

**MINUTES OF THE SPECIAL MEETING
OF THE CAPE CORAL CITY COUNCIL**

Monday, January 8, 2007

CONFERENCE ROOM 220A

4:00 P.M.

Meeting called to order by Mayor Feichthaler at 4:02 p.m.

Pledge of Allegiance to the Flag of the United States of America

A Moment of Silence – Mayor Feichthaler

ROLL CALL: Mayor Feichthaler, Council Members Bertolini, Boyd, Day, Hair, LePera, Rosado and Stevens were present.

BUSINESS

ADMINISTRATIVE / DISCUSSION ITEMS

Forfeiture Hearing Rules and Procedures

Mayor Feichthaler noted he had prepared two memorandums to Council regarding procedures for the forfeiture hearing. He stated that he had also submitted an option that he felt Council Member Rosado and Council should consider regarding Mr. Rosado stepping aside pending the investigations by the Ethics Commission and the State Attorney's Office.

Council Member Hair asked if Mr. Rosado would be willing to step back from the Council meetings and from voting on resolutions and ordinances.

Mayor Feichthaler asked if Council Member Hair was in agreement with the five options listed on page two of his January 5, 2007 memorandum, Options for Hearing:

1. Councilmember Rosado will agree to be absent from Council meetings and not participate in voting pending the investigation by the Ethics Commission and the State Attorney's office. This would be similar to the action taken by Council Member Rosado in October.
2. The Council will excuse all absences by Council Member Rosado during the pendency of the Ethics Commission and State Attorney investigations.
3. Council Member Rosado will continue to serve the residents; including the ability to utilize the travel and conference budget in his service to the City. That is, with the exception of not attending Council meetings, he will have all rights and obligations of a member of Council.
4. The Council will postpone the forfeiture hearing until the conclusion of the State Attorney and Ethics Commission investigations.
5. Council Members will still avail themselves to Mr. Villalobos for any questions he has regarding the alleged Charter violations.

Council Member Hair responded in the affirmative.

Council Member Bertolini stated that she had an issue with option number three, that Mr. Rosado would have the ability to utilize the travel and conference budget during his service to the City.

Mayor Feichthaler stated that Council recently adopted a resolution dealing with Council expenditures. He noted that he would be making the primary decision regarding expenditures with Council having the ability to overrule his decision. He commented that Mr. Rosado must continue to serve District 7 and all of the residents of Cape Coral and that may entail some travel expenses.

Council Member Bertolini asked if Council Member Rosado would be willing to step down with excused absences.

Council Member Rosado responded that he was prepared to move forward and wanted to continue to work as a Council Member.

Council Member Day stated his position that the actual hearing itself should be canceled until the City knows what the State Attorney and the Department of Business and Professional Regulations are going to do; these issues are more significant than the ones on the table at this time. He commented that he did not feel there was anyway for Mr. Rosado to get a fair hearing. He suggested canceling the forfeiture hearing.

Discussion was held concerning Council Members' being unbiased.

Mayor Feichthaler stated that he would not be in favor of postponing the hearing.

Council Member Boyd stated that he had hoped Mr. Rosado would consider stepping aside and not voting on Council matters. He noted he heard that there would be future law suits and stated that he could not base his decisions on the fear of being sued. He questioned the definition of a forfeiture hearing.

City Attorney Menendez read Section 4.12 of the City's Charter into the record: "The Council shall be the judge of the election and qualifications of its members and of the grounds for forfeiture of their office, and for that purpose shall have the power to subpoena witnesses, administer oaths, and require the production of evidence. A member charged with conduct constituting grounds for forfeiture of office shall be entitled to a public hearing on demand, and notice of such hearing shall be published in one or more newspapers of general circulation in the City and published in Lee County at least one week in advance of the hearing. Decisions made by the Council under this section shall be subject to review by the Courts."

Council Member Boyd noted that the Charter was written to protect the City and its residents.

