of this item would still be applicable during this discussion. 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: Saad, Sulick, Sorey and Price/visited the site, met with the petitioner's agent and spoke with neighbors; Finlay/visited the site and met with the petitioner and petitioner's agent; Barnett/visited the site and spoke with the petitioner's agent; and Heitmann/visited the site and met with the petitioner's agent. Planner Adam Benigni then briefly reviewed the petition for reconsideration as contained in his December 28, 2011,

memorandum (Attachment 15), noting that since its original consideration resulting in denial, a similar petition had, in fact, been approved; the Planning Advisory Board (PAB) and staff recommend approval, he added. Council Member Finlay proffered a motion for approval which was seconded by Council Member Price.

In response to Vice Mayor Sorey, Mr. Benigni provided a brief overview of the differing types of ownership, stating that fee simple ownership of town home lots is allowed within the "D" Downtown District. Attorney Jayne Skindzier, agent for the petitioner, added that with the subject request, the existing parcel must be subdivided to allow the fee simple ownership of each half of the duplex. Planner Benigni then indicated that an operating agreement between the two owners would be forthcoming during the replatting process to address common elements, with a reference to that agreement on the recorded plat. City Attorney Pritt observed that, similar to a lot split with a zero lot line, the agreement would be drafted whereby it would entail the approval of the City for any future amendment and afford the City some future control of the function and appearance of the structure.

Ms. Skindzier reported that a declaration would be drafted, and recorded in the public record, which would then run with the land. The declaration is to include maintenance and common elements of the structure by the two owners, with a provision indicating that any disputes regarding the common elements are to be mediated. Council Member Saad then added that, based on his experience with similar two-party agreements, he could not support the petition and viewed the request as a means to address an unfortunate business transaction by the petitioner. Council Member Finlay pointed out that he believed that the neighborhood would be much better served by Council approving the request and would avoid a situation involving the rental of two units. Council Member Price added that the criteria for approval do not include whether the request had been brought forward due to a poor investment. Vice Mayor Sorey advised that neighbors had indicated that their concern is that the property be maintained and that the aforementioned operating agreement would ensure that this occurs.

Public Comment: (3:56 p.m.) None.

MOTION by Finlay to APPROVE RESOLUTION 12-13033 as submitted; seconded by Price and carried 6-1, all members present and voting (Sorey-yes, Finlay-yes, Price-yes, Saad-no, Sulick-yes, Heitmann-yes, Barnett-yes).

RESOLUTION 12-13034.....ITEM 21-a
A RESOLUTION APPOINTING ONE MEMBER TO THE COMMUNITY REDEVELOPMENT AGENCY ADVISORY BOARD (CRAAB) FOR A TWO-YEAR TERM COMMENCING JANUARY 20, 2012, AND EXPIRING JANUARY 19, 2014; AND PROVIDING AN EFFECTIVE DATE. Title not read (3:39 p.m.)

Public Comment: (4:00 p.m.) None.

MOTION by Finlay to APPROVE RESOLUTION 12-13034 APPOINTING DAVID ALGER unanimously carried, all members present and voting (Finlay-yes, Heitmann-yes, Price-yes, Saad-yes, Sorey-yes, Sulick-yes, Barnett-yes).

RESOLUTION 12-13035 (Alt. 2).....ITEM 20-b
A RESOLUTION APPOINTING ONE MEMBER TO THE COMMUNITY REDEVELOPMENT AGENCY ADVISORY BOARD (CRAAB) FOR A TWO-YEAR TERM COMMENCING FEBRUARY 6, 2012, AND EXPIRING FEBRUARY 5, 2014; AND PROVIDING AN EFFECTIVE DATE. Title not read (4:03 p.m.).

Public Comment: (4:04 p.m.) None.

MOTION by Saad to APPROVE RESOLUTION 12-13035 (ALT. 2) APPOINTING JEFFREY CLAPPER unanimously carried, all members present and voting (Finlay-yes, Heitmann-yes, Price-yes, Saad-yes, Sorey-yes, Sulick-yes, Barnett-yes).

CORRESPONDENCE AND COMMUNICATIONS.....

(4:04 p.m.) Various Council Members expressed their appreciation to one another for their service to the City and Council Member Sulick urged residents to vote in the upcoming general election.

PUBLIC COMMENT: (4:07 p.m.) **Theresa Bonness, 1555 Ixora Drive,** expressed appreciation to Mayor Barnett for his many years of service to the City.

ADJOURN.....

4:09 p.m.

_____
Bill Barnett, Mayor

_____
Tara A. Norman, City Clerk

Minutes prepared by:

_____
Vicki L. Smith, Technical Writing Specialist
Minutes Approved: March 7, 2012

Citizens Against Runway Extension, LLC
P.O. Box 2523
Naples, FL 34106

November 30, 2011

Mr. Bill Barnett,
Mayor, City of Naples,
Members of the Naples City Council
735 Eighth Street South
Naples, Florida 34102

Re: Response to Naples City Attorney Robert Pritt's August 25, 2011, Letter.

Dear Mayor and Members of the City Council:

This letter is in response to the City of Naples' City Attorney, Robert D. Pritt's, August 25, 2011, Memorandum in Response to Citizens Against Runway Extension, LLC (CARE) letter of August 12, 2011. We are also enclosing the opinion letter from Steven Taber, aviation counsel, which addresses the legal matters presented by Mr. Pritt.

In CARE's August 12 letter, we asked that the Council address the question as to whether the City of Naples is the proprietor of the Naples Municipal Airport and therefore has jurisdiction to enforce provisions in the airport lease relating to the future development and operation of the airport. In this letter, CARE reiterates its request.

Mr. Pritt's August 12, 2011 Memo claims to want to "put the ongoing dispute to rest," but his Memo just raises additional serious questions, including the accuracy of his legal opinions that need to be addressed by the City, and underlines the City's need to obtain answers to the issues raised by CARE.

The purpose of CARE's August 12 letter was not limited to pointing out deficiencies in the Mr. Pritt's analysis and opinions "as they relate to Runway 5/23 extension/displaced threshold at the Naples Airport." It therefore is clear that the question of asserting the City's proprietary rights as to the airport is not "moot" simply because the Council approved the extension, as claimed by Mr. Pritt. Rather, the purpose of the CARE letter was to address the broader issue of who owns and is the proprietor of the airport. Our August 12 letter also provided the legal basis for CARE's position that it is the City and not the Naples Airport Authority (NAA) who is the "proprietor" and therefore the City is not subject to Federal preemption under the *Burbank* "proprietor's exception."

CARE requested the City Council to obtain the opinion of independent and expert aviation counsel concerning the rights and power of the City relating to the airport before simply agreeing by default with the city attorney's inexpert and flawed opinion.

SUPPLEMENT
A - Parker

In his August 25, 2011 Memorandum, Mr. Pritt correctly states that the March 16, 2011 resolutions adopted by the City Council did not follow Mr. Pritt's advice that the City is not the proprietor of the airport and is therefore preempted. Instead, the Council took the position that it could approve the runway extension under the terms of its existing zoning ordinance which had limited the runway length to 5,000 feet, simply by adopting a resolution to allow a longer runway. The Council decided not to enforce its existing ordinance.

In doing so the Council sidestepped the legal question of who is the proprietor of the airport, even though the City Attorney had authored a May 11, 2010 memorandum that the City was not the proprietor of the airport and was preempted from even addressing the runway extension. The NAA had also stated that the City was preempted and their attorney supported this position. In response to a joint request from the City and the NAA, the Federal Aviation Administration (FAA), said the City was preempted from addressing runway length. However, the FAA opinion was based on its assumption that the City was not the proprietor of the airport, for which the FAA gave no factual or legal support.

In evaluating the issue of airport proprietorship it is important to emphasize that both the NAA and the NAA attorney have conflicts of interest because they have asserted broad authority over airport development conflicting with the City's enforcement of its laws and ordinances which the airport is bound to abide by in its lease with the City.

Also, the FAA has an inherent conflict of interest because it has historically asserted broad jurisdiction over local government bodies seeking to regulate airport development.

And there is no reason to rely on Mr. Pritt's opinions relating to specialized legal matters involving aviation law, an area where he has demonstrated little expertise or consistency.

It is for these reasons that CARE has provided the City Council with an opinion of Mr. Steven Taber, an experienced, independent aviation attorney, responding to Mr. Pritt's August 25, 2011 memorandum.

CARE believes it is important for the Council to have a record confirming that there is a serious legal question of who is the proprietor of the airport, even though the Council has bypassed the issue in addressing the runway extension. Future Council's will inevitably face the same questions as issues arise concerning the relationship between the City and the airport and limitations on the airport's operation, such as weight limits and noise. It is important that future Councils have an understanding of what has occurred here and that they approach the issues of airport ownership and proprietorship with a balanced perspective.

The airport is by far the largest enterprise in the City. It is the only industrial business in the City limits. It dominates a major portion of the community, both physically and through its wide ranging environmental impact. And it is the City that owns the airport, not the NAA. As a result, the City has certain rights that flow from that ownership.

CARE maintains that this and future City Councils must defend the City's rights as the owner with respect to management and regulation of the airport. That issue, which was finessed in the process relating to the approval of the runway extension, still must be answered to define the future role of the City in dealing with the airport.

Mr. Pritt's Memo, which concludes the NAA has complete control of matters relating to the airport, just sows more confusion and errs in providing the City Council with inaccurate information. His Memo only underscores the necessity of clarifying the position of the City of Naples with respect to the NAA and Naples Municipal Airport.

CARE believes that it is in the best interests of the City of Naples and its citizens to assert their ownership of the airport so that the City, for the remaining 50 years of the lease, preserves its rights and protects its interests as to what it can and cannot do with respect to future developments and operation of the Airport. This is a basic obligation of a representative body to its people.

Sincerely,

CARE, LCC

Larry Schultz

Alan Parker

Cc: Mr. Robert D. Pritt, City Attorney

Attachment

3

Taber Law Group

CONFIDENTIAL: ATTORNEY-CLIENT PRIVILEGED

MEMORANDUM

To: Citizens Against Runway Extension LLC (CARE)

From: Steven M. Taber, Taber Law Group

Date: November 30, 2011

Re: Naples City Attorney Pritt's Letter of August 12, 2011

This memo is drafted in counterpoint to the City of Naples' City Attorney's letter of August 12, 2011, wherein he responded to the letter that CARE sent to the Mayor and City Council asking that the City Council consider seeking resolution with respect to issues regarding the ownership of Naples Municipal Airport. As an initial matter, while the runway extensions may be a foregone conclusion due to the fact that the Naples Airport Authority (NAA) decided to fund the construction itself and proceeded with the extension, there are several lessons to be learned from the runway extension debate that will impact the way the City does business with the airport in the future. The first lesson concerns the Environmental Assessment.

I. The Environmental Assessment.

The FAA's Environmental Assessment is not, as Mr. Pritt erroneously states in his Memo, the "NAA Environment Assessment Petition." The Environmental Assessment is not NAA's document. Instead, it is the FAA's. The National Environmental Policy Act (NEPA) requires that the environmental impact of all *federal* projects be assessed prior to their

1

SUPPLEMENT
#B - Parker

commencement. 42 U.S.C. § 4332. This includes projects, although undertaken by local or state authorities, that receive funding from the federal government. *Id.* Most large projects undertaken at airports across the United States are financed by the Airport Improvement Program (AIP), which is administered by the FAA. 49 U.S.C. § 47101 *et seq.* Thus, airports that want the FAA to fund their projects must have the environmental impact of those projects assessed prior to the FAA granting their application for funding. Although the project proponent generally oversees the environmental assessment, the funding for these environmental assessments usually comes from the FAA. This is proper since ultimately completion of the environmental document is the responsibility of FAA, not the project proponent. When the environmental document finds that the project will not cause any significant impact on the environment, or that the environmental impact will be sufficiently mitigated, the FAA is then legally able to fund the project.

Understanding the NEPA process is important to understanding the situation at the Naples Municipal Airport and its relationship with the City of Naples. Since the NAA withdrew its application for federal funding of the runway extension in May 2011 before the completion of the Environmental Assessment, there was no longer any federal requirement under NEPA for an environmental assessment to be completed. There is no law, regulation or guidance document that requires the FAA to environmentally approve NAA's project to extend the runways if NAA pays for the extension itself. The FAA only enters into the picture if the NAA wants federal funding. Thus, contrary to Mr. Pritt's statement that the Environmental Assessment "allowed the extension [of the runways]," it did not. The NAA and the City of Naples had the authority to

extend the runways without the FAA's blessing if they used their own funds.

This inaccuracy on the part of the City Attorney is not a trivial issue. Apparently, the City Attorney was not even aware that the Environmental Assessment was no longer required after the NAA, without notice to the public or the City, withdrew its request for federal funding. The NAA allowed the public (and apparently the City Council) to continue to believe that the Environmental Assessment was required before starting construction and proudly announced commencement of construction after the no longer required FAA Environmental Assessment FONSI was issued. Evidently, the NAA felt it was important to give the impression, although false, that the FAA had indeed approved the runway extension. Presumably, Mr. Pritt was left "out of the loop" by the NAA but in any case he was clearly uninformed about the removal of the requirement for the Environmental Assessment. The truth is that by funding the extension itself the NAA was able to proceed with the extension even if the FAA had rejected the Environmental Assessment.

II. Ownership of the Airport.

One of the ongoing issues created by the debate over the runway extensions at the Airport is over who has ownership rights over the Airport. The FAA's March 2011 Opinion Letter states that because the City of Naples is a "non-proprietor" of the Airport, its ordinances regarding the runway extensions are pre-empted by federal law.

A. Background.

There is no doubt that the City of Naples owns the Naples Municipal Airport. This is

basic property law. A lease, even a 99-year lease, does not relinquish ownership of the property. As lawyers learn in their first year of law school, ownership of property can be thought of as a "bundle of rights." When property is leased from the owner to a lessee, the owner either gives up or shares certain rights it has with respect to the property. Usually, those rights are simple: right to entry, right to access to the property, right to use and enjoyment of the property, etc. In all cases, any right not specifically given to the lessee in the lease is reserved for the owner. This concept is an important one to understand when it is applied to the concept of pre-emption and proprietorship of the airport.

The reason "proprietorship" of the airport is important stems from the U.S. Supreme Court's decision in *City of Burbank v. Lockheed Air Terminal, Inc.*, 93 S.Ct. 1854 (1973). In that case, the U.S. Supreme Court ruled that a municipality that did not own the airport could not impose regulations on aircraft that flew above the municipality creating noise because federal law pre-empted such regulation of aircraft in the air. The Court, however, left open the possibility that the owner of an airport could, in certain instances, regulate aircraft noise by restricting access to the airport. This became known as the "proprietor exception."

After *Burbank*, an entity seeking to regulate aircraft noise (usually by restricting access to the airport) sought to classify itself as a "proprietor" of the airport so it could fit within the "proprietor exception" mentioned in *Burbank*. It is clear that an entity that is not the proprietor of an airport cannot legally enact any regulation that would have the effect of restricting movement of aircraft in the air or in matters of safety. However, none of the cases mentioned in

the FAA Opinion Letter changed the proprietor's exception mentioned in *Burbank*. Thus, it is still good law that a proprietor of an airport may restrict access to an airport and is not pre-empted by federal law in doing so.

