

TOWN COUNCIL MINUTES
September 22, 2003

This meeting of the Malabar Town Council was held at Town Hall at 2725 Malabar Road. The meeting was called to order at 7:30pm by the Chair, Bobbi Moccia. The prayer and pledge were lead by Mr. Rivet.

ROLL CALL: MAYOR:	PHILLIP CREWS - EXCUSED
CHAIR:	BOBBI MOCCIA
VICE-CHAIR:	STEVE RIVET
COUNCIL MEMBERS:	JANE HAVET
	BRIAN HUNTER
	BOB ROSSMAN
ADMINISTRATOR:	ED BOOTH
ATTORNEY:	KARL BOHNE
CLERK:	SUSAN KABANA

ADDITIONS AND DELETIONS:

MOTION: Rivet/Havet to approve agenda.

Moccia – would like to move action item 2 to a later date. Havet – wants to discuss tonight.

VOTE: All aye.

PUBLIC HEARINGS:

1. ORDINANCE 03-08, FIRST READING, 2003/2004 PROPOSED MILLAGE RATE

Moccia read:

ORDINANCE 03-08

AN ORDINANCE OF THE TOWN OF MALABAR, BREVARD COUNTY, FLORIDA, ADOPTING THE MILLAGE RATE FOR THE TOWN OF MALABAR FOR THE PERIOD FROM OCTOBER 1, 2003 THROUGH AND INCLUDING SEPTEMBER 30, 2004.

WHEREAS, public hearings as prescribed by Florida Statutes have been duly held in accordance with the laws of the State of Florida;

NOW, THEREFORE, BE IT ORDAINED BY THE TOWN COUNCIL OF THE TOWN OF MALABAR, BREVARD COUNTY, FLORIDA, THAT:

SECTION 1. The Town Council, in regular session duly assembled adopted the millage rate of 1.8488, to be levied for the General Fund upon all real and tangible personal property located within the boundaries of the above named taxing authority.

SECTION 2. The final levy of 1.8488 mills will result in a 9.9% increase of the rolled back rate of 1.6823.

SECTION 3. This final millage rate of 1.8488 is to fund the expenses for the fiscal year commencing October 1, 2003 and ending September 30, 2004.

SECTION 4. All ordinances or parts of ordinances in conflict herewith are hereby repealed.

SECTION 5. In the event a court of competent jurisdiction shall hold or determine that any part of this ordinance is invalid or unconstitutional, the remainder shall not be affected and it shall be presumed that the Town Council of the Town of Malabar did not intend to enact such invalid or unconstitutional provision. It shall further be assumed that the Town Council would have enacted the remainder of this ordinance without said

invalid or unconstitutional provision, thereby causing said remainder to remain in full force and effect.

SECTION 6. This ordinance shall become effective immediately upon its adoption. Moccia – opened the public hearing and asked for public comment, being none she closed the public hearing.

MOTION: Rivet/Rossman to approve.

MOTION TO AMEND: Rivet/Rossman to amend to 1.7642 mills.

VOTE ON MOTION TO AMEND: All aye.

VOTE ON ORIGINAL MOTION: Aye – Havet, Hunter, Rivet, Moccia, Rossman.

The millage rate will be 1.7642 for the 2003/2004 year.

2. ORDINANCE 03-09, FIRST READING, 2003/2004 PROPOSED BUDGET

Moccia read:

ORDINANCE 03-09

AN ORDINANCE OF THE TOWN OF MALABAR, BREVARD COUNTY, FLORIDA ADOPTING THE BUDGET FOR THE TOWN OF MALABAR FOR THE PERIOD FROM OCTOBER 1, 2003 THROUGH AND INCLUDING SEPTEMBER 30, 2004.

WHEREAS, the Town of Malabar has compiled a budget for the period from October 1, 2003 through and including September 30, 2004; and

WHEREAS, public hearings as prescribed by Florida Statutes have been duly held in accordance with the laws of the State of Florida;

NOW, THEREFORE, BE IT ORDAINED BY THE TOWN COUNCIL OF THE TOWN OF MALABAR, BREVARD COUNTY, FLORIDA, THAT:

SECTION 1. The Town Council, in regular session duly assembled adopt the final Budget of \$1,715,233.00 for the proposed expenditures from October 1, 2003 through and including September 30, 2004, reflecting the general operating millage rate of 1.7642 mills.

SECTION 2. This budget may be amended during the year if necessary, by resolution.

