

**MINUTES OF THE SPECIAL MEETING
OF THE TOWN COUNCIL
TOWN OF CAROLINA BEACH**

July 28, 2009

The Town Council of the Town of Carolina Beach met in special session on July 28, 2009 at 5:30 p.m. in the gymnasium located at the Carolina Beach Recreation Center, 1121B N. Lake Park Blvd., Carolina Beach, North Carolina. The following were present: Mayor Joel Macon; Mayor Pro Tem (MPT) Dan Wilcox; Councilman Alan Gilbert; Councilwoman Pat Efird and Councilman Jerry Johnson. Also present were Town Manager Tim Owens, Town Attorney Steve Coggins, Finance Director Dawn Johnson, and Town Clerk Lynn Prusa,

Mayor Macon called the meeting to order.

RECOGNIZE EMPLOYEES FOR YEARS OF SERVICE

Mayor Macon recognized Fire Captain Jerry Burkhardt for 25 years, and retired Fire Chief Robert Weeks for 50 years of dedicated service as a member of the Carolina Beach Volunteer Fire Department. Fire Chief Jonathon Rorie said he hopes that he and the rest of the members of the team have the strength and courage to pick-up from you guys and carry this forward. Mayor Macon said these guys work hard and are volunteers on a very big scale and have done a lot in this community and it is an honor in the Mayor's seat to recognize them at this time. Chief Rorie said last night the fire department held a roasting ceremony and a pinning ceremony from the NC Firemen's Association. Captain Burkhardt thanked Council for all they do for the fire department and said they are blessed to have them. Mr. Weeks also thanked Council.

REQUEST BY PARK PLACE AT CAROLINA BEACH, LLC FOR A ONE YEAR EXTENSION TO THE PARK PLACE CONDITIONAL USE PERMIT

The town manager said Mr. Charles Daniel and Matt Nichols are here to represent this project.

Before beginning with this item, MPT Wilcox said he wanted to make everyone aware that Mr. Matt Nichols is representing him in a small real estate technical issue and he doesn't feel it will interfere with his ability to make a decision on this matter, if Council doesn't have a problem with it. There were no comments of concern made by any of the members of Council.

Mr. Daniels said due to the economic conditions in the last years this has not been a viable project and 1 more year may not make a difference, but he would like to see this project go through and he hopes Council can see reasonable cause to grant it. He went

over the proposed Park Place project.

Mr. Nichols went over the timeline. He said the conditional use permit was granted August 10, 2004. The issue of 5 years is an issue. To summarize the chronology, shortly after the CUP was granted a lawsuit was filed and for the next 20 months it was in litigation. The courts upheld the town's permit and it was dismissed in the court of appeals April 2006. Council granted 5 years vested rights period in December 2005. In review he researched cases to try and determine some authority for allowance to go beyond the August 10th date. Mr. Nichols provided Council with a handout and referred them to a similar but not exact Rhode Island case. He read the following from the handout: "Although the filing of such a petition does not act as stay, G.L. 1956 45-24-20, common prudence understandably acts as a brake against incurred obligations, the benefits of which would be cancelled by an adverse decision of this court. Apart from the question as it may be affected by a change in the zoning regulations, we think it clear that the requirement of activating a permit set forth in an ordinance does not apply during such time as the legality of a period is open to question by reason of litigation amounting to an appeal from the issuance thereof." Mr. Nichols said that in light of the litigation and the permitting and where we are now this may not fit in exactly to the ordinance, the ordinance is comprehensive, and you may not see this again so in light of that he asks Council to consider the extension so the project can come into its fruition. He also asked Council to consider the state of the economy.

Councilman Gilbert said, so you found no case law in NC, but the closest thing you found was in the building permits in Rhode Island. Mr. Nichols agreed.

MPT Wilcox asked, what is the date he proposes for issuance? Mr. Nichols said according to the clerk of appeals the date filed was April 3, 2006.

Councilman Gilbert asked when the lawsuit was filed. Mr. Nichols said it was filed on December 8, 2004.

MPT Wilcox asked if he found any cases that denied it. Mr. Nichols said he didn't, but there are not a lot of vested right cases in North Carolina and this was the best case he could find.

Councilman Gilbert said this permit was issued in August and if you would have pulled the permit in August then you wouldn't have this situation. Mr. Nichols agreed. Councilman Gilbert asked what kept him from pulling the permit in August. Mr. Nichols explained that you would need detailed plans and it would be difficult from an expense standpoint when you are trying to defend a lawsuit.

