

CITY OF MELBOURNE, FLORIDA
MINUTES – REGULAR MEETING BEFORE CITY COUNCIL
JUNE 8, 2004



A regular meeting of the City Council was held in the City Council Chamber, 900 East Strawbridge Avenue, and was called to order at 6:30 p.m. by Mayor John A. Buckley.

1. Reverend Bruno Malara, Lighthouse Assembly of God gave the invocation.
2. Pledge of Allegiance.
3. Roll Call.

Present:	John A. Buckley	Mayor
	Ed Palmer	Council Member, District 2
	Pat Poole	Council Member, District 3
	Grace Walker	Council Member, District 4
	Cheryl Palmer	Vice-Mayor, District 5
	Loretta Isenberg-Hand	Council Member, District 6
	Jack M. Schluckebier, Ph.D.	City Manager
	Paul R. Gougelman, III	City Attorney
	Cathleen A. Wysor	City Clerk
	Amy W. Elliott	Assistant City Manager
	Cindy Dittmer	Planning & Economic Development Director

Absent: Richard Contreras Council Member, District 1 (vacation)

4. Proclamations and Presentations

None.

5. Approval of Minutes – May 25, 2004 Regular Meeting

Moved by Hand/E. Palmer for approval. Motion carried unanimously.

6. City Manager's Report

City Manager Jack Schluckebier updated Council on the following items:

- Recent rain has caused water usage in the City to drop back to normal – approximately 15 mgd. The water level in Lake Washington has stabilized and the situation will continue to improve as we enter the rainy season.
- The Citizens' Academy, scheduled for June 24 at the Eau Gallie Civic Center, is full. The City issued a news release and an article appeared in the newspaper. Over a four-day period, all 30 spaces filled. Because of the high level of interest, five additional people will be accepted and future academies will be scheduled.
- We have received concerns from across the City about the recent resurfacing of streets. The resurfacing was done during extreme heat, which has resulted in the

CITY OF MELBOURNE, FLORIDA
MINUTES – REGULAR MEETING BEFORE CITY COUNCIL
JUNE 8, 2004

final finish having markings. The company that performed the work will return and take corrective action, probably within the next 30 days. The top coating does not have damage, rather it just doesn't look the best.

- The Florida League of Cities awards banquet will be held on June 26 at the Caribe Royale Resort in Orlando. Council Member Hand will receive recognition for 25 years of public service. And, Attorney Gougelman is a finalist in the City Attorney of the Year award.

7. Public Comments

Lillian Ramey, 230 Third Avenue, Indialantic, expressed concern about the water from the flushing of fire hydrants entering the Indian River Lagoon. She said that this pollutes the river. She added that she has noticed a difference in the taste of the water recently. Ms. Ramey submitted a publication about the Indian River Lagoon for Council to review.

UNFINISHED BUSINESS

8. ORDINANCE NO. 2004-34 (Z-2004-982) THE RICHMAN GROUP: (Second Reading/ Public Hearing) An ordinance to change the zoning from C-2 (General Commercial) to R-2 (One-, Two-, and Multiple-Family Residential) on four parcels totaling 14.35 acres, located on the west side of South Harbor City Boulevard, between Caroline Street and NASA Boulevard. (Owner - Richard L. Schmidt) (Applicant - The Richman Group of Florida, Inc.) (Representative - Robby Block) (First Reading - 5/11/04) (Postponed - 5/25/04)

Mayor Buckley stated that this item has been advertised for public hearing; however, Phil Nohrr, the applicant's representative, has asked that it be postponed until the June 22 meeting. The Mayor asked for a motion to postpone this item and continue the public hearing until June 22.

Moved by C. Palmer/E. Palmer to postpone this item until the June 22 meeting. Motion carried unanimously.

9. ORDINANCE NO. 2004-38 (Z-2004-986) MASLOW DEVELOPMENT GROUP, LLC: (Second Reading/Public Hearing) An ordinance providing a zoning change from R-A (Residential Holding) to R-2 (One-, Two-, and Multiple-Family Residential Dwelling with a cap of six units per acre) on a 9.7-acre parcel, located on the south side of Eber Road, east of Stack Boulevard, and west of Babcock Street. (Owner - New Covenant Fellowship Church/Gary Stebbins) (Applicant - Maslow Development Group, LLC) (Representative - Albert S. Lagano) (First Reading - 5/25/04)

Mayor Buckley announced that this item is a public hearing. He reported that Albert Lagano, attorney representing the applicant, has requested that this item be postponed for 30 days (until the July 13 meeting). He asked for a motion to postpone this item and continue the public hearing until July 13.

CITY OF MELBOURNE, FLORIDA
MINUTES – REGULAR MEETING BEFORE CITY COUNCIL
JUNE 8, 2004

Moved by Hand/E. Palmer to postpone this item and continue the public hearing until July 13. Motion carried unanimously.

10. ORDINANCE NO. 2004-39 (Z-2004-985) STEVE CORDELL: (Second Reading/Public Hearing) An ordinance providing a zoning change from C-2 (General Commercial) to R-3 (Multiple-Family Residential) on a 0.28-acre parcel, located on the east side of North Harbor City Boulevard, north of Sarno Road. (Owner/Applicant - Steve Cordell) (Representative - David Bogenrief, P.E.) (First Reading - 5/25/04)

City Attorney Paul Gougelman read the ordinance by title. There were no disclosures by Council and no comments from the public.