SECTION 3. All ordinances or parts of ordinances in conflict herewith are hereby repealed.

SECTION 4. In the event a court of competent jurisdiction shall hold or determine that any part of this ordinance is invalid or unconstitutional, the remainder shall not be affected and it shall be presumed that the Town Council of the Town of Malabar did not intend to enact such invalid or unconstitutional provision. It shall further be assumed that the Town Council would have enacted the remainder of this ordinance without said invalid or unconstitutional provision, thereby causing said remainder to remain in full force and effect.

SECTION 5. This ordinance shall become effective immediately upon its adoption.

Moccia – opens the public hearing and asks for public comment, being none, she closed the public hearing.

MOTION: Rossman/Havet to approve.

AMEND MOTION: Rossman/Havet to change the total budget amount to \$1,703,391.00.

VOTE ON AMENDMENT: All aye.

VOTE ON ORIGINAL MOTION: Aye – Havet, Hunter, Rivet, Moccia, Rossman.

CONSENT AGENDA:

Rossman/Havet to approve.

Rossman – on page 9, he voted no to the Dispenza refund request, Kabana is to correct.

VOTE: All aye.

Council Minutes 9/8/03.

REPORTS:

ATTORNEY

Bohne - has submitted an ordinance to Council that amends the current nuisance ordinance. He asks Council to look over and give him feedback. Also, is working on the road ordinance as well as others that come up.

ADMINISTRATOR

- FLC LEGISLATIVE CONFERENCE

Booth – one Council member should attend. Havet wants to go. Hunter may also go.

- PROPOSED ROAD ORDINANCE CHANGES

Booth – there is a tremendous amount of ambiguity in our ordinances, Booth is going through them chapter by chapter and will bring those proposals before Council as they come up. Notes that the road ordinance can be amended by resolution and that this will build a good road that will cost less to construct.

- INFORMATION ON FLORIDA RETIREMENT SYSTEM

Booth – we have learned that everyone on the payroll must be covered by some type of retirement program. Both McClelland and Smith have been enrolled in the deferred comp plan.

- JANE HAVET POND PROJECT

Booth – has given the information regarding the Havet pond to Council. There are some ambiguities in our ordinance that we have had to address to the attorney. We have a general ordinance that deals with site plans and excavation. He notes that site plans have to go to P&Z, but we have a specific pond permit procedure that requires a site plan but it does not have to go to P&Z, these two procedures cause a conflict. Discussion. If Council wants pond permits to go to P&Z then we need the code to say that, but it does not say that right now. He notes that this deals with 'general law' and 'specific law', and when you have more specific law then that is what controls, and the pond permit is more specific than a site plan. Discussion.

Rivet – heard that the pond was going to be an aquifer recharge area and is concerned about any detriment to the aquifer. Havet – St. John's went through a very rigorous formula as to whether or not there would be any negative impacts to anything in that area and it was determined that it would be nothing but a positive.

Bohne – one other thing that we have noticed in our code is that a pond is restricted to 12 inches deep, this is obviously a typo. Rivet – it is supposed to be 12 feet. Havet – we don't know that, you can't argue 12 inches or 12 feet so what she chose to do was if we didn't have something within the ordinances that was specifically mentioned, such as depth, then she deferred to the authority on the subject, which is St. John's, and they were very comfortable with 22 feet. Discussion.

Havet – notes that one of the purposes for this pond is to allow for some good drainage for the subdivision south of her.

Rossman – the property north of Havet is the CITA property, how will this affect that? Havet – that was all reviewed by St. John's. She notes that she stayed 80 feet

away from any wetland, which was the issue. Havet notes that the CITA lake is an unpermitted, untapped artesian well, it's really not considered a wetland, it was artificially generated. Discussion.

Bohne – notes that though a pond permit is not required to go to P&Z he feels that it should and that the ordinance should be changed.

- MSTU CONSIDERATION FOR SHERIFF PROTECTION

- Is getting citizen response in regard to this issue.

- There is dirt available at the park.

- Shows pictures of Town Halls. At the next joint meeting we will have more visuals.

- Hunter is looking for a van to use for prisoner transport.

- Rossman – has questions about the Norma Jean Ritter property and he is not comfortable with the decision. He has asked Mr. Booth to get another legal opinion. Rossman is not comfortable with the dividing of the land the way we discussed it. He can almost guarantee that we will have litigation over this. He would like to know that we are completely right before we go forward. Council agrees with Rossman and would like Booth to get a second opinion on this issue before moving forward.

