

# CITY OF PALM BAY, FLORIDA

## SPECIAL COUNCIL MEETING 2020-31

Held on Wednesday, the 16<sup>th</sup> day of September 2020, at the City Hall Council Chambers, 120 Malabar Road, SE, Palm Bay, Florida.

This meeting was properly noticed pursuant to law; the minutes are on file in the Office of the City Clerk, City Hall, Palm Bay, Florida.

Pursuant to Section 286.011, Florida Statutes, and Executive Order 20-69, this public meeting was conducted via communications media technology (teleconference/video conference).

The meeting was called to order at the hour of 6:01 P.M.

### ROLL CALL:

<b>MAYOR:</b>	William Capote	Present
<b>DEPUTY MAYOR:</b>	Kenny Johnson	Present
<b>COUNCILMEMBER:</b>	Harry Santiago, Jr.	Present
<b>COUNCILMEMBER:</b>	Jeff Bailey	Present
<b>COUNCILMEMBER:</b>	Brian Anderson	Present
<b>ACTING CITY MANAGER:</b>	Suzanne Sherman	Present
<b>CITY ATTORNEY:</b>	Patricia Smith	Present
<b>DEPUTY CITY CLERK:</b>	Terri Lefler	Present

**CITY STAFF:** Present was Laurence Bradley, Growth Management Director; Frank Watanabe, Public Works Director; Natalie Shaber, Environmental Engineer, Public Works Department.

Ms. Smith advised that the hearing would be conducted like a trial, but without a jury. It was not as formal as a court hearing but was structured so that each side had a fair opportunity to be heard. The parties could address any procedural issues with City Council before the hearing began. She asked the parties if there were any procedural issues to be addressed.

Attorney Jim Walker, representative for the applicant on behalf of Attorney Robert Schwerer, said the appeal was filed untimely pursuant to Section 169.006(b), Palm Bay Code of Ordinances. He felt the appeal should have been filed when the cases became public knowledge and the City stated its position regarding the stormwater at the November 7, 2019, Council Meeting. Mr. Walker presented a video excerpt from the Council Meeting held on November 7, 2019. He explained that in the video, Mr.

Watanabe said that the data for the stormwater retention would be examined at the time of site plan review, once construction was proposed for each lot. He said it was not reasonable to allow a period of almost one year for an appeal when there was official knowledge of the position of the City. Mr. Walker said the plat was recorded and a lot had already been sold. He said there would be serious prejudice to allow Mr. Smith to file his appeal at such a late date. He added that the plat was signed by Mayor Capote on June 8, 2020, which he felt was the date the plat became official. Mr. Smith's appeal was dated on August 17, 2020, which made the filing timeline more than sixty (60) days.

Deputy Mayor Johnson asked when the plat was recorded within Brevard County. Mr. Walker answered June 26, 2020, which would be less than sixty (60) days. However, Mr. Smith was not appealing the recording of the plat. He urged Council to consider June 8, 2020, as the official date or, alternatively, November 7, 2019.

Mr. Bailey asked if there was a deadline to record the plat. Mr. Walker was unsure. Mr. Bailey asked if Mr. Walker felt it would be prejudice to anyone that desired to file an appeal should Mr. Walker have waited to record the plat at the last minute. Mr. Bradley was unaware of a deadline to record the plat.

Mr. Smith advised he was going to use the same video excerpt as presented by Mr. Walker, which showed how concerned he was about the stormwater. He said that staff's response was vague and open-ended. He had submitted numerous emails as evidence and had contacted staff many times to get an answer regarding the stormwater and was then told by Mr. Bradley that the plat was done and being sent to the Mayor's office for signature. He contacted Ms. Smith to ask if anything could be done and she advised that once the plat was executed, only Council could straighten it out. It was then, with one day to go, that he filed his appeal. Mr. Bailey asked when he started making inquiries to staff. Mr. Smith answered that he asked questions constantly since November 19<sup>th</sup>. He added that there was nothing to appeal as there was no decision made by staff, and he tried everything to avoid having to file an appeal.

Mayor Capote asked for clarification that the applicant felt the appeal should not be considered as the appeal was not filed in a timely manner. Ms. Smith confirmed same. She said that if Council determined it was not filed timely, then Council would no longer have jurisdiction over the matter, and it would have to be heard in the Circuit Court.

