

**TOWN COUNCIL
MINUTES**

CALL TO ORDER

Mayor Fredericks called a special meeting of the Tiburon Town Council to order at 6:35 p.m. on Monday, October 26, 2009, in Town Council Chambers, 1505 Tiburon Boulevard, Tiburon, California.

ROLL CALL

PRESENT: COUNCILMEMBERS: Berger, Collins, Fredericks, Gram, Slavitz

PRESENT: EX OFFICIO: Town Manager Curran, Town Attorney Danforth,
Director of Community Development Anderson

Prior to the regular meeting, the Council met in closed session, beginning at 6:00 p.m., to discuss the following:

CLOSED SESSION

CONFERENCE WITH LEGAL COUNSEL – EXISTING LITIGATION
(Section 54956.9(a))

Martha Company v. Town of Tiburon

ANNOUNCEMENT OF ACTION TAKEN IN CLOSED SESSION, IF ANY

Mayor Fredericks said that there was no action to report from closed session.

ORAL COMMUNICATIONS

Peter Hunt, 607 Ridge Road, 13-year resident, said he would like to address the Council on the subject of the Martha Property.

Mayor Fredericks told Mr. Hunt that the item was on the agenda and asked him if he would mind waiting until the report had been given. He agreed.

There were no other oral communications.

ACTION ITEMS

1. **Proposed Memorandum of Understanding (MOU) regarding *The Martha Company v. Town of Tiburon* Litigation** – Consider adoption of Memorandum of Understanding for Reduced density EIR alternative for Martha Company development application currently pending before the County of Marin (Director of Community Development Anderson, Town Attorney Danforth, Town Manager Curran)

Continued without discussion from the October 21, 2009 Town Council meeting

Councilmember Gram gave the subcommittee's report. He said that since the last Council meeting, there had been numerous meetings with the owners of the Martha Property and the County, and some members of the Last Chance Committee. Gram said that the subcommittee had hoped to have the MOU ready for the last council meeting but that the lawyers had lengthened the process through their review.

Gram said that tonight the subcommittee would recommend that the Council approve the MOU and the form of the Development Agreement (DA), and recommend to the County that it approve the project as set forth in the Development Agreement, approve the Development Agreement, and agree to sign the MOU and the DA.

Gram reiterated that the County is processing an existing 43-unit application as a result of a Federal Court judgment. He said that the County is a party to the lawsuit, brought by the Martha Property owners. He said the Town had tried to appear and make its thoughts known, but it was not a party to the lawsuit (or subsequent judgment). He said that if the MOU and form of Development Agreement were approved, they would represent a recommendation to the County. He said that the reason the subcommittee had been meeting with the County was to make sure the County understood the substance of what the Town recommended, and that the Town would be willing to move forward with the project as presented tonight.

Gram noted that the project was still subject to the EIR process. He said that the Development Agreement cannot be entered into in final form and become binding until the EIR is certified by the County. He said it remained unclear when a draft EIR would be issued. He said the Federal Court judgment says that the County shall approve the project before it by February 4, 2010, and he hoped that the draft EIR would come out in enough time to allow for comment prior to finalization.

Councilmember Gram said that since the last subcommittee report, there had been some changes to the proposed MOU, as follows:

- The (32) homes will go through the Town's Design Review process and the homes will not exceed a 30-foot height limit (except for Lot No. 9 which would be limited to a single story not to exceed 18 feet (including accessory structures) because it would impact

views; in addition, the DRB will have the discretion to lower heights on some of the homes to mitigate view impacts, size and bulk, and other issues under the discretion of DRB and Town guidelines.