CLERK

Nothing at this time.

PUBLIC COMMENTS: GENERAL ITEMS

- Bruno Dispenza – is returning the check written to him for \$200, he wants \$245.

- Dispenza – he recently asked the inspector to come to his house to ask if he could cut down a tree but he really didn't care what the inspector would say because he was going to cut it down regardless and deal with the consequences later. He feels that he does not have to tell the Town if he wants to cut down a tree on his property. He wants to know what is so important about an oak tree that he can't cut it down? He is not satisfied with our tree law and wants it repealed immediately. If not he will take this to court. He wants an answer today. Moccia – Council does not act on a whim.

Hunter – protected species cannot be cut down and when you cut a tree down it may impact your neighbor. Each tree is individual and must be looked at for it's own significance. These laws were established for a good reason and won't be changed overnight. Discussion.

Dispenza – will take this to court. Rivet – you can be sure we will fight you.

Kabana – asks Council if she is to reissue another check? Council – he can have the \$200 check. Discussion.

Hunter – asks Bob Wilbur from the audience if P&Z intended to give all the money back? Wilbur – yes, but not by unanimous vote. Discussion.

MOTION Hunter/Havet to refund Dispenza \$245.

Rossman – voted no the first time, Dispenza's attitude is an example of opening Pandora's box. Rivet – we each have a responsibility to know the law.

VOTE: Aye – Hunter, Havet. Nay – Moccia, Rivet, Rossman.

Discussion. Moccia – the \$200 will be here at Town Hall for 90 days from the date of the check which is September 18, 2003.

- Bruce Fletcher, Flashy Lane – is concerned about Havet's pond. Understands that it did not go to P&Z but he feels that it should. He is of the impression that the code says that the dirt is to stay on the premises. In addition he feels that Havet is taking

advantage of a typo and now the pond will become twice as deep. He wants to know where all the dirt is going. If the dirt is available then how does that conform with the code that states it can't leave the premises? How is the run off going to be affected? Where is the water going to go? How is it going to affect things? There was a 12 foot intent on an ordinance and he feels that Havet is taking advantage of a typo error.

Also, Booth brought this up as a report which means that the permit was already issued. Why bother bringing it up if it is already a done deal?

Fletcher's second issue is that he heard that dirt was available to Council members before the permit was issued. Havet – Fletcher's misunderstands, she offered the use of her contractors' trucks to facilitate the delivery of some of the Town's dirt.

Havet – regarding the depth. In the code it says 12 inches and people assume it means 12 feet, but we can't assume anything. We know that 12 inches is unreasonable but 12 feet is an arbitrary thing and an assumption. When she choose to go 22 feet she planed fully on exporting the dirt and selling it. The dirt is going to go into percolation septic systems. She has the right to sell the sand and she is going to do so.

Fletcher – according to the permit it says that dirt won't leave the premises. Havet – that is no where on her permit. Bohne – does not know what the permit says. Moccia – then we need to look at that permit. Bohne – our code prohibits people from removing dirt from the Town, period. You can deposit it in the Town but you can't deposit it in Palm Bay. He notes that there is no rational reason for this and he thinks it is unconstitutional. Discussion. Bohne – you can't tell someone that they can get rid of their dirt in the Town but not out of the Town, that is an irrational arrangement, it violates interstate commerce as well as a many other things. Discussion.

Havet – states that the water from the pond will not go anywhere. Her engineer designed it so the water will stay in the pond. It will not bother her neighbor to the north or south. The Town has been draining water from the neighborhood in front of her for years, this will provide retention for that water. Fletcher – who is responsible to maintain the pond? Havet – she is donating the surface area to the Town the maintenance will be the Town's issue.

Fletcher – often ponds that can be a liability have a fence around them. Is the Town going to have to fence this 2 ½ acre pond? If the intent is to give the pond to the Town, then that is great. But things are not always as good as they seem. Havet – her donating the surface area to the Town is up to her, the permit is not contingent upon her doing so. If there is a problem with the Town taking it over then she will keep the pond. Discussion.

Havet – there was never any intent to go less than 22 feet. The reason it was brought up at Council is because she does not want to do anything that the Council is not aware of publicly. She wants to answer all questions publicly, and while this is not normally an issue for Council to vote on, nor is it an issue for P&Z to vote on she is willing to answer any questions the public has concerning this issue.