The town's Attorney, Mr. Coggins, said there is a distinction between the Rhode Island case and the NCGS detailing with "vested rights". The Rhode Island case, the Court pointed to which by ordinance "expires" by a certain date. In the Rhode Island case, the Court pointed to no language preventing an extension beyond the period of expiration. That is not the case with our Vested Rights Statute, which provides that the life of the

permit “shall be vested for a period ... not exceeding five years”, which “shall terminate at the end of the applicable vesting period ...” [NCGS 160A-385.1(d)(2), (3) & (6)]. This language strongly implies the town has no power no ability to extend the life of a permit. Instead, only the General Assembly has that power. He recommended that if the Council agreed to extend the time of the permit, that Park Place be required to fully indemnify, hold harmless and defend the town against any claims based on an allegation the town had no power to extend the time. He suggested third parties could bring an action against the town and he wanted the town protected in that event.”

Councilman Gilbert said if we go against it is it possible that a citizen could sue us for going against the general statute.

MPT Wilcox questioned about not recognizing a site specific plan until 2005. Mr. Coggins said this statute applied until the time the town didn't have an ordinance. The town manager believes both parties understood at that time and it is in the minutes.

Mr. Nichols said the town has made some valid points but if the town agrees his client would agree to the indemnification and hold the town harmless. He again stated the statute isn't clear when the 5 years starts.

A motion was made by Councilman Gilbert that we not approve the extension per GS 160A-385.1 subsection (d) that does not allow us to exceed 5 years.

Mayor Macon said it is technicality the way the statute is written and if someone tied it up in a lawsuit for 5 years then they are out of luck. Mr. Coggins thinks it could expose a third party and taxpayers resources should be protected to full authority. Mayor Macon called for a vote.

MOTION CARRIED 4-1 with Councilwoman Efird voting no.

CONSIDER AMENDING THE TOWN CODE TO ALLOW FOR BEACH DELIVERY SERVICES

This item was presented by the Town Planner, Gary Ferguson. Mr. Ferguson went over the following changes being addressed in the proposed ordinance:

1. Review of contracts can be done by the town manager every five years.
2. Contracts shall be non-transferable.
3. There needs to be performance criteria built into the conditions.
4. The brick and mortar business in the CBD shall be open 150 days per year.

He said these are the things that he believes Council wanted them to address in the ordinance.

Mayor Macon asked if anyone would like to speak concerning the proposed changes to the ordinance.

Mr. Jerry Bigley of 1011 Waterview Place said he feels the 5 year contract is too long and should be limited to 2 years and that you can still have control of them. Some delivery services are dropping off at the north end without a pass and cheating the town. Mayor Macon clarified that this ordinance is concerning beach delivery services such as chairs and umbrellas and not vending and it doesn't include Freeman Park. Mr. Bigley said he understands but still feels 5 years is too long and it should be 2 years. Mayor Macon said there is also some performance criteria. Mr. Bigley said that no one else doing business with the town has a 5 year contract.

Mr. Duke Hagestrom of 920 Riptide Lane said he feels there are good performance guarantees in the contract so the town could revoke it if they are not doing right. Mr. Owens said that at the end of 5 years it could go out for RFP. Mr. Hagestrom said he is unclear of the process. MPT Wilcox said at the end of 5 years you could still apply with an RFP the same as others. The town manger said we could go through the RFP process after 5 years or reissue the contract. It was suggested by Councilman Johnson and Councilman Gilbert that maybe the contract should read in such a way that an RFP may go out 1 year prior to the expiration or something to that effect. Mayor Macon said he doesn't really have a problem with the language because if they are not performing prior to the end of five years then the contract will not be renewed. Mr. Owens said the wording could be changed to "one year prior to the termination of the five year contract" if that is what Council wants.

James Golden of 1216 Canal Drive said he is confused because in their vending others are moved ahead to the front if they don't perform and he doesn't understand why this isn't handled the same way. Also he said Mr. Bigley mentioned that he doesn't get a five year contract, but you don't make him close. Mr. Bigley said if you say to give them five years to recoup their expenses, and I have a \$1 million dollars invested in my gas and I don't have 5 years.

A motion was made by Councilman Gilbert to approved Ordinance No. 09-802 (Exhibit 1) with the addition of 1 year, on the second sentence, prior to the expiration and to include the other changes that were presented by the town planner and town manager. MOTION CARRIED UNANIMOUSLY.