Mr. Bailey asked if a motion was required. Ms. Smith said that each party should be afforded the opportunity to be heard on the jurisdictional issue, present evidence, and call on any witnesses as desired, then Council would make a motion as to whether the appeal was timely.

Mr. Walker said that Mr. Smith had conceded that he was aware that the plat was being signed and that he knew about the issue on November 19, 2019, and that the plat was signed on June 8, 2020.

Mr. Smith reiterated that he could not have filed an appeal until the plat was officially recorded as it only became permanent, legally, once it was recorded.

Deputy Mayor Johnson asked Ms. Smith if the plat became legal based on the recording date. Ms. Smith said Council had to determine on what date a decision was made, then when notice of that decision was made, and then the sixty (60) days would start from that point. The Notice of Appeal was dated August 17, 2020. She said that Mr. Smith was counting from the date the plat was recorded and Mr. Walker stated it should start from either November 7, 2019, or when the plat was executed by the Mayor.

Motion by Mr. Bailey, seconded by Mr. Anderson, to find that the appeal was made in a timely manner.

Mayor Capote asked for clarification on the motion and if Council would hear the appeal at tonight's meeting. Ms. Smith said that if the motion passed, then Council would consider the appeal hearing that evening.

Mr. Bailey said the attempt to be timely had been met. Mr. Anderson felt that the recording date was the official date as there would be no public notice that the Mayor signed the plat. He agreed that the appeal had been filed in a timely manner. Deputy Mayor Johnson said the appeal was filed fifty-two days after the recording of the plat.

Motion carried with members voting as follows: Mayor Capote, Yea; Deputy Mayor Johnson, Yea; Councilman Santiago, Yea; Councilman Bailey, Yea; Councilman Anderson, Yea.

**PUBLIC COMMENTS/RESPONSES: (Will be heard under the Public Hearing item.)**

Public comments were heard under the Public Hearing item.

**PUBLIC HEARING(S):**

**1. Administrative Appeal of Plantation Circle Minor Subdivision (Ken Smith). (Quasi-judicial proceeding)**

Ms. Smith advised that Ken Smith no longer requested the Mayor be a witness in his appeal and no longer requested that the Mayor abstain from voting.

Mr. Bailey asked that each party be afforded five (5) minutes for opening statements. Council concurred.

The public hearing was opened.

Mr. Smith waived his time for opening statements.

Mr. Walker said he wanted an opportunity to renew Council's motion based upon jurisdiction that this proceeding was not sought on a timely basis. He said the motion was based on criteria not defined in the Palm Bay Code of Ordinances (Code). The Code stated nothing about the date of recording.

Ken Smith, appellant, presented the appeal to Council. He clarified that he heard the plat was to be signed by the Mayor and did not know the exact date until much later. He advised that emails were submitted to the City Clerk as evidence.

Mr. Smith called Mr. Watanabe as a witness and asked the following questions:

- If any stormwater calculations had been done by Mr. West? Mr. Watanabe answered in the negative;
- What criteria was used to determine if the stormwater system was applicable? Mr. Watanabe said it was regulated by agencies, such as St. Johns River Water Management District (SJRWMD);
- If Mr. Watanabe was familiar with Section 184.19 and what it stated? Mr. Watanabe said it was related to minor subdivisions, but could not cite the exact language;
- When did Mr. Watanabe inform Mr. West of the City's decision to have stormwater in place and designed at Mr. West's request? He advised of emails noting meetings between staff and Mr. West regarding same. Mr. Watanabe said the meeting in February was general in nature, but it was thereafter that he started looking further into the stormwater for the site plan. He said there was an approved drainage plan for this project that was permitted. Mr. Smith asked if this minor subdivision was part of that approved project. Mr. Watanabe said it was taken out through the permitting process, but the entire subdivision had a stormwater master plan. Mr. Smith said it was two different subdivisions.

Mr. Smith said that on the final plat, there were no drainage easements shown. Disclaimer Number 6 on the Plantation Circle plat stated "Each lot owner is to maintain

the historical drainage patterns and any redirection of stormwater offsite from a proposed residential dwelling must be permitted through the City by obtaining residential lot drainage permit and a building permit.” He asked if that meant that a stormwater system was applicable. Mr. Watanabe confirmed same. Mr. Smith asked how Lots 1 and 2 would be able to get water out to Babcock Street without a right-of-way. Mr. Watanabe said that the natural flow and system was already in place. He said that once a structure was built, it would cause an impervious area and that area would need to be addressed pursuant to Disclaimer Number 6. Mr. Smith asked how the stormwater would be addressed if there were no rights-of-way. Mr. Watanabe said it would be self-contained. He further explained the flow of ponds and impervious areas.