- There is no option to purchase and no right of first refusal at this time. Gram said this had been discussed early on with the owners but that they did not agree to it; he explained that this was due to the fact that no value had yet been assigned to the land, that in real estate parlance, “land only has a value when you know what you can do with it.” He said that once a project has been approved, the owners would probably entertain an offer to purchase some of all of the property which could be accomplished through public or private funding, or a combination of the two. He said that the owners would probably be amenable to being paid in cash rather than waiting more years while the project is being developed;
- A \$400,000 lump sum payment will be paid to the Town to pay for repairs to Paradise Drive. Gram said this will be at the beginning of the project, after the initial permit is applied for, before any trucks are on the road;
- Details regarding height maximums: Gram said that the computations on how to measure the height had been conceptually agreed upon but needed wording added to the agreement;
- Meet and confer provision: Gram said that this was a good faith item meant to iron out any details in the EIR that might come up; he said that he was optimistic that this could happen and was confident that the owners had been meeting in good faith for the last four to five months.

Gram also noted that the annexation process was underway through an action brought by many of the neighbors. He noted that the town was only peripherally involved but had made a pre-annexation finding and had adopted a negative declaration. He said the Martha Company had agreed to stay the proceeding once agreement had been reached between the Martha Property owners and the Town, and once the County approves the agreement, it would drop the lawsuit. He said that until that time, the neighbors had the ability to pursue their lawsuit parallel with the current process.

Councilmember Gram asked whether people had had a chance to read the MOU and Development Agreement, and if they had any questions. One respondent said that it was difficult because it was in “legalese.” Gram concurred, noting that he, too, was a lawyer.

Gram said that the agreement contained not only lots of pages but lots of thought and discussion that had gone into those pages, and that the issues discussed in the two public meetings were included in the document. He assured the public that no other agreements had been made other than the ones included in the public documents.

He said that the issue of the construction road, for instance, had been addressed and now it was contemplated that all lots would be accessible from the temporary construction road accessed off of Paradise Drive. He said that in an attempt to share the “burden” between Paradise Drive and the other, adjacent neighborhoods, there was a new provision in the agreement that said that when 12 homes had been built on lots labeled 1-17, or after 10 years, the Town will have the discretion to have the construction road removed, in consultation with the Fire District with regard to any health and safety issues. Then, at the Town’s discretion, the road could be removed and up to five homes would be built via the streets in the Hillhaven and Old Lyford neighborhoods. He said that he thought this decision would be made at a public meeting when the time comes.

Councilmember Gram asked if the Council had any questions.

Mayor Fredericks agreed with Gram in that minor details were still being worked out, such as the concept of measuring height.

Vice Mayor Berger said that one issue that he had raised at the last meeting was the idea of pushing back the landscape envelopes of Lot Nos. 18, 19, 21 and 27 that fronted Paradise Drive so as to preserve the “natural look” of Paradise Drive in that area. He said that while this was not a “make it or break it” issue, it was a refinement worth looking at. He said it would be different if the lots were accessed off of Paradise Drive, so as to require landscaping for the driveways, etc., but he said that the lots would not be accessed off of this road.

Councilmember Slavitz asked whether it would be the Town’s intent to use the \$400,000 to make road repairs before or at the end of the construction.

Councilmember Gram said that it would be at the Town’s discretion. He said that a survey would be done of Paradise Drive at the beginning of the project to see what condition it was in. He said that the Town’s street impact fee would also be collected from each home as it was built, further funding street repairs for damage caused by construction vehicles.

Gram said that the Town’s [pavement management] studies showed that about 60-70% of all street damage is not cause by cars but by heavy vehicles such as garbage trucks, and construction vehicles.

Councilmember Slavitz asked about the EIR process and what might happen if the negotiations faltered. Gram said that the “meet and confer” provision had been written into the agreement for this purpose. He also pointed out that either party could walk away from the agreement at any time but said that he did not think this would happen.

Councilmember Collins noted that the Town was not a signer, nor a beneficiary of, the Development Agreement. He asked how the Town could be bound by its provisions.

Town Attorney Danforth said that after the Town annexes the property, state law says that the Town would be bound by the agreement for eight years, unless the Town agrees to a longer period, up to a maximum of 15 years. She said that the MOU includes provisions that the Town will wait to annex until the earlier of the filing of the first Final Map, or five years. The Town would not inherit any obligations under the agreement until actual annexation, according to Danforth.