Council Member Bertolini stated that she was elected to represent the people and the Charter of Cape Coral. She noted the Charter states that if a Council Member is accused of breaking the law Council should act on that matter.

Council Member LePera agreed with Council Member Day that the issues currently before Council were the least significant charges. She stated that as a result of the investigation Council had certain facts before them that cannot be ignored. She suggested moving forward with the hearing since these matters were Council's responsibility.

Council Member Stevens commented that he was perfectly capable of making an informed decision in this matter when presented with the facts; he noted that the other Council Members could do the same.

Council Member Day asked why the City Manager and City staff had not come to Council immediately when these issues with Mr. Rosado were taking place. He noted that he would have many questions to ask of the witnesses. He questioned why Steve Westphal was listed as a potential witness.

Mayor Feichthaler responded that he noted Steve Westphal as a possible witness in his memorandum because there were Charter implications regarding the purchase of the Motor City property. He asked if the Council Members had any other options besides a forfeiture hearing that they would like to propose.

No other options were presented.

Council Member Boyd stated that he agreed with Council Member Day regarding witnesses also being judges at the hearing. He noted that the Charter does not state that Council Members need to be called as witnesses. He stated he felt that the purpose of the hearing was to allow Mr. Rosado the opportunity to explain what he had done.

Mayor Feichthaler explained that the question at hand was whether or not any relevant information pertaining to the six alleged Charter violations could be obtained by interviewing Council.

Council Member Boyd noted that all of the sworn testimony that he read in the investigator's report was from City employees. He stated that if Council Member Rosado would explain the alleged Charter violations there would be no need for a hearing.

Council Member Day stated he felt it was extremely important that Council members testify during the hearing. He asked if City employees were allowed to bring their attorney to a pre-disciplinary hearing.

City Attorney Menendez responded in the affirmative.

Mayor Feichthaler recommended amending or approving the hearing rules as presented in both of his memorandums.

Council Members reviewed the Mayor's memorandum dated January 4, 2007 and made the following suggestions:

Discussion was held regarding paragraph two of the memorandum:

The most important fact to consider is that these meetings will be conducted, in essence, like any other City Council meeting with a few adjustments for the particular subject matter. As Mayor, I will Chair the meeting and the Mayor Pro Tem, Council Member Boyd, will Chair in my absence or if I am otherwise unavailable to preside over the hearing (e.g., if I am being questioned under oath as a witness).

Council Members agreed that they should all be present at the hearing or review the DVD information.

Council Members had no questions regarding bullet number 1:

- In determining whether any action is appropriate at the conclusion of the meetings, the council should use the same standard of proof we would use for any other proceeding, which is the "preponderance of the evidence" standard. In essence, this means each individual councilmember should weigh all the information and evidence provided regarding the alleged violations of the charter. If the councilmember believes the evidence tends to show it is "more likely than not" that the alleged violations did take place, then the "preponderance of the evidence" shows the violation took place. In the alternative, if the evidence shows it is more likely than not that the violations did not occur, under the "preponderance of the evidence" standard, Councilmember Rosado cannot be found to have violated the charter.

Council Members agreed with bullet number 2 that "hearsay evidence" would be heard:

- Just like in any council meeting, any and all information can be considered during your individual deliberations. However, I urge everyone to consider only those allegations made in the document presented by John Hubbard relating to the charter violations. Any alleged ethical or criminal violations are not relevant to these proceedings, therefore, we must limit our inquiry solely to the issue at hand. As Mayor, I do not feel I am in a position to instruct anyone to disregard any information provided in these hearings. Just like any other hearing, you should take responsibility to weigh the strength and the reliability of any witness or the information they provide. However, if anyone becomes verbally abusive to a witness, or asks a question that has no relevance to our inquiry, I will interrupt that question and request that we confine our inquiry to the alleged charter violations. This is the same procedure we utilize for any other meeting we have. No personal attacks will be tolerated from anyone.