Moved by E. Palmer/Hand for approval of Ordinance No. 2004-39. The roll call vote was:

Aye: E. Palmer, Poole, Walker, Hand, C. Palmer and Buckley

Nay: None

Motion carried unanimously.

11. ORDINANCE NO. 2004-40 (AR-2004-151), ORDINANCE NO. 2004-41 (CPA-2004-05), ORDINANCE NO. 2004-42 (Z-2004-984), AND ORDINANCE NO. 2004-43 (CU-2004-04) ALOHA PET AND BIRD HOSPITAL: Ordinances providing for annexation, Comprehensive Plan Amendment, rezoning, and a conditional use on 0.55-acre parcel, located at 968 East Eau Gallie Boulevard. (Owner/Applicant - Dr. Jose Peppin)
- a. Ordinance No. 2004-40/AR-2004-151: (Second Reading/Public Hearing) An ordinance providing for the annexation of a 0.55-acre parcel, currently developed as a veterinary clinic. (First Reading - 5/25/04)
 - b. Ordinance No. 2004-41/CPA-2004-05: (Second Reading/Public Hearing) An ordinance establishing a Commercial land use for a veterinary clinic. (First Reading - 5/25/04)
 - c. Ordinance No. 2004-42/Z-2004-984: (Second Reading/Public Hearing) An ordinance establishing a zoning designation of C-2 (General Commercial). (First Reading - 5/25/04)
 - d. Ordinance No. 2004-43/CU-2004-04: (Second Reading/Public Hearing) An ordinance granting a conditional use to continue the operation of a veterinary hospital. (First Reading - 5/25/04)

Attorney Gougelman read Ordinance Nos. 2004-40, 2004-41, 2004-42 and 2004-43 by title. There were no disclosures by Council and no comments from the public.

CITY OF MELBOURNE, FLORIDA
MINUTES – REGULAR MEETING BEFORE CITY COUNCIL
JUNE 8, 2004

Moved by Poole/E. Palmer for approval of Ordinance No. 2004-40. The roll call vote was:

Aye: E. Palmer, Poole, Walker, Hand, C. Palmer and Buckley

Nay: None

Motion carried unanimously.

Moved by Walker/Hand for approval of Ordinance No. 2004-41. The roll call vote was:

Aye: E. Palmer, Poole, Walker, Hand, C. Palmer and Buckley

Nay: None

Motion carried unanimously.

Moved by Hand/Walker for approval of Ordinance No. 2004-42. The roll call vote was:

Aye: E. Palmer, Poole, Walker, Hand, C. Palmer and Buckley

Nay: None

Motion carried unanimously.

Moved by E. Palmer/Poole for approval of Ordinance No. 2004-43. The roll call vote was:

Aye: E. Palmer, Poole, Walker, Hand, C. Palmer and Buckley

Nay: None

Motion carried unanimously.

NEW BUSINESS

12. COUNCIL ACTION RE: Contract award for construction of the Babcock Street Realignment, Project No. 02620, William Turnbaugh Construction, West Melbourne, FL - \$1,394,249.20; a transfer of \$86,922.58 from the Water/Sewer Capital Construction Account, \$300,051.72 from the Stormwater Utility Reserve, and a transfer from the Babcock Community Redevelopment Agency (CRA) of \$259,254.70 to the Babcock Street Capital Improvement Project budget; and a budget increase of \$259,254.70 in the Babcock CRA based on anticipated revenue from property sale to accommodate the transfer for their capital project.

City Engineer Howard Ralls reviewed the agenda report. The recommendation is for approval of the construction contract award to William Turnbaugh Construction, Inc. in

CITY OF MELBOURNE, FLORIDA
MINUTES – REGULAR MEETING BEFORE CITY COUNCIL
JUNE 8, 2004

the amount of \$1,394,249.20; a transfer of \$86,922.58 from the Water/Sewer Capital Construction Account, transfer of \$300,051.72 from the Stormwater Utility Reserve, and a transfer from the Babcock CRA of \$259,254.70 to the Babcock Street CIP budget; and an increase to the Babcock CRA budget by \$259,254.70 based on anticipated revenue from sale of the property.

Mr. Ralls confirmed for Council Member Pat Poole that benches are not part of this project. Mrs. Poole asked that benches be considered around the retention area in the future.

Moved by E. Palmer/Hand for approval of the recommendation. Motion carried unanimously.

13. CONSENT AGENDA:

Assistant City Manager Amy Elliott confirmed for Council Member Grace Walker that the video equipment in Item “b” will be used in police cars.

Regarding Item “g”, Mrs. Walker asked about the cost. Mrs. Elliott explained that funding was proposed during the third quarter budget review last year. A total of \$698,636 was funded by transfers from the General Fund and Water and Sewer System Fund. The balance of funding from the Golf Courses, Storm Water Utility and Airport Funds will be recommended after final negotiation with the vendor. The firm that has been ranked as having the best overall product will probably be in the \$700,000 - \$800,000 range. This item authorizes staff to negotiate the contract, which will return to Council for approval.

Moved by Hand/Walker for approval of the consent agenda, Items “a – i.”

Mrs. Poole discussed the Riverwalk Club Villas and Townhomes (Item “h”). Mr. Schluckebier confirmed that this project received the required advertising and notices. He added that with many projects at this level, the neighbors aren’t notified of site plan approval. Mrs. Poole said that she would like to see people notified within 500’ of every development. Following a brief discussion, the City Manager said that staff will ask the consultant selected to review our Zoning Code to review the notice requirements.