The town attorney said it doesn't specifically say rental chair and umbrellas, it says beach delivery service and he believes that is what Council assumes – rental chairs and umbrellas. Councilman Johnson suggested that it be added on page 3 under item 6 defining the items. The manager said he can clarify that.

A motion was made by Councilman Gilbert to reconsider the ordinance and amend item 8 to describe specifically what will be rented and approve Ordinance 09-802 with the considerations from the town attorney concerning ATVs and motor vehicles. MOTION CARRIED UNANIMOUSLY.

CONSIDER AMENDING THE BANNER SIGN REGULATIONS

The town planner presented this item. Mr. Ferguson said in reference to the banner regulations he feels they drafted an ordinance that is adoptable, but in light of some of the issues that have surfaced he would like Council to consider sending it back to Planning

and Zoning at their August 11, 2009 meeting, because some people are on different pages.

Mayor Macon made a motion to take it back to Planning and Zoning for their consideration.

Councilman Gilbert motioned to amend Mayor Macon's motion to hold a workshop with either inside or outside planning staff with respect to responsible sign issues and with a workshop we could have some people here from Chapel Hill and Planning and Zoning to create a responsible ordinance for sign regulations without a lot of clutter. He would like to have a workshop to educate Council and Planning and Zoning on the positives and negatives of the sign ordinance not to preclude the issue going forward if they so choose.

Mayor Macon said there is an amended motion on the floor to consider a joint workshop meeting if they so choose. He called for a vote on the motion.

MOTION CARRIED UNANIMOUSLY.

Next, Mayor Macon called for a vote on his original motion. **MOTION CARRIED UNANIMOUSLY.**

Mr. Ferguson asked until this is resolved do you want us to enforce the ordinance as written or to be a bit more hands off. Mr. Ferguson said he apologizes for asking but he needs to know how to handle it for now. Council seemed to be in general agreement that the ordinance should be enforced but maybe not be so aggressive in the interim in enforcing it, but do require them to get a permit. Maybe go on the honor system for now.

REQUEST FROM JOEL MAY OF ANCHOR BAY CONDOMINIUMS FOR THE TOWN TO CONSIDER PARTICIPATING FINANCIALLY IN THE DREDGING OF BOAT SLIPS IN FRONT OF THE CONDOS

The town manager shared with Council the history of the project and dock system. Mr. Owens said that Mr. May is out of town this week so Council may want to delay this item.

A motion was made by Mayor Macon to table this item to the August 11, 2009 meeting. **MOTION CARRIED UNANIMOUSLY.**

APPOINTMENT TO THE AD-HOC BUDGET COMMITTEE

There being no applications to consider at this time, no action was taken.

APPOINTMENT TO THE FREEMAN PARK COMMITTEE

A motion was made by MPT Wilcox to appoint Rick Rogge and Betsy McQuillen. **MOTION CARRIED UNANIMOUSLY.**

APPOINTMENT TO THE AD-HOC ARTS & ACTIVITIES COMMITTEE

Councilwoman Efirm motioned to appoint Nell Hunnicutt. **MOTION CARRIED UNANIMOUSLY.**

Mayor Macon motioned to appoint Janet Hunt. **MOTION CARRIED UNANIMOUSLY.**

Councilman Gilbert motioned to appoint Roxann Hubbard. **MOTION CARRIED UNANIMOUSLY.**

MPT Wilcox motioned to appoint Kaete Held. **MOTION CARRIED UNANIMOUSLY.**

REQUEST FOR PROPOSALS TO CONDUCT A MANAGEMENT, ORGANIZATIONAL STRUCTURE AND EFFICIENCY STUDY FOR ALL TOWN DEPARTMENTS

Mr. Owens said this is something that was discussed during the budget process. He presented a draft of an RFP for Council to consider.

Council agreed to move forward with advertising for proposals to conduct the study; however, with the understanding that they don't have to accept the request for proposals.

CONSIDER ADOPTING A RESOLUTION HONORING FORMER REPRESENTATIVE BONNER STILLER

Councilwoman Efirm motioned to adopt Resolution No. 09-984 (Exhibit 2). **MOTION CARRIED UNANIMOUSLY.**

CONSIDER ADOPTING A RESOLUTION RECOGNIZING NATIONAL NIGHT OUT

Police Chief Younginer went over the upcoming National Night Out events. He said there will also be an article in the newspaper informing the public as well.

A motion was made by Mayor Macon to adopt Resolution No. 09-982 (Exhibit 3).

MOTION CARRIED UNANIMOUSLY.

DISCUSSION REGARDING A CHANGE IN TIPPING FEES BY NEW HANOVER COUNTY AND THEIR POTENTIAL EFFECT ON THE FY 09/10 BUDGET

Mr. Owens said he wanted to put Council on notice there will be a shortfall in the budget in the amount of about \$15,000 due to the increase in tipping fees.

Also, he said the line item that covers both landscaping and solid waste was budgeted at \$1,400,000 and it is estimated that we may exceed that estimate at the end of the year by close to \$40,000 if you take into account additional expenditures that may be a result of the new landscaping project. He said we should have request for proposals (RFPs) by October.

CONSIDER ALLOWING RETAILERS THAT SELL FREEMAN PARK PASSES TO RETAIN 5% OF THE CHARGE OF THE FREEMAN PARK YEARLY PASS

A motion was made by Mayor Macon to approve the 5% reimbursement to the merchants. MOTION CARRIED UNANIMOUSLY. The manager said this will go into effect immediately.

CONSIDER SETTING A WORKSHOP DATE TO DISCUSS BEACH RENOURISHMENT AND ROOM OCCUPANCY FUNDING AND TO ALSO BEGIN DISCUSSION ON PHASE II OF THE WILMINGTON BEACH PROJECT

Mr. Owens said that at the last meeting Council discussed holding a workshop to discuss beach nourishment. The Town Council expressed interest in setting up a panel to better understand some of the issues regarding current and future beach nourishment projects. Mr. Owens said we could also include in a work session discussion on Phase II of the Wilmington Beach Project. At a later date Council may also want to consider an additional workshop to meet with Peter J Smith to finalize the streetscape design document portion of the Master Development Plan. He would also like Council to consider giving approval to move forward with the lift station #1 project.

A motion was made by Mayor Macon to hold a special meeting on September 22, 2009 at 3:00 p.m. concerning beach renourishment and Room Occupancy Funding,

and a special meeting on October 13, 2009 at 12:00 noon concerning the Wilmington Beach Project and go over other projects. MOTION CARRIED UNANIMOUSLY.

NON AGENDA ITEMS

Councilwoman Efirm asked the Mayor if he went down to the Boardwalk the other night concerning the teenagers and the bad language. The Mayor said he did not go by there

but he did talk the Chief since he is in charge of that type of activity and he did go by there. The Mayor said there are some dark areas on the Boardwalk and we may want to work on the lighting in that area. Chief Younginer said not too long ago we had the same problem and we got there attention for a while. He said they get pretty mouthy and they got their attention once and they'll get it again.

Mr. Coggins said he would like to go into closed session about proposed local act about the harbor.

The manager provided information about the beach renourishment project and the possibility of scaling back the project.

Councilman Gilbert would like to implement a task group concerning various challenges at Freeman Park. He would serve on the committee along with maybe another member of Council, the police chief, 2 P&Z members, 2 Freeman Park members and 2 Police Advisory Committee members. He would like to work on putting a list of issues together maybe at the August meeting. Mayor Macon volunteer to serve on the committee. Chief Younginer said that it is a good idea and maybe add the police officers that have worked the area. He said there have been a lot of ideas thrown out there and we need to sit down and brainstorm it. Councilman Johnson said he would like to be considered as an alternate. Mayor Macon suggested letting the committee chairmen appoint 2 members and everyone agreed.

MPT Wilcox said there was an article in the newspaper about the towing situation He said we need to make the homeowners associations aware of the requirements for towing and the problems. It is a private property issue but it is also a concern of the town.

Mayor Macon made a motion to go into closed session to discuss real estate matters in compliance with NCGS 143-318.11(a)5. MOTION CARRIED UNANIMOUSLY.

A motion was made by Mayor Macon to return to open session. MOTION CARRIED UNANIMOUSLY. Mayor Macon said that no action is needed as a result of the closed session.

Before adjourning, James Golden addressed Council and said the vendors are supposed to be off the North End by 11:00 p.m. but people are upset when they are leaving and they

cannot stop to service them. He said they would at least like to be able to work their way off of the North End and make final stops along the way. He will bring this up at next month's meeting.

ADJOURNMENT

There being no further business to discuss at this time, **Councilwoman Efirm made a motion to adjourn. MOTION CARRIED UNANIMOUSLY.**

Respectfully submitted,

Lynn N. Prusa
Town Clerk

Approved: _____