

**SPECIAL CALL CITY COUNCIL MINUTES
MONDAY, AUGUST 26, 2019 5:15 P.M.
CITY HALL, COUNCIL CHAMBERS, VERO BEACH, FLORIDA**

PRESENT: Val Zudans, Mayor; Tony Young, Vice Mayor; Laura Moss, Councilwoman; Robbie Brackett, Councilman; and Harry Howle, Councilman **Also Present:** Monte Falls, City Manager; John Turner, City Attorney and Tammy Bursick, City Clerk

1. CALL TO ORDER

A) Roll Call

The City Clerk performed the roll call.

2. PRELIMINARY MATTERS

A) Discussion of Agreement for Consent to Sublease between the City of Vero Beach and The Friends of the Vero Beach Dog Exercise Area, Inc.

Mr. John Turner, City Attorney, gave the background of this request that they have under consideration today. He said the original paperwork came to his office on August 15th and it came in the form of a three (3) party agreement for a lease with the City of Vero Beach (CVB), Florida Power and Light (FPL), and Vero Beach Dog Park, Inc., for construction of a certain structure at the Dog Park. He reviewed the information and determined that it was not an appropriate document to bring forward to Council for their consideration because it was a third party agreement to lease property that was already being leased. He said under the lease agreement that the City has with the Vero Beach Dog Park, Inc., before they could lease to any other third party or assign any interest in the lease they had to obtain consent of the City Council, which had not been done. At that point he advised the interested parties that they would have to obtain a consent from Council and would need the proper paperwork to do so. He told them that request would be difficult to get before the City Council on August 20th because of the agenda that was set on August 20th and that it would more than likely to be considered in October. Then after talking with the City Manager and being told about the rush it was added to the August 20th agenda. At that time the information that he had was presented and the information was insufficient in many respects. It did not have the proper legal description, it did not include a proper sketch of the proposed area, it did not have all the proper consents and was deficient in that the Public Work's department were not consulted and they are in charge with managing the Park. So that information was presented to Council on August 20th and Council determined that there would be an effort made to get all the paperwork together and this matter would be heard at a Special Call meeting. After that instruction was given, the City Attorney's office began working with all parties and with the City surveyor to obtain all the necessary information for the package that could be approved by the Council if that was their decision. The City

surveyor worked approximately two (2) days at the site to obtain the proper legal description and also set forth the proper location of the structure. It was determined that it would be in a City easement, which was unacceptable and that the legal description was not correct. This information was delivered to the City Clerk's office late Thursday afternoon for preparation and to assemble that package together. Unfortunately, the "Agreement for Consent to Sublease" had a few errors in it that had to be addressed before the final package could be delivered and published and that was done today. He said all the errors were addressed and all the corrections were made. They now have in front of them the final package for the Consent to Sublease with the proper attachments (legal description and sketches). Mr. Turner commented that it was troubling with the information that came to his office the way that it did. The parties involved had entered into a lease agreement between FPL and Vero Beach Dog Park, Inc. in July, which is a breach of their lease. He said that the lease is very clear that the Vero Beach Dog Park, Inc., has to obtain the City's consent first and not afterwards. There are also some issues regarding the Vero Beach Dog Park, Inc.'s management that need to be addressed by Council. He said if improvements or additions are made outside of the leased property there needs to be concern. Additionally, if there is any intent of FPL using this site in some commercial form or charging or accepting donations for operation of this site it needs to be looked at. He said that Council's direction to FPL that this is a donation to the City, and public use in connection with this particular property is only for recreational purposes and there cannot be any commercial activities. He was hoping to proceed with the Agreement for Consent to Sublease and get it signed tonight.

Mayor Zudans asked if they needed to address the commercial matter now or do it later.

Mr. Turner stated that it could be addressed right now with a motion in connection with this consent to sublease. The motion would be that this is solely for recreational purposes only.

Councilwoman Moss added that anything that FPL does is a gift to the City and it is not a source of financial revenue for anybody including donations.

Mayor Zudans made a motion that this is solely for recreational and demonstration purposes. It is a gift to the City from FPL and not to be used for commercial purposes. He said that this was his motion to amend this lease. Mr. Young and Mr. Brackett seconded the motion.

Mr. Turner told the Mayor that he could vote on this motion without public comment and then have public comment on the total agreement.

The motion passed unanimously.

Mayor Zudans made a motion to approve the agreement for consent to sublease. Mr. Brackett seconded the motion.