Council Members had no questions regarding bullet number 3:

- This is not a judicial proceeding, therefore we will follow general Council rules and Robert's Rules of Order. This means that the rules governing the 20th Judicial Circuit or any other court of law will not apply to these proceedings.

Council Member LePera stated that she did not understand bullet number 4 regarding Council Members being allowed to make opening statements:

- We will allow opening statements from all Council Members, although statements are not required. I request you limit your comments to two minutes. Councilmember Rosado will have five minutes, and may elect to make the statement through his attorney.

Mayor Feichthaler explained that Council Members could make an opening statement but would not be required to do so.

Council Member Rosado moved, seconded by Council Member Day to allow Mr. Rosado or his designee twenty minutes for an opening statement

Council polled as follows: Hair, LePera, Rosado, Stevens, Boyd and Day voted "aye". Bertolini and Feichthaler voted "nay". Six "ayes" and two "nays". Motion carried.

Mayor Feichthaler reviewed bullet number 5:

- We will have two lecterns, one for Councilmember Rosado's counsel and a second for witnesses. Due to the nature of our chambers, witnesses will stand behind the "main lectern", which is the one usually used by the public during input. This will be angled slightly toward our left. The second lectern will be set up our left of the main lectern, along with a table and two chairs, in a position in front of Councilmember Rosado's seat. The lectern and table will be angled so that it will be facing all of Council, as well as the witness lectern during questions. Questions will be directed from behind the lectern from Councilmember Rosado's counsel. He will not be permitted to approach any witness or the Council unless there is a specific reason for doing so and, as Chair, I approve of same. It should be noted at this time, if Council has an objection to procedure during the meeting a "Point of Order" can be made and a vote can be taken, if necessary. Also, any items or information to be submitted as physical evidence can be easily provided to the Clerk from the attorney's position.

Council Member LePera stated that she would like this item clarified, that if Council Members were witnesses while trying to be the judge and jury they would not have to step down to stand behind a lectern to do so.

Council Member LePera moved, seconded by Council Member Bertolini to allow all eight Council Members to be questioned at the dais from their seats if they are called as witnesses.

Council polled as follows: Hair, LePera, Rosado, Stevens, Bertolini, Boyd, Day and Feichthaler voted "aye". Eight "ayes". Motion carried.

Council Members had no questions regarding bullet number 6:

- I expect that all Council Members will fully cooperate should you be called to provide information. However, there is no legal requirement for you to answer questions, particularly those that do not have relevance to the matter at hand. Because there may be questions both from Councilmember Rosado's counsel and fellow Council Members, I request you also take the position at the main lectern to answer those questions.

Mayor Feichthaler reviewed bullet number 7:

- We will call as witnesses all city employees that were interviewed for purposes of Mr. Hubbard's report as well as all Council Members. We should also seek to call the following individuals:
 - Bill Nolan
 - Maria Giraldo
 - Steve Westphal

Council Member Day stated that he felt Steve Westphal should not be required to testify at the hearing.

Council Member Boyd agreed with Council Member Day regarding Mr. Westphal's testimony.

Mayor Feichthaler suggested that Steve Westphal and Maria Giraldo be removed from the witness list.

Council Member Boyd moved, seconded by Council Member Day to remove Steve Westphal and Maria Giraldo from the witness list.

Council polled as follows: Hair, LePera, Rosado, Stevens, Bertolini, Boyd, Day and Feichthaler voted "aye". Eight "ayes". Motion carried.

Attorney Villalobos explained why he was seeking to interview City Council members.

Council Member Boyd moved, seconded by Council Member Rosado to exclude Council Members as witnesses.

Council polled as follows: Hair, LePera, Stevens, Bertolini, and Boyd voted "aye". Day, Feichthaler, and Rosado voted "nay". Five "ayes" and three "nays". Motion carried.