In addition, it is important to note that none of the cases mentioned in the FAA Opinion Letter preclude the possibility that there could be more than one proprietor of an airport. In the context of federal preemption, courts have left open the possibility that two proprietors may exist—*i.e.*, the public landlord of an airport may retain proprietary rights in the airport along with a private tenant given a lease to operate it. *See City of Burbank*, 411 U.S. at 635 & n.14; *Pirolo*, 711 F.2d at 1009. For example in *San Diego Unified Port District v. Gianturco*, 651 F.2d 1306 (9th Cir. 1979), the Ninth Circuit held that the California Department of Transportation "is not a proprietor," deliberately using the indefinite article "*a* proprietor" as opposed to a definite "*the* proprietor" to allow for the legal possibility of co-proprietors. 651 F.2d at 1316

B. FAA statement that the City of Naples "does not dispute that NAA is the proprietor of the airport" and therefore the City's ordinances are subject to federal pre-emption.

The FAA Opinion Letter begins with the premise that the City of Naples is a "non-proprietor" of Naples Municipal Airport. FAA March 2, 2011 Opinion Letter, p.1. But the FAA does not offer any explanation as to why it believes that the City of Naples is a "non-proprietor." There is simply nothing in the FAA Opinion to support this conclusion. Presumably, it got this notion from the City of Naples itself when the City Attorney stated that the City is preempted in the documents submitted to the FAA requesting its opinion as to whether the City is preempted

or not.1 The City Attorney thus became an advocate before the FAA for an opinion that the City is not a proprietor of the Airport. In his letter Mr. Pritt states that he is not an "advocate for either position" whereas he clearly intervened on behalf of the preemption opinion.

Thus, from the very beginning the FAA ruled out any possibility of the proprietor's exception as an avenue for the City of Naples. If one strips away the notion that the City of Naples is not a proprietor of the Airport from the FAA Opinion Letter, the FAA's entire pre-emption argument in the FAA Letter Opinion implodes because it relies almost entirely on the City of Naples not being the owner of the airport. This means that the FAA Letter Opinion did not consider whether ordinances enacted by the City of Naples would be enforceable under the proprietor's exception. This is a question that the City of Naples must now resolve.

C. The *Pirolo* Case.

This brings us to a discussion of *Pirolo v. City of Clearwater*, 711 F.2d 1006 (11th Cir. 1983). This case is important because, as the Pritt Memo points out, it arises out of Clearwater, Florida, and should the Naples issue be decided by a federal court, it could be the same court, the U.S. Court of Appeals for the Eleventh Circuit, that could decide the matter. *Pirolo* is also important because it involves a municipality that leased its existing airport to an airport authority and then the municipality tried to regulate the noise created by the aircraft flying in and out of

1 The FAA Director of Airport Compliance in *Paskar and Friends of LaGuardia Airport, Inc. v. the City of New York and the Port Authority of New York and New Jersey*, FAA Docket No. 16-11-04, (May 24, 2011)p.7, fn.7 stated that "the City of Naples does not dispute that the NAA is the proprietor of the airport." Since this decision comes from the same FAA office as the FAA Opinion Letter, his basis for making that statement was not based "on evidence presented in that case" but rather, more likely, on representations from the Naples City Attorney, which, if they occurred, are clearly not binding on the City as a matter of law.

the airport. The court found that because the City of Clearwater had given the right to regulate noise to the airport authority by the terms of its lease, the City could no longer avail itself of the *Burbank* "proprietor's exception." Therefore, Clearwater's regulation of aircraft noise was pre-empted. In contrast to Clearwater, our issue relates to the enforceability of zoning laws and the lease between the City of Naples and the NAA. Unlike the City of Clearwater's lease, the Naples lease does not give up the Naples' ability to enact ordinances that affect the airport. Indeed, the Naples lease does just the opposite, specifically stating that the City may enact "laws, ordinances, rules and regulations which may pertain or apply to [the airport] and the use thereof…."2 Mr. Pritt makes the circuitous argument that this provision cannot establish the City as a proprietor because it is preempted and therefore unenforceable. He ignores the fact that it is this lease provision itself that confirms that the City is the proprietor, thus precluding the preemption which was found in *Pirolo*. Contrary to Mr. Pritt's opinion, *Pirolo* has no application here.

D. City Attorney Pritt's position that Naples is not the proprietor of the Airport is in marked contrast to his position on the same subject in the Stage 2 litigation.

Mr. Pritt also ignores the very words he wrote in the Stage 2 litigation when he told the

2 This is where Pritt's analysis of the lease on p.5 of his Memo is flawed. He states that "a local law, rule, ordinance, etc. cannot 'pertain or apply' if it is preempted." Pritt Memo, p.5. The FAA in its Opinion Letter makes no claim that a proprietor of an airport would be pre-empted under federal law, only that a non-proprietor is pre-empted. Since the lease shows that the City of Naples, as the airport owner, has retained its right to regulate the use of the airport, it is a proprietor under that analysis and there is no indication that the FAA would opine that a proprietor is pre-empted from regulating the airport. Thus, Pritt's claim that the lease clause is "pre-empted" is without basis – there simply is no basis to presume that the City of Naples, as a proprietor of the airport, would be pre-empted under federal law.

FAA: "Formulation of local land use policy is reserved to local governments and should not be preempted by the Federal Government." *See Naples FAA Proceeding* FAA Docket No. 16-1-15, City of Naples Post Hearing Brief, p.4, June 17, 2003, signed by Robert D. Pritt. There simply is no basis for reconciling that position with his current argument that the City cannot enforce its zoning ordinance, because the zoning ordinance that he successfully showed was not preempted in 2003 is now preempted.

Mr. Pritt attempts to distinguish his 2003 position from his current one by making the argument that the Stage 2 litigation was based on noise, as opposed to safety. He states: "[t]he current preemption is based upon runway safety which is clearly preempted by the Federal Aviation Act, not the Noise Act." Pritt Memo, p.8. This position is without any basis. The FAA Opinion Letter never mentions that the FAA's concept of federal pre-emption is based on safety. One can only guess as to the basis for Mr. Pritt's statement, but the fact remains, he cannot distinguish his 2003 stance from that which he takes today. In the end, for whatever reason, the Pritt Memo conflates the ownership issue with the pre-emption issue. They are separate and distinct issues. The pre-emption issue only arises, according to the FAA's opinion letter, if the City of Naples is not the proprietor of the airport. The FAA has made no determination or offered its opinion as to whether the City of Naples is the proprietor of the Airport – it merely assumed that it is not, stating that Naples does not dispute the matter.

III. Other Matters.

A. Contradictions Between Stage Two Proceedings and Current Matter.

The allegation in the Pritt Memo that the City of Naples was not pre-empted by federal law during the Stage Two proceedings is not consistent with his position and that the City of Naples is now pre-empted. He claims that this is because the NAA was involved in the Stage 2 proceedings. However, whether the NAA is involved in the proceedings or whatever the outcome of the matter has no bearing on *his* 2003 argument that the City of Naples was not pre-empted from enforcing zoning at the airport. Irrespective of whether the NAA was involved in the Stage 2 litigation, Mr. Pritt made the argument that the City of Naples was not pre-empted by federal law from asserting land use ordinances at the Airport. The facts have not changed since Mr. Pritt made that statement. Nor does the context of the statement alter the underlying legal position that the City of Naples may assert its land use jurisdiction over the Airport without being pre-empted by federal law. The difference between the two statements is that in 2003 the NAA supported the City of Naples asserting its land use jurisdiction, now; the NAA does not support that assertion of authority.

B. Taber Law Group's Letter.

The Pritt Memo also claims that the letter sent by Taber Law Group to the City Council on behalf of CARE attempts to advise or interpret Florida law. Nothing could be further from the truth and for him to make such a claim exposes either his inadequate grasp of the law or a disingenuous attempt to disparage the Taber Law Group. The Taber Law Group had pointed out that federal law does not "pre-empt" ownership rights, and that there is no federal law that takes away the City of Naples' ownership rights, at least not without due compensation. The position

set out in that letter has not been rejected by any court, nor does it run contrary to any statute, law or even FAA guidance document, nor does it involve Florida law.

C. The *Paskar* Administrative Matter.

It is true that the FAA, in an Administrative Order, partially dismissed an Administrative Complaint that Taber Law Group had filed with the FAA on behalf of Kenneth D. Paskar and the Friends of LaGuardia Airport. However, no legal argument for or against the position was made – it was a Complaint, not a Brief, and thus contained allegations, not legal argument. Further, the ruling was merely a procedural matter as a condition precedent to be able to appeal the matter to the U.S. Court of Appeals. Thus, the Pritt Memo's reliance on the opinion of an administrative matter that has not yet been briefed cannot be used as legal support for his opinion.

IV. Conclusion.

The runway extension issue has brought to light a much deeper, more important issue: the ability of the City of Naples, as owner, to control the growth and activities of the Airport. Certainly no business in Naples has the right to conduct its business outside the rigors of the City's laws, ordinances, rules and regulations and the Airport should be no exception. From a legal standpoint, it would be the best course of action for the City to have a determination in place when the issue of proprietorship of the Airport and pre-emption once again arises before the City. The airport lease has 50 years remaining on its term. During that time the make-up of the Naples City Council and the NAA will change many times over. The City should not allow this issue to remain fallow and should not imply that its inaction to defend its ownership rights

pursuant to the lease with the NAA is, by default, acquiescence with the FAA opinion.

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MEMORANDUM

TO: Hon. Bill Barnett, Mayor, & Naples City Council

FROM: Robert D. Pritt, Naples City Attorney

DATE: August 25, 2011

RE: Citizens Against Runway Extension, LLC
Response to Letter of August 12, 2011

Cc: **William Moss, City Manager**
A Roger Reinke, Assistant City Manager

The City Manager and City Council have requested that I respond to the letter from Larry Schultz and Alan Parker on behalf of Citizens Against Runway Extension, LLC (CARE) complaining about City Attorney opinions and advice to City Council in connection with Petition 10-SP1 and 11-CU-4, filed by Naples Airport Authority (NAA), as they relate to Runway 5/23 extension/displaced threshold at the Naples Airport.

In short, the Complainants say that the analysis and opinions are wrong in that the City is the "proprietor" of the Airport, that the City Attorney took a position to the contrary in another case in 2003 [as Amicus Curiae in the Stage Two jet ban case], and that the City should engage the services of an expert airport attorney, who presumably would opine that the City is the proprietor and is not preempted by Congress from controlling various aspects of the Airport operations.

In hopes that this response might put the ongoing dispute to rest, the following is offered.

SUPPLEMENT #e-Parker

SUMMARY:

1. **City Council declined to follow the advice of the City Attorney and held the hearing as requested by CARE complainants.**
2. **This quasi-judicial matter was decided on the merits and is now moot.**
3. **The opinions of the City Attorney in 2010 & 2011 are not inconsistent with the position of the City in 2003 in the Stage Two jet ban case.**

MEMORANDUM
(PAGE 2 OF 14)

1. ***City Council's Action on Holding a Hearing.*** *City Council actually did* not follow the City Attorney's advice that it was preempted by Congress from determining whether the runway should be expanded. It held a hearing, allowed Mr. Parker, Mr. Schultz and any of a hundred or so other members of the public to provide input by testimony, exhibits, PowerPoint presentation and/or written comments. It decided the quasi-judicial case on the merits of the issue, and voted 4-3 in favor of the NAA, but with conditions concerning aircraft weight.

2. **Mootness.** The case is moot. "A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy (i.e., academic, not deciding anything)." [1]

    a. The Complainants could have challenged the City Council decision in the local circuit court by filing a Petition within 30 days after the decision was rendered. They did not.
    b. The Complainants also could have challenged the NAA Environment Assessment Petition (EA) that had the effect of allowing the extension, with the Federal Aviation Administration (FAA). They did not.
    c. It is axiomatic in the law that if, after a judicial or quasi-judicial hearing, a person does not appeal or otherwise challenge a decision to a higher authority (usually a court), that decision is final.[2] There is an exception where the challenge is to jurisdiction. However, the Council here, **DID** take jurisdiction, at the behest of Complainants. They (Complainants) could have challenged the decision of Council, which they did not do, and are now foreclosed by law from doing so.
    d. We are a nation of laws and not whim. This means that laws must be obeyed, or be challenged in appropriate proceedings, following existing legal standards. The hearing on March 16, 2011 was that proceeding.

3. **Specific Charges.** Notwithstanding the foregoing, this section is a response to specific comments and charges made in the letter (with the statements contained in the letter in quotes). The entire letter is contained in the attached Exhibit.

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[1] See Black's Law Dictionary (Sixth Edition).
[2] This is the principal of "res judicata" meaning that the same matter between the same parties cannot be litigated more than once.

MEMORANDUM
(PAGE 3 OF 14)

a. **Letter:** "But, in a May 24, 2011 decision involving another airport, the FAA publicly stated that the City of Naples does not dispute that the NAA is the proprietor of the airport. This means the FAA had been advised that the City conceded it is preempted and has no jurisdiction over the runway extension. See *Pascar* [sic] *v. City of New York*,[3] further discussed below. The FAA did not disclose the source of the City of Naples concession, but apparently no one in City government has questioned the FAA's position that the City has conceded preemption. In any event, it is apparent that Mr. Pritt is in agreement with the FAA in his opinion that the NAA is the proprietor of the airport, supporting his position that the City is preempted."

Response:

1. How we wish we could control what a federal agency or a judge says, even if it were in our own case, let alone a different case. But that is not the reality. It is hard enough to deal with our own cases as opposed to one out of New York City. The FAA hearing officer apparently said what he did based upon evidence presented in that case, in which we did not make an appearance.

2. If the Complainants are intimating that the City Attorney surreptitiously tipped off the FAA about the City Council's position, that is simply untrue. The FAA, in writing to the City, extended the time for the City to provide its official response to the EA to March 31, 2011 due to Council's stated intention to hold the hearing on March 16, 2011. At Council's direction, the Clerk transmitted to the FAA a copy of the City Resolutions and file from the City's March 16 hearing, as constituting the City's official response to the invitation for comments in NAA's EA petition to the FAA. If Complainants are complaining that the local proceedings should have been kept from the FAA, they do not understand or respect open government.

3. It is true that the City Attorney was and is in agreement with the FAA that the City is preempted in the field of runway safety, as opined all along, after a great deal of research. Better put, the FAA in March 2011 and in the May 24, 2011 *Paskar* case, opined consistently with the City Attorney's previous opinions.

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[3] *Kenneth Paskar & Friends of LaGuardia Airport, Inc. v. State of New York & The Port of New York & New Jersey*. FAA Docket No. 16-11-04 (May 24, 2011)

MEMORANDUM
(PAGE 4 OF 14)

4. In performing a research project and rendering a legal opinion, the city attorney should not act as an advocate for a position, as a litigator might do when in a lawsuit. The city attorney is simply trying to find the law, so as to guide the decision-makers in their task of applying it to the facts that may arise. The attorney's function is to research the [sometimes] plethora of previous cases or statutes that form the foundation for applying precedent for the decision in the present case.[4] Seldom is there a "red cow"[5] precedent, i.e., a case exactly like the present case, or as stated in law, a case "on all fours" with the current case.