Councilwoman Moss said it is deeply troubling that the Dog Park would go ahead and file something without asking the City. She said they filed without the permission of Council, which is a violation of the lease. She asked the City Attorney if this was a violation of the original lease. The City Attorney said that it was. Councilwoman Moss expressed that at this moment in time the Dog Park is in violation of the original lease. They have violated the lease. Her question to the City Attorney is in regard to sub-leases that clause should be stricken because how would they prevent this from happening in the future. Councilwoman Moss reported that this was filed out of state. She said it was filed in New York on July 9, 2019 and it has been recorded. She showed the official document that was recorded and read how the recorded seal read on the document. The document was recorded on July 23, 2019. She said within the body of the document is dated July 17, 2019 and signed on July 9, 2019. She said this whole thing is deeply troubling that the party would go behind the backs of the City. She said frankly she thinks that this party owes the people of the City of Vero Beach a written explanation and addressed to the people of the City of Vero Beach and an apology is in order. She does not think that this should ever have happened. She asked the City Attorney how they found out about this since it was filed out of state.

Mayor Zudans stated that he highly doubts that this was some plan to sign a lease for a demonstration purpose. He said they made a mistake of thinking that this is how they were suppose to do it. He understands Councilwoman Moss's frustration that a mistake was made, but insinuating some kind of motive that they are doing things behind the back of the City is not fair to the people who are involved.

Councilwoman Moss said it was not a motive; it was an action because it already has happened.

Mayor Zudans asked Mr. Turner if the lease that was signed by the two (2) parties is valid.

Mr. Turner explained that they would need some sort of release of that lease to clear this up.

Councilwoman Moss stated that the lease that was filed is valid and should have not been done. They violated their original lease.

Mayor Zudans commented that the lease is not valid because the Vero Beach Dog Park, Inc., did not have the authority to sign it.

Mr. Turner explained the agreement between FPL and Vero Beach Dog Park, Inc. is voidable by the City because of the lease agreement they have with Vero Beach Dog Park. He said to cure this the City would have to be willing to waive that objection it would have regarding the breach that the Vero Beach Dog Park, Inc. has committed and then have the parties that entered into that agreement execute a release of the obligations under that agreement. He said right now it shows of record that they have the agreement

and there needs to be some kind of release. He said that this release could be prepared, have the parties sign it, and then filed, which would need to be a direction of Council.

Mayor Zudans asked how do they do that.

Mr. Turner said as a condition of approval for consent to sublease a motion would need to be made that a request for the parties to execute and file for the record a release or some document prepared and agreed to by the City Attorney's office. **Mayor Zudans made that in form of a motion.**

Councilwoman Moss asked the City Attorney how did he even become aware of this document, which is in fact valid.

Mr. Turner said that he does not remember. He believes that the surveyor discovered it.

Councilwoman Moss explained that her point was that they would not have known about it and it is a legal, valid document. She said that the Vero Beach Dog Park, Inc., knew or should have known that this required the approval of the City Council prior to anything occurring. She asked the City Attorney if she was correct.

Mr. Turner stated that the document that was entered into by the two (2) parties violates the terms of the original lease and that agreement is a binding contract, but there is no way it can be performed because it does not have the consent of City Council. He said it definitely needs to be addressed.

Mayor Zudans made a motion as a second condition of the approval of this consent to sublease that a preparation and filing of a release of record of that document to the satisfaction of the City Attorney's office. Vice Mayor Young seconded the motion.

Mr. Clay Price, Vero Beach Dog Park, Inc., Board Member, stated that they were willing to comply. He said that prior City administration had asked the Vero Beach Dog Park, Inc., to enter into this agreement with FPL so as a good citizen of the City of Vero Beach they did this not understanding that they had made any mistake or attempt. It was their understanding that they needed to have a sublease in place in order for FPL to come before City Council and move forward. He asked that they be forgiven for the oversight noting that they are not attorneys. He told Councilwoman Moss that this was not done in New York. Their Chair was in New York on vacation and in order to expedite this...

Councilwoman Moss stated that all she said is that the document was signed in New York. She does not know what was done in New York. She noted that the last time the Vero Beach Dog Park, Inc. appeared before the City Council they did have an attorney with them who was Mr. Barry Segal. She asked if he gave them legal advice.

Mr. Price stated that Mr. Segal does volunteer his time for Vero Beach Dog Park, Inc.