In response to a question from Councilmember Collins, Danforth said that the Town would inherit the same protections as the County, including the provisions for indemnity. She pointed out a section near the end of the agreement that says, after annexation “County means Town” except where the context means otherwise.

Vice Mayor Berger asked if that included the provisions regarding acceptance of open space offered for public dedication. Town Manager Curran said, no, that it specifically said otherwise in that provision. She said there were several instances where that distinction was made (between the County and the Town).

Mayor Fredericks said that she noticed several people in the audience who were not in attendance at the first two hearings; she reviewed some of the provisions of the stipulated judgment and what it meant; she said that it was hoped that the County would approve a 43-lot development that would be acceptable to the Town and its residents, but that the uncertainty of this outcome had led the Council and its subcommittee to work to preserve the ridgeline and views from the ridge and to develop a spread of houses that we could “live with.”

Mayor Fredericks opened the public hearing.

- Peter Hunt, who said that he had been quite ill for some time and could not attend previous Council meetings, said that he had strong feelings about the proposed development. He said that he was concerned about the disturbance of peace and quiet on Ridge Road by heavy trucks, as well as the safety of children and grandchildren running out into the street. He recommended that the Council disclose the name and ownership interests of each member of the Reed family, the name of the lead negotiator for the family, and their attorney; he suggested that the Town run a Dunn & Bradstreet report on the family as this is very common business practice.
- David Barker, Lagoon View Drive, asked about language in the agreement pertaining to health and safety; said the MOU provided good coverage but questioned Section C-3 on page 2 of the resolution going to the County of Marin. [Town Attorney Danforth explained that it was a “precondition” and that if the County does not find that the 32-lot plan is equal or better than the 43-lot plan, it cannot approve it. She said that the stipulated judgment allows the County to approve less than 43 lots if there is a basis in public health and safety. So, if such an issue arises with the 43-lot project, then the County does not have to approve it, either. She explained that the “heat is off the County” to approve either one of these and presumably at that point, the parties would have to go

back to the drawing board. The bottom line of the language in the resolution presupposes that there is no health and safety problem with the 32-unit project, according to the Town Attorney.] Barker said that it made no common sense but he would accept the explanation.

- Barker also asked about Item 5-4(b)ii on page 24 of the Development Agreement concerning traffic mitigations. He said the agreement did not define whether they were necessary or who defines what is necessary. He said there had been no public discussion of whether specific mitigations were appropriate, and he recommended that a better solution would include language that the Town would specify what should be done and paid for. [Town Manager Curran said that he made a good point and, as a practical matter, any construction in the Town's right-of-way would require an encroachment permit, thereby placing the Town "in the driver's seat" with regard to improvements, their location, etc. She said that the gist of the provision was that Martha had agreed to pay for these mitigations.]
- Finally, Mr. Barker recommended that the spelling of Latin phrases in the agreement be checked.

Councilmember Slavitz asked for clarification of the off-site traffic mitigation measures. He asked whether specific ones could be inserted after the EIR is adopted. Town Attorney Danforth said yes, they could be.

- Bruce Portner, who said he was acting as an agent for the Bornstein property on Spanish Trail, said that a potential buyer was "nervous" about the fate of the property; he said that many agents and owners were in this position and wanted to know, one way or another, what the outcome of this development would be. [Mayor Fredericks said to tell them that "we're trying to get to certainty;" Vice Mayor Berger said that the key fact to note was that for the first 10 years, or until 12 houses were built, construction traffic would be directed through Paradise Drive.]
- Bob McDermott, Ridge Road, said he bought his house 25 years ago and had hoped to retire in peace and quiet. He had a list of questions and concerns, including traffic impacts from new construction on top of a series of remodel projects in the area, the instability of the soil on the property; the impact of construction traffic from Ridge Road (he suggested another solution, that is, a temporary construction road off of Lyford Drive through the Old St. Hilary open space, for certain lots); said that construction traffic through any of the neighborhoods was problematic; said there was no discussion of how utilities would get to the property; [Mayor Fredericks said that individual property owners would grant utility easements and that the utilities would decide how they were placed; Director Anderson said that utilities were shown on the drawings filed by Martha with the County]; questioned what "non-residential" uses meant in the agreement; [Councilmember Gram said that meant if certain lots were dedicated to open space]; Mr. McDermott asked when they would know about this.