AGENDA REQUEST FORM:

1. DAVID AND VALERIE CARTER, 1790 SANDY CREEK LANE, REQUEST FOR REIMBURSEMENT OF FINE FOR CUTTING DOWN TREES

Valerie Carter – they cut down nine dead pine trees where their house pad was to go and Jim Phelps fined them. They went to the Special Master but they weren't allowed to talk. Havet – feels that it was retaliation on Phelps' part.

Rivet – is there a mechanism for appeal of a Spécial Master? Bohne – they can appeal to the circuit court. Discussion. Bohne -- reads from the minutes of that Special Master meeting and states that the Carter's were given the opportunity to speak. Carter – they were told that Phelps would assist them at the hearing but he didn't and the Carter's were concerned that if they said anything they would get a \$5,000 fine. Moccia – understands what Carter is saying, notes that Phelps no longer works here.

Moccia – does not feel we can refund everyone's fine. Hunter – does not think Council can refund Carter's fine. Moccia – helping Dispenza led to this mess. Rivet – we understand the problems with the previous building inspector. Rivet does not think the Carter's should have been fined but states that the Council does not have the power to change the decision. Discussion. Moccia – Council feels their pain but they are sorry, they cannot refund the money.

Cindy Zindel – just wanted to say that when she called Phelps he told her she could cut down trees, she didn't know you had to have a permit.

OLD BUSINESS:

1. PROPERTY OWNER'S MAINTAINING THEIR STORMWATER DRAINAGE STRUCTURES

Cindy Zindel – feels there is confusion between zoning regulations and the Land Development Code regarding acreage needed to develop, unless there is water and sewer. Zindel herself wanted to know where this came from so she looked in the comp plan and explains what she found to Council.

Booth – regarding stormwater, our ordinance requires an individual to maintain their stormwater runoff. The county has the requirements for the septic. Booth states that an individual should be responsible to control their runoff in perpetuity and we need to correct the enforceability of our ordinance, it needs more 'teeth' to it.

Hunter – in referencing Zindel's issue he states that he went out to her site and both Zindel and O Z are both very, very low now. Water is actually directed to O Z's property. Booth – that is why we need to put teeth in our ordinance, which we are going to rewrite.

Rossman – how is the development of the Town 'packet' coming? Booth – Danielle is rewriting this and is 85% done.

Hunter – what can we do for O Z now? Booth – he has been there for a very long time. Discussion. Booth – will take Norm Smith out there and maybe they can come up with something. Rossman – would like to help him.

ACTION ITEMS:

1. QUALIFICATION OF CANDIDATES FOR THE NOVEMBER 4TH ELECTION

Moccia – those who qualified are: District 4 – Bobbi Moccia and Tom Eschenberg. District 5 – Bob Rossman.

MOTION; Rivet/Hunter to qualify the candidates.

Rivet – has the Clerk qualified the candidates and verified signatures? Kabana – yes.

VOTE: All aye.

2. IN LIGHT OF POSSIBLE SUNSHINE VIOLATIONS, A REQUEST TO SUSPEND SPECIFIC P&Z MEMBERS UNTIL SUCH TIME AS PUBLIC HEARINGS AND INVESTIGATIONS CAN TAKE PLACE

Moccia – feels this is personal, Havet should approach this on her own. Rossman – agrees with Moccia, feels that Council would be getting into an area that we shouldn't.

MOTION: Rivet/Rossman to table.

There is no discussion on a motion to table.

VOTE: Aye – Rivet, Rossman, Moccia. Nay – Hunter, Havet.

Hunter – feels this should be over as soon as possible.

3. RESOLUTION 09-03, AMENDING THE DEFERRAL FOR THE TOWN OF MALABAR 457(b) DEFERRED COMPENSATION PLAN**MOTION: Rivet/Rossman to read by title only. VOTE: All aye.**

Moccia read:

RESOLUTION 09-03

A RESOLUTION OF THE TOWN OF MALABAR, BREVARD COUNTY FLORIDA AMENDING THE DEFERRAL AMOUNT FOR THE TOWN OF MALABAR DEFERRED COMPENSATION BENEFITS; REPEALING SECTION 2 OF RESOLUTION 16-95; PROVIDING FOR DEFERRALS FOR EMPLOYEES; PROVIDING FOR CONFLICT; PROVIDING FOR AN EFFECTIVE DATE.

