

TOWN COUNCIL MINUTES
July 1, 2002

This meeting of the Malabar Town Council was held at the Town Hall at 2725 Malabar Road.

ROLL CALL: MAYOR/CHAIR:	PHILLIP CREWS
VICE CHAIR:	CHARLENE HORTON
COUNCIL MEMBERS:	BOBBI MOCCIA
	BOB ROSSMAN
	NANCY TINIO-BORTON
	STEVE RIVET - EXCUSED
ATTORNEY:	KARL BOHNE
CLERK:	SUSAN KABANA

This meeting was called to order at 7:30pm by the Mayor.

ADDITIONS AND DELETIONS:

Mayor – move item #5 (EELS) as the first action item after the public hearing. Agenda changed without objection.

CONSENT AGENDA:

MOTION: Borton/Horton to approve the consent agenda. VOTE: All aye.

Council Minutes 5/20/02, 6/3/02, Workshop Minutes 6/11/02.

REPORTS:

ATTORNEY:

Bohne – nothing at this time.

CLERK:

- Kabana – stated that DEP sent a memo stating that we are funded for the 2002/2003 FRDAP grant. We have a ceremonial check for \$112,000. This grant is for irrigation for Malabar Park.
- Kabana – a few months ago representatives from the Florida League of Cities and City Street gave a presentation to Council on the employee retirement program. They were told to compare their program to our current program. They have finished their investigation of our current plan and the League charges a flat 30 basis-points as opposed to our current plan which is 45 to 75 basis-points, so there is a cost savings to the employees. Would like to present two resolutions at a future Council meeting to adopt this retirement program. Mayor – orders without objection. Horton – does public works have retirement? Kabana – yes. Another benefit for employees will be one-on-one consultations. Our current program is managed through the internet and telephone and leaves some employees in the dark as to how to manage their retirement.
- Kabana – is gathering information for the 2002/2003 budget. Asked if she needs to go out to bid for auditors this year. Mayor – yes, feels like we haven't been getting our monies worth. Would like a policy in place to change auditors every 3 to 5 years.
- Kabana – is working on the next newsletter, let her know if you have anything for it.
- Kabana – asks to take vacation, every year her family goes on vacation the last two weeks in July. Council does not object.

- Kabana – we received a fax from Anne Birch regarding the Baulkeny and the Flagler property. Since Birch is here tonight Kabana would like her to give a status of the properties.

Anne Birch – states that there are that there are about 21 acres remaining of Baulkeny's property that has been in the project area for some time. EELS was approached by Baulkeny's realtor last week asking if EELS is interested in acquiring the property. Birch states that they are interested, and the EELS faxed information on negotiations on this property to the Town this morning.

As a second items Birch explains that as an on-going effort toward good communication between the Town and the EELS, Birch informed the Town that they would be ordering appraisals on the Flagler property. Birch asks if there is any interest on the part of the Town in any additional road right-of-way. And if there is, then the EELS will need to know so that they can have the land appraised accordingly. This land runs along the Marie Street ROW so Birch is asking if there is any interest along Marie Street for any additional right-of-way.

There is some confusion as to whether we want to vacate ROW and Birch explains that she is not requesting a vacating of right-of-way. She states that EELS is looking to acquire the Flagler property and they need to know if the Town would like to acquire any additional ROW along Marie Street, and that the Town would be responsible for purchasing the ROW. If the Town wants the ROW the EELS will have the land appraised without that strip of ROW that the Town is interested in.

Mayor – feels we need a workshop, Council agrees. Birch – states that they will proceed with the appraisal.

PUBLIC HEARING:

1. CONDITIONAL USE, DOCK CONSTRUCTION, MALABAR MARINERS, 1555 U.S. HIGHWAY 1, IN COASTAL PRESERVATION ZONING.

Mayor – opens the public hearing.

Mark Thoe, Commodore of the Malabar Mariners – they need a conditional use permit due to the coastal preservation zoning. This went to P&Z and they approved the application. They have a DEP permit and they are in compliance with our code. Horton – feels they did their homework.

Mayor – asks for additional comment, being none he closes the public hearing.