Council Members had no questions regarding bullet number 8:

- Both Council and Councilmember Rosado's attorney will have the opportunity to ask questions of all witnesses. The order of questioning will be as follows: For each witness we call, Council will have the opportunity to ask questions. We will go in a rotating alphabetical order as the first filter. When a witness is called, and if you have a question, I ask that you hit your call button prior to them being sworn in. Once the witness is sworn in, I will follow the alphabetical rotation based on the lights on at the commencement of questions. At the end of those questions, if any Council Member has an additional question that was conceived during the initial questions, I will ask for final questions, and you can again hit your call button. Please wait until I ask for final questions to hit your button a second time. The

rotation will allow for all members to ask questions in a fair manner, but does not compel any Council Member to ask questions or "pass".

Council Members had no questions regarding bullet number 9:

- After Council has concluded its questions of a particular witness, Councilmember Rosado's attorney may ask questions. After he has completed his questions, I will allow Council a final opportunity to ask follow-up questions. When I ask for "follow-up" questions, please hit your call button if you have a question.

Mayor Feichthaler reviewed bullet number 10:

- After all of the above witnesses are questioned, Councilmember Rosado's attorney may call additional witnesses. We will follow the same procedure as above, except that the attorney will ask questions first, then Council, then the attorney can ask "follow up" questions, if any.

Council Member LePera asked if the additional witnesses referred to in bullet 10 were the ones being required by Council to be on the January 19th list.

Mayor Feichthaler responded in the affirmative.

Council Member Boyd questioned bullet number 11:

- I will require Councilmember Rosado's attorney to provide Council with a list of proposed witnesses prior to close of business on January 19th. He will not be required to call all of these witnesses at the meeting, but he cannot call the witness unless he or she is on the January 19th list.

Mayor Feichthaler explained that if there were additional witnesses that Council felt they had to interview before rendering a decision they could vote to continue. He stated that he felt the witness list was complete.

Mayor Feichthaler reviewed bullet number 12:

- At the conclusion of information from all witnesses, I will allow Councilmember Rosado, or his designee, five minutes for a closing statement. At the conclusion of that statement, Council will have an opportunity to make final statements, again following the call system. You are not required to make a final statement.

Attorney Villalobos asked for clarification of the witness list. He asked if Council would be allowed to amend the list.

Mayor Feichthaler responded in the affirmative and noted that he did not anticipate any amendments to the list.

Council Members had no questions regarding bullet number 13:

- Depending on the time of day and the facts we have received, we will adjourn for a period of time so that each of us may consider the evidence separately. I propose we render a decision one hour after the close of the evidence. We will then reconvene, have discussion, and consider motions, if any. In the alternative, we can adjourn to the following day if Council prefers.

Council Members reviewed the Mayor's memorandum dated January 5, 2007, Additional Proposed Rules For Forfeiture Hearing, and made the following suggestions:

Council Members had no questions regarding item number 1:

1. During the meeting we may discover that there are additional witnesses that need to be interviewed to corroborate or rebut information we receive. If any Council Member believes we should call an additional witness or witnesses, a motion can be made for that purpose. New witnesses will be placed at the end of the list of all witnesses, to allow for time for everyone to consider what questions should be asked.

Mayor Feichthaler reviewed item number 2.

2. Council should decide whether witnesses should be allowed in the Council Chambers during the proceedings. Considering that the meeting will be televised live, I do not see a benefit in excluding witnesses from the Chambers. This is especially so since many witnesses, such as the eight of us, are required to be in the room. However, if any Council Member believes we should exclude the presence of any of the witnesses, this can be discussed at our next meeting.

Council Member Day stated he felt it was important that the witnesses be excluded from Chambers during the proceedings.

Mayor Feichthaler agreed with Council Member Day's comments.

City Attorney Menendez noted that Council could instruct the witnesses not to watch the proceedings on television.

Council Member Day moved, seconded by Council Member Hair to exclude witnesses from Council Chambers both before and after testifying and to use room 220A as a holding room prior to their testimony.

Council polled as follows: Hair, LePera, Rosado, Stevens, Bertolini, Boyd, Day and Feichthaler voted "aye". Eight "ayes". Motion carried.