[Mayor Fredericks replied, “when someone comes in with a check”]; [Vice Mayor Berger added that there are people interested in buying those lots (Nos. 9 through 17) and that it was not outside the realm of possibility.]

- Mr. McDermott said that with regard to environmental impacts of the project, stated “we are the environment” and would be affected for 10 years and even more if the infrastructure was laid for the homes and then the lots took more time to sell; he suggested an alternative be written into the agreement that would make the 10 years a “floating” timeframe whereby no construction would begin until a certain number of lots were sold, for instance 25-30% (six houses), and to delay the start of construction until that time.
- Mr. McDermott said he agreed with Mr. Barker’s concerns about what constituted construction traffic and who would monitor it. He said the Town should do so and be able to impose fines, etc. for violations. He said that all traffic should be controlled, from bulldozers, to pick up trucks and vans.
- Barry Wilson, affected homeowner and co-president of Lyford’s Cove/Old Tiburon Homeowner’s Association, complimented the Council subcommittee for an “awful lot of good work” and evenhandedness in its negotiations. He had several questions: 1) could the \$400,000 be used for sidewalks or other infrastructure improvements in the area; 2) what had the Martha annexation lawsuit parties agreed to? [Councilmember Gram said there were willing to “stay” their action while this agreement process is underway but that they are not bound by the Town’s actions]; 3) would the temporary construction road serve all the lots, except Lot No. 1? [Gram said it would serve all lots, including Lot No. 1]; further, even if some of the lots were taken into conservatorship (open space), he asked whether the construction road would be built and whether Ridge Road would carry some of the traffic [Gram said yes]; would the utilities be underground [Gram, yes]; and would it be possible to preserve a trail that he often walked on the perimeter of the property [Gram said, “we are working on it.”]

Gram added that he thought that the preservation of Lot Nos. 1 through 8 would be desirable but said that other residents thought that preserving the lots on the “nose” of the peninsula would be better (Lot Nos. 9-17). He said that either one would be a great way to eliminate a large number of homes and preserve the open space. He said that if the money was there, then there would be the “luxury” of making that decision.

- Wilson asked whether the construction road would still be built [to construct homes on Lot Nos. 1-8]. Gram replied that the public would rather preserve Lot Nos. 9-17.
- George Landau thanked the Council for “getting us to this point;” said that the trails were more than a means of exercise for him and represented a spiritual connection to the land. He encouraged to subcommittee to keep the trails connected in the agreement and said that a photo montage would help. Landau said that he and others

had worked very hard to purchase and preserve open space through the purchase of the Old St. Hilary's property.

Slavitz asked for clarification regarding the temporary construction road, if Lot Nos. 9-17 were not built, would the road still be built, and whether the language of the MOU could be modified.

Town Attorney Danforth said that the development agreement language could be changed, depending on which lots might be purchased in future.

Town Manager Curran added that there was language in the development agreement that spoke to this issue, specifically that if Lot Nos. 9-17 were not built, it would eliminate the requirement to build a construction road for reasons previously discussed by Councilmember Gram.

Councilmember Gram said that he would not have a problem going back to negotiate new terms pertaining to the road, but added that he did not know how the owners would respond.

Vice Mayor Berger said that in previous meetings, he had noted three separate scenarios that might be considered for purchase: the upper lots (Nos. 1 through 8), Lot Nos. 9 through 17, and the idea of buying up the bigger lots from both clusters and moving the development back further from the ridge. He said that a photo montage would help illustrate this point and sort out which lots were most desirable to preserve as open space.