MOTION: Horton/Moccia to approve the conditional use based on Malabar Code Section 1-6.1(2), Criteria for Conditional Use and Approval. VOTE: All Aye.

ACTION ITEMS:

5. EELS ISSUE: RESULT OF SPECIAL MASTER MEETING OF JUNE 24, 2002

Birch – there was a Special Master hearing last week, and the order of the Special Master was to dismiss the action. She received a letter from the State of Florida in respect to the Town this morning, indicating that they (the State) had delayed the closing of the property. This is because the Council has 30 days to appeal the action and the State does not want to close with a cloud on this title. At first EELS was afraid that the State was going to terminate the closing but the State has decided to delay the closing until such time that the Council takes action stating that they will not appeal. She is hear tonight to answer any questions.

Bohne – the Special Master concluded that dismissal was warranted because he found that the tree protection ordinance of the Town was not intended to preclude or require a permit for legitimate fire control activities undertaken by another governmental entity. In his verbal order the Special Master did find that there should be intergovernmental cooperation. Bohne reads an excerpt from the order: 'we've received substantial testimony from the County

employees who have testified that this activity would not have resulted in the death of vegetation protected by the ordinance, but would have basically put it back to a size where it is more reasonably fire controllable.” So the Special Master found that there was no violation. Bohne feels that this would be a very hard appeal to win.

MOTION: Borton/Horton to direct the Town attorney to write a letter to the State that we concur with the finding of the Special Master and the Town does not plan to appeal the decision. VOTE: All Aye.

Moccia – would just like to have better communication. Birch – definitely.

1. APPROVAL OF BID, JOHNSTON AVENUE, 306 FEET

William Turnball of West Melbourne submitted the low bid of \$5,757.50.

MOTION: Borton/Moccia to approve the bid. VOTE: All Aye.

2. REQUEST FOR ISSUANCE OF BUILD PERMIT PRIOR TO COMPLETION OF ROAD CONSTRUCTION (PARKER)

Mayor – it is Town policy that a road is constructed prior to the issuance of a permit to build and that really doesn't make good sense for anyone because what happens is that a new road is built and then it's torn up by the big trucks that are used to build the house. And then we have a brand new road that is in pretty bad shape. What Parker is asking for is that they will put up the 120% bond to build the road if we'll allow them to do the construction first and then build the road after they have completed the house.

Rossman – he talked to Phelps today and he notes that this is the exact reason for Parker's request. Phelps – the key to this is to withhold the Certificate of occupancy until the road is completed and accepted. He feels that it would be far better for the Town to allow the construction of the house before the road is completed.

Motion: Borton/Rossman to approve this request.

Phelps – notes that Parker's permit is ready, as soon as he pays the bond he's able to pick up the permit.

VOTE: All aye.

Mayor – for the record, Steve Rivet is out of the country and his absence is excused.

3. DON FOLEY, BERRI PATCH PRESCHOOL REQUESTING SUPPORT FOR RELIEF FROM COUNTY IMPACT FEE

Kabana – Mr. Foley can apply for an exemption to the impact fees under the county ordinance, but in the county ordinance there is no section allowing for an exemption due to a late entry, which is what he has. Unless Mr. Foley comes up with a legal reason as to why he should be exempt, he will be turned down by the County. Foley can appeal that decision to the Brevard County Board of Commissioners.

Foley – stated that he signed the application on the 25th of May. The Town didn't date stamp the application until the 6th of June. The impact fees went into effect on the 2nd of June, there was a two day weekend period. There were two business days that went by and those two days are going to cost him \$32,000. He feels this is in excess, especially since he's paid over \$100,000 in improving Malabar Road. He is asking for Phelps to issue the CO without them paying the impact fee.

Rossman – feels that Foley should pay the impact fees. Mayor – feels that the County Commission would have to provide the relief that Foley needs. Foley – then could they put up a bond for the amount due until this is resolved so they can have their CO? Mayor – does not

think we can do this. We can call the Commission and ask that the issue be expedited. Moccia – feels that each Council Member should call the Commissioners and explain how they feel.

