

**ORMOND BEACH SPECIAL CITY COMMISSION MEETING
HELD AT CITY HALL COMMISSION CHAMBERS**

August 24, 2006 5:30 p.m.

Present were: Mayor Fred Costello, Lori Gillooly, Troy Kent, Ed Kelley, and Bill Partington, City Manager Isaac Turner, Assistant City Manager Theodore MacLeod, City Attorney Randy Hayes, and City Clerk Veronica Patterson.

A G E N D A

- 1) Meeting call to order by Mayor Costello.
- 2) Resolution No. 2006-164 authorizing and directing the City Manager and City Clerk to take all necessary action to place the proposed amendment to the Ormond Beach City Charter as a result of the petition drive of the Ormond Beach electorate regarding building height limits and restrictions on the ballot for the November 7, 2006, General Election; setting forth an effective date. (Options A, B and C)
- 3) Close the meeting.

Item #1 - Call to Order

Mayor Costello reconvened the August 22, 2006, meeting at 5:30 p.m.

Item #2 - Discussion Regarding Court Order

Mayor Costello stated the issues are well familiar; therefore, he asked the speakers to be brief and avoid being redundant. He explained Option A was to use the same language that was proposed by the CAN DO petition, placing the item on the ballot as CAN DO indicated; Option B was to reverse the language between the ballot summary and the text of the amendment; and Option C was to use the language from the ballot summary for both the ballot summary and the text of the amendment. Mayor Costello reported other potential motions would be to place Option A, B, or C on the ballot and to appeal to the District Court or a rehearing at the Circuit Court, or to not place anything on the ballot and to appeal for a rehearing at the Circuit Court or the Fifth District Court.

Commissioner Partington moved, seconded by Commissioner Kelley, to approve Option A, placing the question on the ballot for the November 7, 2006, General Election while pursuing the constitutional issues through a rehearing and an appeal.

RESOLUTION NO. 2006-164

A RESOLUTION AUTHORIZING AND DIRECTING THE CITY MANAGER AND CITY CLERK TO TAKE ALL NECESSARY ACTION TO PLACE THE PROPOSED AMENDMENT TO THE ORMOND BEACH CITY CHARTER AS A RESULT OF THE PETITION DRIVE OF THE ORMOND BEACH ELECTORATE REGARDING BUILDING HEIGHT LIMITS AND RESTRICTIONS ON THE BALLOT FOR THE NOVEMBER 7, 2006, GENERAL ELECTION; SETTING FORTH AN EFFECTIVE DATE.

Ms. Sandy Glover, 67 Kent Drive, requested the Commission allow this to go for a vote in November. She pointed out a great deal of money had been spent by both sides; appeals would cost additional taxpayers' money; and if an election day other than the November general election were approved, even more taxpayers' money would be spent.

Mayor Costello clarified Ms. Glover's request was for the motion that was made, should it pass.

Ms. Lucille Bornmann, 6 Windsor Drive, stated the people have a right to petition their government and the right to vote. She reported the petition was legal because the judge ruled it was legal, but some do not want to accept the judge's ruling. Ms. Bornmann pointed out some were willing to spend over \$40,000 of taxpayers' money for a special election, and the Commission already spent over \$50,000 to fight the peoples' petition. She noted other cities, attorneys, and judges were watching Ormond Beach, which now had a negative image. Ms. Bornmann noted another city's petition was identical to Ormond Beach's petition and was accepted while Ormond Beach's was refused. She stated the people feel they are no longer important, and only the attorneys and developers mattered. Ms. Bornmann threatened that this was only the beginning of what the people can do, and she warned more would come.

Mayor Costello stated the motion was to place the CAN DO petition on the November ballot. He noted the City had spent less than \$5,000 on attorney's fees, including court costs.

Commissioner Kent stated the figure noted was as of June, but the City was not billed for July or August.

Mr. Randall Hayes, City Attorney, stated billing was 30 days in arrears. He stated the total was for approximately \$4,800, but he was not certain if that was only up to June or if it was for a portion of July.

Mayor Costello stated there was no identical petition; however, there were similar petitions. He noted the motion and second should assure the people the Commission was listening.

Commissioner Kent stated the motion was to approve Option A; however, the motion also included an appeal, so it was not merely to place the amendment on the ballot, but to place it on the ballot with an appeal.