Councilwoman Moss asked if Mr. Segal was aware of this.

Ms. Jill Jones, Vero Beach Dog Park, Inc., Board Member, stated that this process started when Mr. Jim O'Connor, former City Manager and Ms. Kira Honse, former Assistant City Attorney asked them if they had any interest in partnering with FPL on the SolarNow program. At that point they said that this would be good for the community and asked what is the process. She said that Ms. Honse said that there has to be a lease between Vero Beach Dog Park, Inc. and FPL and after that lease is signed then the City would do a consent to sublease. She said that was the order that they were told to do this. Then they asked FPL to produce the document and they had their attorney, Mr. Barry Segal, approve it and then they signed the agreement because that is what they were told to do. She said that this is not something that they are trying to hide from anyone. This is for the betterment of the community.

Councilwoman Moss asked if Mr Segal reviewed the document that they filed in July. Ms. Jones said that he reviewed the document. Councilwoman Moss said that Mr. Segal is a lawyer and he would know and presumably he would have seen the original lease.

Mayor Zudans stated that he did not appreciate the accusatory tone from Councilwoman Moss. He said there was a mistake made and lets just fix it.

Councilwoman Moss said she would like to prevent it in the future.

Mayor Zudans told the Vero Beach Dog Park Board Members that he was glad that they were here to try and work this out and he liked the attitude that they just wanted to fix this and to move forward. He likes this project and thinks that it is a great idea. There is no one trying to make a buck off of this. There was an honest mistake that needs to be resolved and correct moving forward. He agrees that it is a good message that anyone who has a lease with the City and they want to sublease, approval needs to come to the Council first. There has been a lot of change in City staff and sometimes things fall through the cracks. It is Council's job to resolve this, which he felt was going to be pretty easy to do.

Councilwoman Moss questioned if Mr. Segal was looking at this and he is an attorney (legal oversight) she would have to question that. She said to her it was not plausible, but she is willing to move forward. They do not need to blame Ms. Honse over this, but Ms. Jones is welcome to send the emails that she has from Ms. Honse to the City Attorney. She is looking to prevent this in the future that no organization that is engaging in subleasing goes AWOL. She asked the City Attorney how do they prevent this from happening in the future. She said at the time that this happened the City didn't even know about it.

Mr. Turner felt that in future agreements that clause should be redacted. In this case the City has a contract and it needs to be honored.

Mr. Brackett commented after hearing the comments made by Ms. Jones it was indicated that the City did know what was going on. He said that the Council might not have known about it, but City staff did.

Ms. Jones stated that they were aware that they needed to get consent from the City Council. They just needed to know what were the proper steps to take and that was the information that they received from Ms. Honse. She said that even FPL questioned the way that Ms. Honse was telling them to do it because they said that was not how they normally would do it.

Councilwoman Moss stated that you do not have to be an attorney to understand the lease. She is not an attorney and she understands what it says. She said what happened was wrong. She was surprised in this case because the Vero Beach Dog Park did have legal advice.

Mayor Zudans commented that apparently the City's attorney told them to do it that way.

Vice Mayor Young asked the City Manager if he was satisfied that they were on the right track.

Mr. Monte Falls, City Manager, stated that staff was satisfied that they were on the right track.

Mr. Bart Gaetjens, External Affairs Manager for FPL, thanked Mr. Turner for all his efforts on this. He said that when FPL first approached the City on this they needed to wait until the sale of the Electric Utility had been completed. He said if the sale of the Electric Utility had fallen apart then this would not have happened. They vetted a lot of locations of where to place these solar shade structures and the Dog Park was the best location. He expressed that FPL was not collecting any money from the City of Vero Beach on this project and there is no outlay costs on their part. It is so people are aware of what solar is. The question has come up as to why they are rushing this. He explained that the funding for this program will be sunsetting soon and they needed to have everything in place.

Mr. Anuj Chokshi, Project Director for FPL, added that there has been a lot of success with this program in other places. They wanted to incorporate this program in Vero Beach as soon as the sale of the Electric Utility had taken place. He said Vero Beach will be one of the last places where this program will be instituted because the program is now going to be sunsetted and there will not be any new "SolarNow" projects taking place. He would like to move forward on this. The agreement outlines the use of the structure. He said FPL wants to be good partners with the City on this project and he expressed how much success that FPL has had in other places where this project has been installed. He then provided a copy of a Power Point presentation that outlines the whole concept (attached to the original minutes).