4. DISCUSSION OF TOWN ADMINISTRATOR

Mayor – has a speaker card and asks if Judith Hard from the audience wants to speak. She passes. Mayor – notes that there was a previous meeting regarding this issue and what needs to be considered tonight is the letter of resignation from the Town Administrator.

MOTION: Moccia/Rossman to accept the resignation as submitted by the Town Administrator including paying him \$4,000 and including terminating the Council investigation at this time. Also, she would like Mr. Hall to execute a release for the Town of Malabar.

Bohne – it will release any liability concerning his employment with the Town, it will be very detailed.

Moccia – reads the resignation: 'I hereby submit my resignation as Town Administrator effective July 31, 2002. I request a motion by Council to award me \$4,000 in accrued benefits and that all investigations cease.' Moccia – has a problem with the last sentence. Rossman – has a problem also.

Bohne – the resignation differs from the motion. The resignation states that 'all investigations cease' and the motion states that 'all investigations cease at this time'.

Tinio-Borton – so this could be opened up again in a few month? Moccia – if there was something that was found she feels that the Town should be protected. Tinio-Borton – are we not protected? Rossman – if there were other acts of a greater nature that were found later then they could hang around our necks like an albatross. Tinio-Borton – we can move on? Rossman – yes, we can move on.

VOTE: All aye.

Rossman – we need to replace the Town Administrator as quickly as possible, we need to have a workshop as soon as possible. Bohne – went online today and found a list of 'managers in transition' from the City Managers website, we may be able to use someone temporarily.

The workshop is set for July 9, 2002 at 7:30 pm.

- Kabana – needs Council to assign one of themselves to approve bills.

MOTION: Tinio-Borton/Rossman that Moccia approve bills for the Town. VOTE: All aye.

- Kabana – Phelps needs someone to take direction from. Phelps – uses the Attorney and the Planner when necessary and can go to the Mayor for other issues. Mayor – is not sure he is the best person for that job. Rossman – will do this.

MOTION: Moccia/Tinio-Borton for Phelps to take direction from Rossman. VOTE: All Aye.

- Kabana – now the Fire Chief and Carl Beatty need contacts. Moccia – will take over for public works. Mayor – the Chief can report to himself.

- Kabana – we need a voting member to the TAC. Rossman – will do this.

MOTION: Tinio-Borton/Moccia for Rossman to be the voting member for the TAC. Mayor approves without objection.

- Kabana – the Space Coast League of Cities? Mayor – will do this.

MOTION: Horton/Tinio-Borton for the Mayor to be the voting member for the Space Coast League of Cities. Mayor approves without objection.

6. APPROVAL REQUEST FOR GENTILE TREE PLANTING PLAN FROM SPECIAL MASTER MEETING OF JUNE 24, 2002

Bohne – his understanding is that there is a Special Master order concerning the location of several trees that were removed off the Gentile property. And the order left it up to Phelps and the applicant to come up the plans for replacement, and apparently there is a glitch as to the location of the trees. Phelps has one idea for the location and Gentile has another idea. And, interestingly enough, the relocation of trees is defined in our code as something that comes before Council. So it is up to Council as how to proceed.

Moccia – has looked at the types of trees Gentile wants to plant and where he wants to plant them and she feels that it will not work. The base of the trees is 25 feet and it looks as though the trees will cover the street in some areas and go into the neighbors property.

Victor Watson, 1970 Michigan Avenue, Cocoa, FL – he is a real estate attorney and he is here representing Dr. Gentile. They are trying to comply with the special masters order. The special master found specifically that there were some trees removed accidentally, based on a good faith misunderstanding, and that the permit had a legal description on there that was the entire property and Mr. Bohne said that would not have been allowed. It would have been in a smaller area. They weren't able to determine the number of trees which were outside the permit as opposed to inside, but they found that the total number of trees removed was 41. The heavier vegetated area was where the house was to be, so the estimate is that there were probably 20 trees removed outside the permit area. The special master said that there should be 40 trees replanted.

At that time there was a C.U.P. application before the Town and that it had already shown that southern red cedar were to be used as an opaque buffer on the property. Southern cedar is a native species, it is an evergreen and is very hearty and it grows in a variety of climates and it grows very quickly. It is a good species to use for this purpose.