Mr. Walker cross-examined Mr. Watanabe. He asked Mr. Watanabe’s opinion or action that was the subject of the appeal. Mr. Watanabe said it was related to the stormwater runoff and drainage plan. Mr. Walker asked if Mr. Watanabe’s hypothetical analysis of the drainage runoff from the properties referred to the stormwater drainage. Mr. Watanabe confirmed same. Mr. Walker asked if the point of that analysis was that the calculations for stormwater management were made at the time of site plan review for the lot in question when the plan was showing the footprint for dwelling and the size of the driveway. Mr. Watanabe answered in the positive. Mr. Walker asked if Mr. Watanabe had any involvement in the recording of the plat with Brevard County. Mr. Watanabe answered in the negative. Mr. Walker asked when Mr. Watanabe determined that the stormwater runoff was to be calculated and handled at a later stage of site plan review. Mr. Watanabe said it was sometime in February when the conference call was held that he started researching the stormwater plan. Mr. Walker asked if Mr. Watanabe had communicated his views with the Growth Management Department. Mr. Watanabe said most communications were with his department staff and then it was communicated with Growth Management to include the notation on the final plat. Mr. Walker asked if there was any disagreement from staff regarding Mr. Watanabe’s thinking. Mr. Watanabe was not aware of any negative comments. Mr. Walker asked if Mr. Watanabe had spoken with SJRWMD and if they had the same views as staff. Mr. Watanabe said that his staff contacted SJRWMD, but he advised of email communications.

Mr. Smith asked if Mr. Watanabe was aware that Mr. Smith owned the front pond and that he had to maintain it. Mr. Watanabe confirmed same.

Mr. Smith called Ms. Shaber as a witness and asked her to verify four (4) emails received by her from Mr. Bradley on this case. Ms. Shaber confirmed same.

Mr. Smith provided a presentation and history of numerous meetings and contacts with City staff. He reviewed a historical synopsis of subdivision procedure for Plantation Circle, the City's Staff Report, City's Code and related email communications. Mr. Smith said he had demonstrated that the ordinances applicable to the subdivision required a stormwater drainage system unless a waiver was granted by City Council. He said it appeared that the City Engineer erroneously circumvented the City Council in granting an authorizing waiver for a stormwater drainage system. Mr. Smith said that pursuant to FLU-6.1B(5), septic tank drainfields were prohibited from locating within a wetland and must maintain a seventy-five foot (75') buffer between the edge of the drainfield and the identified boundary of any wetlands and shall be located in soils suitable for septic tank drainfields. Mr. Walker stated that Mr. Smith was not a qualified expert to talk about wetlands. Mr. Smith said he was reading directly from the ordinance and was not expert or providing expert testimony. He said that Lots 3 and 4 contained significant wetlands as outlined in the National Wetlands Inventory Map. Due to the way the lots were divided, he said that Lots 3 and 4 would not be able to support a septic system. The City, without knowledge of the wetlands, granted a waiver to the applicant releasing him from hooking up to City water and sewer.

Mr. Smith further cited Section 184.19, Palm Bay Code of Ordinances, which stated that a stormwater drainage system shall be provided for all subdivisions. A disclaimer on a plat was not a stormwater plan. Mr. Smith said he had demonstrated for over a year that he had consistently done everything possible to make sure that a stormwater system was included in the Plantation Circle Subdivision in order to make sure that the water was not dumped onto his property or into his pond. He requested that Council honor his appeal and require a revision to the existing subdivision plat of Plantation Circle to include an approved stormwater plan and delineation of wetlands. He added that due to wetlands restrictions in FLU-6.1B(5), the waiver for water and sewer should be rescinded, and water/sewer hook-up should be required to at least Lots 3, 4 and 5.

Mr. Walker asked Mr. Watanabe to clarify his decision regarding the stormwater drainage. Mr. Watanabe said he would provide his reasoning during the presentation. Mr. Walker asked about a minor subdivision having a stormwater plan. Mr. Watanabe answered that the original system had a drainage plan in place and although the five lots were not permitted, the system was still functional with the five lots in it.