   It is even more difficult to apply legal principles to a case that has not been decided. *Paskar* was decided well after City Attorney opinions on preemption and over two months after City Council's hearing. To nobody's surprise except maybe the Complainants' attorney, his position on proprietorship in that case was rejected.

b. **Letter:** "But in his June 15 presentation, Mr. Pritt omitted to tell the Council that the *Pirolo* Court reasoned Clearwater was not the proprietor of the airport, not because it had leased the airport to an operator, but rather because, unlike Naples, Clearwater's lease contracted out its proprietary powers to the operator. In contrast, in 1969 the City of Naples retained proprietary powers in the Naples/NAA lease using specific language to obligate the NAA to abide by all "laws, ordinances, rules and regulations which may pertain or apply to the demised premises and the use thereof." Naples (unlike Clearwater in the Pirolo case) contractually retained the rights and powers of the municipal owner and proprietor, by including in the lease the right to enforce its zoning ordinances which it could change at any time. So under the Naples lease, if the NAA doesn't abide by the City zoning (or any other) ordinance, the City can declare a breach and potentially terminate the lease."

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[4] This is called "stare decisis" which means to abide by, or adhere to, decided cases. See Black's Law dictionary (Sixth Edition).

[5] See *Corn v. City of Lauderdale Lakes*, 997 1369 (11th Cir. 1993)

MEMORANDUM
(PAGE 5 OF 14)

Response:

1. In the opinions and advice to Council, reference was made to several cases, with *Pirolo* being one, due to its similar circumstances and its having been decided by the court in our state appeal District. There were other similar cases around the country on various points that led to the conclusion that runway safety issues are preempted to the federal government (FAA) by Congress.

2. The City's lease with NAA is (in retrospect) possibly the worst contract/lease the City ever entered into. It ties the City up for 99 years. It is the poster child for the consistent warning from the City Attorney for the City to be very wary of entering into long term leases, use agreements or contracts with anybody, without an "out" clause.

   However, in fairness to those in positions of power in 1969, it was likely considered a reasonable and integral part of the City's overall strategy of transferring proprietorship (and cost) of the Airport to a governmental entity to be formed by the legislature for that very purpose. Monday morning quarterbacking 42 years later is a waste of vitriol.

4. At the March 16, 2011, hearing the city attorney at that time (1969) testified what was being accomplished. All facts and actions, taken together, show that the City was getting out of the Airport operation business and turning it over to the NAA. Importantly, the power to contract with the FAA for federal benefits and funds, and the responsibility for adhering to the federal requirements for use of those funds, began to accrue to the NAA and no longer the City.

5. Complainants did not read all of the provisions in the lease. It says in pertinent part that NAA must abide by:

   > "…"laws, ordinances, rules and regulations **which may pertain or apply** to the demised premises and the use thereof…" (emphasis in **BOLD**).

   This lease clause does not advance the proprietorship case. A local law, rule, ordinance, etc. cannot "pertain or apply" if it is preempted. While it is true that local ordinances do apply

MEMORANDUM
(PAGE 6 OF 14)

generally to an airport within the city's jurisdiction, because the City (not the airport) has the zoning power, they simply do not apply to those ordinances to the extent that they are preempted. In Florida, an ordinance or provision of local law that is preempted is deemed to be void and non-existent. If a proposed action does not violate a zoning provision because the City's ordinance is preempted, it cannot be the subject matter of a lease violation.

c. **Letter:** "Mr. Pritt also omitted to tell the Council on June 15 that the City of Naples had taken the opposite side of the preemption argument in 2003, when it successfully showed the FAA that the City was **NOT** preempted from enforcing zoning at the airport. In 2003 the City told the FAA the following:

> *"The NAA is bound by City ordinances, and the City expects the NAA to comply with City policy. Pursuant to the [1969 Enabling] Act, the City transferred only the management and operating authority over the airport to the NAA under a ninety-nine (99) year lease. The Act further reserves to the City, the exclusive right to regulate zoning at the airport, in addition to the full police powers over the lands of the airport and the airspace above."*

The City of Naples went on to chastise the FAA for what Naples said was the FAA's wrongful assertion of preemption against the City:

"The City is genuinely distressed that the FAA overstepped its legal authority and interfered with the City's ability to determine and administer local land use policy by withholding grant funds from the NAA in an effort to coerce the City's land use policy to meet some vague concept created by people 2,000 miles away who think Naples is a city in Italy. ***Formulation of local land use policy is reserved to local governments and should not be preempted by the Federal Government.*** *It seems that for every thoughtful local government action there is a greater opposite federal agency."* See City of Naples Post Hearing Brief, pages 2, 4. Filed June 17, 2003/ FAA Docket 16-01-15.[emphasis added].

MEMORANDUM

(PAGE 7 OF 14)

The City prevailed in its position, and the FAA finally conceded that there was no FAA preemption.

The attorney who so authoritatively authored the Naples 2003 FAA brief and successfully defeated the FAA preemption claim was none other than Mr. Pritt. His position in the Stage 2 litigation was in direct opposition to his June 15 statement to Council where he supported FAA preemption and denied that the City had a proprietary right to enforce its zoning ordinances against the NAA. Although he is the City Attorney, Mr. Pritt switched positions, and now supports preemption and giving full control of the airport to the NAA, while leaving his client, the City of Naples, powerless to enforce its zoning laws and ordinances relating to the airport development."

Response:

1. There is a mouthful of criticism here. However, there is a basic difference between this case and the Stage Two case. In that case the challenge was to the noise of the jets and the NAA (proprietor) was challenging the FAA. The City obtained Amicus Curiae (Friend of Court) status and outlined its position. As indicated in 2003 and in the present case, the City does expect the NAA to mind its land use ordinances, and both state law and federal law respect that, except to the extent that Congress has preempted the issue to the FAA.

   Notably, the *Pirolo* case is not mentioned in the City's brief in 2003 or in the Court of Appeals decision in 2005. This is due to the fact that the proprietor (NAA) in the Stage Two case was indeed challenging the FAA. As noted in the Circuit Court decision, part of the reason the NAA and City won is that the FAA (in the Court's opinion) did not do a satisfactory job in making its case at the hearing and a part of the reason is the interpretation of a provision of the Noise Act, that is not part of the current case.[6]

[6] *City of Naples Airport Authority v. Federal Aviation Administration*, 409 F. 3d 431 (D.C. Circuit 2005).

MEMORANDUM
(PAGE 8 OF 14)

2. The current preemption is based upon runway safety which is clearly preempted by the Federal Aviation Act, not the Noise Act. Regardless of the motives alleged by the Complainants against the NAA (subterfuge for seeking bigger airplanes and commercial carrier service) the safety of the runways and displaced thresholds calls into consideration the Runway Safety provisions of the federal law.

3. Thus, there is no inconsistency in the position taken in 2003 and that taken recently. It is simply an analysis and interpretation of different laws or provisions of the laws. The cases on runway safety, including those decided since the first opinion in May of 2010 strongly support the City Attorney's conclusions.

Letter: "We provided the City Council with a legal brief from an experienced aviation attorney which confirmed that the City retains the legal right to enforce its zoning ordinance limiting runway length, refuting the erroneous opinions of the NAA's attorney, the City Attorney and the FAA."

Response: Complainants omitted to tell Council that their attorney's position was soundly rejected in the *Paskar* case just two days before he sent his opinion to the City. Nor did they advise Council that the attorney is not licensed to practice law in Florida and is therefore not competent to be advising clients on the interpretations of Florida laws such as the Enabling Act or the effect of local zoning any more than your City Attorney should be advising Santa Monica in his state.

Letter: "It is clear from the record that Mr. Pritt's contradictory opinions have compromised his ability to continue to advise the City Council on the Federal preemption matter. As CARE has requested before, the City Council needs to retain independent experienced aviation counsel to review the record and advise the Council of its legal position and options. Mr. Pritt must be told to recuse himself on all matters relating to the airport. The City Council must decide based on expert advice if the City is indeed preempted from enforcing its zoning ordinances as the nonproprietor or is not. Whatever the City Council decides should be memorialized properly by a vote of the Council."

Response: In the case that was before Council, the Council declined to follow the City Attorney's advice. That should be

MEMORANDUM
(PAGE 9 OF 14)

enough. However, if Council wishes to continue to expend significant funds in order to obtain a second opinion on a moot issue, this City Attorney has no objection. That was stated during the hearings. If the City Council wants to take on the FAA in this manner, it needs to budget a whole lot of money for the fight.

There is a strenuous objection here to any hint that the opinions are based upon anything other than an honest and forthright analysis of case law. The City Attorney is not an advocate for either position. It is not for the City Attorney to decide whether the airport runways/displaced thresholds should be lengthened.

As to the demand that the City Attorney be told to recuse himself from all matters relating to the airport, that should be written off as just being spiteful. It is a common tactic to try to neutralize a perceived opponent with *ad hominem* criticism. In fact, an honest disagreement is not a proper basis for personal attacks. The CARE representatives have been trying to restrict the Airport for almost 15 years, mostly by prevailing upon the City Council, as is their right. But now the advice of the City Attorney is apparently being taken personally, and that is unfortunate.

Letter: "A competent determination of the City's status relative to preemption is essential for the City's future and directly impacts on its ability to control land use of its airport property. Among other things, it would affect future changes at the airport such as increasing the weight bearing capability of the runways to allow larger and heavier planes to use the airport."

Response: This apparently foreshadows some other planned action. Complainants appear to want the City Council or somebody to rein in the Airport. They are legally entitled to do so, but not in the context of the runway expansion Petition to the City that has now been decided by the Council.

Respectfully submitted,
s/Robert D. Pritt,
City Attorney

MEMORANDUM
(PAGE 10 OF 14)

EXHIBIT
LETTER FROM:

CITIZENS AGAINST RUNWAY EXTENSION, LLC

August 12, 2011

To Naples Mayor and City Council
Mayor@naplesgov.com
Council@naplesgov.com

Re: City of Naples as airport proprietor

Dear Mayor and Council:

At the June 15, 2011 City Council meeting, City Attorney Robert Pritt told the Council that although the City is the owner of the airport property, the City is not the airport proprietor and therefore it is preempted from the right to regulate zoning or to control land use policy at the airport. Under these conditions the City has no jurisdiction over the runway extension. This was a confirmation of earlier written opinions Mr. Pritt had rendered on the subject.

Nevertheless, the Mayor and some Council members maintain that the Council voted on the runway extension proposal on March 16 as if there were no preemption, and the City legally exercised jurisdiction over the runway extension.

But, in a May 24, 2011 decision involving another airport, the FAA publicly stated that the City of Naples does not dispute that the NAA is the proprietor of the airport. This means the FAA had been advised that the City conceded it is preempted and has no jurisdiction over the runway extension. See Pascar v. City of New York, further discussed below. The FAA did not disclose the source of the City of Naples concession, but apparently no one in City government has questioned the FAA's position that the City has conceded preemption. In any event, it is apparent that Mr. Pritt is in agreement with the FAA in his opinion that the NAA is the proprietor of the airport, supporting his position that the City is preempted.

Mr. Pritt's position that the NAA, and not the City, is the airport proprietor, and therefore controls all matters relating to the City's airport is of great concern to the

MEMORANDUM
(PAGE 11 OF 14)

citizens of this community. The City's position as to whether it can or cannot control development of the airport is critical to the future of the community.

It is therefore important to evaluate Mr. Pritt's position in this matter and to decide whether the City reasonably can rely on his opinion. This issue was previously raised and brushed off at City Council, but at that time the Council was not apprised of some of the information set forth below. We therefore believe the matter should be revisited and thoroughly vetted.

MR. PRITT'S PROPRIETOR/PREEMPTION ANALYSIS

In his June 15 statement that the City is not the proprietor of the airport, Mr. Pritt relied on a case called Pirolo v City of Clearwater, where Clearwater, like Naples, owned a municipal airport which it leased to an operator (in our case the operator is the NAA). The Court found that Clearwater was not a proprietor and, relying on that decision, Mr. Pritt concluded Naples was not the proprietor of the Naples airport which it had leased to the NAA in 1969.

But in his June 15 presentation, Mr. Pritt omitted to tell the Council that the Pirolo Court reasoned Clearwater was not the proprietor of the airport, not because it had leased the airport to an operator, but rather because, unlike Naples, Clearwater's lease contracted out its proprietary powers to the operator. In contrast, in 1969 the City of Naples retained proprietary powers in the Naples/NAA lease using specific language to obligate the NAA to abide by all "laws, ordinances, rules and regulations which may pertain or apply to the demised premises and the use thereof." Naples (unlike Clearwater in the Pirolo case) contractually retained the rights and powers of the municipal owner and proprietor, by including in the lease the right to enforce its zoning ordinances which it could change at any time. So under the Naples lease, if the NAA doesn't abide by the City zoning (or any other) ordinance, the City can declare a breach and potentially terminate the lease.

Mr. Pritt also omitted to tell the Council on June 15 that the City of Naples had taken the opposite side of the preemption argument in 2003, when it successfully showed the FAA that the City was **NOT** preempted from enforcing zoning at the airport. In 2003 the City told the FAA the following:

> *"The NAA is bound by City ordinances, and the City expects the NAA to comply with City policy. Pursuant to the [1969 Enabling] Act, the City transferred only the management and operating authority over the airport to the NAA under a ninety-nine (99) year lease. The Act further reserves to the City, the exclusive right to regulate zoning at the airport, in addition to the full police powers over the lands of the airport and the airspace above."*

MEMORANDUM
(PAGE 12 OF 14)

The City of Naples went on to chastise the FAA for what Naples said was the FAA's wrongful assertion of preemption against the City:

> "*The City is genuinely distressed that the FAA overstepped its legal authority and interfered with the City's ability to determine and administer local land use policy by withholding grant funds from the NAA in an effort to coerce the City's land use policy to meet some vague concept created by people 2,000 miles away who think Naples is a city in Italy.* ***Formulation of local land use policy is reserved to local governments and should not be preempted by the Federal Government.*** *It seems that for every thoughtful local government action there is a greater opposite federal agency.*" See City of Naples Post Hearing Brief, pages 2, 4. Filed June 17, 2003/ FAA Docket 16-01-15.[emphasis added].

The City prevailed in its position, and the FAA finally conceded that there was no FAA preemption.

The attorney who so authoritatively authored the Naples 2003 FAA brief and successfully defeated the FAA preemption claim was none other than Mr. Pritt. His position in the Stage 2 litigation was in direct opposition to his June 15 statement to Council where he supported FAA preemption and denied that the City had a proprietary right to enforce its zoning ordinances against the NAA. Although he is the City Attorney, Mr. Pritt switched positions , and now supports preemption and giving full control of the airport to the NAA, while leaving his client, the City of Naples, powerless to enforce its zoning laws and ordinances relating to the airport development.

It is interesting to note that the Pirolo case was decided in 1983, twenty years prior to Mr. Pritt's 2003 successful argument that the City of Naples was not preempted from enforcing its zoning laws. Also, it is curious that he should now rely on Pirolo while he did not mention the case in 2003.

WHY PREEMPTION REMAINS IMPORTANT

In a recent form letter to citizens, the Mayor said the question of preemption seems irrelevant because on March 16 the City Council acted "as if" it were not preempted in voting 4 to 3 to approve the runway extension. This confirms that, as of March 16, the City Council refused to tell the public whether it was preempted. Worse yet, the Mayor's letter also is in direct conflict with the May 24, 2011 FAA decision in Pascar, which includes the footnote that "The City of Naples does not dispute the fact that the NAA is the proprietor of the Naples Airport. " Pascar v City of New York, Partial Dismissal Order, May 24, 2011 Note 7.

