

**TOWN COUNCIL
MINUTES**

CALL TO ORDER

Mayor Fredericks called the regular meeting of the Tiburon Town Council to order at 7:37 p.m. on Wednesday, June 15, 2005, in Town Council Chambers, 1505 Tiburon Boulevard, Tiburon, California.

ROLL CALL

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

ABSENT: COUNCILMEMBERS: Smith

PRESENT: EX OFFICIO: Town Manager McIntyre, Town Attorney Danforth, Director of Community Development Anderson, Director of Public Works/Town Engineer Echols, Chief of Police Odetto, Director of Administrative Services Bigall, Financial Analyst Stott, Meeting Recorder Creekmore

ANNOUNCEMENT OF ACTION TAKEN IN CLOSED SESSION, IF ANY

Mayor Berger announced that direction was given to the Town to execute an agreement regarding litigation with the school district. He said that a subcommittee, whose members include Councilmembers Slavitz and Smith, had been formed to address issues regarding negotiations with the school.

ORAL COMMUNICATIONS

David Matheson, Tiburon resident and member of Media Action of Marin, said that Marin County's public access television is run by Comcast and not by local government. He spoke in favor of a nonprofit public access station, to be run by the cities [of Marin County]. He said that Comcast is in violation of numerous terms of their franchise agreement and presented a public access non-profit resolution for the Council's consideration.

Steven Fienes, resident of Strawberry, spoke in support of Mr. Matheson's statements. He said that Comcast is to blame for the community's lack of interest in public access television and urged the Council to consider adopting the resolution presented by Mr. Matheson.

CONSENT CALENDAR

1. **Approval of Town Council Minutes** – June 1, 2005
2. **Recommendation by Town Manager** – Authorize Renewal of CDBG Block Grant Agreement with County of Marin

MOTION: To approved Consent Calendar Items 1 and 2, above.

Moved: Slavitz, seconded by Fredericks

Vote: AYES: Unanimous

ABSENT: Smith

REGULAR AGENDA

3. **Recommendation by Town Manager** – Introduction of FY 2005-06 Municipal Budget and Capital Improvement Program

Financial Analyst Stott gave a PowerPoint presentation of the proposed budget showing an operating budget of \$7.4 million with an operating surplus of \$280,000. He reviewed the Town's operating budget, revenue sources, and planned expenditures, including increased CalPERS contributions. He reported that a significant change in the upcoming budget is the inclusion of \$210,000 in ERAF rebate revenue.

Town Manager McIntyre explained that the operating budget, general fund, and capital improvement program are three separate and distinct entities.

Director of Public Works Echols gave an overview of the capital improvement program budget and noted that due to two current undergrounding projects, the budget is possibly the largest it has been in the Town's history. He reviewed the projects included in the program and said that \$925,000 will go to street resurfacing and repair projects. He reported that the Town had received more revenue from the street impact fee in the previous year than was expected, including a one-time funding in the amount of \$50,000 from AB2928 (Traffic Congestion Relief Fund).

Councilmember Fredericks asked if a long-term policy would be presented to the Council to address long-term funding for road resurfacing projects. Director of Public Works Echols replied that later this summer specific funding scenarios and their alternatives will be presented to the Council.

Mayor Berger said that he would like to incorporate something into the Town's phone survey to identify which expenditures the public is most interested in.

Director of Public Works Echols reported that Fire Chief Pierce is interested in seeing restoration of vehicle access on many of the fire roads in Tiburon, including Gilmartin Drive.

Mayor Berger opened and closed the public hearing. There was no public comment.

Councilmember Slavitz commended Staff for their work and said that he is happy to see that the street rehabilitation funds were increased.

Councilmember Gram said that he would like to receive feedback on the janitorial program.

Councilmember Fredericks said that she is happy with the budget and added that she hopes the public understands that the increase in street rehabilitation funds is a blessing. She said that she would like to see a policy developed that keeps the Town's roads in good condition.

Mayor Berger agreed with the comments of his fellow Councilmembers.

Town McIntyre informed the Council that Staff would return to Council on June 29 with the final budget and adopting resolutions.

4. **Request from Marin Telecommunications Agency – Direction to MTA Delegate Concerning**
 - a) Resolution Adopting Preliminary Engineers Report & Action Related Thereto
 - b) Renewal of Comcast Franchise Agreement
 - c) Telephone Company's Entrance into Cable Arena
 - d) MTA Development of Media Facility

Town Manager McIntyre gave a brief background on the current challenges faced by the Marin Telecommunications Agency (MTA), as well as its role with the Town. He reported that the MTA's the biggest current issue is with Comcast and informed the Council that the Town is a partner in MTA's franchise agreement with Comcast. He indicated that Comcast pays a 5% franchise fee to local agencies for the use of rights-of-way in each community. He said that total franchise fees collected for 2004-05 for all MTA members totaled \$2 million; Tiburon received \$108,000 of that.

Town Manager McIntyre said that there are four issues being brought before the Council. Council agreed to discuss and provide direction and feedback for each of the issues separately.

1. Should the MTA pursue a municipally-owned broadband cable system?

Councilmember Slavitz asked who would be responsible for running such a system. Town Manager McIntyre replied MTA would run the system. He said that there are cities that run their own cable systems, which typically incur costs of approximately \$500,000.

Mayor Berger opened the public comment period.

Mr. Matheson said that the franchise agreement belongs to Marin County, not Comcast, and that it should be run and controlled by the people of Marin. He added that there has not been an analysis in over three years to determine if Marin is owed any money by Comcast. He spoke against Comcast being Marin's cable provider.

Mr. Fienes said that there are many potential functions of public access to service the community. He expressed concern over Comcast's role as the county's cable provider and discouraged the Council from entering into a ten-year agreement with Comcast.

Mayor Berger closed the public comment period.

Councilmember Fredericks commented it would be prudent to "lock in" franchise fees with Comcast in anticipation of changes to the state and federal communications law that might give Comcast the exemptions they are seeking.

Mr. Fienes said that this issue has been addressed by Congresswoman Lynn Woolsey and the MTA.

Councilmember Gram said that one of the big keys is crafting an agreement that provides protection five or ten years from now based on changes to the current technology. He said that he does not believe that Marin is big enough to pursue a municipally owned broadcast system.

Mayor Berger asked if an entity other than Comcast could provide cable services to Marin.

Councilmember Gram said that the MTA is in a good position to negotiate with Comcast and clarified that there is no push to sign the contract at this point in time. He said that he believes a short-term contract would be preferred over a ten year contract.

Council agreed that Marin is not prepared to pursue a municipally-owned cable system.

2. Should the MTA pursue the "formal" cable renewal process rather than the "informal" process?

Town Manager McIntyre said that the invoking the "formal" process would be time consuming, structured, and expensive, costing approximately \$500,000 more than the "informal" process. He reported that the MTA attorney is not recommending the formal process.

Mayor Berger opened the public comment period.

Mr. Fienes said that Tom Robinson, consultant to the Marin Access Advisory Committee, was brought in to perform an assessment of what might occur should the MTA select the formal process. He said that the formal process, albeit more expensive, gives the MTA the ability to start and stop the process at any time.

Councilmember Gram clarified that the formal process opens up the possibility of replacing Comcast as the cable provider. He said that he does not feel that declaring a formal process at this time is necessary, as it can be started at any time.

Mr. Matheson said that Media Action of Marin has been negotiating with Comcast in good faith for over five years. He said Comcast violated the franchise agreement by placing commercial content on a non-commercial station, which put them into the position to make money off of a non-profit station. He urged the Council to opt for the formal process.

Mayor Berger closed the public comment period.

Council agreed with Councilmember Gram's suggestions.

3. Should the MTA sue SBC requiring them to obtain a franchise as a condition to provide video services to MTA residents?

Town Manager said that this question has to do with whether non-cable providers, such as internet service providers, should pay a franchise fee for the services that they are providing. The larger question, he explained, is whether Marin County wants to be the agency that challenges SBC to provide a franchise fee for the services they bring into Town. He said that one of the arguments that have been suggested is that a larger entity with more resources, and more to gain, should be the one to challenge SBC.

Mayor Berger asked why the Town should receive franchise fees from non-cable providers. Town Manager McIntyre explained that one of the reasons is because they are given exclusive use of Town rights-of-way. Additionally, he added, they disrupt the Town's infrastructure when trenching for their services.

Town Manager said that SBC currently pays franchise fees for telecommunication services, but not information services.

Mayor Berger opened the public comment period.

Mr. Matheson said that the MTA should not sue Verizon or SBC.

Mayor Berger closed the public comment period.

Council agreed that the MTA should not sue SBC.

4. Should the MTA require Comcast to provide a media facility (cable studio) as part of the franchise renewal?

Town Manager McIntyre indicated that Comcast presently provides a media facility for the purpose of public, education, and government (PEG) access television, but that they will not

provide operating costs for such a facility. He informed the Council that operating costs are approximately \$5.7 million over a 10 year period; Tiburon's share would be \$173,000. He said that the issue is whether there is sufficient demand from Tiburon cable subscribers and residents for PEG access to justify the costs.

Councilmember Gram clarified that the issue is whether Comcast should pay for the facility's operating costs.

Mayor Berger commented that planning and design review sessions for the City of Piedmont are broadcast over their public access channel.

Mayor Berger opened the public comment period.

Mr. Matheson presented a list of nonprofit-run PEG channels by local cities and the services that they provide to the community with those channels. He said that although Comcast is supposed to provide twenty-four hours of noncommercial programming, they currently only provide 8-10 hours of noncommercial programming. He urged the Council to consider an independent, publicly-run public access station.

Councilmember Gram said that the reason Channel 26 is run from an old, dilapidated building is because it's a vestige from an old agreement, and that the situation will change with the new agreement. In response to Mr. Matheson's comments, he said that upon request by the MTA, Comcast no longer plays commercials on Channel 26.

Councilmember Slavitz said that he watches County Board of Supervisor meetings via the internet and said that many services could just as easily be provided over the internet in addition to public access channels.

Mr. Fienes said that Comcast has no interest in seeing Channel 26 succeed and that they are responsible for it having done so poorly. He said in order for public access television to prosper, the community should become more involved in the programming and content.

Mayor Berger thanked the public for their comments and closed the public hearing.

Council directed representative Gram to continue his negotiations on behalf of the Town.

PUBLIC HEARING

5. Recommendation by Town Attorney & Director of Community Development – Economic Exception Ordinance

Town Attorney Danforth gave a detailed introduction to the proposed zoning ordinance text amendment to add provisions regarding economic exceptions. She told the Council that the Institute of Local Self Government developed a model ordinance that creates an economic

variance procedure. She said that takings claims are one of the most contentious areas of land use law and litigation can be protracted, costly, and of uncertain outcome. She explained that takings litigation falls into two broad categories: facial claims and the more common "as-applied" challenge. She overviewed the process of Economic Exception and the actions that would be required of Town Council should a hearing be held.

Town Attorney Danforth explained that the proposed ordinance would require property owners to request an Economic Exception before making a takings claim, which would give the Town an opportunity to review all the facts and reasoning relevant to the potential claim.

Community Development Director Anderson gave an overview of the concerns raised by the Planning Commission regarding the ordinance. These concerns included excessive filing of Economic Exception applications, whether information regarding the fair market value of the property should be required, and a request from Jerry Riessen to modify Section 16-7.5(a)(2).

In response to questions by Councilmember Slavitz, Town Attorney Danforth explained that a developer could make a claim that they are entitled to some return on the money that they have put into the property. She said that this is something the Council could consider, but they could also consider countervailing factors.

Councilmember Gram expressed concern over the language "as early as possible" without any mention of the penalty involved. Town Attorney Danforth referred to Sections 16-7.2, 16-7.3(a) and 16-7.3(b) and explained that the penalty of not requesting an Economic Exception in a timely fashion is that they would not get to litigate it afterwards. She said that a minimum of twenty days is required for the developer to provide all necessary information, but that the Director of Community Development can provide additional time if necessary.

With respect to the timeframes outlined in the ordinance, Town Attorney Danforth said that she had concerns with CEQA and the Permit Streamlining Act. She explained that she wanted to make sure that there was a mechanism in place to waive the Permit Streamlining Act deadlines if the developer were to receive an extension on the timeframes outlined in the ordinance.

Councilmember Slavitz asked how long the permit timeline is. Community Development Director Anderson replied that if there is an EIR involved, typically there are 180 days to take action on a project after the EIR has been certified, if it is a negative declaration or categorical exemption, there are 90 days to take action.

Councilmember Fredericks commented that the ordinance can be viewed as a benefit to developers.

Councilmember Gram expressed concern that the timeframes outlined in the ordinance will create problems. Community Development Director Anderson replied that an expert will be retained to handle each case. Town Attorney Danforth added that she does not expect the ordinance to be invoked with great frequency, but that when it is invoked it has the potential to

allow the Town to avoid taking any action that would create an unconstitutional taking and to greatly reduce the cost of litigation should a taking claim be filed in court. She realized that there is room for improvement in the ordinance, but that the concept is very beneficial. She explained that the function of the ordinance is to put all of the information before the Council.

Mayor Berger opened the public hearing.

Joanna Kemper, Tiburon resident, said that she thought that the ordinance appeared to be a reasonable plan. She referenced Jerry Riessen's comments on page 4 of the Staff report and explained that Mr. Riessen proposed the change to keep in line with the Town's General Plan to provide protection of undeveloped ridgelines.

Mayor Berger closed the public hearing.

Councilmember Fredericks expressed concern over the proposed amendment regarding the protection of ridgelines. She said that statutory construction rules could interpret the listing of significant ridgelines to preclude other environmental resources if the ordinance were challenged. She recommended substituting "minimizes damage to the environment and significant environmental resources."

Councilmember Fredericks said that she supports adopting the ordinance.

Councilmember Slavitz said that the biggest advantage of the ordinance is that it forces the developer to put all of their cards on the table. He suggested tightening up the language regarding timeframes. Town Attorney Danforth requested that the Council provide specific feedback as to how the timeframe should be changed.

Councilmember Gram said that he would like to take additional time to review the ordinance and that he would like Councilmember Smith to have an opportunity to provide feedback on it as well.

Councilmember Slavitz said that Mr. Riessen's addition regarding ridgelines is good but that since they are addressed in the General Plan, it doesn't seem necessary to spotlight them in this ordinance.

Mayor Berger agreed that it would be best to leave the language more general and not include ridgelines.

Mayor Berger also suggested that explicit language be included that the Planning Director could grant additional time.

Council agreed that Section 16-7.5(a)(2) should be revised to state "minimize environmental damage as required by CEQA".

Council agreed that changes made to the timeframe would be discussed at a later date.

Item continued.

WRITTEN COMMUNICATIONS

Town Council Weekly Digest – June 3, 2005

Town Council Weekly Digest – June 10, 2005

ADJOURNMENT

There being no further business before the Town Council, Mayor Berger closed the meeting at 9:52 p.m., and the Council agreed to an adjourned meeting on June 29, 2005.

MILES BERGER, MAYOR

ATTEST:

DIANE CRANE IACOPI, TOWN CLERK