Public Works and Utilities Director Robert Klapproth confirmed for Council Member Ed Palmer (Item “d”) that the conversion from chlorine gas to sodium hypochlorite has occurred at Grant Street. The item on this agenda will cover the D. B. Lee plant.

The question was called. Motion carried unanimously.

The consent agenda was approved as follows:

- a. Contract award for lift station valve installation, Project No. 04306, Mueller Service Co., Pompano Beach, FL - \$21,688 and transfer of \$1,688 from the Infiltration & Inflow Project (No. 03314) to this project budget.

CITY OF MELBOURNE, FLORIDA
MINUTES – REGULAR MEETING BEFORE CITY COUNCIL
JUNE 8, 2004

- b. Purchase of five Gemini digital in-car headliner video equipment systems, Decatur Electronics, Decatur, IL - \$16,075.
 - c. E. Harris Drew Municipal Official Lifetime Achievement Award.
 - d. Sodium hypochlorite conversion at the D. B. Lee Wastewater Treatment Facility, Odyssey Manufacturing Company, Tampa, FL - \$35,600.
 - e. Authorization to sponsor the Florida Missing Children's Day with a donation of \$1,000 from the Law Enforcement Trust Fund.
 - f. SHIP 2003-2004 budget adjustments and authorization for the City Manager to execute an amendment to the City's agreement with Community Housing Initiative, Inc. to increase 2003-2004 SHIP funding for the Purchase Assistance Program - \$20,000.
 - g. Authorization for the City Manager to negotiate a contract for Replacement Financial Software, Tyler Technologies, Inc./MUNIS Divisions.
 - h. Resolution No. 1881: A resolution adopting names for private streets serving Riverwalk Club Villas & Townhomes.
 - i. Resolution No. 1882: A resolution to implement FY 2003-2004 Second Quarter Budget Review recommendations.
 - j. Resolution No. 1883: A resolution supplementing the schedule of miscellaneous fees to adopt property lien search fees.
 - k. Resolution No. 1884: A resolution amending Resolution No. 1705 by extending the terms of financing for the Babcock Street Community Redevelopment Agency Revenue Bond Anticipation Note, Series 2001 to mature on October 1, 2004.
 - l. Approval of payment schedule to consulting attorney for review of the adult entertainment ordinance, Michael Kahn, P.A. - \$20,000 and authorization for the City Manager to execute the legal services agreement.
14. FINAL PLAT APPROVAL (SD-2002-06) PALMWOOD SUBDIVISION: (Public Hearing)
A request for final plat approval on a 12.23-acre parcel zoned R-1B (Single-Family Residential), located on the west side of John Rodes Boulevard, north of Eau Gallie Boulevard. (Owner/Applicant/Representative - Eastwood Park Investments, Inc.) (P&Z Board - 5/20/04)

Planning and Economic Development Director Cindy Dittmer reviewed the agenda report. The Planning and Zoning Board unanimously recommended approval of the final plat for Palmwood Subdivision, consisting of a three-sheet plan coded 12\723-32\PLAT,

CITY OF MELBOURNE, FLORIDA
MINUTES – REGULAR MEETING BEFORE CITY COUNCIL
JUNE 8, 2004

prepared by John E. Stultz, Sr., PSM, of Melbourne, Florida, survey dated July 14, 2003, with the findings outlined in the agenda report and the following conditions:

- a. Any change to the final plat will require its re-evaluation by the Planning and Economic Development Department and Engineering Department.

Any substantial change to the final plat will require review and approval by the Planning and Zoning Board, Local Planning Agency, and City Council. A substantial change in the final plat includes, but is not limited to: 1) an increase of more than four lots, or 2) any change in the street network or retention pond location.

- b. The applicant shall not be entitled to record the final plat until all subdivision improvements are constructed to the satisfaction of the City or an improvement guarantee of at least 110% is provided to the City to ensure the completion of the improvements.
- c. Provide the additional required documents pursuant to Chapter 29 (Melbourne City Code), Section 29-5 (c) (4) prior to plat recordation.

Mrs. Poole referenced the applicant, Eastwood Park Investments, Inc., and asked who the owner is. She said the item was presented by Beville Outlaw at the Planning and Zoning Board meeting; however, Glen Outlaw (Planning and Zoning Board member) said he was the owner and filed a conflict of interest.

There were no disclosures by Council. Mayor Buckley opened the public hearing.

Glen Outlaw, President, Eastwood Park Investments, said that he is the president and his father is the vice president of the corporation. Eastwood Park Investments is one of their development corporations. He stated that he has nothing further to add to the presentation.

Mrs. Poole asked if any gopher tortoises or scrub jays were found during the environmental impact assessment. Mr. Outlaw said he believes the site has a couple of gopher tortoises. They have obtained permits and plan to do mitigation. He confirmed for Mrs. Poole that the gopher tortoises will be killed. Mrs. Poole said based on this she will not vote for the project.

Mayor Buckley asked Mr. Outlaw if he agrees with the conditions. Mr. Outlaw asked if condition “b” covers tri-party agreements and Attorney Gougelman replied yes. Mr. Outlaw said he has no problem with the conditions.

Mrs. Hand asked why it is so difficult to move the gopher tortoises. Mr. Outlaw replied that all the tortoises have to be tested and if they carry a disease, they cannot be relocated. The tortoises have to be preserved on site or the developer has to pay into a mitigation bank, which allows the tortoises to be buried. He added that is the way the

CITY OF MELBOURNE, FLORIDA
MINUTES – REGULAR MEETING BEFORE CITY COUNCIL
JUNE 8, 2004

game is played. Mr. Outlaw noted that his environmental engineer said there is a percentage that have the disease and, therefore, can't be relocated.