This raises important questions. How and when did the City take the position that

MEMORANDUM
(PAGE 13 OF 14)

it is preempted? Who authorized its communication to the FAA? If it was decided prior to March 16 that the City conceded the NAA was the airport proprietor, preempting the City, why did we sit through over 10 hours of a pretend quasi-judicial hearing and why wasn't the public told of the City's position at the outset? Why was there no vote on preemption at an open Council meeting? What impact does this have on the March 16 decision? How does it affect the credibility of the Mayor and the Council?

It also must be emphasized that the issue of preemption itself is continuing, and goes well beyond the runway extension, right or wrong. The Mayor ignores that the NAA has consistently taken the position that the City is preempted from enforcing its zoning ordinance. He also ignores that the people of Naples are entitled to enforcement of both their zoning ordinance and to the rights the City has as the owner under its lease with the NAA.

The City is also entitled to the protections the law gives owner-proprietors in addressing FAA regulations. It is essential that the City Council know the rights of the City when they address issues relating to the airport. Voting on an "as if" basis sounds like a stratagem dreamed up by the lawyers. It is no substitute for having correct legal advice and is a sham when the Council knowingly was circumventing its own attorney's opinion that the City was preempted.

It is clear that in 2003 Mr. Pritt had no reluctance in challenging the FAA's claim that Naples was federally preempted, whereas now he has sided with both the FAA and the NAA, **asserting preemption against the City**. In fact, the FAA attorney whom Mr. Pritt successfully opposed on the preemption issue in 2003 in the Stage 2 case, is the same FAA attorney Mr. Pritt went to for preemption legal advice in 2010 on the runway extension. This raises the questions of what discussions Mr. Pritt had with the FAA attorney, whether Mr. Pritt had any reason to believe the FAA attorney had changed his legal position since 2003, and most important, why did Mr. Pritt change sides on the issue?
Knowing the answer as to who is the proprietor and whether there is preemption, and the role Mr. Pritt played in making these determinations for the City, as well as reconciling his disparate opinions all are essential in addressing these questions.

CONCLUSIONS AND RECOMMENDATIONS
It is clear from the record that Mr. Pritt's contradictory opinions have compromised his ability to continue to advise the City Council on the Federal preemption matter. As CARE has requested before, the City Council needs to retain independent experienced aviation counsel to the review the record and advise the Council of its legal position and options. Mr. Pritt must be told to recuse himself on all matters relating to the airport The City Council must decide based on expert advice if the City is indeed preempted from enforcing its zoning ordinances as the nonproprietor

MEMORANDUM
(PAGE 14 OF 14)

or is not. Whatever the City Council decides should be memorialized properly by a vote of the Council.

A competent determination of the City's status relative to preemption is essential for the City's future and directly impacts on its ability to control land use of its airport property Among other things, it would affect future changes at the airport such as increasing the weight bearing capability of the runways to allow larger and heavier planes to use the airport.

The public deserves thorough and careful consideration of this important matter by the Mayor and the Council who should not simply walk away with the issue unsettled. The City owns the land on which the airport sits, and what takes place on that land impacts the citizens and the quality of life in the City. City rights to control its land use must not be given away to an independent, appointed governmental agency, which has no direct responsibility to the people who are impacted by its decisions. .

Your consideration of our request will be appreciated.

Citizens Against Runway Extension, LLC
Larry Schultz, Manager
Alan Parker, Manager

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l:corresp/mayor and council
l:opinion/pritt

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May 26, 2011

Mr. Robert D. Pritt,
Naples City Attorney,
Roetzel & Andress
850 Park Shore Drive
Trianon Centre, Third Floor,
Naples, Florida 34103-3587

Re: FAA March 2, 2011, Legal Opinion And Request of CARE, LLC for Action by the City of Naples

Dear Mr. Pritt:

This letter is sent on behalf of the Citizens Against Runway Expansion, LLC (CARE). In June 2010, the City of Naples and the Naples Airport Authority (NAA) requested a legal opinion from the Federal Aviation Administration (FAA) on whether the provision in the Code of Ordinances of the City of Naples (the "City") which states that the NAA must obtain a conditional use approval from the Naples City Council if it wants to increase the declared runway distance at the Naples Municipal Airport (the "Airport"), is pre-empted by federal law. On March 2, 2011, the FAA rendered its Legal Opinion (the "FAA Opinion") that the Ordinance requiring conditional use approval was federally pre-empted. In its Legal Opinion the FAA made the assumption that the City is not the proprietor, or, more precisely, is a "nonproprietor," of the Airport. Because the FAA's position that the City is not the proprietor of the Airport has material ongoing implications with respect to the relationship between the City and NAA, CARE believes that the City should request a clarification from the FAA as to what it deems the legal and factual basis for its conclusion that the City is a "nonproprietor" of the Airport.

I. FAA's Fallacious Position That The City Is A "Nonproprietor" Of The Airport Is Central To The FAA Opinion's Conclusion That The City Is Pre-Empted.

SUPPLEMENT #D - Pages

It is inconceivable that the City should be considered a "nonproprietor" of the Airport and therefore foreclosed from asserting the "proprietor exception" to federal pre-emption under *Burbank*.

The basis of the FAA Opinion that the City is pre-empted from dictating the length of the runways at the Airport rests on its unsubstantiated belief that the City is somehow a "nonproprietor" of the Airport, despite the fact that the City is the legal owner of the Airport.

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Without explanation, the FAA asserts that the City is a "nonproprietor," which it defines as someone who "has no proprietary interest in the airport." FAA Opinion, p.5. There is absolutely no support of any kind for this position – not in the FAA Opinion, not in the law and not in the facts.

Because of the FAA's unsupported conclusion that the City of Naples is a "nonproprietor," the FAA claims the zoning provision in the City's Code of Ordinances does not fall under the "proprietor's exception." That exception, first announced by the U.S. Supreme Court in *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973), noted with approval a letter from the Secretary of Transportation indicating that:

> [T]he proposed legislation [the 1972 Act] will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.

411 U.S. at 635, fn. 14. *Burbank* then held that because the Hollywood-Burbank Airport was privately owned and not owned by the municipality of Burbank, the Court "do[es] not consider here what limits, if any, apply to a municipality as a proprietor." *Id.* Since *Burbank*, courts have held that nonproprietors cannot control aviation noise due to federal pre-emption, although airport proprietors may establish rules for noise control that are "nondiscriminatory."[1] Thus, if the City of Naples *is* in fact the proprietor of the Airport, then the FAA's pre-emption argument falls apart.

II. The Facts Of This Matter Confirm The City Of Naples Status As The Proprietor Of The Airport.

One need not look far to see the FAA's error. The facts as stated in the FAA Opinion indicate the error of their assumption that the City is a "nonproprietor" of the Airport. "In early 1942 the City of Naples and Collier County, which had purchased property jointly for use as an airport . . . . Collier County and the City of Naples jointly operated the airport until the County sold its interests to the City in 1958. . . . On December 3, 1969, the management and operation

[1] This letter does not attempt to refute the FAA's flawed legal reasoning with respect to its finding that municipalities that are "nonproprietors" are pre-empted from controlling land use on an airport within their jurisdictions. Suffice it to say that most of the cases cited by the FAA concern the regulation of aviation noise, not, as here, the length of a runway or the overall expansion of an airport. In the FAA Opinion, the FAA relies heavily on an *amicus* brief filed on appeal in a matter that was decided against its position. Ultimately, the case settled, so the lower court's decision contrary to the FAA's position still stands as good law. *See*, *City of Cleveland v. City of Brook Park*, 893 F.Supp. 742 (N.D. Ohio 1995). The issue as to whether a "nonproprietor" municipality can regulate airport expansion through its zoning authority has not been settled by court or by statute.

of the Airport were transferred from the City to the NAA under lease for 99 years." FAA Opinion, pp.1-2. Thus, it is clear: the City of Naples owns the airport and leases the airport to the NAA. There is no indication in the Opinion that NAA has anything more than a leasehold interest in the airport or that the City of Naples has given up any ownership interest in the property.

III. The Opinion That The City Of Naples Is A "Nonproprietor" Is Contrary To Statute And Well-Established Legal Precedent.

Although there is no indication in the FAA Opinion what law or facts the FAA relies upon for its conclusion that the City of Naples is a "nonproprietor," presumably, the FAA would argue that while the City owns the land, the "airport" merely sits on the property owned by the City." The statutory definitions of "airport" and "proprietor," however, lend credence to the position that the City that it is, in fact, the proprietor of the Airport.

Section 40101(a)(9) of Title 49 of the United States Code defines the term "airport" as "a landing area used regularly by aircraft for receiving or discharging passengers or cargo." 49 U.S.C. § 40101(a)(9). That section further defines "landing area" as "a place on land or water, including an airport or intermediate landing field, used, or intended to be used, for the takeoff and landing of aircraft, even when facilities are not provided for sheltering, servicing, or repairing aircraft, or for receiving or discharging passengers or cargo." 49 U.S.C. § 40102(a)(28). The statute, thus, does not make a distinction between the land and the "airport." Indeed, the statute states that the "airport" is the land upon which aircraft land and take-off. The facilities at the airport are not, technically speaking, part of the "airport" according to 49 U.S.C. § 40102. Thus, by statute, the property owned by the City constitutes the Airport.

It is equally clear that the City "owns" or is the "proprietor" of the Airport despite the fact that it is not in possession of the property or operates the Airport. Black's Law Dictionary defines "proprietor" as "[o]ne who has the legal right or exclusive title to anything. In many instances it is synonymous with owner." There is no doubt that the City has a "legal right or exclusive title" to the real estate that comprises the Airport. This definition is based on the U.S. Supreme Court's definition of "proprietor" in *Ferguson v. Arthur*, 117 U.S. 482 (1886) where it held that "'proprietor' being defined [as], 'one who has the legal right or exclusive title to anything, *whether in possession or not; an owner . . .*'" 117 U.S. at 487 (emphasis added); *see also*, *Koppel v. Downing*, 11 App. D.C. 93, 103 (D.C. Cir. 1897). Thus, the fact that City is not in possession of the Airport which it does not manage or operate, does not determine its legal status as a "proprietor" of the airport.

Ultimately, who owns the Airport is a matter of law, not a matter of FAA policy. The FAA cannot change the fact that as owner of the Airport, the City has ultimate liability with

respect to the activities that take place there. Likewise, if the City were to claim that the NAA is the owner or the NAA claim to be the owner, the legal fact that the City still holds title to the Airport and is ultimately responsible for any liabilities with respect to the Airport. For example, while the NAA may have agreed in its lease to indemnify and hold the City harmless for activities at the Airport, that provision does not negate the liability that still lies with the City and does not immunize it from lawsuits. It is in recognition of this legal exposure as owner that the City requires the NAA to maintain liability insurance under the Lease.

IV. The Opinion That The City Of Naples Is A "Nonproprietor" Is Contrary To FAA Policy, Goals And Mission.

The FAA Opinion's classification of the City as a "nonproprietor" of the airport is also likely not to withstand legal scrutiny by a court or by the FAA itself. This is due to the fact that the FAA's theory seriously jeopardizes the FAA's ability to control airports and their operations. Since the FAA does not own the airports, its ability to control the activities on airports (as opposed to aircraft in the sky) is limited. The FAA's primary mechanism for controlling the activities and operations of airports is through the issuance of grant money. In order to receive federal grant money, the recipient must agree to follow the FAA's rules for proper operation of a "federally-obligated" airport. Usually, these rules apply to both the owner and the operator of the airport. In addition to the grant assurance rules, "airport revenue diversion rules," limit what an airport owner can do with the profits from the airport and the proceeds from any sale or lease of the airport, including whether the proprietor can sell the airport or close it. If the FAA is correct and the City is not the proprietor of the airport, then none of these rules apply to the City and its ownership of the "land under the airport."

This would free the City to increase the rent and take any lease payments made by the NAA and apply them to the City's general fund, instead of saving them for development of the airport. It would also mean that the City of Naples could sell all or portions of the airport to private companies without having to comply with the FAA's rigid rules on the sale of property for federally-obligated airports. It may even be possible for either the City or a purchaser of the airport to void the lease and kick the NAA off of the airport. For example, here the lease obligates the airport to abide by the City's ordinances, which includes the zoning provisions regarding runway length. If the NAA fails to obtain approval from the City for a runway expansion, the NAA t would be in breach of the lease and the City of Naples may be able to terminate the lease, irrespective of whether the clause is pre-empted by federal law.

In short, if the City is, in fact, not the proprietor of the airport for the purposes of the "proprietor's exception" under *Burbank,* then it is not the proprietor of the airport for any other FAA purposes either. Although this may be good news for the City of Naples, this position should be untenable for the FAA.

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V. Conclusion And Request For Action

There no basis either in fact or in law for the FAA's assumption in the FAA Opinion that by leasing the Airport to the NAA the City has somehow divested itself of *all* of its ownership interest in Airport. That assumption forms the basis for the FAA Opinion's conclusion that the proprietor's exception under *Burbank* is not available to the City and, therefore, the City cannot regulate the length of the runways at Naples Municipal Airport. Therefore, because the City *is*, by law, the proprietor of the Airport, the FAA's pre-emption argument must fail.

In light of this information, CARE requests that the City ask the FAA to clarify its position regarding its assumption that the City is not the proprietor of Naples Municipal Airport. The City should ask that the FAA provide the legal and factual basis for its position.

The FAA's response will have an effect on the current issue regarding the runway extensions. The City Council voted on the runway extension based on a misrepresentation of the legal relationship between the NAA, the City and the FAA. This matter should be reconsidered based upon a correct understanding of the City's legal status.

Furthermore, it is essential that the City's legal position be clearly established based on existing law to accurately define its rights and remedies for the future. The effect of the FAA Opinion reaches beyond the matter of the runway extensions. As a nonproprietor, the City would not be able to control noise at the Airport, nor would it be able to enforce the weight restriction that is currently in place. Those, too, would be pre-empted. The resolution of those issues would be left totally in the hands of the NAA, which need not consult with the City or its citizens under the FAA Opinion.

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V. Conclusion And Request For Action

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In light of this information, CARE requests that the City ask the FAA to clarify its position regarding its assumption that the City is not the proprietor of Naples Municipal Airport. The City should ask that the FAA provide the legal and factual basis for its position.

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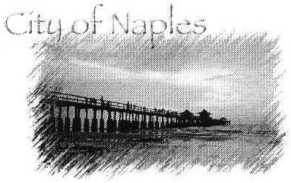


NAPLES CITY COUNCIL AGENDA MEMORANDUM

Regular Meeting Date: January 18, 2012

Agenda Section: Regular	Prepared By: David M. Lykins, Director Date: December 15, 2011 Department: Community Services
Agenda Item: 13	Legislative ☒ Quasi-Judicial ☐

SUBJECT:
A resolution for the naming of public property located at 755 East Lake Drive.

SUMMARY:
City Council is asked to consider a resolution for the naming of public property located at 755 East Lake Drive.

BACKGROUND:
Staff received an application from a City resident requesting consideration for the naming of the ROW along the east side of 755 East Lake Drive, including a small stormwater retention lake of 11,250 square feet. The lake is part of the South Florida Water Management Environmental Resources Permit for stormwater drainage in Basin III. The request is to create a small Mini-Park to be named for Ms. Lois Selfon.