Mayor Zudans was happy that the SolarNow program was going to be in Vero Beach. He said not only are they getting 30% lower electric bills in this entire community, but the emission profile of the energy that they are receiving from FPL compared to what they were getting from Florida Municipal Power Agency (FMPA) and Orlando Utilities Commission (OUC) is significantly better.

Vice Mayor Young asked Mr. Chokshi when did he anticipate work beginning on this project and being completed.

Mr. Chokshi explained that once the agreement is executed they would kick the project off and then start construction. He hoped that would take place in December and the project would be completed in January. He said all the necessary permits would have to be applied for and approved.

Vice Mayor Young asked if there would be outlets to charge cell phones.

Mr. Chokshi did not know if there actually was AC power on the structures themselves, but he would look into that.

Councilwoman Moss stated that in order to prevent this problem from occurring again, as far as subleasing, they were going to redact the sublease clause from their future leases. She asked in addition to that with regard to this specific lease, what is the way to prevent a so called honest mistake like this one from occurring again.

Mr. Turner recommended that if the Vero Beach Dog Park, Inc. would be amendable in amending the lease to redact Section 27 of the lease, that allows for or permits subleasing upon obtaining consent from the City. This would require a written amendment to the lease. In the future there would not be any subleasing or assignment.

Councilwoman Moss suggested adding that to the motion.

Mayor Zudans did not think that they could do that if they were about to approve a sublease.

Councilwoman Moss felt that this needed to be made really clear. There was a mistake for whatever reason so it needs to be very clear.

Mayor Zudans understood that this was a valid contract, but it was totally voidable because it was in violation of the lease. The damages would not go back to the City it would go back to Vero Beach Dog Park, Inc., for signing the lease, which they had no right to do. He said this was never something that was going to be non-voidable.

Mr. Turner stated that Vero Beach Dog Park has been advised as to what the City expects in the future. He said a follow up letter noting if something ever comes up like this again they need to contact the City first.

Mayor Zudans said that they (Vero Beach Dog Park) did that.

Councilwoman Moss stated that they need approval from the City Council.

Mr. Clay Price referred to page 2 of the document in paragraph 4 where there is a notice, which he read. He said all they were trying to do was say that this was being done and they wanted to proceed accordingly. This was done according to the prior Assistant City Attorney's instructions and they were just trying to comply. They are happy to move forward the way that the City and FPL has deemed appropriate, unfortunately they got caught in the middle.

Councilwoman Moss said it is no problem to do that and lets do it.

Vice Mayor Young did not agree with doing that and felt it was unnecessary.

Mayor Zudans also agreed that it was unnecessary. He said that Vero Beach Dog Park made a mistake, but that mistake never bounded the City to anything. He said that the Council shouldn't say that they never will be able to sublease. They just need consent from the City Council.

Councilwoman Moss felt that maybe the Mayor did not understand the legal ramifications of this and the seriousness of it.

Mr. Ken Daige asked if they were voting now on the consent to sublease.

Mayor Zudans said no, that will be coming up next. He said they are voting on a motion to make a condition of the sublease.

The City Clerk reread the motion.

Councilwoman Moss wanted it made clear that this was the remedy to the legal document that was filed in July.

Mr. Turner said that is correct.

The motion passed unanimously.

Mayor Zudans said that now they would discuss a motion to approve the consent to the sublease.

Councilwoman Moss asked what are they doing in preventing so called honest mistakes in the future.

Mr. Turner said procedurally if that is the unanimous direction of Council it might be better to bring it up at another Council meeting as a City Attorney item as to how to

address these kind of problems in the future. He said this could be considered now if all Councilmembers agree to consider it.

Councilwoman Moss thought it was fine to address the matter at another time. She said that this was not properly noticed. She said that the Council did not have this sublease themselves until just before they sat down, which is not a good way to do business. It is not the proper protocol.

Mayor Zudans stated that when Councilwoman Moss said that the meeting was not properly noticed that is not legally factual.

Councilwoman Moss said it was quite legally factual. This document was not on the City website.

Mr. Turner said that Councilwoman Moss has a good point, but they have met all substantive requirements. He said there were some changes made, but that is allowed for in the Ordinance and there can be some last minute changes made at a Special Council meeting. Also, allowed in the Ordinance is that notwithstanding some irregularities in the way the meeting was called or published is not going to impact the decision.