The location of the trees has never really changed, nor the types of trees. It is just a question of where the trees will be planted because there will be more than 40 in the long run. But application for the replacement trees has been shown to Phelps, who had some questions. Gentile would like to put 34 trees ending where the road curves, and then another six trees in another area. Watson uses a map to show the location of the trees.

Dr. Gentile – shows on a map where he cleared trees. He states that the majority of the trees that were cleared were from the area for the house pad and where the barn is proposed to go. Bohne – let's not re-litigate the special masters findings. Right now we need to discuss where the trees are going to go. Gentile – from a historical back ground he feels it is important to know where why this all came about.

Crews – his question is, if the trees are to be replaced where are they to come from?

Rossman – the Special Master says 'as directed by the Building Official of the Town of Malabar'. Gentile – it also says that he (Gentile) is to recommend and offer where he is to plant them and then it goes to the Building Official and Gentile has discussed that with Phelps and he feels that Phelps agrees.

Rossman – asks if Phelps agrees with the drawing that Rossman has. Phelps – yes, he agrees with the drawing that Rossman has. Watson – the problem is that Gentile will have to take out existing vegetation to put other vegetation back in, which defeats the purpose.

Gentile – he left 20 feet deep or more of vegetation between himself and Drivers property.

Crews – wants to hear from Phelps. Phelps – on the property line where the trees are proposed by Gentile on the north side of the entrance lot, the road is off set to the north and very close to the property line, and there is also a drainage swale there. And in order to plan a

25 foot tree, such that it is not on landowner to the north (Wilson's property), would put the tree out into Gentile's existing driveway. Gentile – agrees.

Crews – states that Phelps' drawing shows a tree line on the south side on the front portion of the lot. Phelps – one of the main things that has been an objection by the adjoining property owner has been the operation of the commercial stable. Phelps' reasoning for placing the trees on the south side is that there is adequate land for placing the trees so that they do not overhang onto the property to the south (Driver's property) and it will also provide Driver a barrier that Driver has been looking for, which Phelps believes to be the reason for the screening requirement that was established in the conditional use code. Based on that is why he made the recommendation that the trees be planted on that south line. And then to start where the driveway stops at Mr. Wilson's and go north along the east boundary line in order to provide a barrier between those property owners along Corey Road and Gentile's property. Once those trees are planted then Gentile can add additional plantings.

Crews – it looks to him like somewhere along the process trees will be planted in such a manner that will satisfy both what Phelps is requesting and what Gentile is asking for, is that correct? Phelps – that will be the case depending on Council's action regarding the CPU. Crews – then at this point we are talking about timing. Rossman – the 40 trees were supposed to be in by the 2nd of June.

Watson – but at the last Special Master meeting did not Phelps say that he (Phelps) was not sure that the Southern Red Cedar was acceptable? Phelps – that is correct and that is why we are here this evening.

Gentile – states this has been the problem all along, ever since the day of the order. Gentile has asked Phelps whether or not southern red cedar would be acceptable and Gentile could not get an answer from Phelps, and Gentile still does not have an answer. Crews – do we have an answer now? Phelps – the reason there has been no answer is because in the order it specifically refers to the section of code that places the 'tree selection' on the Town Council. It is Phelps' opinion that the red cedar does meet the requirements of the ordinance, whether it's good or not is up to the Council.

Tinio-Borton – all she wants is for the neighbors to have the barrier they feel they need. The neighbors are the ones we care about, this has gone on way too long. So Council needs to make a motion that we make the trees go down both sides and let these people decide because they will have to live around it all the days of their lives. When she came to the meeting last week she found out that the Town is holding up the process, so let's make a decision.

MOTION: Rossman/Moccia that we follow the building inspectors design and we do not care what tree.

Watson – so you are suggesting that the current native vegetation be removed and that these trees be planted in their place? Moccia – no, you can't plant on top of the fence line anyway. Gentile – along the Driver's fence line, where his horses are currently installed there is 25 feet of width of vegetation that runs down the length of Driver's house as a barrier. Gentile is suggesting planting trees where it is sparsely vegetated, which is in the back. In the front it is already so heavily vegetated he wants to leave that alone.