Ms. Selfon served on the Community Services Advisory Board (CSAB) from June 2003 to June 2009; was appointed Vice Chair on May 10, 2005; appointed Chair on June 13, 2006 and again on June 12, 2007 serving until June 2009.

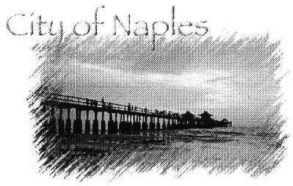
Ms. Selfon was instrumental in coordinating and developing the City's Volunteer Ambassador Program, and participated in numerous projects tasked to the CSAB as assigned by the City Council, including, but not limited to, amendments to the recreation division fee schedules, the $1.0 million annual contribution to the City through the 10-year Interlocal Agreement between the City and Collier County, a revised Citywide Special Events Policy, Naples Preserve Ambassador Program and achieved numerous "Green" initiatives supported through the City's Landscaping efforts and the Urban Forest Programs.

The Selfon Family will provide all costs for annual maintenance of the site and an additional contribution in the amount of $10,000 has been committed for future site needs, such as bench and sign maintenance.

The request meets the following criteria established in the naming policy:

POLICY:
2. Proposals to name parks or public facilities after persons may be considered based on meritorious civic or public service including one or more of the following: a) financial gifts, though property or financial donation is not a single determining factor, b) public service as an elected official, c) public service as a community volunteer, or d) long term sponsorship agreements.

Naming consideration will be based on the following criteria.
a. Living People or Organization:
   2. When 50 percent or more of the cost is contributed for acquisition, development, maintenance or continuing operation of a park or public facility.



NAPLES CITY COUNCIL AGENDA MEMORANDUM

Regular Meeting Date: January 18, 2012

Page Two

Agenda Item: 13

BACKGROUND (cont.):

3. When a significant contribution of time and public service has been made by the person or organization to the enhancement or betterment of the quality of life in the community and/or was instrumental in acquiring, developing or maintaining a park, public property or city owned facility.

The CSAB considered this request during their meeting of December 13, 2011 and, by motion, unanimously approved the request and recommends City Council support and approval. The recommendation complies with Policy 2 (c), and Criteria a., 2, and 3 established by City Council on December 3, 2008 adopted by Resolution 08-12283.

Staff is supportive of the naming request, confirmed that appropriate criteria for approval have been met and recommends City Council approval.

RECOMMENDED ACTION:

Adopt a resolution approving the recommended name of public property located at 755 East Lake Drive to be named Lois Selfon Park.

Reviewed by Department Director	Reviewed by Finance	Reviewed by City Manager
Dave Lykins	N/A	A. William Moss

City Council Action:

NAPLES CITY COUNCIL AGENDA MEMORANDUM

Regular Meeting Date: January 18, 2012

Agenda Section: Regular	Prepared By: Erica J. Goodwin, AICP, Planner II Date: December 29, 2011	Department: Planning
Agenda Item: 8	Legislative ☐	Quasi-Judicial ☒

SUBJECT:
Resolution determining Conditional Use Petition 11-CU9 in order to allow Le Lafayette Restaurant to operate with 20 parking spaces on their property, as well as the approved valet services, where the Code requires 45 spaces, amending the prior condition of approval in Resolution 09-12486, for property in the C1 Retail Shopping District located at 375 13th Avenue South.

SUMMARY:
City Council is asked to consider a Resolution determining Conditional Use Petition 11-CU9 pursuant to Sections 50-103 (e) and 50-107 of the Code of Ordinances, to grant approval of a parking needs analysis in order to allow Le Lafayette Restaurant to operate with 20 parking spaces on their property, where the Code requires 45 spaces, amending the prior conditions of approval in Resolution 09-12486, for property in the C1 Retail Shopping District, owned by Pratt Shoes, Inc., located at 375 13th Avenue South. In that this is a Quasi-Judicial matter, disclosures and the swearing in of those giving testimony are required.

BACKGROUND:
Le Lafayette French Restaurant petitioned the Planning Advisory Board (PAB) and City Council in 2009 for a parking variance in order to allow the restaurant to expand to the west, thereby encompassing the entire existing building. The PAB recommended approval of the variance by a 4-3 vote at its May 13, 2009 meeting. City Council denied the variance unanimously at its June 3, 2009 meeting. Subsequently, Le Lafayette applied for and obtained Conditional Use approval to allow for the expansion of the restaurant with the operation of a valet parking service and a reciprocal parking agreement with the owner of the neighboring building, authorizing the restaurant to utilize 23 spaces in the neighbor's parking lot. City Council approved the Conditional Use Petition on August 19, 2009 by Resolution 09-12486, subject to conditions. The petitioner wishes to amend the current parking situation through a parking needs analysis, pursuant to Section 50-107(c).

Pursuant to the calculations for required parking based on interior space and outdoor seating in the Code, the restaurant requires a total parking provision of 45 spaces. With the provision of valet service and the use of the adjacent parking lot, a total of 52 parking spaces are available. Based on actual parking counts, the petitioner is asserting that the 20 parking spaces on-site (27 spaces available with valet parking) is enough to serve the existing restaurant under most circumstances and that the 23 spaces available on the adjacent property through the reciprocal parking agreement are adequate to supplement parking on the limited occasions where it is needed. Their objection to the conditions imposed under Resolution 09-12486 is that the use of the restaurant square footage is contingent upon the neighboring property owner continuing to limit evening hours of that building. They are concerned that a change in ownership of that building or simply a desire to lease to a tenant with evening hours will result in a loss of square footage for the restaurant.

The petitioner would like approval to operate the entire interior and exterior square footage of the restaurant during the daytime when valet service is not provided, contrary to the condition limiting the

NAPLES CITY COUNCIL AGENDA MEMORANDUM

Regular Meeting Date: **January 18, 2012**

Page Two

Agenda Item: 8

BACKGROUND (cont.):
use of square footage in the approved Resolution. Staff disagrees with this request and recommends that in the event that the parking needs analysis is approved, a condition be includedrequiring that the petitioner comply with the original condition in Resolution 09-12486 limiting the use of the restaurant during daytime hours (between 8:00 am and 6:00 pm) to either 1,898 square feet of indoor seating or 1,248 square feet of indoor seating and 1,507 square feet of outdoor seating.

The petitioner has submitted parking counts taken by the valet service demonstrating the actual number of parking spaces utilized by patrons of the restaurant during the peak months of January, February and March in 2010 and 2011. These counts show that for the most part, the maximum number of parking spaces utilized is less than 20; however, on at least 4 occasions, the actual number of parking spaces utilized exceeds 20, up to a maximum of 46 on one occasion. It is also important to note that the parking counts were taken while the restaurant has been operating under the limitations on square footages under the previous approval.

On December 19, 2011, the Planning Advisory Board voted 6-0 to recommend approval of Conditional Use Petition 11-CU9 to allow an alternate ratio to calculate the parking for the kitchen, office and circulation area using one space per 300 square feet instead of one space per 100 square feet of gross square footage. The PAB recommendation is conditioned upon the following:

1. The restaurant will be allowed to operate the entire indoor and outdoor square footage during daytime and nighttime hours.

2. Parking will be calculated as follows (shown on Valet Parking Plan in submittal):

Parking Required

Use/Calculation	# of Spaces
1,240 sq. ft. indoor dining @ 1 space/100 sq. ft.	12
1,666 sq. ft outdoor dining @ 3 spaces/1,000 sq. ft.	5
297 sq. ft. office +624 sq. ft. kitchen + 2,089 sq. ft. circulation/other space @ 1 space/300 sq. ft.	10
Total Required	**27**

3. The restaurant will provide only the 20 spaces on the Pratt property (27 spaces with provision of valet service during nighttime hours).

4. The owner will provide valet service only during nighttime hours.

This recommendation of approval is subject to the following condition in place of all other conditions previously approved in Resolution 12486:

The petitioner will obtain a Right-of-Way Permit for the revised valet plan showing the use of

NAPLES CITY COUNCIL AGENDA MEMORANDUM

Regular Meeting Date: **January 18, 2012**

Page Three

Agenda Item: 8

BACKGROUND (cont.):
the spaces on the Pratt property and the delineation of the valet parking spaces during nighttime hours when valet service is provided to indicate that the spaces are reserved for valet parking only.

File Reference: 11-CU9
Petitioner: Le Lafayette French Restaurant, Astrid Maillard & Sebastien Maillard
Agent: Richard Yovanovich, Coleman, Yovanovich & Koester, P.A.
Location: 375 13th Avenue South
Zoning: C1 Retail Shopping and 3rd Street Commercial Area Special Overlay District

PUBLIC NOTIFICATION:
On October 18, 2011, and again on December 5, 2011, a total of 157 letters were mailed to all property owners located within 500 feet of the subject property. As of the date of this report, staff has received numerous phone calls and several letters in response to the mailing. Copies of these letters are attached.

RECOMMENDED ACTION:
Denial of a Resolution determining Conditional Use Petition 11-CU9.

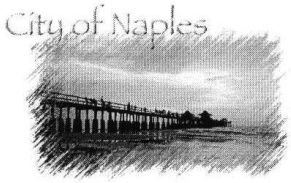
Should City Council vote to approve the Conditional Use request, Staff recommends the following conditions:

1. The petitioner will obtain a Right-of-Way Permit for the revised valet plan showing the use of the spaces on the Pratt property and the delineation of the valet parking spaces during nighttime hours when valet service is provided to indicate that the spaces are reserved for valet parking only.

2. Daytime Operations: When valet service is not in use restaurant activities shall be limited to either 1,898 square feet of indoor seating or 1,248 square feet of indoor seating and 1,507 square feet of outdoor seating.

Reviewed by Department Director	Reviewed by Finance	Reviewed by City Manager
Robin Singer	N/A	A. William Moss

City Council Action:



NAPLES CITY COUNCIL AGENDA MEMORANDUM

Regular Meeting Date: January 18, 2012

Agenda Section: Regular	Prepared By: Adam A. Benigni, Sr. Planner Date: December 20, 2011 Department: Planning
Agenda Item: 9	Legislative ☐ Quasi-Judicial ☒

SUBJECT:
Resolution determining Waiver of Distance Petition 12-WD1 for Olde Church 811, LLC, located at 811 7th Avenue South.

SUMMARY:
City Council is asked to consider a resolution determining Waiver of Distance Petition 12-WD1 for Olde Church 811, LLC, located at 811 7th Avenue South, in order to obtain an alcoholic beverage license within 400 feet of an established church. In that this is a Quasi-Judicial matter, disclosures and the swearing in of those giving testimony are required.

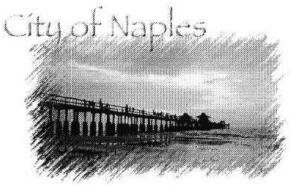
BACKGROUND:
Olde Church 811, LLC is requesting approval of a Waiver of Distance petition in order to obtain a 4COP alcoholic beverage license to sell beer, wine and liquor for consumption on-premises. Section 56-122(b) of the Code of Ordinances prohibits the sale of liquors, wines or beers for consumption on or off the premises by any licensee when the location of the licensed premises is within 400 feet of any established church or school. However, the City Council may grant a waiver to this requirement subject to consideration of the criteria found in Section 56-122(f)(1). An analysis of the applicable criteria can be found in the supplemental memorandum. The 400-foot distance is measured as the shortest distance between the lot on which the existing church or school is located and the lot on which the alcoholic beverages are to be sold. The subject property abuts property upon which the Naples Community Church is located. Therefore, approval of a Waiver of Distance for the alcoholic beverage license is required. The hours of operation for the proposed restaurant at this location is limited to evenings, weekends and holidays. The Church holds service at 10:00 a.m. on Sundays. It is not expected that there will be any regular overlap of hours of operation between the Church and the proposed restaurant.

File Reference: 12-WD1
Petitioner: Olde Church 811, LLC
Agent: John M. Passidomo, Cheffy Passidomo
Location: 811 7th Avenue South
Zoning: C2, General Commercial

PUBLIC NOTICE:
On December 19, 2011, a total of 99 letters were mailed to all property owners located within 500 feet of the subject property. As of the date of this report, staff has received no responses to the mailing.

RECOMMENDED ACTION:
Adoption of a Resolution granting Waiver of Distance Petition 12-WD1 for Olde Church 811, LLC, located at 811 7th Avenue South.

Reviewed by Department Director	Reviewed by Finance	Reviewed by City Manager
Robin Singer	N/A	A. William Moss
City Council Action:		



NAPLES CITY COUNCIL AGENDA MEMORANDUM

Regular Meeting Date: January 18, 2012

Agenda Section: Regular	Prepared By: Adam A. Benigni, Sr. Planner Date: December 20, 2011 Department: Planning
Agenda Item: 10	Legislative ☐ Quasi-Judicial ☒

SUBJECT:
Resolution determining Waiver of Distance Petition 12-WD2 for Flava Restaurant located at 849 7th Avenue South, Suite 101.

SUMMARY:
City Council is asked to consider a resolution determining Waiver of Distance Petition 12-WD2 for Flava Restaurant located at 849 7th Avenue South, Suite 101, in order to obtain an alcoholic beverage license within 400 feet of an established church. In that this is a Quasi-Judicial matter, disclosures and the swearing in of those giving testimony are required.

BACKGROUND:
Flava Restaurant is requesting approval of a Waiver of Distance petition in order to obtain a 4COP alcoholic beverage license to sell beer, wine and liquor for consumption on-premises. Section 56-122(b) of the Code of Ordinances prohibits the sale of liquors, wines or beers for consumption on or off the premises by any licensee when the location of the licensed premises is within 400 feet of any established church or school. However, the City Council may grant a waiver to this requirement subject to consideration of the criteria found in Section 56-122(f)(1). An analysis of the applicable criteria can be found in the supplemental memorandum. The 400-foot distance is measured as the shortest distance between the lot on which the existing church or school is located and the lot on which the alcoholic beverages are to be sold. The subject establishment is located on the same property as the Naples Community Church, therefore requiring approval of a Waiver of Distance for the alcoholic beverage license. The hours of operation for Flava Restaurant are seven days a week from 11:00 a.m. to 3:00 p.m. for lunch and from 4:00 p.m. until 11:00 p.m. for dinner. The Church holds service at 10:00 a.m. on Sundays.

File Reference: 12-WD2
Petitioner: Veronika Bustamante, Flava Restaurant
Location: 849 7th Avenue South, Suite 101
Zoning: C2, General Commercial

PUBLIC NOTICE:
On December 19, 2011, a total of 125 letters were mailed to all property owners located within 500 feet of the subject property. As of the date of this report, staff has received no responses to the mailing.

RECOMMENDED ACTION:
Adoption of a Resolution granting Waiver of Distance Petition 12-WD2 for Flava Restaurant located at 849 7th Avenue South, Suite 101.

Reviewed by Department Director	Reviewed by Finance	Reviewed by City Manager
Robin Singer	N/A	A. William Moss
City Council Action:		

NAPLES CITY COUNCIL AGENDA MEMORANDUM

Regular Meeting Date: January 18, 2012

Agenda Section: Regular	Prepared By: Erica J. Goodwin, AICP, Planner II Date: December 29, 2011	Department: Planning
Agenda Item: 11	Legislative ☐	Quasi-Judicial ☒

SUBJECT:
Resolution determining Site Plan with Deviations Petition 11-SPD3 to allow the renovation of a hotel with a new enclosed restaurant facility and a Conditional Use for a parking needs analysis to allow interior improvements and the expansion of a restaurant for the Bayfront Inn, to allow the rental of motor vehicles and vessels as accessory to the primary permitted use, for property located in the C2-A Waterfront Commercial District at 1221 5th Avenue South.