Mr. Walker called Alan Sakowitz, principal of West Pointe Babcock, LLC (West Pointe), as a witness. He asked if Mr. Sakowitz had any conversations with City staff regarding the stormwater plan. Mr. Sakowitz met with various City officials and there was a question whether the stormwater system in place was proper. The City did not believe so at first

and West Pointe hired an engineer, consulted with SJRWMD, and it was determined that the property was draining properly with the current system and would continue to do so unless they built on the property. He said it was correct that West Pointe did not submit a waiver but that was due to other exemption options being applicable under Section 174.065, of the Code. Specifically, Section 174.065(B) and (C). West Pointe's engineer spoke with the City Engineer and the applicant was found to be in compliance.

Mr. Smith cross-examined Mr. Sakowitz. He asked if West Pointe's engineering report had been provided to the City. Mr. Sakowitz answered in the negative because West Pointe's engineer said that one was not necessary and SJRWMD provided a letter stating the plan was fine as is. Mr. Bailey asked that the letter from SJRWMD be submitted for the record. Mr. Sakowitz provided same and read it into the record. Mr. Smith said he was familiar with the letter and after speaking with SJRWMD, he was told that it was different as to whether it was permitted by SJRWMD or Florida Department of Environmental Protection (FDEP). It did not apply to any ordinances as required by the City.

Mr. Bailey asked Mr. Sakowitz to cite the exemptions from Section 174.065. Mr. Sakowitz said it was (B) and (C) and read each into the record. Mr. Bailey asked if a development plan was submitted with the plat. Mr. Sakowitz advised that there was no development plan. The lots were being divided, but nothing was being built.

A brief recess was taken after which time the meeting reconvened.

Mr. Watanabe provided a presentation of the drainage plan for Plantation Circle. He explained the drainage history of the site from 1984 to date. Mr. Bailey asked if a permit was a condition of having an approved plan. Mr. Watanabe said the permitted project subdivision was approved. There were issues with SJRWMD and the overall subdivision, but the drainage plan was approved and given a permit by SJRWMD. Mr. Bailey asked if the permit was just for drainage and Mr. Watanabe confirmed same. Mr. Bailey asked if the lots in question were permitted. Mr. Watanabe said they were taken out of the plan and were not permitted but were part of the drainage analysis. Mr. Bailey said that if the lots were not in the permitted plan, then there was no approved plan. The overall plan was approved, but it excluded the applicant's lots. Mr. Anderson asked if the five (5) lots currently drained into a privately-owned pond. Mr. Watanabe confirmed same.

Mr. Bailey called Ms. Shaber as witness. He asked Ms. Shaber the same questions as Mr. Watanabe regarding the permitting and approved plan. Ms. Shaber said the Plantation Circle Drainage Plan, as shown in Mr. Watanabe's presentation, was a permitted plan through SJRWMD. The reason those particular lots were removed was

due to no proposed construction and no need for water quality volume in that area. She said that within a Stormwater Management Plan, there were two components - flood and water quality. The flood component for the properties in question was in the permitted calculations. The only reason water quality was not part of the calculation was due to no proposed construction. Mr. Bailey asked if the water quality component would have to be completed should there be future construction. Ms. Shaber recommended that component if construction occurred and further explained drainage of the lots. She said that SJRWMD did not regulate single-family lots or minor subdivisions. It was seen as an FDEP issue, but the lots were being platted to be sold as single-family residential lots. She answered other questions posed by Councilman Bailey. She mentioned that Mr. West was insistent that they were not moving forward with development. However, because this site was already covered under a drainage plan, staff felt that the lots would be covered under the single-family lot drainage and building permits.

Mr. Anderson asked if subdivisions at Lake Mina and Ivanhoe had a drainage plans. Ms. Shaber said yes, but they were different situations. Mr. Anderson asked if this was the first time that Council had considered a site without a drainage plan. Ms. Shaber said this was her first experience with such a project.

Mr. Walker cross-examined Ms. Shaber. He asked if she was satisfied with staff's decision. She confirmed same as Plantation Circle had an approved drainage plan that was permitted with calculations for flood control, and it was evident that the lot was draining into Retention Pond 2. There was no concern about flooding or the negative impact to surrounding properties.