Mrs. Poole questioned that statement and said gopher tortoises are constantly being moved.

Moved by C. Palmer/E. Palmer for approval of the final plat, subject to the conditions noted. Motion carried. Council Members Poole and Walker voted nay.

15. ORDINANCE NO. 2004-44 (CPA-2004-07) AND ORDINANCE NO. 2004-45 (Z-2004-987) PAUL RUFO: Ordinances providing for a Comprehensive Plan Amendment and a zoning change on a 3.25±-acre parcel, located on the south side of East Eau Gallie Boulevard, east of Unity Drive, and west of Highway A1A. (Owner - BIFI Brokers) (Applicant/Representative - Paul Rufo) (P&Z Board - 5/20/04)
- a. Ordinance No. 2004-44/CPA-2004-07: (First Reading/Public Hearing) An ordinance changing the land use from Commercial to Medium Density Residential (10 units per acre).
 - b. Ordinance No. 2004-45/Z-2004-987: (First Reading/Public Hearing) An ordinance changing the zoning from C-P to R-2 (10) (One-, Two-, and Multiple-Family Residential).

The City Attorney read each ordinance by title. Mrs. Dittmer briefed Council. The Planning and Zoning Board unanimously recommended approval of this request subject to the findings in the agenda package and the following condition:

- a. The project will be generally consistent with the conceptual site plan submitted by the applicant at the Planning and Zoning Board meeting, with the understanding staff has not reviewed the site plan.

The proposed ordinances for the Comprehensive Plan amendment and the rezoning are included in the package in the event that City Council approves the request. If the request is not approved, the ordinances should be denied. City staff is not recommending approval of the requests due to the concerns regarding the consistency with other land uses along the Eau Gallie Boulevard frontage and the potential incompatibility issues that could arise with allowing residential uses directly along the roadway. Additionally, staff is concerned with the change of one of the last vacant parcels on the beachside to a residential use, thus lessening the overall amount of commercial uses.

Mayor Buckley asked for disclosures. Vice Mayor Cheryl Palmer said she looked at the property.

Paul Rufo, applicant, representing BIFI Brokers, explained that the buyers are interested in developing the property as a luxury townhouse project. Mr. Rufo distributed a letter

CITY OF MELBOURNE, FLORIDA
MINUTES – REGULAR MEETING BEFORE CITY COUNCIL
JUNE 8, 2004

dated April 20, 2004 to him from Planning, which outlines the process to develop the property with residential uses. The letter notes that staff has reviewed his request and finds that the requested land use and zoning would be consistent with the pattern of land uses in the area. Mr. Rufo said that based on this, he is surprised at the staff recommendation for denial.

Continuing, Mr. Rufo said that the property along Eau Gallie Boulevard, beachside, is in three jurisdictions – Brevard County, Melbourne and Indian Harbour Beach. Mr. Rufo distributed a map showing the commercial and residential uses in the area. He listed the square footage of commercial property along with the vacancy rate and stated that there is a tremendous amount of commercial property along Eau Gallie Boulevard, beachside, that is vacant. Additionally, the former K-Mart property in Indian Harbour Beach will soon be torn down to make way for residential uses.

Mr. Rufo explained that the subject property is small. They plan to construct 26 units, which would be eight units per acre. The development would be set back from Eau Gallie Boulevard and be completely walled with a gated entry system. Auto Zone is located next door and the back part of that property has a retention area, which would be compatible with the multi-family project.

Mr. Rufo submitted a letter he sent to the property owners on Unity Drive (single-family residential to the west) outlining his plans and asking the residents to contact him to discuss any concerns. Mr. Rufo reported that the owner of the subject property had the property for sale for at least five years, possibly more. The property could not be sold with a commercial zoning. Two respected developers are interested in developing the property as a residential development. Mr. Rufo concluded by asking Council to accept and approve the Comprehensive Plan amendment and the rezoning request.

Mrs. Walker asked Mr. Rufo why he believes there is so much vacant commercial property in this area. Mr. Rufo said he does not believe there was a need. He added that he attempted to attract Macaroni Grill, Chili's and other restaurants beachside; however, the demographics do not support the investment.

Vice Mayor Cheryl Palmer said that there is a lot of new residential development along A1A. Also Panera Bread Company is locating on Eau Gallie Boulevard. She asked if a change in the commercial development is coming soon. Mr. Rufo said there will probably be an increased demand; however, there is still a tremendous amount of vacant square feet available in the area.

Mrs. Palmer asked if it is more desirable to build on vacant land than to demolish existing structures. Mr. Rufo said not necessarily. Redevelopment is a sign of the future; it rids the area of eyesores and run down properties and makes way for a new and better product.

A brief discussion followed about jurisdiction. Mayor Buckley said that the north side of Eau Gallie Boulevard, from South Patrick Drive to A1A, is located in Indian Harbour

CITY OF MELBOURNE, FLORIDA
MINUTES – REGULAR MEETING BEFORE CITY COUNCIL
JUNE 8, 2004

Beach, with the exception of the veterinary clinic. Mrs. Poole said that if the commercial property in the area had developed under the City of Melbourne there wouldn't be so many vacant parcels.

Mr. Rufo distributed photographs showing the product they plan to build on this property. He discussed the development and stated that it would be an improvement for the single-family residential area located to the west. Mrs. Palmer said that it is similar to the layout or concept in Celebration, Florida.

Mayor Buckley referenced the recommendation. Mrs. Poole's motion for denial did not receive a second.