Mayor Costello stated he understood that was made clear. He reiterated the mover indicated he wanted to place it on the ballot for November 7 and appeal it to the Circuit Court for a rehearing and to the District Court.

Commissioner Kent noted he heard the motion; but when Mayor Costello restated it, he only mentioned it would be placed on the ballot.

Mayor Costello clarified the motion was to place it on the ballot, and due to constitutional concerns, to concurrently continue the appeal process.

Mr. Hayes recommended a separate vote on the resolution and another for the appeal process to obtain a clear record.

Commissioner Partington withdrew the motion and Commissioner Kelley withdrew his second.

Commissioner Partington moved, seconded by Commissioner Kent, to approve Option A which would place the CAN DO language for the amendment on the ballot for the November 7, 2006, election.

Commissioner Kelley moved to amend the motion to include an appeal to the Circuit Court as well as to the Fifth District Court, if necessary.

Commissioner Kent stated it baffled him to hear from certain Commission members that they were tired of hearing people come to the Commission and get an answer, and then they come back because it was not the answer they wanted to hear. He noted the Commission had an answer from Judge Randell Rowe, but it was not the answer the Commission wanted to hear so they want to go back.

Commissioner Partington seconded the motion.

Mr. Craig Olson, 146 Magnolia Drive, stated he was confused as to what just occurred. He stated he supported the motion with the amendment.

Mayor Costello noted before the Commission now was the main motion and the amendment to appeal.

Mr. Tom Brinkman, 23 Walnut Lane, stated it was prudent to do this constitutionally correct and to take the time to ensure the decision to carry this forward to the ballot. He reported obtaining a vote by the people was the right action and would avoid further problems.

Mr. Jeff Boyle, 613 North Halifax Drive, representing CAN DO, reported four months ago CAN DO presented a letter formally requesting an election date for the ballot question, and he hoped the Commission decision tonight would prepare the ballot question and send it to the Supervisor of Elections for the November 7 General Election. He noted Mr. Pelham generated a memo to the Commission indicating his cost to the City would be between \$25,000 and \$50,000 without an appeal. Mr. Boyle stated the decision he urged the Commission to make tonight was to place the item on the ballot without an appeal, which would comply with Judge Rowe's ruling that cited a recent ruling by the Second District Court of Appeals that approved four similar citizen petitions in St. Pete Beach. He expressed approval for splitting the two motions. Mr. Boyle stated if the City would appeal the ruling, citizens would bear the additional burden of more legal costs and the added cost of reprinted ballots for a special election. He noted an appeal would be successful only if the Fifth District Court of Appeals overturned Judge Rowe and contradicted the unanimous ruling from the Second District Court of Appeals. Mr. Boyle reported by placing this on the ballot without an appeal, the Commission would be inviting 28,000 registered voters to participate in a public hearing in the 75 days remaining between now and November 7. He stated a public debate about the issue could begin rather than a debate about people. Mr. Boyle noted citizens would then decide the profile of the City, and the City could move forward.

Mayor Costello clarified if this motion passed there would be a vote regardless of whether the appeals would have been heard or if it would be heard afterward.

Mr. Hayes explained the amendment would go on the ballot for a vote. He noted if the appeal was concluded before the vote and the City would prevail, then the vote would be ruled unconstitutional, and there would be no vote. Mr. Hayes advised it was also possible there would be no hearing until after the election.

Mr. Chris Duval, 27 Sunny Shore Drive, reported he supported the motion and the appeal because there was a great deal at stake.

Mr. James Fowler, attorney for the petitioner, stated Option A proposed to use the ballot language placing a question in the Charter; therefore, he recommended approving Option B which was a declaratory statement. He noted selecting Option A would set the City up for further expense in litigation. Mr. Fowler saluted the Commission for the process. He noted any appreciable expense could be avoided if the appeals were delayed until after the election. Mr. Fowler noted this could go to the Supreme Court, doubling the amount of money spent; and should the Supreme Court order an election, a special election would have to be set costing even more money. He recommended filing the motion for rehearing, but urged it not be brought up until after the November election. Mr. Fowler stated the real issue was not the 75-foot height limit, but whether or not the citizens had the right to participate in making that decision.

Mayor Costello stated he found it ironic the CAN DO attorney recommended Option B, because he was vehemently chastised by the CAN DO people when he tried to make that same recommendation.

Mr. Paul Duncan, 385 Kings Road, stated this would not affect him, but he was tired of people coming before the Commission to allow them to do something that would enable them to make more money. He explained if the Commission would allow rules to be changed after a landowner purchased property, the City would be allowing that landowner to make a larger profit. Mr. Duncan questioned if any Commission member owned property on the beach. He stated if the Commission would allow this for the height limit issue, he would ask the code be changed on his land. Mr. Duncan noted all citizens have the same rights. He stated Ormond Beach did not have the fire fighting capability to fight anything above 75-feet. Mr. Duncan advised he was opposed to spending citizens' funds for an appeal.

Mayor Costello stated the developer would not be getting any additional units with this proposal. He reported there was already a 17-story building in Ormond Beach, and Ormond Beach was prepared to fight any fire. Mayor Costello pointed out the newer codes were better than when the existing 17-story building was constructed. He advised the dollars spent for an appeal would have to be balanced against the potential dollars the City would spend defending the issue should it be ruled unconstitutional considering the Bert Harris Act regarding private property rights.

Commissioner Kelley clarified that he did not own any property on the beach.

Mayor Costello stated he also did not own any property on the beach. He stated these types of issues could be discussed later.

Commissioner Kent stated Chief Baker indicated the ladder trucks go only 75-feet.

Mayor Costello reported ladder trucks go only 75-feet, which was as high as they go in New York City and other areas because fires are not fought with ladders.

Commissioner Kent stated they could be used to take people out of buildings.

Mayor Costello explained fires were fought from the inside of buildings, and Chief Baker had assured that Ormond Beach was well equipped to have buildings over 75 feet.

Mr. Greg Avakian, 161 Heritage Circle, FACTS PAC Chairman, reported it was important to consider the consequences of any action. He stated people who signed the petition were not told of the consequences of this ballot initiative at the time they signed the petition. Mr. Avakian noted people were told super high rises would be built along Granada Boulevard, A1A, and the riverfront; the Commission was bought and paid for by developers; and that the proposal was actually a "done deal." He reported FACTS PAC still believed this was not legal. Mr. Avakian stated he would like to vote for this and everything else such as the war in Iraq, the death penalty, abortion law, and every other issue; but it was not as simple as the slogan being used "let the people vote." He noted FACTS PAC believed the silent majority would not favor this Charter amendment; however, should it pass, there were still issues looming such as vested rights which must be considered. Mr. Avakian explained the CAN DO amendment stated that every building over 75-feet had vested rights, yet they would only have vested rights if they were built under a development order, and only two out of possibly 12 buildings over 75 feet were constructed with development orders. He reported there were also property rights issues to be considered. Mr. Avakian assured the Commission there would be lawsuits; therefore, the City would have to defend those lawsuits, costing taxpayers' money.

Mayor Costello asked Mr. Hayes if Mr. Avakian was correct that only two out of 12 buildings had development orders.

Mr. Hayes stated he was not certain of the validity of that number.

Mr. Mickey Pedersen, 17 Greenvale Drive, reported he was for the Bray and Gillespie proposal, but upon receiving his tax bill he urged the Commission to stop spending money. He noted the City could not afford this appeal. Mr. Pedersen stated the people should be able to vote, and the City should not appeal the decision.

Mr. Sean Daly stated this was not a forum to argue the pros and cons of the height limitation. He noted the questions were: should this go on the ballot, and should the Commission be paying tax money to appeal. Mr. Daly reported the Commission can not vote to spend money to appeal because they believe the Bray and Gillespie plan was better; they could only spend money to appeal because there was an impropriety in placing the issue on the ballot. He questioned why the Commission would be spending the money to appeal this after a judge stated there was no constitutional or statutory limitation in placing this issue on the ballot. Mr. Daly questioned if the Commission believed that some developers would not appeal on their own in the future. He stated a developer would appeal the decision, so the City would not need to send the money to do so. He stated the City did not raise the issue of property rights before the court, and they could not do so because this was not an issue for the City to raise. Mr. Daly noted the City was barred from raising this issue in future litigation. He questioned what the basis was for not going forward. Mr. Daly pointed out litigation could occur after the vote. He stated the City would not win on rehearing because of the well-reasoned order from a circuit court judge based upon the most current case law. Mr. Daly reported the likelihood it would be reviewed by the Fifth District Court before the election was nil. He noted those people who were aggrieved, would file suit. Mr. Daly stated the cost for Mr. Pelham's service was high, and he urged the Commission to stop wasting money.

Commissioner Kent stated he heard excellent comments from speakers this evening regarding the proposed appeal. He reiterated this situation was similar to people coming to the podium numerous times with the same questions when they got an answer but the answer was not the one they wanted to hear. Commissioner Kent reported the City got the answer from the judge, so to appeal would be wasting taxpayers' money. He stated Bray and Gillespie publicly offered to stay within 75-foot limit. Commissioner Kent noted his comment to that Bray and Gillespie offer was asking the developer to stay within the 75-foot limit and also give a small piece of land for a beachfront park. He reported he would not vote for an appeal, but he could vote for either option because they would all keep the height at 75 feet without waivers. Commissioner Kent stated if Option B would help the taxpayers in the future, he would favor Option B. He reported he would favor waiting until after the vote as Mr. Fowler recommended. Commissioner Kent pointed out that the judge wrote: "therefore, the Court finds that this initiative is not unconstitutional and does not violate Section 101.161 of the Florida Statute." He stated he would like to make a motion for Option B.

Mr. Hayes stated, procedurally, there was a motion on the floor for Option A, and before the Commission could move to another option, either the primary motion would have to be withdrawn and a new one substituted, or Option A would have to be voted down so a new motion could be made.

Commissioner Gillooly stated she contended from the beginning that she had a duty to be responsive to the petitioners. She reported there was no question that the 10% qualification rule was met, but the question for her was to be fiscally responsible to the entire City. Commissioner Gillooly reiterated there was never a question to deny the people their opportunity to speak, or be heard, or to vote, but to insure the City was addressing 100% of the citizens. She noted there was a general consensus that there would be lawsuits against the City, and this was a joint process because of the petition; therefore, there was a shared responsibility regarding the costs. Commissioner Gillooly questioned if following through with the appeal process to answer all of the question would help the City in future lawsuits.

Mr. Hayes stated no issues were raised at this level regarding damage claims under the Bert Harris Act or vested rights principals because it was not appropriate for this forum. He noted what the City was litigating now was whether the issues were constitutional; and while the Circuit Court contended it was, he believed there were differences of opinion with some of the District Court opinions. Mr. Hayes explained the problem was that if this was not appealed and the issue was not resolved on constitutionality conclusively, the amendment would go to the ballot; and should the amendment be approved by the voters, subsequent lawsuits filed against the City would require the City to defend the Charter amendment and any Bert Harris claims for money damages. He noted if the City could see the constitutional issues through the appellate process and it was determined the question was not constitutional, additional future costs would be prevented; and if the District Court finds the question constitutional, the issue would be resolved and the City would have to defend any lawsuit brought against it as it would for any

other lawsuit. Mr. Hayes explained the reason the costs were as low as they were, was because he spent a great deal of his time working on this issue. He noted the costs for Mr. Pelham's services provided earlier were estimated. Mr. Hayes reported he was doing all he could to keep the costs down.

Commissioner Gillooly noted her first reaction was that it was sent to the court, the court made a ruling, and the item needed to be placed on the ballot; however, in reviewing the material and speaking to Mr. Hayes, she had concerns. She reported she believed the City did need to appeal the ruling. Commissioner Gillooly pointed out this issue had been fraught with confusion, misinformation, and misunderstanding; and many unfair personal comments had been made toward the Commission. She expressed concern that if this was placed on the ballot, the City would appeal the ruling; and if the appeal negated the vote, the issue would become even more confusing. Commissioner Gillooly noted she hesitated supporting a special election due to the cost, but the judge indicated this could be on either the general election or a special election. She reported her intention was not to help a developer make money, but to find the best solution, negotiating on behalf of the citizens. Commissioner Gillooly cautioned if the amendment were placed on the ballot for the General Election in November, appealed, and if the City would prevail in the appeal, the citizens would be even more confused and may even mistrust the Commission. She questioned Mr. Hayes regarding the wisdom of waiting for the appeal until after the election.

Mr. Hayes stated the City had only 30 days from the date of the order to file an appeal, so the City could not wait until after election to file. He reported if the proposal would be placed on the ballot, the appeal would be concluded before the election and the City would prevail, the ballot would be invalidated, and the people would not vote. Mr. Hayes noted if the City would not prevail on the appeal, the issue would still be scheduled, and the election would occur. He advised if the appeal would not be concluded until after the election and the issue was voted down, the parties would dismiss the appeal at that point; but if the referendum was approved at the election, and the City was still on appeal and the appeal was successful, the court would invalidate the Charter amendment approved by the voters.

Commissioner Gillooly stated it would be extremely important that the citizens are aware that there were still issues that, despite the judge's order, were questionable, and they had to be resolved in order to protect the City as a whole.

Commissioner Partington reported he had studied and had contact with numerous people regarding this issue. He noted he was pleased the Commission could place the question on the ballot and continue with an appeal, accomplishing both the goals of CAN DO and protecting the City, satisfying all parties.

Commissioner Kelley reported he had been accused of not listening to the people, but the Commission could truly vote for the people's wishes because they can vote to place the question on the ballot and appeal it, which should appease everyone. He noted regarding the cost, the City could pay now or pay later. Commissioner Kelley reported it was important the City would get this done right at this time. He stated many laws have gone through a number of challenges, and few controversial issues were rendered at the Circuit Court level and not appealed all the way to the United States Supreme Court. Commissioner Kelley advised if the City would not prevail and the CAN DO question were to pass and it was later challenged, the City would eventually have to go to the Florida Supreme Court to prove it was constitutional because he believed the challenges would extend to the Supreme Court. He pointed out lawyers disagree, and a judge was a lawyer. Commissioner Kelley noted he did not see any confusion with an appeal, and he believed this method would resolve the issue at the least cost.

Mayor Costello noted he was also hopeful everyone would be happy, but by what had been indicated tonight, it did not seem that was possible.

Commissioner Kent asked Mr. Hayes which option he would prefer.

Mayor Costello noted the Commission would first be voting only on the appeal.

Mr. Hayes stated the timing would be dictated by the appellate rules. He reported this was not a quick process, and he recommended allowing the process to proceed.

Call Vote on the Amendment:	Commissioner Gillooly	yes
	Commissioner Kent	no
	Commissioner Kelley	yes
	Commissioner Partington	yes
Carried.	Mayor Costello	yes

Commissioner Kent moved to amend the motion to approve Option B.

Mayor Costello yielded the gavel to Vice Mayor Kelley to second the motion.

Mayor Costello reported he had advocated Option B for quite some time.

Commissioner Gillooly asked for clarification regarding Option B.

Mr. Hayes stated Option A contained the language as presented in the petition, and Option B and Option C vary that language slightly. He explained Option B and Option C was his intent to try to correct what he believed was the true intent behind the petition. Mr. Hayes advised that since the City was to appeal, he cautioned against making any changes to the CAN DO language and suggested approving it as presented because Option A was what CAN DO litigated over and it was the subject of the court order. He noted he believed Option B and Option C were better proposals, but those options were offered to exercise his subjectivity, and he recommended approval of Option A for the above-described reasons.

Commissioner Gillooly stated she hesitated changing the ballot language that was signed by the people.

Call Vote on the Motion to Amend:	Commissioner Kent	yes
	Commissioner Kelley	no
	Commissioner Partington	no
	Commissioner Gillooly	no
Failed.	Mayor Costello	yes

Mayor Costello stated he had been adamant about keeping the language the same, but changed his mind when the CAN DO attorney urged it be changed. He explained his policy was not to second a motion because if he had to second a motion, it probably would not pass; but he forgot that policy and would try remembering it in the future.

Mayor Costello explained there would be a vote, and the focus for the next several months needed to be on whether the City wanted to have the height limited to 75 feet in Ormond Beach. He noted this was not about a particular proposal, but included the Ormond Crossings area and should the City ever have the opportunity, for a hospital. Mayor Costello explained the church building was in the County and could not annex into the City because they would be over 75 feet. He urged all of the issues be examined, and the Bray and Gillespie proposal would be at the heart of the discussion but not the only issue. Mayor Costello noted there would be multiple forums to educate the people on the issues.

Call Vote on the Underlying Motion:	Commissioner Kelley	Yes
	Commissioner Partington	Yes
	Commissioner Gillooly	Yes
	Commissioner Kent	Yes
Carried.	Mayor Costello	Yes

Item #3 - Close the Meeting

The meeting was adjourned at 7:40 p.m.

APPROVED: _____ September 6, 2006

BY: _____
Fred Costello, Mayor

ATTEST:

Veronica Patterson, City Clerk