Mr. Smith cross-examined Ms. Shaber. He asked if there was a drainage plan for the 9-acre lot. Ms. Shaber said City did not have an approved drainage plan. Mr. Smith said that SJRWMD was not really involved in this project as they felt it was an issue to be addressed by the FDEP. He asked if the City had contacted FDEP for its opinion. Ms. Shaber answered in the negative and said that the reasons SJRWMD did not feel it needed to be permitted was because the site fell below their thresholds. FDEP regulated single-family lots, and SJRWMD regulated large-planned developments.

Mr. Walker cross-examined Mr. Watanabe. He asked if staff was confident in its decision regarding Disclaimer Number 6 on the plat. Mr. Watanabe answered in the affirmative and relayed the same response as Ms. Shaber. Mr. Walker asked if Mr. Watanabe was familiar with the applicable City Codes and if staff's decision was in conformity with those Codes. Mr. Watanabe answered in the affirmative.



Mr. Smith cross-examined Mr. Watanabe. He asked if Mr. Watanabe ever received communications from Mr. Crosby at SJRWMD that the drainage from the new subdivision should not flow into existing drainage of Plantation Circle. Mr. Watanabe said he could not recall.

Mr. Bailey asked Mr. Watanabe to what exemption in the Code was he referring. Mr. Watanabe said that if there was an established drainage plan in place, and the proposed subdivision did not change any of the existing roads or lots or drainage plan, then it would be exempt. Mr. Bailey asked if the disclaimer had been placed on any other plats. Mr. Watanabe was not aware, and the surveyor was hesitant in putting it on the plat, but he felt this situation was very unique and warranted the note.

Mr. Bailey asked for clarification on a section of Chapter 184, of the Code, which stated that the process could be handled administratively in two stages. Mr. Bradley cited Section 184.34(A) which explained that there was a preliminary plat review, and then a construction plan and final plat review. He said the only reason the item came before City Council was due to the waiver for the water and sewer requirement.

Bill Battin, resident, said that when this item was presented to Council for the waiver, he had questioned the item as it was mandated in the City's Code.

Mr. Walker provided concluding remarks. He wanted to formally renew his motion to dismiss the appeal as it failed to comply with the timeliness requirement of the City's Code. He said there were no witnesses offered by the appellant and he was not an expert.

Mr. Smith provided concluding remarks. He questioned where the water would go – either into his pond or into a swale on Babcock Street. He was told it would not go into his pond and said that many admissible documents were submitted to the City Clerk proving same. He said the plat did not have a permitted drainage stormwater plan in place from the City.

The public hearing was closed.

Motion by Deputy Mayor Johnson to uphold staff's ruling. The motion died for lack of second.

Mr. Bailey had an additional question for staff. Ms. Smith advised it was allowed if other parties had the opportunity to cross-examine.

The public hearing was reopened.

Mr. Bailey asked Mr. Bradley if other subdivisions had to have construction plans with the final plat review. Mr. Bradley said there could be a gap between subdivision approval and submittal of an engineer design. Mr. Bailey questioned if construction plan and final plat review had to occur at the same time, as reflected in the Code, or could they be separated. Mr. Bradley said that for a single-family development, the homes may not be built at the same time, so the sites had to provide drainage at the time the homes were designed. Mr. Bailey asked if Mr. Bradley interpreted the Code to mean that the two would happen at the same time. Mr. Bradley answered that it could appear that they should happen simultaneously, but it depended on the project.

The public hearing was closed.

Motion by Mr. Bailey, seconded by Mr. Santiago, to uphold staff's decision.

Mr. Bailey felt there should have been more to this process and understood the issues as presented by the appellant, but with all facts given from staff, he found it difficult to vote otherwise. He said that staff acted within the parameters of the Code.

Mr. Santiago agreed with Councilman Bailey and he felt confident with Ms. Shaber's explanation.

Mr. Anderson felt that the City was skipping a step and that the applicant should have received approval from Council to waive the drainage plan requirement. He did not believe the water would flow into the private pond, but felt it was unfair to use a 30-year old map and state that it was applicable to a new minor subdivision. He was not saying that staff was wrong but felt that Council should have been given the authority to give the waiver.

Motion carried with members voting as follows:

Mayor Capote	Yea
Deputy Mayor Johnson	Yea
Councilman Santiago	Yea
Councilman Bailey	Yea
Councilman Anderson	Nay

**ADJOURNMENT:**

There being no further business, the meeting adjourned at the hour of 9:25 p.m.

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William Capote, MAYOR

ATTEST:

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Terri J. Lefler, DEPUTY CITY CLERK