MOTION: Rivet/ Rossman to approve.**VOTE: Aye – Havet, Hunter, Rivet, Moccia, Rossman.****4. RESOLUTION 10-03, ENROLLING IN THE STATE OF FLORIDA RETIREMENT SYSTEM****MOTION: Rossman/Hunter to read. VOTE: All aye.**

Moccia read:

RESOLUTION 10-03

A RESOLUTION OF THE TOWN OF MALABAR, BREVARD COUNTY, FLORIDA, PERTAINING TO MEMBERSHIP INTO THE FLORIDA RETIREMENT SYSTEM; PROVIDING FOR REPEAL OF RESOLUTIONS OR PARTS OF RESOLUTIONS IN CONFLICT HERewith; AND PROVIDING FOR AN EFFECTIVE DATE.

MOTION: Rivet/Rossman to approve as per Ed Booths comments.

Rivet – accepts the amendment.

VOTE: All aye.**5. BUDGET LINE ITEM ADJUSTMENTS**

Kabana - adds two items.

MOTION: Rivet/Rossman to approve. VOTE: All aye.**6. RESOLUTION 11-03, BUDGET ADJUSTMENT UTILITY FUND, FUND 400****MOTION: Rivet/Rossman to read by title only. VOTE: All aye.**

Moccia read:

RESOLUTION 11-03

A RESOLUTION OF THE TOWN OF MALABAR, BREVARD COUNTY, FLORIDA, PERTAINING TO AN ADJUSTMENT IN THE FISCAL YEAR 2002-2003 MALABAR WATER UTILITY, FUND 400 BUDGET; PROVIDING FOR ADDITIONAL INCOME; PROVIDING FOR ADDITIONAL EXPENDITURES; PROVIDING FOR REPEAL OF RESOLUTIONS OR PARTS OF RESOLUTIONS IN CONFLICT HERewith; AND PROVIDING FOR AN EFFECTIVE DATE.

MOTION: Rivet/Rossman to approve.

Rossman would still like to know why we have to pay. Kabana – because the customers did not sign up like Bill Hall thought they would. Rossman – feels someone should be responsible for that boondoggle.

VOTE: all aye.

REPORTS: MAYOR, COUNCIL

- Havet – is concerned about the culpability if the P&Z members broke a sunshine law and Council allows them to continue in their office. She would like an investigation in a public forum. She worries that there have been several occasions where P&Z have overstepped the parameters of their office. She is very concerned that they will continue to do that. If this ends up at the state attorney's office and she wants to know if we would be held liable. Bohne – no.

Havet – she does not want this to go to the state attorney's office, she does not know enough about the issue. When she asked for a suspension it was only so we could get this out in the open and clear the air. That was her only reason. Her issue is that if there was an impropriety then to just shut their eyes to it is a mistake.

Moccia – Havet can file a complaint to the state attorney's office. Havet – she feels that Council can handle it better.

- Havet – if anyone has any questions on her pond, please call her.

- Hunter – the fence around the Jordan Scrub is finally beginning. He is seeing more hoof tracks than truck tracks. Caught some hog poachers trying to dump the hog remains, they were unsuccessful.

- Hunter – wants to help Zindel and O Z with the water.

- Hunter – feels that all things should be in the sunshine, an issue should be discussed.

- Rossman – agrees, but feels that this should be done in the proper manner. Notes that at the last meeting our attorney gave us direction regarding this issue and that we should follow that direction. Agrees that this should not hang over peoples heads.

Discussion. Bohne – as it relates to the particular project, the matters pertaining to alleged sunshine violation can be cured by holding a public meeting and having the matters that were discussed in private disclosed at that meeting. Bohne states that he called the state attorney's office and they said they would have difficulty prosecuting.

Havet – she does not want it to go there, her feeling is that if they did something wrong should they be exercising the rights of their office? Discussion. Havet – she just wants to know what they are doing. When can Council look at this? Rossman – we can hold a public hearing. Bohne – asking questions of a person who has a pending Sunshine violation has a 5th amendment right to not say a word. Havet – so then suspend them until we can figure out what happened. Discussion. Moccia – this is a discussion that was tabled and we have given options as to how it can be cured.

ADJOURNMENT


MOTION: Rivet/Hunter to adjourn. VOTE: All aye.

Meeting adjourned at 9:40 pm.

BY:


Chair Bobbi Moccia

ATTEST:


Susan Kabana, CMC
Town Clerk/Treasurer

DATE: 10/9/03