- Victor Wong, 1808 Lagoon View Drive, thanked the Council subcommittee for its work but wondered whether the committee would explore the idea of creating greater economic incentive through the agreement for the [Martha Property] owners to build fewer lots by increasing the square footage of homes sizes on other lots. He said this would alleviate some of the fundraising burden. [Mayor Fredericks said that the smaller lots had been created to pay attention to the character of the surrounding neighborhoods and that any increase might meet with opposition from the neighbors; Vice Mayor Berger said that this had, in effect, already been done in the 32 versus 43-lot plan.] Mr. Wong said that this would represent a compromise in his mind which would result in fewer, but larger, homes. [Town Attorney Danforth said that the parties could always agree to an amendment of the agreement, in response to his question.]
- Wong asked whether the Town was prepared to “police” the construction activity and whether an additional economic “bite” should be added to the developer in the agreement;
- Wong made a recommendation to limit the impacts of construction, that is, to add language to the agreement that would limit how many homes (two, as an example) in all areas that could be actively under construction at any given time.

- Jerry Riessen, Ridge Road, raised several issues: a) shouldn't the EIR be compared to Tiburon's General Plan and not just the County's, given the time and effort spent by townfolk to amend the General Plan with the Martha Property in mind; b) does anything in the agreements bind the Town to the Federal Court judgment or stipulation? [Town Attorney Danforth said she did not believe so and would not agree to include any such language.] Riessen asked if language affirming this could be added to the agreement and not just in the recitals; Danforth said that the recitals was the appropriate place in the agreement to discuss mutual understandings between the parties; c) Riessen said that some of the landscape stakes seemed to have been misplaced and asked if they were going to be replaced or fixed to match the published map/plan; d) the February 2010 was troubling, said Riessen, and he asked if that "club" could be removed by asking the owners to waive that deadline in the spirit of signing the MOU; e) he hoped that Tiburon had the right to look at more than just health and safety issues in the EIR; [Town Attorney Danforth referred again to Section 2 of the Development Agreement – she said that the County had to accept a mutually acceptable alternative and that if changes were made that were different than what is stated in the draft Development Agreement, they would have to be acceptable to the Town.] Riessen asked if this meant the owners could walk away from issues other than those related to health and safety. Danforth concurred.
- Landscaping – Riessen continued to lobby for language in the agreement to regulate landscaping, stating that if the object was to protect views by limiting house height, something should be written into the agreement regarding landscaping to prevent trees that could grow to a height of 50 feet, for example, to be planted. [Vice Mayor Berger said that all landscape plans would be presented to the DRB for review and that there were already guidelines in place that precluded planting of certain species, such as Monterey Pine and redwood trees, for example.]

Town Attorney Danforth added that the Tiburon Tree Ordinance would apply to the property explicitly, assuming it is annexed, and that the ordinance limits the types of trees that can be planted. In response to a further question, she said that the ordinance is enforced by Town staff. Mr. Riessen countered that certain trees, such as maple, were not prohibited by the ordinance and could conceivably grow and block views. He asked, for the very least, to add some sort of restriction that the views of the Bay will not be obstructed.

Mayor Fredericks said she understood his concerns and posed the question of regulations through CC&R's. Town Attorney Danforth said that CC&R's could not be regulated by the Town.

Town Manager Curran said that the Town could continue to look into Mr. Riessen's concerns, in addition to the layers of protection already in place, such as the Tree Ordinance and design review process.

Vice Mayor Berger concurred that this would be helpful as his concern was not far-fetched.

Town Attorney Danforth suggested that language to page 17, a subsection of “K,” might be added that would direct the DRB to consider the effect of landscaping on views.

Councilmember Slavitz said he thought Mr. Riessen wanted to go one step further.

Riessen suggested that one specific location be identified from which water views would be protected, or other, very explicit language. Town Manager Curran said it would be looked into.