Mayor Buckley recognized a member of the audience who wished to speak.

Michael Lawrence, Hawksbill Island Drive, Satellite Beach, said that he owns the mobile home park located east of this property. He asked Council to approve the request. Mr. Lawrence stated that currently several homeless people are living in tents on the subject property, and they steal from the residents of his mobile home park.

Mrs. Poole said that developing the property as residential won't rid the area of homeless people. She added that we need quality development in the right area; there has to be a balance.

Council Member Loretta Hand said she supports taking another look at this, especially since there are so many shopping centers in the area with empty space.

Moved by Hand/Walker for approval.

Mrs. Poole read the reasons cited by staff in the agenda package for recommending denial. She stressed that in accordance with that recommendation, the ordinances should be denied.

Mrs. Palmer said she will vote for this on first reading; however, she wants to look at the overall issue of rezoning commercial to residential. She added that the City is in a growth mode and Council needs to carefully consider the future needs of residents in areas where development has been approved.

Mrs. Walker pointed out that it is unusual for staff to recommend denial. However, with all of the vacant commercial property in the area, it seems this request needs to be considered.

Mrs. Poole said that most of the vacant commercial property is not in the City of Melbourne. She added that the vacant property outside of the City was not properly planned or developed.

CITY OF MELBOURNE, FLORIDA
MINUTES – REGULAR MEETING BEFORE CITY COUNCIL
JUNE 8, 2004

Mr. Palmer said that a wide panoramic view of vacant property was given; however, all of that property is not in the City. He added that he would like to know how much of the property located in the City on Eau Gallie Boulevard zoned for business is vacant.

Mayor Buckley said that this item could be approved on first reading and staff would provide the answer by the next meeting, or the item could be postponed to allow staff time to obtain the information.

Moved by E. Palmer/Poole to postpone this item for two weeks until the next meeting (June 22). Motion carried. Mrs. Hand voted nay.

Mr. Schluckebier asked for clarification on the request for additional information. Mayor Buckley said that Council would like to know how much (commercial) property on the south side of Eau Gallie Boulevard located in the City of Melbourne is vacant. Mr. Schluckebier said that staff will provide jurisdictional information by the next meeting.

Attorney Gougelman added that the photographs distributed are conceptual and, at this time, are not a condition of approval.

Recessed: 8:02 p.m.
Reconvened: 8:12 p.m.

16. ORDINANCE NO. 2004-46 (CU-2004-06) CIGAR BOB'S HAVANA CLUB: (First Reading/ Public Hearing) An ordinance granting a conditional use to allow the consumption of alcohol on the premises in conjunction with a cigar shop on a portion of a 0.92-acre parcel in a C-2 zoning district, located at 426 North Harbor City Boulevard in the Harbor City Plaza, just south of the intersection of North Harbor City Boulevard and Ballard Drive, on the west side of U.S. 1. (Owner - James Vlamis) (Applicant/ Representative - Robert Ripoll) (P&Z Board - 5/20/04)

Attorney Gougelman read the ordinance by title. Mrs. Dittmer briefed Council. The Planning and Zoning Board unanimously recommended approval of this request. Staff recommended approval with the following condition:

- a. The conditional use shall be limited to the tenant unit addressed as 426 North Harbor City Boulevard.

There were no disclosures by Council.

Mrs. Palmer said she is not sure where this property is located. She asked if a bar or restaurant is currently located on the property. Mrs. Dittmer said no and added that it is located in a strip center where Tippy's Taco House was located. Mayor Buckley added that it is just north of Del's Freeze.

Mrs. Palmer asked if the center has enough parking to accommodate a bar. Mrs. Dittmer explained that most of the other uses are retail oriented, 9:00 a.m. – 5:00 p.m. The cigar

CITY OF MELBOURNE, FLORIDA
MINUTES – REGULAR MEETING BEFORE CITY COUNCIL
JUNE 8, 2004

bar is not a large establishment and will be more of an off use from daytime traffic. Mrs. Palmer asked if it will be open mainly at night and Mrs. Dittmer replied that is her understanding. She added that before an occupational license is issued, staff will determine if there is adequate parking based on the number of seats.

Mrs. Poole asked if cigar bars are a new trend. Mrs. Dittmer said the requests are in response to the recent change in State law regarding smoking. Smoking is prohibited in most establishments that serve food.

Mayor Buckley opened the public hearing.

Robert Ripoll, owner, came forward.

Mrs. Palmer asked Mr. Ripoll where he is located in relation to Del's Freeze. Mr. Ripoll said he is at the opposite end of the center, next to the U-Haul parking lot. He reported that the business is very small; they plan to have 60 seats; parking is located in front of and behind the building; and he does not anticipate a huge crowd.

Continuing, Mr. Ripoll said that he was born and raised in Cuba. He would like his shop to mimic the old ways in Cuba where folks sit around, enjoy a cigar and have conversation. He added that he does not plan on having hard liquor. Mr. Ripoll confirmed for Mrs. Poole that the shop will not be limited to men; many women do smoke cigars.

Moved by C. Palmer/E. Palmer for approval of Ordinance No. 2004-46. Motion carried unanimously.

17. COUNCIL ACTION RE: Brevard County Circuit Court decision regarding seizure of slot machines - Starlight Palace.

From the agenda report: In the case of Starlight Palace, 1382 South Babcock Street, Brevard County Circuit Court Judge Maxwell has issued an order finding no probable cause existed for the seizure of assets in the preliminary hearing. Council will need to decide whether the alleged contraband should be released to the owners of the Starlight Palace or alternatively, the City will need to appeal the court's decision to the 5th District Court of Appeal. The owners of Starlight Palace have filed a motion to have their property returned and intend to sue the City for damages if we do not comply. They have also indicated they may seek to require that the City post a bond to proceed with appeal.