SUMMARY:
City Council is asked to consider a Resolution determining Site Plan with Deviations Petition 11-SPD3 to allow an enclosed restaurant facility to be located approximately 16.5 feet from the rear property line, where the Code of Ordinances requires a 25 foot rear setback, and a Conditional Use for a parking needs analysis to allow interior improvements and the expansion to the Bayfront Inn Restaurant, to allow the rental of motor vehicles and vessels as accessory to the primary permitted use, and to allow the modification of prior conditions of approval in Resolution 96-7699 for property owned by Gordon River Hotel Associates, located in the C2-A Waterfront Commercial District at 1221 5th Avenue South. In that this is a Quasi-Judicial matter, disclosures and the swearing in of those giving testimony are required.

BACKGROUND:
The Bayfront Inn is proposing major interior and exterior renovations to add amenities considered standard for boutique hotels and to renovate the exterior of the building to bring it up-to-date and in harmony with the surrounding architecture. The proposed interior changes include: reconfiguring a number of the existing rooms; reducing the number of rooms from 91 to 86 to make room for an increase in the area dedicated to meeting rooms; adding a full restaurant facility with indoor and outdoor dining areas; and adding a spa and fitness area. The proposed exterior changes include: the addition of roof massing elements and balconies; the relocation of the outdoor bar to provide for the outdoor portion of the restaurant; and the restriping of the parking under the building to provide spaces for the storage of up to 12 electric street-legal cars. The electric cars will be an added amenity of the hotel and will be available only to guests of the hotel for use during their stay. The petitioner has stated that the cars will not be for rent to anyone that is not a guest of the hotel and they will not be advertised for rental. The petitioner has prepared a parking needs analysis to account for the proposed changes to the vehicle and vessel parking on and off site. The petitioner is not proposing to add any additional square footage to the existing structure, although the restaurant area, currently enclosed only with a canvas covering, will be extensively renovated. The proposed renovation will improve the exterior appearance of the Bayfront Inn 5th Avenue, allowing it to become a visually attractive element of the City.

The hotel was permitted and constructed in 1986 at four stories over parking (a total of five stories) and was designed to meet the corporate standards of the Comfort Inn hotel chain. In 1996, the Florida Department of Transportation (FDOT) obtained a portion of the site in order to widen the traffic area intersecting US 41 and Goodlette Road. This taking of property resulted in the loss of parking and conditional use and variance approval was granted to compensate for the loss of

NAPLES CITY COUNCIL AGENDA MEMORANDUM

Regular Meeting Date: **January 18, 2012**

Page Two

Agenda Item: 11

BACKGROUND (cont.):
property and parking. The conditional use petition established alternate parking calculations for this site that are detailed in the Planning Advisory Board report. The approval granted in Resolution 96-7699 was subject to a number of conditions, including the prohibition of installation of a kitchen, the prohibition of personal watercraft rental from the docking facility and limitations on the hotel bar. The approval of this site plan with deviations petition will modify those conditions in order to allow the described renovations and changes.

On December 19, 2011, the Planning Advisory Board voted 6-0 to recommend approval of Site Plan with Deviations 11-SPD3, subject to the parking calculation found on Sheet SK0 of the plans submitted, and the following condition:

1. The 12 electric street-legal cars to be parked in the spaces provided within the parking plan will be available to guests of the hotel only and will not be advertised for rental or rented to non-guests. These electric cars will be parked only in the spaces delineated for their use in the Bayfront Inn 5th Avenue garage labeled on Sheet SK2 as "Electric Car Storage" and will not utilize any unauthorized parking spaces on- or off-site.

File Reference: 11-SPD3
Petitioner: Gordon River Hotel Associates
Agent: Matthew Kragh, AIA, MHK Architecture and Planning
Location: 1221 5th Avenue South
Zoning: C2-A Commercial Waterfront District

PUBLIC NOTIFICATION:
On October 18, 2011, and again on November 21, 2011, a total of 243 letters were mailed to all property owners located within 500 feet of the subject property. As of the date of this report, staff has received one response to the mailing which is an Attachment to the Planning Advisory Board Staff Report. In addition, an email received by the City Attorney is attached for City Council's review.

RECOMMENDED ACTION:
Approval of a Resolution determining Site Plan with Deviations Petition 11-SPD3, subject to the parking calculation found on Sheet SK0 of the plans submitted, and the following condition:

1. The 12 electric street-legal cars to be parked in the spaces provided within the parking plan will be available to guests of the hotel only and will not be advertised for rental or rented to non-guests. These electric cars will be parked only in the spaces delineated for their use in the Bayfront Inn 5th Avenue garage labeled on Sheet SK2 as "Electric Car Storage" and will not utilize any unauthorized parking spaces on- or off-site.

Reviewed by Department Director	Reviewed by Finance	Reviewed by City Manager
Robin Singer	N/A	A. William Moss

City Council Action:

NAPLES CITY COUNCIL AGENDA MEMORANDUM

Regular Meeting Date: January 18, 2012

Agenda Section: Regular	Prepared By: Erica J. Goodwin, AICP, Planner II Date: December 29, 2011	Department: Planning
Agenda Item: 12	Legislative ☐	Quasi-Judicial ☒

SUBJECT:

a) Resolution determining Subdivision/Replat Petition 11-SD6 in order to add two (2) single-family parcels and residences to the approved five (5) parcel single-family development in the R3-12, Multi-family Residential zoning district on property located at 12-52 6th Street South.

b) Resolution determining Site Plan with Deviations Petition 11-SPD4 to allow for the construction of seven (7) two-story, single family homes with 7.5 foot interior side setbacks (15 foot separation between structures) where 10 feet is required on property located at 12-52 6th Street South.

SUMMARY:

City Council is asked to consider the following:

a) Resolution determining Petition 11-SD6 for Final Plat approval to replat 560 Central and Lots 14-16, Block 20, Tier 6, Plan of Naples, together with the east ½ of a 20 foot north / south vacated alley abutting Lots 14 through 16, Block 20, Tier 6, containing approximately 51,185 square feet in the R3-12, Multifamily Residence District, to create 7 separate lots located at 12-52 6th Street South

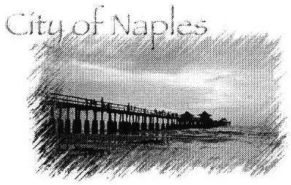
b) Resolution determining Site Plan with Deviations Petition 11-SPD4 to allow for the construction of 7 two-story, single family homes in the R3-12, Multiple Family Residence District, with 7.5 foot interior side setbacks (15 foot separation between structures) where 10 feet is required for property located at 12-52 6th Street South

In that this is a Quasi-Judicial matter, disclosures and the swearing in of those giving testimony are required.

BACKGROUND:

The petitioner received approval from City Council on February 2, 2011 of a Subdivision/Replat petition to subdivide the 36,000 square foot parcel comprised of Lots 7-14, Block 20, Tier 6, Plan of Naples to create five (5) single-family lots. This development is known as the 560 Central Plat. This project has also received administrative Site Plan review approval, final Design Review Board approval of the unified architectural scheme of the development and City Council approval of a Site Plan with Deviations petition to allow for reduced interior side yard setbacks of 7.5 feet, where 10 feet is required in the R3-12, Multifamily Residential district. The first residence on Lot #2 is complete and a second residence on Lot #3 is currently under construction. These parcels previously contained a total of thirteen (13) apartments over the entire subject property, all of which have been demolished.

The petitioner wishes to include the property immediately adjacent to the 560 Central parcels to the South and create two (2) new single family lots to add to the existing five-parcel development, for a total of seven (7) single family parcels. The properties are zoned R3-12, Multi-family Residence District and the proposed lots will retain this zoning designation although only one single family home is to be built on each parcel. The minimum lot area for newly-created lots in the R3-12 district is 6,000 square feet and the minimum lot width for newly-created interior lots in the R3-12 district is 40 feet. Each of the newly created seven (7) single family lots will conform to the R3-12 zoning district size and dimension



NAPLES CITY COUNCIL AGENDA MEMORANDUM

Regular Meeting Date: **January 18, 2012**

Page Two

Agenda Item:
12

BACKGROUND (cont.):
standards (see table below). In order to accomplish this, the petitioner is proposing to take 2 feet 6 inches from the existing platted Lot #5 (currently an exterior lot in the 560 Central plat), making Lot #5 an interior lot and adding this land to the newly created Lot #6.

	LOT AREA (6,000 SF required)	LOT WIDTH (40 Feet required)
LOT 1	9,329 SF	58.31 FEET
LOT 2	6,528 SF	40.80 FEET
LOT 3	6,528 SF	40.80 FEET
LOT 4	6,528 SF	40.80 FEET
LOT 5	6,528 SF	40.80 FEET
LOT 6	6,528 SF	40.80 FEET
LOT 7	9,202 SF	57.59 FEET

George Archibald, City of Naples Streets and Stormwater Department, has reviewed the proposed plat and finds it consistent with the general requirements and criteria for subdivision in the City. The final replat will be processed concurrently with the preliminary replat.

Development on the property will comply with the front, side and rear setback requirements at the perimeter of the property. The petitioner obtained approval of a Site Plan with Deviations to allow 7.5' side yard setbacks on the interior side property lines where the Code requires 10' side yard setbacks for the original 560 Central plat and wishes to extend that approval to include the two additional lots.

On December 19, 2011, the Planning Advisory Board voted 6-0 to recommend approval of Site Plan with Deviations petition 11-SPD4 and of Subdivision/Replat petition 11-SD6, subject to the following conditions:

1. The owner will extend the sidewalk along the 6th Street South frontage and will relocate the temporary sidewalk on 1st Avenue South to the property line.
2. All cost to install/extend utilities shall remain at the cost of the owner.
3. On-Site drainage shall conform to the applicable City stormwater management requirements.
4. A platted utility easement with a minimum width of 10' shall be provided/maintained along the west property line for both public and private utilities. This encumbrance can also function to provide the necessary landscape buffer and other development functions/uses.
5. Access from both Central Avenue and 1st Avenue South is approved subject to the owner's final design and submittal.
6. On-street parking along 6th Street South shall be a pervious design and shall be consistent with prior approvals.

Deed restrictions and/or dedication language on the replat shall confirm density of a single unit per lot in lieu of multiple lots/multi-family units/increased density per existing zoning district (R3-12).

NAPLES CITY COUNCIL AGENDA MEMORANDUM

Regular Meeting Date: **January 18, 2012**

Page Three

Agenda Item:
12

BACKGROUND (cont.):
File Reference: 11-SD6 & 11-SPD4
Petitioner: Adam Smith, SVM, LLC
Agent: Matthew Kragh, AIA, MHK Architecture and Planning
Location: 12-52 6th Street South
Zoning: R3-12, Multi-family Residential

PUBLIC NOTIFICATION:
On November 21, 2011 a total of 67 letters were mailed to all property owners located within 500 feet of the subject property. To date there have been no responses to the mailing.

RECOMMENDED ACTION:

a) Adopt a Resolution approving Petition 11-SD6 for final plat approval to replat 560 Central and Lots 14-16, Block 20, Tier 6, Plan of Naples, together with the east ½ of a 20 foot north / south vacated alley abutting Lots 14 through 16, Block 20, Tier 6, containing approximately 51,185 square feet in the R3-12, Multifamily Residence District, to create 7 separate lots located at 12-52 6th Street South, subject to the following conditions:

1. The owner will extend the sidewalk along the 6th Street South frontage and will relocate the temporary sidewalk on 1st Avenue South to the property line.
2. All cost to install/extend utilities shall remain at the cost of the owner.
3. On-Site drainage shall conform to the applicable City stormwater management requirements.
4. A platted utility easement with a minimum width of 10' shall be provided/maintained along the West property line for both public and private utilities. This encumbrance can also function to provide the necessary landscape buffer and other development functions/uses.
5. Access from both Central Avenue and 1st Avenue South is approved subject to the owner's final design and submittal.
6. On-street parking along 6th Street South shall be a pervious design and shall be consistent with prior approvals.
7. Deed restrictions and/or dedication language on the replat shall confirm density of a single unit per lot in lieu of multiple lots/multi-family units/increased density per existing zoning district (R3-12).

b) Approval of a Resolution determining Site Plan with Deviations Petition 11-SPD4.

Reviewed by Department Director	Reviewed by Finance	Reviewed by City Manager
Robin Singer	N/A	A. William Moss

City Council Action:

NAPLES CITY COUNCIL AGENDA MEMORANDUM

Regular Meeting Date: January 18, 2012

Agenda Section: Regular	Prepared By: Gregg Strakaluse, P.E. Date: December 21, 2011	Department: Streets & Stormwater
Agenda Item: 14	Legislative ☒	Quasi-Judicial ☐

SUBJECT:
Resolution amending the City of Naples Stormwater Master Plan to include policies intended to mitigate impacts of stormwater outfalls on the beach through technically sound and economically feasible methods that also achieve the public safety and flood protection goals of the City.

SUMMARY:
City Council is asked to consider adopting a resolution that amends the City's Stormwater Master Plan to include general policies that mitigate the impacts of stormwater outfalls on the beach.

BACKGROUND:
In 2007, City Council received the most recent update to the 10-Year Stormwater Master Plan. The plan summarizes stormwater conditions throughout the City (up to that date) and identifies a wide range of projects and programs aimed at improving flood protection and water quality. Since 2007, the City has accomplished over $16.8 million worth of infrastructure improvements to the City's stormwater management system, of which 36% ($6 million) has been funded through grants. Additionally, much progress has also been made to strengthen the City's Code of Ordinances and public education programs. Positive results have been documented through a substantial reduction in flood damage claims and noticeable improvements in stormwater conveyance.

There are ten stormwater outfalls that discharge inland stormwater to the Gulf of Mexico through pipes on the beach (Exhibit #1). These plastic pipe outfalls require substantial maintenance to repair damages caused by wave action, sand infiltration, and weather. In January 2005, the Florida Department of Environmental Protection (FDEP) issued a beach nourishment permit to Collier County. The permit contained a specific condition requiring a long range management plan to remove the outfalls from the beach. Submittal of an acceptable plan was a prerequisite for approval of the next beach nourishment effort. In late 2009 and early 2010, the City and County jointly allocated resources (staff time, $7,500 City funds, and $30,000 County funds) to develop a response to FDEP's permit requirement. In February of 2010, the consulting firm of Humiston & Moore Engineers submitted a report to the FDEP on the City and County's behalf summarizing the physical, technical and economic challenges associated with removal of outfalls. The report also provided FDEP documented evidence that the four areas of concern related to beach outfalls (lateral access, erosion, water quality and sea turtle habitat) were not adversely impacted from the outfalls.

Over the past year, City and County staff, along with FDEP officials, have developed a solution to decouple beach outfall management from the beach nourishment permit. The solution is the attached resolution that amends the City's 10-year Stormwater Master Plan to include policies aimed at mitigating impacts from beach outfalls through technically sound and economically feasible methods that also achieve the public safety and flood protection goals of the City. Decoupling beach outfall management from beach nourishment permitting allows the County and FDEP to focus on specific permitting issues associated with a proposed 2013 beach nourishment project.