- Riessen asked about the ability of the Town to approve alternate access to the Martha Property. Director Anderson said the Town had written a letter to the County of Marin asking them to address the issue in the EIR]; Riessen asked about the annexation process and expressed concern that language in the MOU would tie the hands of the Town if certain conditions were not met; [Town Attorney Danforth responded that Section 10, on page 5, provided that if the County adopted something that was not acceptable to the Town, the MOU would terminate and the Town could proceed with annexation];
- Riessen expressed concern about timing of annexation and said he thought the tax-sharing agreement would be signed early in the process with LAFCO [Town Attorney Danforth said that was not her understanding.]
- John Wellner, Tiburon resident and attorney representing the Last Chance Committee, said that Mr. Riessen’s concerns regarding timing and the February 2010 deadline were valid and perhaps could be easily fixed in the agreement. He said an example was the 90-day meet and confer section of the MOU—he asked what would happen if all or part of that period fell after the February deadline; he said that the County might be in technical violation of the court order and would be under pressure to approve the application; he said that the recourse would be to ask the Martha Company to waive the deadline; [Councilmember Gram added that they could be asked to extend it, as well];

Town Attorney Danforth said that Section 3A already said that Martha waived all rights to approve any project that would involve the subdivision of more than 32 lots, so that during the term of the MOU, it had waived its right to pursue the 43-lot alternative and is also obliged to wait the 90 days.

Mr. Wellner disagreed, stating that it was a “future waiver” if things “go right” and not if the MOU falls apart.

Councilmember Gram said that he would add this to his list of issues to go back to the negotiating table.

- Joanna Kemper, reiterated the importance of many to the preservation of certain trails through the property [and Mayor Fredericks acknowledged that she understood which trails they were referring to];
- Peter Hunt, asked again if the Town had run a Dunn & Bradstreet report on the Martha Company and knew who the ownership percentages of the individuals in the company; [Mayor Fredericks and staff said that they knew it was a family-owned company and some members of the family were known to the Town; Town Manager Curran said that the Town knew that the Martha Company were the owners of record and that was the party the Town was negotiating with].

Mayor Fredericks closed the public hearing.

Councilmember Gram said that many of the comments were useful but that the Development Agreement was not the appropriate place to address some of them. However, he said that issues such as traffic should be under the Town's control, and the Town should pay attention to it.

Councilmember Gram said that he had a list of talking points for his next meeting with the Reeds, and he thanked the public for helping the committee move this along with its feedback. He said that "we are 98-99% there," but acknowledged that there are still some issues, such as the trails, the 90 days in the MOU, and the concern of the neighbors regarding annexation, that needed to be resolved. He said that he would recommend that the Council approve the MOU and the form of Development Agreement tonight.

Councilmember Slavitz asked if Gram he could add to his list the issue of which lots [the development of which] would trigger the construction of the access road. Gram said that was on his list. Slavitz said he appreciated the efforts of the subcommittee and wished them well.

Vice Mayor Berger asked that the setback issues that he had previously raised be looked into before signing the MOU.

Councilmember Collins asked that the issue of height of landscaping on the most sensitive lots be added to Councilmember Gram's list of further talking points.

Mayor Fredericks thanked staff for their hard work, but said that it would have been impossible without Councilmember Gram's efforts. She said that she was the "greek chorus" on the subcommittee, but added that she, too, had a list and would compare notes with Councilmember Gram.

Fredericks also thanked the public for their input and participation in the process.

MOTION: To adopt the resolution approving the MOU and authorizing the Town Manager to complete any final minor negotiations on details in consultation with the subcommittee, and execute it as appropriate.

Moved: Gram, seconded by Slavitz

Vote: AYES: Unanimous

MOTION: To adopt the resolution urging the Board of Supervisors to take certain actions with respect to the Easton Point (Martha Company) Development Applications.

Moved: Slavitz, seconded by Collins

Vote: AYES: Unanimous

ADJOURNMENT

There being no further business before the Town Council of the Town of Tiburon, Mayor Fredericks adjourned the meeting at 8:35 p.m.

ALICE FREDERICKS, MAYOR

ATTEST:

DIANE CRANE IACOPI, TOWN CLERK