Attorney Gougelman reported that the first step in this process is to deal with the alleged gambling equipment (98 video slot machines) seized by the Police Department, \$17,354.50 in cash, and \$13,800 in VISA gift cards. An adversarial preliminary hearing was held to determine whether there was probable cause to believe that the equipment was used in violation of the law and whether the City may continue to retain the equipment pending a forfeiture hearing.

CITY OF MELBOURNE, FLORIDA
MINUTES – REGULAR MEETING BEFORE CITY COUNCIL
JUNE 8, 2004

The case was assigned to Judge George Maxwell, who came back with an interesting decision. The Judge found that in some places the anti-gambling/anti-slot machine statute is being enforced and in other places violations of the law are not being prosecuted. The Judge found a problem with inconsistent prosecution. The second point is that the court found that the statute is less than a model of clarity and noted that a person of common intelligence could not read the statute and understand what kind of conduct violates the law.

The owner/operator of Starlight has filed a motion to have the equipment returned. Judge Maxwell will make a decision on that (on June 9). Regardless of what happens (on June 9) the City Council needs to decide whether or not to appeal Judge Maxwell's decision to the 5th District Court of Appeal.

The City's forfeiture attorney, Greg Hansen, feels the City has a good chance of prevailing on appeal, although there are no guarantees. The cost to appeal will be around \$7,500. The owner/operator and her representative are present and Council should listen to their comments. Mr. Schluckebier added that the Police Chief is present and prepared to comment on the activities conducted by the Police Department during the criminal investigation.

Al DeLeo, paralegal for Michael H. Wolfe, representing Starlight Palace, and Joanne Gervais, owner/operator of Starlight, came forward.

Mr. DeLeo discussed his legal background and outlined his concerns as follows: several District Court judges in the State have interpreted the law differently; Florida Attorney General Charlie Crist has said that the machines are illegal, although in 1995 and 2003 he said the machines are legal; no Circuit has determined the level of skill or chance; and all Circuits agree that the machines that were in Starlight Palace can be operated with an application of skill and, over time, persons can learn how the machines operate.

Mr. DeLeo said that it is not fair for Broward County to allow the machines to be operated, yet the City of Melbourne says the machines are illegal. He stressed that this is a political issue that should be addressed through the State Legislature.

Continuing, Mr. DeLeo questioned the logic behind allowing "grandma" to pay \$40 a card for bingo or go on a gambling ship and lose \$2,000 - \$3,000. However, we are not going to allow her to go to a place where she can be with her friends betting pennies and nickels. The arcades are fun entertainment. (Grandma) learns how to play and she gets gift coupons.

Mr. DeLeo discussed the ambiguities in Chapter 849.161, Florida Statutes. He noted that Starlight Palace operated within the law. It had 50 or more machines, coupons or merchandise, no more than 75 cents per game, no cash and no alcohol. He added that under the forfeiture statute, pending the appeal, the City has to pay Ms. Gervais the damages per day of what she is losing. He said he is talking \$178,000. And, \$2,000 - \$3,000 per day that will have to be paid pending appeal.

CITY OF MELBOURNE, FLORIDA
MINUTES – REGULAR MEETING BEFORE CITY COUNCIL
JUNE 8, 2004

Mr. DeLeo briefly discussed the need to support retirees. He said that we should not think that they are senile and that they don't know what they are doing with their pennies and nickels. He added that the State Legislature or the Supreme Court of Florida has to decide which way to go because innocent people who do the right thing are getting caught in the middle. It is a bad example for the City to give a permit to a business to operate and then three months later say that the business is illegal. Mr. DeLeo said they would like for Starlight Palace to open. It is a safe haven; it is an adult amusement arcade that caters to adults; and children go in if they want to play.

Mrs. Walker asked about the reference to "grandma." Mr. DeLeo said that anyone can go into the arcade; however, the term "grandma" is used in a plural sense for anyone that is older than he is. He added that he uses the term with respect. Ms. Gervais said that in 10 weeks of operation she had 2,200 members with 80% being age 60 or older.

Mrs. Hand asked about the reference to children playing. Mr. DeLeo said that children don't play the game. Sometimes a couple might come in with kids and they would be put in the corner. By law, the business has to be open to the general public.

Mrs. Poole asked Mr. DeLeo about his involvement and if he traveled to different areas doing this type of work. Mr. DeLeo said that this file fell into his lap. He added that he normally doesn't gamble and he hasn't played these machines before. Mr. DeLeo explained that he is a constitutionalist and an environmentalist. When decent people obtain permits and then get arrested for doing the things that they obtained permits for, that borders on constitutional issues.

Mrs. Palmer said that being an environmentalist has nothing to do with this issue; however, she said she is glad that Mr. DeLeo is not a gambler and that he doesn't go into these establishments. Mrs. Palmer asked about the loss of income.

Mr. DeLeo said that if Ms. Gervais won the appeal, the City could be exposed to a claim of about \$178,000. Mrs. Palmer asked what that is based on. Mr. DeLeo said that is the value of the machines, cash and gift certificates. This figure does not include the \$2,000 - \$3,000 per day they have incurred. This is based only on the physical assets that were confiscated.