NAPLES CITY COUNCIL AGENDA MEMORANDUM

Regular Meeting Date: January 18, 2012

Page Two

Agenda Item: 14

BACKGROUND (cont.):
Before moving forward to City Council with a staff recommendation to adopt a resolution, staff requested written confirmation from FDEP that doing so would: 1) satisfy the requirements of the prior beach nourishment permit, and 2) decouple beach outfalls from future beach nourishment permits. On December 21, 2011, the City received a letter from Mr. Robert Brantly, Program Administrator for the Bureau of Beaches and Coastal Systems (at FDEP) that confirmed staff's understanding. Please see attached Exhibit #2.

This year, the FY 2011-12 Stormwater Capital Improvement Program allocates up to $260,000 for the preparation of a comprehensive assessment of options that would reduce impacts from the ten stormwater beach outfalls. A benefit-burden and cost analysis would be prepared for a matrix of options that would include, but not be limited to, consolidation of outfalls, aquifer storage and recovery, bury and extend, and redirect via pump station. Currently, the County is in the design stage for the upcoming beach nourishment project. This project may have significant construction components that could integrate groins that minimize future erosion and a beach profile that may extend up to 100-feet in places. Coordination between the City and County is critical since even a standard beach re-nourishment project would likely affect the existing beach outfalls.

FUNDING SOURCE:
Adoption of the resolution is limited to staff time. Execution of the policies contained within the resolution will have a fiscal impact that will be set by City Council and adoption of future CIP and operating budgets.

RECOMMENDED ACTION:
Adopt the attached Resolution which amends the City's Stormwater Master Plan to include general policies that mitigate the impacts of stormwater outfalls on the beach.

Reviewed by Department Director	Reviewed by Finance	Reviewed by City Manager
Gregg R. Strakaluse, P.E.	N/A	A. William Moss

City Council Action:

NAPLES CITY COUNCIL AGENDA MEMORANDUM

Regular Meeting Date: January 18, 2012

Agenda Section: Regular	Prepared By: Gregg R. Strakaluse, Director Date: January 3, 2012 Department: Streets and Stormwater
Agenda Item: 15	Legislative ☒ Quasi-Judicial ☐

SUBJECT:
Award of contract to Environmental Products of FL Corporation in the amount of $288,156 for the purchase of a new street sweeper and five year turn-key maintenance plan, and approve a budget amendment Resolution in the amount of $28,156 to appropriate funds from the Stormwater Enterprise Fund Balance to Capital Improvement Project No. 12V05.

SUMMARY:
After significant efforts to compare an outsourced street sweeping operation with in-house operations, the Department is recommending the approval of an agreement with Environmental Products of FL Corporation in the amount of $288,156.00 for the purchase of a new street sweeper with a five year maintenance plan in order to continue in-house operations at the same level of service. Additionally, a budget amendment resolution is necessary in the amount of $28,156 to appropriate funds from the Stormwater Enterprise Fund Balance to Capital Improvement Project No. 12V05.

BACKGROUND:
Generally, two types of street sweepers are manufactured: an air (or vacuum) sweeper, and a mechanical sweeper. The air sweeper has been rated as the most effective at removing the debris off streets, especially small particulate matter that is known to pollute waterways. For the past eleven years, the City has used an air sweeper to clean City streets and to keep significant debris and particulate matter out of the stormwater system and waterways. Each year over 278 tons of debris is removed from City streets by the street sweeper. The street sweeping program is a mandatory condition of the City's National Pollution Discharge Elimination System (NPDES) permit. Also, the City's street sweeper plays an important roll in cleaning up after vehicle accidents and special events such as parades, art festivals and storms including post debris pickup after hurricanes.

The City's existing street sweeper was purchased 5-years ago and because of the intense day-to-day operation of the equipment, it has reached the end of its useful life. The manufacturer's maintenance plan expired on December 16, 2011 and all warranties have expired. The manufacturer of the existing equipment has provided a buy-back option to the City of $30,000. Prior to taking advantage of this offer, staff proposes to receive competitive bids by auctioning the equipment at a starting price of $30,000. Revenue obtained for the 2007 sweeper would be returned to the Stormwater Enterprise Fund, thereby offsetting the purchase cost of a replacement sweeper.

On December 22, 2011, the Purchasing Division advertised Invitation to Bid 016-12 for the purchase of a new street sweeper. The bid invitation was placed in the Naples Daily News on December 24, 2011, as well as on the Demand Star web site. Demand Star notified 203 potential vendors about this bid and reported seven actual plan holders. On January 10, 2011, one company submitted a bid to the Purchasing Division. The bid was submitted by Environmental Products of FL Corporation, which is the same company that provided the City's existing 2007 sweeper. Please see Exhibit A.

The solicitation was specifically written to request pricing for both an air sweeper and mechanical

NAPLES CITY COUNCIL AGENDA MEMORANDUM

Regular Meeting Date: **January 18, 2011**

Page Two

Agenda Item:
15

BACKGROUND (cont.):
sweeper in the event that City Council wanted to reduce the current level of service. The bid can be summarized as follows:

	AIR SWEEPER	MECHANICAL SWEEPER
Sweeper Unit	$222,156	$232,018
5-Year Turn Key Maintenance	$ 66,000	$ 66,000
TOTAL	**$288,156**	**$298,018**
Buy Back (after 5-years)	$ 40,000	$ 40,000

Staff has reviewed the bid submittal and has determined that it fully complies with the specifications set forth in the bid. Staff believes the lack of additional bidders to this solicitation reflects the limited number of manufacturers that provide the required set of parts and options necessary of a municipal street sweeper that meets City standards.

During the August 2011 budget meeting, staff presented a report comparing in-house operations with outsourcing. This report, which is attached as Exhibit B, concluded that in-house operations over the next five years would average $13,796 per month, while outsourcing costs would range from $11,962 to $14,037 per month. Based on the low bid submitted for the air sweeper, staff has updated its earlier estimate for providing in-house street sweeping services from $13,796 per month to $13,993 per month. In the event that City Council wishes to consider reducing the current level of service, staff received a bid price for a mechanical street sweeper and has been able to determine that in-house operations would cost $14,149 per month. The report also concluded that private companies preferred to utilize a mechanical sweeper rather than an air sweeper because a single operator can sweep more curb miles per hour with a mechanical sweeper. While this translates into higher staff production, it lowers the level of service because it collects much less debris.

In an effort to corroborate the information about outsourcing contained within the August staff report, the Purchasing Division advertised an Invitation to Bid to private street sweeping companies. The bid invitation was placed in the Naples Daily News, as well as on the Demand Star web site. Demand Star reported eight plan holders and the Purchasing Division notified seven companies. On November 11, 2011, three companies submitted bids to the Purchasing Division. The Bid Summary is attached as Exhibit C. The solicitation was specifically written to maintain the City's existing level of service with an air sweeper; however, the solicitation did not prohibit bidders from volunteering information for an alternative sweeper such as a mechanical sweeper. Based on the bids provided from each company, staff was able to prepare the following summary of actual outsourcing costs:

1. Precision Cleaning: $12,075.58 /mo. (Unknown Equipment)
2. Star Cleaning: $12,502.18 /mo. (Mechanical Sweeper)
3a. USA Services: $14,237.08 /mo. (Mechanical Sweeper)
3b. USA Services: $17,347.08 /mo. (Air Sweeper)

Staff Report Outsourcing Estimate
$11,962 - $14,037 /mo.

In-House Cost (based on bid results)
$13,993 /mo.

NAPLES CITY COUNCIL AGENDA MEMORANDUM

Regular Meeting Date: **January 18, 2011**

Page Three

Agenda Item:
15

BACKGROUND (cont.):
The costs above represent the bidder's costs plus the City's cost of properly disposing of street sweeping material and managing the new street sweeping contract and the existing contract with the street sweeping disposal company. If each bidder were to dispose of street sweepings, the City's disposal costs are eliminated and program costs would be as follows:

1. Precision Cleaning: $9,475.50 /mo. (Unknown Equipment)
2. Star Cleaning: $9,902.10 /mo. (Mechanical)
3a. USA Services: $13,192.08 /mo. (Mechanical)
3b. USA Services: $16,302.00 /mo. (Air)

Costs decrease when the bidder is responsible for disposing of street sweeping material. This can be attributed to the fact that mechanical sweepers collect less debris than vacuum sweepers; therefore, disposal costs are lower. Also, the final disposal location is unknown, which can be problematic if debris is disposed of illegally or at a site not approved to accept street sweepings.

The positive impacts of the City's street sweeping program are demonstrated by clean streets and waterways. The advantages of an air sweeper include the removal of finer particle sizes from the environment which results in less pollution into the stormwater system. Additionally, an air sweeper minimizes the nuisance of dust and better complies with air quality standards.

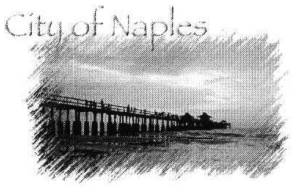
After a thorough effort to corroborate the August Staff Report, staff has determined that maintaining the street sweeping operation in-house will cost $13,993 per month over the next five years. Outsourcing the street sweeping operation to a private company that would maintain the City's existing level of service would cost $16,302 per month. If the City were to reduce its current level of service by utilizing a mechanical sweeper, in-house operations would cost $14,149 per month and outsourcing operations would cost $9,475.50 per month. Please note that reference checks have not been completed for any company that has submitted a bid to provide private street sweeping services.

FUNDING SOURCE:
Funding in the amount of $260,000 is available within the Stormwater Enterprise Fund – CIP 12V05; Account: 470.6060.539.6070. An additional $28,156 is required from fund balance ($5,700,000) via a budget amendment resolution.

RECOMMENDED ACTION:
It is recommended that City Council award a contract to Environmental Products of FL Corp. in the amount of $288,156.00 for the purchase of a new air street sweeper and a five-year maintenance and repair agreement per Bid 016-12; authorize the City Manager to sign the agreement; and approve a budget amendment resolution in the amount of $28,156 to appropriate funds from the Stormwater Enterprise Fund Balance to Capital Improvement Project No. 12V05.

Reviewed by Department Director	Reviewed by Finance	Reviewed by City Manager
Gregg Strakaluse	Ann Marie Ricardi	A. William Moss

City Council Action:



NAPLES CITY COUNCIL AGENDA MEMORANDUM

Regular Meeting Date: **January 18, 2012**

Agenda Section: Regular	Prepared By: Gregg R. Strakaluse, Director Date: January 3, 2012	Department: Streets and Stormwater
Agenda Item: 16	Legislative ☒	Quasi-Judicial ☐

SUBJECT:
Approve an agreement with Erickson Consulting Engineers, Inc. for an amount not to exceed $355,270 to design, engineer, and permit dredging of designated canal areas within the Port Royal Special Assessment District, and approve a budget amendment Resolution appropriating funds from the Capital Projects fund for the project.

SUMMARY:
City Council is asked to consider approving a professional services agreement with Erickson Consulting Engineers, Inc. to provide design, engineering and permitting services related to the dredging of designated canal areas within the Port Royal Special Assessment District for an amount not to exceed $355,270, and approve a budget amendment resolution appropriating funds in the Capital Projects Fund for the project.

BACKGROUND:
Since April of 2010, the Port Royal Property Owners Association has been working with staff to develop the scope of a dredging project. The details of the project are more fully described in the Initial Assessment Resolution No. 11-12978, but can be summarized as the removal of approximately 19,120 cubic yards of sediment from various canals within Port Royal. On December 14, 2011, City Council approved a final assessment resolution to establish a special assessment district for the purpose of dredging canals in the Port Royal area. A special assessment district provides a means for the property owners to pay their pro-rata share of the cost to dredge canals.

On February 2, 2011, the City Council approved Resolution No. 11-12837 which pre-qualified marine and coastal engineering firms for use by the City. As part of that solicitation, the City identified several potential projects that may require professional engineering services over the next few years, including the Port Royal dredging project. This project is within the statutory definition of a "continuing services contract" under the Consultant's Competitive Negotiations Act (CCNA), as construction is not anticipated to exceed two million dollars. On November 17, 2011, the Purchasing Division distributed official notice to all five pre-qualified firms for professional services related to the Port Royal dredging project. Two letters of interest were received on December 6th and after careful evaluation, staff selected the firm of Erickson Consulting Engineers, Inc. (ECE). ECE is based in Sarasota, Florida and has experience in dredging waterways in Charlotte and Lee Counties, as well as the construction of habitat islands in Sarasota and North Carolina.

The attached professional services agreement includes the scope of services, fee and project schedule. The scope of services has been developed with the intent of acquiring field data, preparing plans and specifications, and obtaining all permits necessary to complete the project according to the conditions as set forth in the initial assessment resolution. Typical dredge projects transport dried sediment to a landfill for use as daily cover; however, the scope of this project

NAPLES CITY COUNCIL AGENDA MEMORANDUM

Regular Meeting Date: **January 18, 2012**

Page Two

Agenda Item: 16

BACKGROUND (cont.):
includes services necessary to create a habitat island with the dredged material. While this alternative requires more time during the design and permitting process, a significant cost savings is expected during construction since dewatering and hauling will not be necessary.

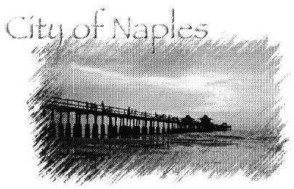
After significant negotiation, ECE's original fee submittal has been reduced by 17% and ECE has agreed to perform the services detailed in the scope for an amount of $355,270. Prior to the formation of the special assessment district, staff had estimated the engineering fees between $337,081 and $370,789. The design, engineering and permitting effort is expected to take twelve months once a notice to proceed is issued. Construction inspection services are not part of this package; however, staff's plan would be to supplement this agreement by negotiating those services (and fee) with ECE once a construction contractor has been selected. Such a supplemental work effort would require a contract amendment to be approved by City Council.

FUNDING SOURCE:
The final assessment resolution for the dredging district was approved on December 14, 2011. The City will prepay for the costs related to the dredging using the Capital Projects Fund, (expected to be approximately $2.1 million for design, engineering and construction) and will receive reimbursement using Special Assessment payments starting in November 2013.

RECOMMENDED ACTION:
Approve a professional services agreement with Erickson Consulting Engineers, Inc., for an amount not to exceed $355,270 to design, engineer, and permit dredging of designated canal areas within the Port Royal Special Assessment District, and approve a budget amendment resolution to appropriate funds from the Capital Projects Fund for the project.

Reviewed by Department Director	Reviewed by Finance	Reviewed by City Manager
Gregg R. Strakaluse, P.E.	Ann Marie Ricardi	A. William Moss

City Council Action:



NAPLES CITY COUNCIL AGENDA MEMORANDUM

Regular Meeting Date: **January 18, 2012**

Agenda Section: Regular	Prepared By: Roger Reinke, Assistant City Manager Date: January 9, 2012 Department: City Manager
Agenda Item: 17	Legislative ☒ Quasi-Judicial ☐

SUBJECT:
Resolution considering Right-of-Way Permit Application #2012-38 submitted by the Fifth Avenue South Business Improvement District, Inc. (FASBID) for the placement of decorative lighting in the right-of-way on Fifth Avenue South between 3rd Street and 9th Street (US41).