Crews – it appears that there are to be trees planted along that vegetated area eventually and whether it is done now or later does not seem all that important in the Mayor's mind.

AMENDED MOTION: Moccia/Rossman to follow the building inspectors design and that southern red cedar is a fine choice of tree for this.

VOTE: All aye.

Tinio-Borton – how soon will these trees need to be planted? Phelps – he will leave that up to Gentile, Phelps will send Gentile a letter tomorrow regarding the Council's decision. Time is on Gentile's side. Rossman – does not agree, there is a clock ticking. Crews – but that is in the Special Master corner and not a Council's decision.

Tinio-Borton – can she ask Driver's if they are satisfied with Council decision? Bohne – not really, that is for the Special Master.

Watson – can they have the size of the tree approved? This time of year the size of trees that are available are 5 to 6 feet tall and in 15 gallon containers. Gentile – the 8 foot variety will not be available until November. Watson – these will be 8 feet by November. Gentile – he wants Council to know that he is trying to achieve the opaqueness that Council is asking for by choosing this tree. There are less expensive trees available and it wouldn't satisfy any visible opaqueness, he is trying to give cover from the ground up and will block visibility and block sound. He has spoken to Wilson and Wilson knows that the trees will not work on their property line and Gentile is willing to work with Wilson to come up with something that does satisfy them. But Gentile is asking Council one more time to reconsider the placement of those cedars because in the front part of the property there isn't any room to put the cedars but where there are spaces Gentile will happily plant them. He wants Council to know he is not fighting them on this.

Crews – states that we are beyond that point and that issue is between Gentile and Phelps. Crews feels that now we are talking about the size. Phelps – can make a decision on the height.

MOTION: Rossman that we allow Phelps to do that. Mayor approves without objection.

Rossman – what happens if the trees die? Phelps – he is not aware of any warranty requirements.

7. RESOLUTION 13-02 TRAFFIC SIGNAL MAINTENANCE

Crews – by administrative error there was not a motion put on the floor for this item, and while we are at it we might as well change the authorized signature on contract.

MOTION: Rossman/Horton that the Mayor sign and the Clerk attest his signature on this contract. VOTE: All aye.

8. FIRST READING, ORDINANCE 02-04, REDISTRICTING OF COUNCIL MEMBER SEATS

Mayor recognizes Bill Withers – as the sole witness of the redistricting meeting he feels that district 1 should encompass the entire coastal area because of their many similarities, including transportation issues. Currently Rocky Point is proposed to be in district 2 which is all the way west to Corey Road, he asks if an elected official from Rocky Point would seriously consider raising taxes to pave roads when they live on some of the best paved roads in Town? He would like Council to consider changing this. Horton – notes that Julane Kikla lived in Rocky Point and she did a good job regarding flooding on LaCourt Lane.

MOTION: Tinio-Borton/Horton to read by title only. VOTE: All aye. Mayor read:

ORDINANCE NO: 02-04

AN ORDINANCE OF THE TOWN OF MALABAR, BREVARD COUNTY, FLORIDA, PROVIDING FOR AMENDMENT TO CHAPTER SEVEN, ELECTIONS, OF THE CODE OF ORDINANCES; PROVIDING FOR CODIFICATION; PROVIDING FOR SEVERABILITY; PROVIDING FOR CONFLICTS; AND PROVIDING FOR AN EFFECTIVE DATE.

MOTION: Tinio-Borton/Horton to approve.

Tinio-Borton – feels that there needs to be two representations on the rivers edge. Crews – notes that Council was constrained by the way the numbers came back from the census bureau and also he feels that it's best to keep the lines as similar to the lines that were already there. Rossman – after going through the process he feels that the proposed plan is the best plan but he does think that Withers has a valid point.

VOTE: Aye – Tinio-Borton, Horton, Moccia, Rossman. Nay – none.

Kabana – this will have a public hearing and second reading at the July 15th Council meeting.

DISCUSSION:

1. DISCUSSION OF BREVARD COUNTY LANDSCAPING AND CLEARING ORDINANCE

Bohne – this has to do with the eradication of invasive vegetation and the County has amended it's ordinance to keep up with new legislation encouraging the removal of those type of plants. It looks like it is targeted toward developers and if the Town does not opt out then we are covered. Bohne feels that we should not re-invent the wheel and stay covered under the County on this. Crews – agrees, he does not know what we would do different.

Phelps – his only concern is if there is a conflict between this ordinance and Malabar's landscaping ordinance. Crews – then that issue should be looked at and brought back to Council if necessary. Phelps – if there are no objections he would like to put this in front of P&Z and have them look at this. Bohne – feels we can opt out as long as we write our own ordinance. Tinio-Borton – but is P&Z the correct place to take this? Rossman – why do this? Let's not reinvent the wheel.

MOTION: Mayor we will not opt out without objection.

PUBLIC:

Richard Cameron put in a speakers card but he has left.

REPORTS: MAYOR, COUNCIL

- Horton – nothing at this time.
- Tinio-Borton – nothing at this time.
- Moccia – nothing at this time.
- Rossman – at the last Council meeting Bohne stated that the DOT light maintenance contract stated that we were a city and that it should be changed to town, has that been done? Bohne – is not sure. Crews – there is no legal distinction between the two. Rossman – but we will address this, correct? Bohne – yes, but it is no legal significance.
- Rossman – with this letter to the County will we resolve the BML lawsuit? Bohne – he spoke to Cliff McClelland about the status of dismissal of the suit and McClelland said that Kirshenbaum is taking a nice long vacation and has no status regarding the dismissal and it is something that we will monitor.
- Tinio-Borton – what about the truck ordinance? Bohne – he has been so busy he has not had a chance to look at this. Rossman – could you call the City of Palm Bay and just copy theirs instead of reinventing the wheel again? Bohne – yes, it certainly is an issue that needs to be addressed. Tinio-Borton – apologized for making you wait so long. Rossman – thinks we do need to address this and could we have this for our next Council meeting? Bohne – does not see any reason why we can't.

- Kabana – will give Council an action item list behind the agendas. Rossman – likes this and finds it helpful.
- Rossman – can we resolve the Town Administrator tomorrow? Bohne – will work on this. Moccia – wants to make sure we can get all our items back. Bohne – has a comprehensive list of items that belong to the Town and will be contacting Mr. Hall.
- Crews – we often get comments from the public and sometimes it is disruptive and as the Chair it is a difficult decision as to when to let them speak. At Council's indulgence he would like to have a Council sponsor in order to recognize someone who would like to speak. Otherwise he is not going to recognize comments from the floor unless he has some interest on the Council. Council has no problem with that.
- Bill Withers, Candy Lane – would like the email address's of the Council members in the Mailboat. Kabana – does not feel that is a good idea due to public records law. Crews – if you have email then you probably have access to the web and contact should be made through the web and that way public records are kept and properly filed.
- Yovone Rasor, Kramer Lane – regarding the resignation of the Town Administrator. There are a couple of issues that she would like to bring to the Council's attention. It saddens her that it came to this and she hopes that it will never take ten years to do it again. She would really like to see some type of regulatory action put in place so that when you have citizens come before a Town Council meeting and they say that there are complaints against the Town Administrator, or anyone else on staff, that we don't have to wait however long for a Council that will finally back the citizens. Also, she is not in favor of changing the title of the administrator to manager, she likes the strong Council form of government. And she does not know who signs the checks but a check should not be signed without receipts.
- Rossman – invites the citizens to the meeting regarding the town administrator's position.
- Wilbur – is happy we are going to have a meeting regarding the Town Administrator, the position needs to be defined. He was part of a committee that spent months going over the requirements for the Building Official and he would like to see the same procedure used for the town administrators position. We need a measuring stick for that position to be accountable to.

MOTION: Mayor adjourned the meeting without objection.

BY:

Chair Bobbi Moccia

ATTEST:

Susan Kabana, CMC
Town Clerk/Treasurer

DATE: _____