Mrs. Palmer asked what the daily revenues are estimated to be. Ms. Gervais discussed the amount of her rent, utilities, etc. She said she is not asking for damages for harm caused, all she is asking for is justice. And, all she wants is to open the business. Mr. DeLeo stated that if the machines are returned and the business is allowed to open until the final decision is made on the ambiguity, Ms. Gervais will waive the damages.

Mrs. Palmer asked what the daily revenues are estimated to be. Ms. Gervais said she estimates that the gross is \$2,000 - \$3,000 per day. A brief discussion followed about Ms. Gervais' initial investment in the business.

CITY OF MELBOURNE, FLORIDA
MINUTES – REGULAR MEETING BEFORE CITY COUNCIL
JUNE 8, 2004

Attorney Gougelman asked what Starlight would expect as far as a settlement if the City does not go forward with the appeal. Mr. DeLeo said they would expect the machines, gift certificates and any other items that were taken. Also, they would expect to reopen. He agreed to place in writing a release from any further damages.

Attorney Gougelman asked what they would expect if the City does not prevail on appeal. Mr. DeLeo said that Mr. Wolfe has indicated that they would move immediately for compensation and damages, including lost profits, \$2,000 plus per day. Also, they would expect some sort of other damages, deprived use of machines and premises.

Attorney Gougelman described the following scenario: The Court decides (on June 9) that Mr. DeLeo's client is entitled to have the machines back while the City figures out whether it is going forward with an appeal. He asked Mr. DeLeo if he would seek a bond if the City does go forward with an appeal. Mr. DeLeo said that the statute doesn't require a bond and they would probably not seek a bond.

Mr. Schluckebier clarified that the issuance of an occupational license is not a permit or indication that the City has pre-approved an activity. It is simply receipt for the payment of a tax. An analogy would be that the issuance of a driver's license does not license a person to do something illegal.

Police Chief Don Carey reviewed the investigative process. After Council gave direction for law enforcement to take its proper action, he met with State Attorney Norm Wolfinger. Mr. Wolfinger decided that if the City were able to bring in a court certified expert who would determine that these particular machines are gambling devices per the statute, then he would support legal action against these entities.

Undercover operations began at both locations in Melbourne. Officers surreptitiously videotaped the operation; close records were kept of the amount of money spent and amount of certificates and gift cards won; and gift cards were turned into cash at Publix and Wal Mart, which in the Department's estimation, violated the statutes. In addition to that, just before the search warrants were issued, the City brought in a state certified and recognized expert who determined that the machines at both locations were in fact gambling devices. This information was presented to the State Attorney and he agreed that there was probable cause to prosecute. A search warrant was obtained for both locations. And, in the State of Florida, when a search warrant is utilized in this instance, the contraband is also seized.

Continuing, Chief Carey said that when the search warrant was served on April 2, the certified expert was able to determine that individual machines contained a computer chip that made them games of chance and not games of skill. The items were seized and criminal charges were filed. The equipment is currently in storage and the process has shifted to the judicial arena.

In response to Vice Mayor Palmer and Council Member Grace Walker, Chief Carey said he would provide detailed information on the amount of money spent, value of

CITY OF MELBOURNE, FLORIDA
MINUTES – REGULAR MEETING BEFORE CITY COUNCIL
JUNE 8, 2004

merchandise, and number of hours spent during the investigation. Mrs. Palmer commended the Police Chief and the Department for the professional and methodical way that this issue was handled.

Mr. Carey confirmed for Mr. Palmer that the State Attorney has not changed his opinion that these machines are illegal.

Mrs. Hand asked why Judge Maxwell did not take all of this into consideration. Attorney Gougelman explained that the Judge did not review whether the City did a good job of investigating or whether officers did the right thing. He decided that it is unfair to have prosecutions going on in some parts of the State and not in others. And, he decided that the Statute is vague and citizens of normal intelligence can't read and determine what type of conduct is legal.

Attorney Gougelman explained that the Legislature has taken the law and carved up exceptions; there is a policy war in the Legislature. He said that Council has the opportunity to decide from a policy standpoint where to go. If Council believes that this conduct is illegal, the stakes will start to get elevated. If the City appeals and loses, we will probably get sued for damages.

Mrs. Hand said that at the grass roots level, Council should make its thoughts known and should appeal. Mayor Buckley agreed and said as far as he is concerned the machines are illegal; the City should appeal the case. Mrs. Palmer pointed out that the citizens of the State of Florida have overwhelmingly voted against gambling several times. This is a known loophole that people are using and the battle is not in the Legislature, it is in individual communities where community leaders are willing to enforce what they believe is a good statute.

Mr. Palmer noted that the City did not take action until it had evidence that these machines are illegal gambling devices. He commended the Police Department for doing a fantastic job of investigating. Mr. Palmer said it is not the City's problem that the machines are considered legal in some places and not in others. The City obeyed the law and we ought to appeal the case.

Moved by E. Palmer/C. Palmer to file an appeal. Motion carried unanimously.

18. COUNCIL ACTION RE: Olde Eau Gallie Riverfront Community Redevelopment Agency Advisory Committee - Appointment of three regular members and one alternate member.

Mayor Buckley referenced the additional application from Denise M. Johnson that was distributed to Council. The Mayor called for nominations for Ralph Sanders' seat.