SUMMARY:
City Council is asked to consider a Resolution approving Right-of-Way Permit Application 2011-38 submitted by the Fifth Avenue South Business Improvement District, Inc. for the placement of decorative lighting in the right-of-way of Fifth Avenue South between 3rd Street South and 9th Street South (U. S. 41); and authorizing the City Manager to execute the Right-of-Way Permit.

BACKGROUND:
The Code of Ordinances does not permit placement of private property, including landscape lights, in the right-of-way without issuance of a right-of-way permit. A right-of-way permit may allow for installation of landscape lights on a permissive basis that may be modified and/or revoked by the City.

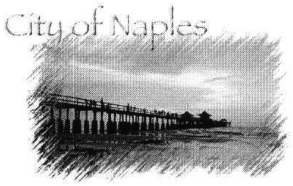
On November 2, 2011, City Council approved a special event permit providing for the installation of miniature white lights on trees along the north and south sides of 5th Avenue South between 9th Street South and 3rd Street South for the period of November 15, 2011 through January 15, 2012.

FASBID is requesting approval of a right-of-way permit: for lighting as follows:
1. To extend display and allow for annual display (comparable to the trees at Sugden Plaza) of the miniature white lights already installed by the FASBID on the palm trees at the 9th Street and 3rd Street entrances to Fifth Avenue and on various trees throughout the street (Reference attachments to the application).
2. To display up to 75 lighted spheres through April 30, 2012 (Season), and approval to re-install the spheres on a seasonal basis from November 1st thru April 30th.

Staff's special conditions for approval are attached to the application and include operational controls and subsidy of added electrical cost in the estimated annual amount of $880.

RECOMMENDED ACTION:
Consider a Resolution approving Right-of-Way Permit Application 2012-38 of the Fifth Avenue South Business Improvement District, Inc. for the placement of decorative lighting in the right-of-way on Fifth Avenue South between 3rd Street South and 9th Street South; and authorizing the City Manager to execute the Right-of-Way Permit Application subject to conditions therein.

Reviewed by Department Director	Reviewed by Finance	Reviewed by City Manager
Roger Reinke	N/A	A. William Moss
City Council Action:		



NAPLES CITY COUNCIL AGENDA MEMORANDUM

Regular Meeting Date: January 18, 2012

Agenda Section: Regular	Prepared By: Adam A. Benigni, Sr. Planner Date: December 19, 2011 Department: Planning
Agenda Item: 18	Legislative ☐ Quasi-Judicial ☒

SUBJECT:
Resolution determining Outdoor Live Entertainment Petition 12-LE2 for Barbatella located at 1290 3rd Street South.

SUMMARY:
City Council is asked to consider a resolution determining Live Entertainment Petition 12-LE2 for Barbatella to allow outdoor live entertainment consisting of up to three entertainers on Thursday through Saturday from 6:00 p.m. until 11:00 p.m. and on Sunday from 6:00 p.m. until 10:00 p.m. on property located at 1290 3rd Street South. In that this is a Quasi-Judicial matter, disclosures and the swearing in of those giving testimony are required.

BACKGROUND:
Barbatella, located at 1260 and 1290 3rd Street South, is requesting outdoor live entertainment located in the outdoor seating area that will consist of up to three entertainers on Thursdays, Fridays and Saturdays from 6:00 p.m. until 11:00 p.m. and on Sundays from 6:00 p.m. until 10:00 p.m. There are six establishments along 3rd Street South that currently have live entertainment permits: Ridgway's, Tommy Bahama, Sea Salt, Campiello, Handsome Harry's and the Old Naples Pub. Ridgway's live entertainment permit has the latest finishing time at 11:30 p.m. on Thursdays, Fridays and Saturdays while the other establishments end at 10:30 p.m. or 11:00 p.m. Barbatella's live entertainment will end at 11:00 p.m. on Thursdays, Fridays and Saturdays. The proposed hours of live entertainment, location and configuration are similar to the other establishments in the area.

The Police Department has reviewed the Computer Aided Dispatch (CAD) and has found no noise complaints or City ordinance violations for this establishment since it is a new establishment. A memo from the Police Department is included with the staff report.

File Reference: 12-LE2
Petitioner: Fabrizio Aielli for Barbatella, LLC
Location: 1290 3rd Street South
Zoning: C1, Retail Shopping District

PUBLIC NOTICE:
A total of 83 public notices were mailed out December 5, 2011. As of the date of this report, there have been no letters in support or opposition in regards to the proposed entertainment.

RECOMMENDED ACTION:
Approve the resolution determining Outdoor Live Entertainment Petition 12-LE2 for Barbatella located at 1290 3rd Street South.

Reviewed by Department Director	Reviewed by Finance	Reviewed by City Manager
Robin Singer	N/A	A. William Moss
City Council Action:		

Memo

Planning

TO: A. William Moss, City Manager
FROM: Robin D. Singer, Planning Director
DATE: January 17, 2012
SUBJECT: Live Entertainment Petition for Barbatella – Agenda Item 18

A question was raised at today's City Council Workshop regarding the impact of the proposed Barbatella Live Entertainment on the adjacent Olde Naples Pub. There is no clearly prescribed method of measuring the impacts of one establishment on another. However, the Resolution for the Olde Naples Pub is attached and the entertainment times for both establishments are provided below. If approved, the two establishments would both be providing outdoor live entertainment between 6:00 pm and 8:00 pm on Sundays.

Old Naples Pub

Live entertainment is limited to a single amplified performer indoors between the hours of 7:30 p.m. and 10:30 p.m. Monday through Saturday in season (November through April) and Thursday through Saturday off season (May through October), and one outdoor performer amplified with one 50-watt P.A. system, from 5:00 p.m. to 8:00 p.m. on Sundays November through April.

Barbatella

Outdoor live entertainment consisting of up to three entertainers from 6:00 pm to 11:00 pm on Thursday through Saturday and 6:00 pm to 10:00 pm on Sundays.

Ethics above all else... Service to others before self... Quality in all that we do.

NAPLES CITY COUNCIL AGENDA MEMORANDUM

Regular Meeting Date: January 18, 2012

Agenda Section: Regular	Prepared By: Robin D. Singer, Director Date: January 6, 2012	Department: Planning
Agenda Item: 19	Legislative ☐	Quasi-Judicial ☒

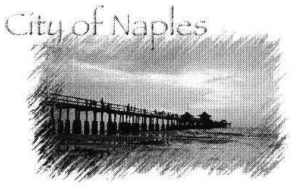
SUBJECT:
Consideration of a Resolution determining Variance Petition 11-V6 to allow a house and an addition to the house be rebuilt and a guest house to be elevated along existing nonconforming setback lines on property in the R1-10 Residence District located at 163 10 Avenue South.

SUMMARY:
City Council is asked to consider a Resolution determining Variance Petition 11-V6 from Section 58-176 of the Code of Ordinances in order to allow a front porch to be constructed approximately 21'-5" from the front (south) property line where 25 feet is required and relocate and raise the existing guest cottage at the rear of the property to base flood elevation, which is located approximately 5'-6" from the rear (north) property line where 25 feet is required on property in the R1-10 Residence District located at 163 10th Avenue South. In that this is a Quasi-Judicial matter, disclosures and the swearing in of those giving testimony are required.

BACKGROUND:
The owner of the subject property would like to renovate the existing single family home, build additions to the home and renovate and relocate the guest house. The guest house and a portion of the main house are listed as contributing structures in the City's historic district. Improvements that are not historic have been demolished. Over the years there have been many modifications that have altered the historic structures and some delayed maintenance on the primary residence has resulted in damage to the structure that may make it impossible to retain it. The petitioner applied for a variance rather than the expansion of a nonconformity in anticipation of the fact that the structures may not be salvageable. However, the proposed new home and guest house are designed to be very similar in design and scale to the existing historic structures. They also plan on moving the guest house approximately 12 feet to the east along the existing rear setback line.

The petition was originally listed as a variance to the front setback requirements for the main house and additions, including the front porch, and a variance to the rear setback for the guest house. The front house and additions were to be 25'-5" from the front property line where 30 feet was required in the district. Since the petition was first heard by City Council at the November 16, 2011 hearing, staff has determined that the front yard requirement is less than the 30 feet required in the district pursuant to Section 56-54(c) which reads:

> "(c) *Modification of front yard requirements for lots on streets with existing development.* Whenever 40 percent or more of the frontage on 1 side of a street between 2 intersecting streets is improved with buildings that have a front yard that is less than the minimum front yard requirements of the district in which they are located, then the average front yard of such buildings shall become the minimum required front yard for that side of the street. This regulation shall not, however, permit a front yard of less than 25 feet in depth in any residential zone district."



NAPLES CITY COUNCIL AGENDA MEMORANDUM

Regular Meeting Date: January 18, 2012

Page Two

Agenda Item:
19

BACKGROUND (cont.):
The front yards of the properties along the street are as follows:

Address	Existing Front Yard (30' required)	Lot Width	% of Block
955 Gulf Shore Blvd. S.	32.6'	100.00'	25.00%
149 10th Ave. S.	*23.52'*	*116.67'*	*29.17%*
163 10th Ave. S.	*24.5'*	*83.33'*	*20.83%*
187 10th Ave. S.	*24.0'*	*100.00'*	*25.00%*

The total width of the block is 400 ft. The average front yard of the non-conforming lots (shown in italics) is 24 ft. As such, the minimum front yard requirement is actually 25 feet and a variance is not required for the portions of the front building which are at least 25 feet from the south property line. The existing house is approximately 25'-5" from the front property line. They would like to keep the home in this location and provide additions on the east and west side of the house along the same setback line. They would also like to add a front porch which will extend to 21'-5" from the front property line. The front porch would still require variance approval.

The variance will allow the guest home, which is currently 5'-6" from the rear property line where 25'-0" is required, to be shifted approximately 12 feet to the east and to be elevated to meet minimum floodplain standards along the existing nonconforming rear setback. If the guest house has significant structural deterioration, the variance will allow the owners to replace the guest house in the same location. The architect will report his findings regarding the viability of the existing structures at the meeting.

Staff has provided notice to adjacent property owners consistent with Section 16-112 regarding the demolition of historic structures which requires an 180-day waiting period. The 180-day waiting period will end April 7, 2012.

File Reference: Variance Petition 11-V6
Petitioner: Anthony Margolis
Agent: Daniel Alan Summers, AIA, BSSW Architects, Inc.
Location: 163 10th Avenue South
Zoning: R1-10 Residence District

On September 28, 2011, the Planning Department mailed 69 notices of the subject petitions to the property owners within 500 feet of the subject property. Two responses were received, one in favor and one objection. Copies of the email responses are attached.

NAPLES CITY COUNCIL AGENDA MEMORANDUM

Regular Meeting Date: January 18, 2012

Page Three

Agenda Item: 19

BACKGROUND (cont.):
On October 12, 2011, the Planning Advisory Board voted 7-0 to recommend approval of petition 11-V6 subject to the conditions recommended by staff. On November 16, 2011, the City Council voted to continue this item expressing concern of a tear down rather than a renovation.

RECOMMENDED ACTION:
Adopt a Resolution approving Variance Petition 11-V6 from Section 58-176 of the Code of Ordinances to renovate or rebuild a house with a front porch and raise the existing guest cottage at the rear of the property to base flood elevation, said property being in the R1-10 Residence District, owned by Anthony M. and Karlene M. Margolis and located at 163 10th Avenue South.

Reviewed by Department Director	Reviewed by Finance	Reviewed by City Manager
Robin D. Singer	N/A	A. William Moss

City Council Action:

NAPLES CITY COUNCIL AGENDA MEMORANDUM

Regular Meeting Date: January 18, 2012

Agenda Section: Regular	Prepared By: Adam Benigni, Sr. Planner Date: December 28, 2011	Department: Planning
Agenda Item: 20	Legislative ☐	Quasi-Judicial ☒

SUBJECT:
Reconsideration of a Resolution determining Variance Petition 11-V7 for the property located at 697-699 Fairway Terrace.

SUMMARY:
City Council is asked to reconsider the resolution determining a variance from Section 58-296 of the Code of Ordinances in order to allow an approximately 14,250 square foot parcel with an existing duplex to be subdivided resulting in two parcels (approximately 7,125 square feet each) with zero-foot side yards where 10-foot side yards are required. In that this is a Quasi-Judicial matter, disclosures and the swearing in of those giving testimony are required.

BACKGROUND:
On November 16, 2011, City Council denied Variance petition 11-V7 to allow a parcel with an existing duplex to be subdivided. According to City Council's policy for reconsideration of decisions, the Mayor received a written request from Council Member Sam Saad requesting that discussion of reconsideration of the variance be placed on the December 7, 2011 agenda. At its December 7, 2011 meeting, the City Council voted by a majority (6-1) to reconsider this Variance petition at its January 18th meeting.

The developer of the subject property constructed the existing duplex starting in 2007. The developer defaulted on the loan obtained from Liberty Bank, FSB. Liberty Bank acquired the title to the property in 2010. The petitioner listed the property for sale after acquiring ownership and, in August 2011, secured separate buyers for each townhome. The variance would allow the petitioner to split the lot in a north/south fashion along the common wall of the duplex and sell each unit as a single-family residence rather than as condominiums or use the structure as a rental duplex. If the variance is approved, the petitioner would then apply for a replat in order to split the property. The property is 0.33 acres in area. The R3-12 zoning district allows up to 12 units per acre; therefore, a total of 4 units could have been constructed on the property. Currently, there are only 2 units on the property. If the variance is approved and the replat is processed successfully, each property would be approximately 0.16 acres in area and be permitted to have 2 units; therefore, there would be no increase in density if the variance was approved.

The Planning Advisory Board recommended approval of this request by a vote of 6 to 1 with the condition that the size of the property be divided equally based on an as-built survey of the common wall.

City Council heard this item at the November 16, 2011 regular meeting. After testimony from staff and the petitioner's agent, City Council denied the variance request by a vote of 6 to 1.

NAPLES CITY COUNCIL AGENDA MEMORANDUM

Regular Meeting Date: January 18, 2012

Page Two

Agenda Item: 20

BACKGROUND (cont.):
File Reference: Variance Petition 11-V7
Petitioner: Liberty Bank, FSB
Agent: Jayne M. Skindzier, Esq., Cummings & Lockwood, LLC
Location: 697 & 699 Fairway Terrace
Zoning: R3-12 Multifamily District

PUBLIC NOTICE:
On September 27, 2011, a total of 115 letters were mailed to all property owners located within 500 feet of the subject property. Staff has received two phone calls related to this request. Both callers wanted clarification on the request and subsequently had no issue with the request. Staff received one email and one letter relative to the request (attached). After City Council voted to reconsider the variance request, a total of 115 letters were mailed to all property owners located within 500 feet of the subject property on December 13, 2011. Staff has received one email relative to the request (attached).

RECOMMENDED ACTION:
City Council adopt a Resolution approving Variance Petition 11-V7 from Section 58-296 of the Code of Ordinances in order to allow a parcel (approximately 14,250 square feet) with an existing duplex to be subdivided for property owned by Liberty Bank, FSB and located at 697-699 Fairway Terrace subject to the conditions found in the resolution.

Reviewed by Department Director	Reviewed by Finance	Reviewed by City Manager
Robin Singer	N/A	A. William Moss

City Council Action: