

TOWN COUNCIL MINUTES

CALL TO ORDER

Mayor Smith called a special meeting of the Tiburon Town Council to order at 7:00 p.m. on Monday, March 20, 2006 , in Town Council Chambers, 1505 Tiburon Boulevard, Tiburon, California.

ROLL CALL

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

PRESENT: EX OFFICIO: Town Manager McIntyre, Interim Director of Public Works Bernardi, Director of Administrative Services Bigall, Project Coordinator Bassett, Town Clerk Crane Iacopi

ORAL COMMUNICATIONS

Town Manager McIntyre introduced Nick Nguyen, new Director of Public Works/Town Engineer, who will start his employment with the Town on April 17, 2006.

PUBLIC HEARING

1. **Recommendation by Interim Director of Public Works and Project Coordinator** – Approve Preliminary Engineer’s Report for Formation of Del Mar Valley Utility Undergrounding Supplemental Assessment District
 - a) A Resolution of the Town Council of the Town of Tiburon Preliminarily Approving Engineer’s Report and Directing Related Actions

Interim Director of Public Works/Town Engineer Bernardi said that in January 2006, upon completion of engineering design documents for the Del Mar Valley utility undergrounding project, District Engineers Harris & Associates had prepared a revised construction cost estimate which was presented to the Council on February 1, 2005.

According to Bernardi, the revised estimate showed a significant escalation in construction costs that the industry has seen since the preliminary estimate was prepared in Spring 2005. Because of this, existing funds for the district are currently inadequate to fund the construction costs.

Mr. Bernardi said that in order to move forward with the project, a supplemental engineer’s report had been prepared for the district which was consistent with the Council’s direction to

provide the property owners with the information and let them vote on whether or not to move forward with the district.

Mr. Bernardi said that the lowest bid for construction costs received by the Town for the project was \$4,070,868; the engineer's report, presented to the Council in May 2005, estimated \$2,454,100 in construction costs, which left a budget shortfall of \$1,715,131.

The Interim Director said that with additional contingencies and costs detailed in the supplemental report, the total supplemental assessment now required to fund the project was \$3,235,000. He said this amount was comprised of the following costs:

- Construction costs in the amount of \$2,872,011;
- PG&E construction cost shortfalls (not to exceed cost for drawings not yet complete) \$779,748;
- 15% contingency on above costs of \$881,882
- Legal defense fund of \$50,000;
- Other costs associated with the an additional bond issue.

Mr. Bernardi said that Staff had looked for ways to "value engineer" the project in order to reduce costs. He said that the Town was engaged in "ongoing discussions" with ComCast for their portion of the cost associated with joint trenching. He also said that Staff had looked into the use of Rule 20A funds but noted that Town policy identified Tiburon Boulevard and Trestle Glen as the next priority uses of these funds. He said that another option was to use above-ground, "pad mounted" equipment instead of underground vaults. This would result in an estimated savings of \$67,500.

Mr. Bernardi said that the Council could also vote to cancel the project. However, he said that there were still costs remaining (in the amount of \$614,000) which had already been incurred for the district formation. These costs would result in an assessment on the properties within the district for the life of the bonds, according to Bernardi. He recommended that the Council take public comment on the supplemental report and direct staff whether or not to move forward with formation of a supplemental assessment district.

Councilmember Fredericks asked who would decide on the option of whether to use above-ground versus underground vaults. Mr. Bernardi said that Council could make this decision, at some point prior to the award of contract.

Councilmember Berger asked for an explanation of the increase in PG&E costs (since the last report) and whether there was a mechanism to regulate the final number.

Mr. Bernardi said that Harris & Associates had an employee who was formerly employed by PG&E. He said that he would be the one to review the documents submitted by PG&E to determine the exact costs; he stated that PG&E had yet to prepare plans and that they would be very specific.

Project Coordinator Bassett said that the PG&E estimating process was not a public process, and therefore not subject to public review. However, she agreed that Mr. Colicchia (Harris & Associates) would compare it to other, similar districts in his review.

Ms. Bassett said that basically, the PG&E costs comprised the preparation of plans and specifications, inspection of all trenches, and the “pulling of wires.” The cost also included two credits, according to Bassett: one being what it would cost to install a new, overhead system, and second, removal of all poles.

Councilmember Berger surmised that the CPUC would be the vehicle for review if a “red flag” went up during the review (of PG&E costs).

Mayor Smith asked for further clarification on the PG&E number presented in the staff report as a “not to exceed number.” Ms. Bassett said that it was a very high estimate set by PG&E in order to “protect themselves” pending the outcome of the design.

Councilmember Slavitz noted that in the case of the Lyford Cove supplemental assessment district, the Town picked up some of the costs associated with this district.

Town Manager McIntyre agreed, stating that the Town picked up the portion associated with the “redundant” efforts needed to issue a supplemental bond. He suggested that a similar, pro-rated number be used in the case of Del Mar Valley.

Councilmember Slavitz also commented that Harris & Associates had not charged its fees for preparation of Lyford Cove Supplemental Engineer’s Report and suggested a similar arrangement for Del Mar Valley.

Councilmember Slavitz asked whether the contingency fee contained in the first report was too low. Ms. Bassett said that in the supplemental report, the contingency was applied against all the costs rather than just the construction costs.

Slavitz asked if any unused amounts would be refunded to the residents. Ms. Bassett said that if the cost of the actual project turned out to be less than estimated, the money would be returned to the property owners within the district.

Finally, Councilmember Slavitz asked what the Town’s position was in relation to points raised about “subzones” within the district by Mr. Mulberg [plaintiff in lawsuit against the Town].

Jones Hall Bond Counsel attorney Scott Ferguson said that there was nothing in assessment law to support Mr. Mulberg’s position.

Mr. Slavitz concluded that “what the Town is doing is legally correct.”

Councilmember Berger asked why it was Staff's recommendation to move ahead with the district formation if some of the estimates were not, in fact, final numbers.

Project Coordinator Bassett said that Staff had moved forward with the bid process after receiving authorization from Council on February 1. She said at that time, Staff assumed that all of the numbers comprising the costs would be available for inclusion in the supplemental engineer's report.

Berger asked if the bids could be held for 90 days (as in Lyford Cove), or whether the project could be re-bid at the end of the supplemental assessment ballot process. Ms. Bassett said that this was an extraordinary amount of time to wait and that costs and bids might continue to rise if the process was delayed.

Project Coordinator Bassett noted that if adopted now, the numbers shown in the supplemental engineer's report would be fixed; anything in excess could not be charged to the district.

Mayor Smith reviewed the process before the Council and asked the following questions: Can we take subdistricts out? Can we change the assessment formula?

Bond counsel Ferguson said that technically, a supplemental district was a separate district and that the Council was free to change the boundaries and formula. However, he noted that it was, in fact, the "same project and the same district," and that the report before the Council reflected that fact. He said that it would be difficult to reconcile the two districts, if changes were made, which would require the Town to "start over."

Mayor Smith noted that as a practical matter, it was "all or nothing;" that the question before the Council was whether to cancel the project or allow the property owners to vote on whether or not to form a supplemental assessment district and ultimately, whether to move forward with the project.

Mayor Smith opened the public hearing. He noted that each speaker was limited to three minutes.

Frank Mulberg, Hacienda Drive, said that over 50% of the residents in the Hacienda "subdistrict" were opposed to the formation of the utility undergrounding district. He said that this satisfied neither state law nor the Town's policy of 60% support (in order to form a district). Mr. Mulberg asked how the zone was created and what case law or statute the Council had based its decision on (to include the zone) and what it would base its decision on to move forward.

Mayor Smith suggested that Mr. Mulberg consult the Town Attorney.

Mr. Mulberg continued to ask for a written legal opinion. Mayor Smith said that he personally had not seen a written opinion.

Mr. Mulberg commented that the initial \$31,000 assessment had turned into a \$50,000

assessment, without the [lateral] hook-up and that these numbers were not “minor.”

Mulberg said that the original petitions had estimated assessments at \$11,000 - \$20,000, and not \$36,000 - \$50,000, for separate zones within the district. He said that this was not what was originally voted upon and that the residents had “voted on something that was materially incorrect.”

Mayor Smith noted that Mr. Mulberg had taken twice his allotted three-minute comment period. Mr. Mulberg replied that others in the audience had yielded their time to him. An audience member called a point of order.

Mr. Mulberg concluded his remarks by stating that it [the supplemental costs] should be the responsibility of someone else, such as the bankers or bond counsel, and that “we should not have to face the costs.”

Mayor Smith commented that the original assessment was based on a \$3.9 million project cost and that the supplemental assessment district was based on \$3.2 million, for a total project cost of around \$7 million.

Valerie Bergman, Del Mar resident, questioned whether refunds would be made to residents and made reference to paragraph 12, page 3, of a resolution she said she had obtained from the Town’s website.

Councilmember Fredericks could not find such a reference and noted that it was not the same resolution before the Council. Mayor Smith asked for the title of the resolution being reference by Ms. Bergman.

Ms. Bergman said that the language gave her cause for concern because it did not order the Council to give refunds to the residents, in the event of a surplus. Rather, she read some language that allowed a surplus to be used in three ways: as a transfer to the General Fund; as a credit to the assessment or supplemental assessment; or, for maintenance of improvements.

Ms. Bergman said that this was disturbing to her because there was no guarantee that they [Del Mar residents] would receive the surplus and said that the residents in the Little Reed Heights district were still fighting to get theirs back.

Ms. Bergman said that she would like it to be made clear that “all monies will be returned” to the district members [in the event of a surplus].

Mayor Smith said that this was the intention of the Town Council and asked whether the language should be added to the resolution under consideration by the Council tonight.

Bond counsel Ferguson said that the statute allowed these three ways to deal with a surplus (as

summarized by Ms. Bergman from a previously-adopted resolution). He said that the intent of the Council could be memorialized in the minutes.

Vice Mayor Smith asked the Town Clerk whether the Council's intention would be reflected in the minutes. The Town Clerk answered affirmatively.

Ms. Bergman added that language reflecting "within a reasonable time" should be added, as well, because two years "seems excessive to me."

John Tripp, Del Mar resident, said that the increase from \$3million to \$7million represented an 81% increase and was a "major change." He said that while no one was opposed to undergrounding, the question was one of affordability. He said that over time, the original Del Mar assessment of \$21,000 would actually cost \$42,673 (if not paid in full) and that with the supplemental assessment, it would jump to \$72,280 plus trenching, for a cost of nearly \$80,000.

With regard to a surplus, Mr. Tripp warned that in the beginning, district engineers had said that they were "estimating high."

Karen Jones, Hacienda Drive, wife of Barry Jones, real estate appraiser, read a letter from her husband that stated that telephone poles and wires "hurt" property values and were considered "below standard." She said that he urged a vote in favor in order to "bring your neighborhood up to standard."

Kevin Mostyn, said that while there was 60% in favor of initiation of the original district, the Council had not done any polling to determine the sentiment of the public at this juncture. Mayor Smith replied that the Council was "doing that now."

Mr. Mostyn wanted to know more about a "bribe" or arrangement by the Town with the [Reed Union] school district to get them to not vote against the project. He asked whether any promises had been made to the school for a "tit for tat."

Mayor Smith commented that there was a difference in legal opinion as to whether the Town could force the school district to pay its assessment; that there had been negotiations over the matter which had been resolved.

Mark Morris, Rowley Circle, suggested that the Del Mar property owner's association hold a "town hall" style meeting in which an impartial moderator could address the issues raised by the residents as to the different "zones" in a non-adversarial manner.

Tyler Comann, Malvino Court, said that he and his neighbors wished to exercise their democratic option and asked for a vote on the supplemental district.

Jean Bonander, one of the plaintiffs in a lawsuit against the district (on appeal), said that she was

not in favor of the district, primarily due to “our particular circumstance.” She said that the boundaries of the district were set “approximately three weeks before the vote was taken,” and that previously, they had been part of another district from which they might have received a benefit. She said that the current plans “do not include removing the pole in front of our house.”

Ms. Bonander said that “borders are key,” and that in future, it would behoove the Town to take a look at a particular property to see if a pole stays or goes (when drawing the boundaries).

Ms. Bonander said that the Proposition 218 and the legality of three zones within the same district was a “significant issue for us.” She said that all of the properties were different sizes, with different impacts, and that in most districts she was aware of, the assessment was set property by property, not zone by zone.

Ms. Bonander said that they would continue to fight the issue, on appeal, and that she did not think the district was put together “in a way that makes sense.”

Councilmember Fredericks asked about the pole on Ms. Bonander’s property. Project Coordinator Bassett said that the pole in the photo showed by Ms. Bonander was, in fact, slated for removal. Ms. Bonander said that she was not aware of this.

A Del Mar resident, who stated that he was the President of Uptown Parking Corporation, asked why bonds were issued without a bid in hand. He said that his company was not allowed to do this in San Francisco, when they bid on a project.

Mayor Smith replied that the Town had tried to keep the initial subscription costs low, as requested by the proponents of the district. He said that otherwise, the \$1,000 per parcel cost would have been \$6,000. He said that the Council authorized the process as part of a Town ordinance [in support of the formation of districts to underground utilities].

The Mayor added that a variety of factors, including unusual circumstances, had caused the cost of the project to escalate substantially.

The Uptown Parking Corporation President maintained that that the engineers did not have a good handle on the costs and that their report was “all wet.” He said that the way the process was moving forward seemed very unfair and that the project should be abandoned, and that the Town should pay for it.

Councilmember Fredericks said that the costs had gone up not due to incomplete or partial plans, but other circumstances.

Mayor Smith added that the Town would pick up the “incremental costs” associated with the supplemental district formation. The resident replied that it “wasn’t much.”

Marvin Breen, Noche Vista, repeated his advice to the Council from a previous meeting to not

“rush to judgment.” He said that there was a case on the Supreme Court docket that spoke to the issue at hand, and asked the question, “may an agency impose an identical assessment or must it calculate a benefit cost for each individual parcel?” Mr. Breen said that the Council could find itself in a bad position [depending on the outcome of the lawsuit] and that it was not just enough to “let people blow off steam.” He asked that the Council take a leadership role; to not allow people in one part of the district to vote on what their uphill neighbors should pay. He suggested having a vote by zone because the current method was unfair.

Charles Epstein, Noche Vista Lane, said that he always felt that the inclusion of their street was iniquitous because they had undergrounded their utilities in 1967. Mayor Smith commented that there was some sort of legal requirement that they be treated as part of the district.

Marilyn Siewert, Del Mar resident, said that she voted in favor of the district on the first ballot, even through it “doesn’t do us any good.” She said that it was “outrageous” to face a \$40,000 assessment when there were no wires to their house. She added that they paid only \$50,000 for their home 40 years ago. Ms. Siewert said that she was a “community-spirited person” but that she questioned the value of the district at this time.

Priscilla Tripp, Del Mar resident, asked whether a resident might realize a reduction to their assessment if they allowed an above ground vault, pursuant to one of the cost-saving options mentioned in the staff report. On the other hand, she said that the estimated \$67,000 savings to the district seemed “trivial” in light of the overall cost of \$7 million.

Councilmember Fredericks asked if the vaults would be located on private property or within the Town’s right-of-way.

Project Coordinator Bassett said that they were in the right-of-way, but would be “in front of someone’s house.” She added that it was part of PG&E’s plan to locate the vaults in the right-of-way, otherwise an easement over the private property would be required.

Mayor Smith asked if this cost could be “pulled out” after the vote, if need be. Ms. Bassett said yes.

Kristen Keeling, who said that she agreed with the comments of Ms. Siewert and Mr. Mulberg, asked who would pay for repair of undergrounded facilities. Ms. Bassett said that PG&E maintained the facilities, just like they maintained their overhead system.

Mayor Smith closed the public hearing. He asked the district engineers to comment on the Hacienda Drive portion of the district.

Joan Cox, Harris & Associates, said that Hacienda Drive was part of the overall concept of the district but was not part of the original district. She said that while the petitions were still being circulated some [Hacienda Drive] residents requested inclusion, so they were “tacked on.” Ms. Cox said that Hawthorne Drive was also “tagged on,” but when she looked at the district

wholistically, she said, it seemed logical to put Hacienda in a separate zone because they could “stand alone.”

Engineer Cox also noted that Noche Vista residents had received a reduction to their assessments due to the undergrounding that had previously taken place on that street.

Mayor Smith asked what the effect would be on the overall district if Hacienda Drive was taken out, at this late stage.

Ms. Cox said that the assessments for the [supplemental] district had not yet been set so that Hacienda Drive could conceivably be taken out at this point in time. But she added that the incidental costs would have to be spread over the other two zones. In addition to this, Ms. Cox said that the bonds had already been sold (for the first district) and Hacienda Drive would be charged for these bonds without realizing the benefit of the undergrounding. Ms. Cox said that these would be policy questions for the Council to consider.

Councilmember Fredericks also commented that there would be costs associated with the creation of a new engineer’s report, if the district was changed. Ms. Cox concurred.

Mayor Smith asked Engineer Cox to more fully address the question of why Noche Vista was included in the district.

Ms. Cox described the street as a private driveway for six properties, next to another property that looked exactly the same. She said that the private driveway was entered from the public street, which had overhead utility lines.

Mayor Smith stated the Noche Vista property was treated just like any other house on Hacienda, then. Ms. Cox concurred.

Councilmember Slavitz asked what would happen if the ballots were not 50% in favor of the supplemental district: Would the district “be dead?”

Ms. Cox said that the bids would either expire or need an extension, and that to start over again would be a two-three month process.

Councilmember Fredericks said that she sympathized with the Del Mar residents and understood how disheartening it was to see the cost of the district double. However, she said that the bids “are what they are” and that the Council wanted the residents to decide whether to move forward or not with the district.

Councilmember Slavitz said that the Town would pick up the cost associated with the issuance of the supplemental bonds, and that the Town had looked into the “legality” of the formation of the district and that Council was satisfied with its legality.

Ms. Fredericks said that she could not imagine how the boundaries could be changed at this point in the formation of the district; she added that the vaults should be left underground in order to “do it right;” and that staff would return with resolution language about the return of a surplus, if any.

Councilmember Berger said that he had been concerned with the increased PG&E cost but said that he now felt more comfortable that the final number would not just be “up to their whim.” He agreed with resident Bergman’s request to memorialize the Town’s intent to refund a surplus, if any, to the residents.

Councilmember Fredericks said that she understood the concern of the Hacienda neighbors being “outvoted” by members of the larger district; however, she said that there was not way to “fix” that fact; that the cost of undergrounding seemed like an “unconscionable amount of money” but that was the way to achieve the result. Ms. Fredericks said that Noche Vista had received an adjusted benefit which made the assessment equitable in relationship to the surrounding area.

Vice Mayor Gram said that he would not reiterate any of the previous remarks, but added that he was in the “construction business” and knew the costs associated with current market conditions.

Someone in the audience asked where the money would come from if the Town paid a portion. Vice Mayor Gram said that it would come from the Town’s General Fund.

Mayor Smith commented that the most affordable way to achieve undergrounding was to form a private district and pay cash. He said that he and his neighbors had done this for seven or eight homes in their area. However, he said that the present project was different in that the Town had to be the “conduit” to allow residents to use bond financing. Therefore, the residents had to go through the process, as frustrating as it might be, to achieve the goal.

Mayor Smith added that the Town did not “plan” the cost overruns; that it had worked hard to make the district “affordable up front” but that, in the end, the Town was “just a third party.”

Mayor Smith said that the balloting was a democratic process, and that even though it was an expensive project, the residents should decide the outcome.

A brief discussion ensued about what would be on the ballots that would be mailed out. Project Coordinator Bassett said that the ballots would include the supplemental assessment per parcel.

Someone in the audience asked whether the grand total could be printed on the ballots. Ms. Bassett said that it could not, as this was a separate ballot.

MOTION: To adopt resolution, as amended (to reflect correction to the public hearing date)
Moved: Slavitz, seconded by Gram
Vote: AYES: Unanimous

Engineer Cox said that a “slightly modified” engineer’s report would be produced to reflect the Town’s contribution toward the sale of the supplemental bonds.

Councilmember Slavitz asked whether language concerning a surplus would be added to the resolution.

Mayor Smith said that language concerning a refund of surplus would be added to the final resolution, if the district passed.

ADJOURNMENT

There being no further business before the Town Council of the Town of Tiburon, Mayor Smith adjourned the meeting at 8:35 p.m., to the next regular meeting scheduled for April 5, 2006.

PAUL SMITH, MAYOR

ATTEST:

DIANE CRANE IACOPI, TOWN CLERK