Moved by Hand/E. Palmer to reappoint Ralph Sanders. Motion carried unanimously.
(6/12/2004 – 6/11/2006)

CITY OF MELBOURNE, FLORIDA
MINUTES – REGULAR MEETING BEFORE CITY COUNCIL
JUNE 8, 2004

Mayor Buckley called for nominations for Dennis Walker's seat. Council Member Grace Walker said that she will not vote for Mr. Walker because of his absenteeism – absent 14 out of 33 meetings. She nominated Fredrick Dillen for the seat. Mrs. Palmer said she had also intended to nominate Fredrick Dillen. Mayor Buckley announced that someone has asked to speak on this item.

Rick Hester, 617 Eau Gallie Boulevard, said that because people miss meetings does not mean they are not involved in the community. He added that Mr. Sanders is an excellent member of this board and Mr. Walker is a resident in the southern area of the district. Mr. Walker keeps the area residents informed and he attends many other meetings related to the redevelopment area.

Mayor Buckley said Rick Dillen has been nominated. He asked if there were any other nominations. Mrs. Palmer withdrew her support of Mr. Dillen. She said she does not want to make the same mistake that she made last year. Mayor Buckley asked if there were any other nominations.

Moved by Hand/E. Palmer to appoint Rick Dillen.

Mrs. Palmer said she will vote for Mr. Walker to remain a member based on Mr. Hester's comments. Mayor Buckley said that he did not receive a nomination for Dennis Walker. Mrs. Palmer reported that last year she moved to replace Mr. Hester on this board because of the number of meetings he had missed. Later she learned that although he missed a number of meetings, he had spent many hours diligently working on behalf of the CRA. That was her mistake and she doesn't want to make that mistake with Mr. Walker.

Mrs. Palmer nominated Mr. Walker. Mr. Palmer agreed that Mr. Walker needs to remain on the board. Mayor Buckley pointed out that there is a motion to appoint Rick Dillen in Dennis Walker's place. Mr. Palmer noted that Jacie Stivers' seat is also open.

The question was called (to appoint Rick Dillen). Motion carried unanimously. (6/12/2004 – 6/11/2006)

Mayor Buckley called for nominations for Jacie Stivers' seat:

Moved by Walker/E. Palmer to appoint Dennis Walker. Motion carried unanimously. (6/12/2004 – 6/11/2006)

Mayor Buckley called for nominations for Philip Azeredo's seat.

Moved by E. Palmer/Poole to reappoint Mr. Azeredo. Motion carried unanimously. (6/12/2004 – 6/11/2006)

19. PETITIONS, REMONSTRANCES AND COMMUNICATIONS

CITY OF MELBOURNE, FLORIDA
MINUTES – REGULAR MEETING BEFORE CITY COUNCIL
JUNE 8, 2004

Mrs. Hand noted that although Council previously appointed Gregory Genco as the first alternate to the Planning and Zoning Board, second alternate Manuel Rodriguez has recently been seated first in the absence of a regular member. City Clerk Cathy Wysor explained that the Zoning Code provides that the alternate member who has served the longest will be seated first as a voting member in the absence of a regular member. Although Council appointed Mr. Genco as first alternate, Mr. Rodriguez has served the longest. Following a brief discussion, the City Manager said that staff will ask the consultant that is selected to review the Zoning Code to review the composition of the Planning and Zoning Board.

Mrs. Hand asked that the City continue its efforts with fireworks enforcement. Mr. Schluckebier said that the Police Department intends to continue its increased enforcement activities over Fourth of July. The increased enforcement was fairly successful over New Year's. He added that although the problem won't go away, we will see an improvement.

Mayor Buckley reported that Harris Corporation established a \$150,000 "challenge grant" to help start the campaign for the Brevard Neighborhood Development Coalition Outreach Center for Children and youth. The center is located in the Booker T. Washington neighborhood.

The City Manager reported that unless the City Council directs otherwise, the City does not intend to issue or recommend a City holiday on Friday, June 11, in recognition of the recent passing of former President Ronald Reagan. Supervisors will be asked to be respectful of any employee who wishes to take annual leave on Friday.

Council Member Ed Palmer reported that Honor America will conduct a Flag Day Ceremony at Honor America on June 14. The activities will begin at 6:00 p.m.

Council Member Pat Poole asked about the role Main Street plays in the City's Downtown Redevelopment effort. Also, she noted that another study is being proposed for the redevelopment area. Mr. Schluckebier confirmed that the Melbourne Downtown Community Redevelopment Agency Advisory Committee is and will remain the primary advisory body to the Community Redevelopment Agency (City Council).

Regarding the discussion about a study, the City Manager said that a blight study was conducted 18 months ago at a cost of \$7,500 paid to a consultant. This was for a determination on a specific area to be added to the CRA area that would extend the area from Crane Creek southward to University Boulevard, primarily encompassing the east side of U. S. 1, including commercial frontage on west side. He noted that this has not been brought back to Council for action.

Continuing, Mr. Schluckebier said that some Council Members have asked about the overall capital improvement plan in the area. That plan has not been updated in over 20 years, and a lot has changed in the Downtown area. It makes sense to have a consultant

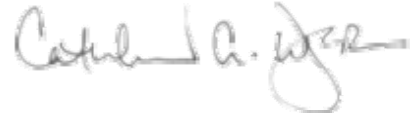
CITY OF MELBOURNE, FLORIDA
MINUTES – REGULAR MEETING BEFORE CITY COUNCIL
JUNE 8, 2004

provide an outside view of the Downtown area and develop a plan rather than a project being selected every 18 months.

20. ADJOURNMENT

Moved by E. Palmer/Hand to adjourn. Motion carried unanimously.

The meeting adjourned at 9:43 p.m.



City Clerk – 6/17/2004

Approved by Council: June 22, 2004