Councilwoman Moss commented that there have been a lot of irregularities and that is the problem. The City lives in fear of this kind of thing and she is not over stating it. She said there has been a lot of fear because things appear out of no where, literally, and then there is a rush to action on them and this has been going on for quite some time. She said the City Attorney has not been here and he is not privy to that so there is no way that he would know, but he will see.

Mayor Zudans made a motion to adopt the consent to sublease agreement. Mr. Young seconded the motion.

Mr. Ken Daige wanted to make sure that the consent to sublease that they were voting on had the word “recreational” in it instead of “commercial.” He was told that was one of the changes that was made. Mr. Daige asked with the solar panels/solar tree that would be generating energy will the energy it generates be for that site only or will it be put back in for grid use. Mayor Zudans said that his understanding is that it will go on to the grid. Mr. Daige said when it goes on to the grid isn’t that a profit based company doing that. He wondered if that could be done with Charter protected property. Mayor Zudans explained that this is a highly regulated industry and all the costs are passed through the Public Service Commission (PSC) and all of the ratepayers are getting benefits. Councilwoman Moss did not think that was Mr. Daige’s question. She said his question had to do with Section 5.05. Mr. Daige said this is a Charter protected piece of property and he could understand if the costs would go the small generated area of the Park. He said when it goes back to the grid it is for a profit based company who is benefiting for their customers and shareholders. He said this would be a concern going forward if they have another large company come in to do something else on a piece of property and they make some money off of the deal. He had some concerns about that.

Councilwoman Moss asked if that was a legal concern. She said they don't want to be endorsing something that is in violation of any regulations.

Mr. Turner explained that there is a provision under Section 5.05 that allows leasing on the property for recreational purposes and incidental concessions.

Councilwoman Moss asked Mr. Turner if he needed time to review this. She did not think that he should be operating under duress.

Mr. Howle commented that electricity is being used by people in the grid and it is not a profit making kind of scheme.

Mr. Gretjens said to delay some of their fears there are many municipalities who already have these solar panels installed. He said this is not a big solar facility. It only consists of 24 panels.

Mr. Chokski added that it is a 7 kilowatt structure. This is meant to be a demonstration product, which will allow people of all ages to be able to see solar panels.

Mr. Gretjens explained that this is funded by a volunteer group of FPL customers. They voluntarily donate \$9.00 every month from their FPL bill to go towards the SolarNow project.

Councilwoman Moss commented that they understand that it is a feel good thing and everyone feels good about it, but it is still a legal matter. She asked Mr. Turner if they were about to endorse something that is a regulatory matter. She asked him if he would like time to give an answer that is not given under duress.

Mr. Gretjens added that the PSC did bless this program and understood that these panels would be going into different areas of municipalities in Florida.

Councilwoman Moss appreciated that, but did not know if the PSC looked at their City Charter.

Mr. Turner stated after reading the Charter and looking at the intent of the restrictions of the property, a public use and public enjoyment structure if it is built as planned and it is generating solar power that in addition to powering facilities that can be hooked up at the Dog Park some access amount will be put back into the public domain they would have a successful defense if they were challenged. He said it would be a defensible position and the City would prevail.

Councilwoman Moss stated so legally it is allowable.

Mrs. Phyllis Frey commented that a couple of concerns that she would raise is if there were other organizations such as the Rowing Club, would they be allowed to do the same thing (sublease to someone).

Mayor Zudans said yes. He gave a perfect example of the Seaside Grill at Jaycee Park.

Mrs. Frey brought up that this particular project is being funded by taxpayers through a grant.

Mayor Zudans reminded her that FPL customers voluntarily give \$9.00 a month towards the solar demonstration project. He said private citizens give this through their utility bills.

Mrs. Frey suggested donating this structure like other businesses do. She said that subleasing was not necessary. They need to include a temporary time limit for renewal.

The motion passed 5-0 with Mr. Howle voting yes, Mr. Brackett yes, Councilwoman Moss yes, Vice Mayor Young yes, and Mayor Zudans yes.

Mr. Howle commented that this is not the first time that the Dog Park has been caviler about their contract. He suggested to them that when things like this come up that they take more time and study it so they don't have these issues in the future. He told them they were doing a good job.

B) Public Comment

Public comment was taken throughout the meeting.

3. ADJOURNMENT

Tonight's meeting adjourned at 6:15 p.m.

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