Council Member Bertolini questioned item number 3. She stated that she saw no need for Mr. Hubbard to come to the hearing and testify as to what he had already stated in his notarized report:

3. I will be preparing the order of witnesses we are calling. I plan to call witnesses in the order they appear in the Hubbard Report. The only exception is Council Members, which I plan to call in alphabetical order at the conclusion of the other witnesses we call. We will also need to call Mr. Hubbard himself to authenticate the report and have the ability to ask him questions.

Council Member Bertolini moved, seconded by Council Member Day that Mr. Hubbard not be called as a witness to authenticate his report.

Attorney Villalobos noted that there were a number of issues that were not addressed in Mr. Hubbard's report.

Mayor Feichthaler explained that Council would not be calling Mr. Hubbard as a witness, however, Mr. Villalobos could call him if he so desired.

Council polled as follows: Hair, LePera, Stevens, Bertolini, Boyd, Day and Feichthaler voted "aye". Rosado voted "nay". Seven "ayes" and one "nay".

Motion carried.

City Attorney Menendez questioned item number 4. She asked how the witnesses would be informed regarding time schedules and documents to be provided.

4. All documentary evidence that may be used by Council in their decision should be made available and present at the meetings. We will request that all witnesses bring e-mails and other documents that may be relevant to the proceedings.

Mayor Feichthaler explained that he planned on setting a time schedule for all witnesses. He stated that he would send a letter to the witnesses giving them a timeframe and asking them to bring any documentary evidence that they felt might be relevant to the hearing.

City Attorney Menendez asked if a similar letter would be going out to Mr. Villalobo's witnesses.

Mayor Feichthaler responded in the affirmative.

Council Member Boyd moved, seconded by Council Member Bertolini to write the letters informing witness of a timeframe as well as the need to bring all of the documentary evidence they felt was relevant.

Council polled as follows: Hair, LePera, Rosado, Stevens, Bertolini, Boyd, Day and Feichthaler voted "aye". Eight "ayes". Motion carried.

Attorney Villalobos noted that he should have the ability to review the documents that were not part of Mr. Hubbard's report at least seven days prior to the hearing.

Mayor Feichthaler responded that he could ask the witnesses to provide an early copy but could not guarantee that those documents would be available seven days before the hearing.

Attorney Villalobos asked that Mayor Feichthaler request that the documentation be submitted as early as possible before the hearing date.

Council Members had no questions regarding item number 5:

5. To reiterate my message from the previous memorandum, our inquiry is limited to the six issues identified in the "Notice of Forfeiture" sent to Councilmember Rosado, and no other issues. This will be additionally stated at the commencement of the meeting.

Council Members had no questions regarding item number 6:

6. In the event there is an objection from Mr. Rosado's attorney, I recommend you allow the Chair to rule on the objection. However, if a Council Member believes the ruling is not the correct one, a Council Member may request the objection be voted upon by the entire Council.

Mayor Feichthaler reviewed item number 7:

7. Although subpoenas have not been previously discussed, there may become a need to compel the appearance of witnesses or documents. Should that need arise, I request you provide me the authority to issue subpoenas where the majority of Council seeks the presentation of a particular witness or document.

City Attorney Menendez noted that under the Charter Council had the ability to subpoena witnesses. She suggested delegating that authority to the Mayor.

Council Member Boyd moved, seconded by Council Member Hair to allow Mayor Feichthaler to issue subpoenas.

Council polled as follows: Hair, LePera, Rosado, Stevens, Bertolini, Boyd, Day and Feichthaler voted "aye". Eight "ayes". Motion carried.

Mayor Feichthaler asked if the Council members wished to change the hearing date to an earlier one or keep it at February 7th.

Brief discussion was held regarding the hearing date. It was agreed by the Council members that the date for the hearing should remain at February 7th.

ADJOURNMENT

There being no further business, the meeting was adjourned at 5:30 p.m.

Respectfully submitted,

Bonnie J. Vent, MMC
City Clerk