

**Minutes**  
**Town of Atlantic Beach, North Carolina**  
**Town Council Special Meeting**  
**Tuesday, September 30, 2003**

A special meeting of the Atlantic Beach Town Council was held Tuesday, September 30, 2003 at 5:30 p.m. in the Town Council Meeting Room to review and discuss a proposed contract between the Town of Atlantic Beach and FMB, Inc. to develop "the Atlantic Beach Circle Community Development Project Area" in accordance with the "Atlantic Beach Circle Community Development Plan."

**Members Present:** Mayor Joe Stroud; Mayor Pro Tempore Doug Creech; Council Members Dona Anastasi-Styron, Eddie Dawkins, Doug Harris, and Christie Roberson

**Members Absent:** None

**Others Present:** Pete Allen, Town Manager; Derek Taylor, Special Town Counsel; Kathy Bruce, Finance Director; Marc Schulze, Public Works Director

**CALL TO ORDER**

Mayor Stroud called the meeting to order at 5:30 p.m. All Council members were present except Councilwoman Anastasi-Styron, who arrived at approximately 5:45 p.m.

Special Town Counsel Derek Taylor explained that the purpose of this work session was an opportunity for the Council members to meet as a group to provide him with input regarding terms and conditions of the September 12, 2003 draft contract between the Town of Atlantic Beach and FMB, Inc. for development of the Atlantic Beach Circle Community Development Project Area. A public hearing on the contract has been scheduled for October 13, 2003. Mr. Taylor provided the Council members with an Executive Summary Outline of the contract, and the items were discussed as listed. (Clerk's Note: Copies of the contract and the outline are attached and hereby made a part of these minutes.)

1. **Real Estate Sold.** Mr. Taylor said that the property being sold is made up of the five parcels of land in four major components that the Town owns on the Circle: the Pavilion location at 115 Atlantic Boulevard (.762 acres±), two adjoining tracts on West Bogue/West Drive (.370 acres±), West Atlantic/West Drive (.189 acres±), and the Maze location at East Atlantic/East Drive (.537 acres±). The acreage is estimated because some of the tax records do not contain accurate acreage on some of these parcels. Surveys and the metes and bounds descriptions from the property deeds were used to calculate actual acreage. Consequently, there will be an adjustment in price when the final contract is prepared, because the same appraised square footage value will be used and multiplied by the actual acreage. There is a

metes and bounds description for each of the parcels except the two West Bogue/West Drive parcels, for which a lot and block description was used instead of a metes and bounds description. Fred Bunn is obtaining a survey that will reflect the actual square footage on the property and adjustments will be made to the contract price accordingly.

Since the time the process of identifying the property the Town will sell to FMB, Inc. began, it was discovered that two factors must be dealt with that the appraisals did not originally address. One is that there is a drainfield for a septic system on the Pavilion property, and the Town has an agreement with the owner of that drainfield that the drainfield would remain there. This is an encumbrance on the property and will reduce its appraised value. The second factor is the lease for the Maze. The lease covers that property for a period of time and is therefore an encumbrance which will reduce the value of that property. The square footage of the Pavilion property is greater than what was originally used, so the values will "wash" in the end and there will not be much difference in the price of the contract as it is now written. The actual appraised value will be provided at the public hearing because the General Statutes require that the Town receive the appraised value for the property when sold.

2. **Use.** There is a "use" provision in the contract which essentially states that these five parcels of property, once sold, will be used as part of the Atlantic Beach Circle Development Plan (the "Plan"). The Plan is subject to changes based on future amendments to the zoning ordinance that might be recommended by the Planning Board and adopted by the Town Council. The Plan idea is a combination of commercial and residential properties resulting in full development and better utilization of the existing property.

3. **Price.** The sale price for the property is approximately \$1.846 million, which is the current appraised value and does not include the adjustments which will be made in the near future.

Councilwoman Anastasi-Styron did not care for the last sentence in Item 2 of the contract ("Buyer's intended use"), which reads: "A general summary of the redevelopment project presently proposed by Buyer and a copy of Seller's 'Atlantic Beach Circle Development Plan' is set forth in Exhibit B attached hereto, but it is understood and agreed that said plans and proposals may change from time to time, at Buyer's discretion." She asked if it would be appropriate to request a limit or description of the boundaries of those types of changes. Mr. Taylor said the flexibility of the Plan had been discussed in the past, because his original intent had been that any changes to the plan would have to be brought to the Town Council for approval. However, the parties had been unable to determine a way that was acceptable to the Buyer to completely lock down the Plan at this point. If there is no real way to define what the Town will hold Mr. Bunn to, there is no way to enforce it. Councilman Harris reminded the group that these are questions that would be answered at the Planning Board

level when the Planned Unit Development (PUD) is negotiated, and the project must still be presented to the Town Council for approval.

Councilwoman Roberson remarked that the concept of this plan is to determine a way to provide a successful balance of commercial and residential uses for a vibrant boost for the commercial uses. The vibrancy will hopefully come from the support and commitment of people staying and living on the property year-round. The onus is on the Council to promote Atlantic Beach, and especially the Circle area, as a community-driven place.

Mr. Taylor felt that currently, the problem for FMB is that the company will obtain financing and begin the development process, but cannot predict where the process will be two or three years from now. Mr. Bunn cannot say at this time what percentage of the plan will be commercial and what percentage will be residential. He will have to fine-tune the plan before it is brought to the Planning Board and at that time, the Council will have a stronger idea of what those percentages will be. Any changes to the plan should not vary too much from what has been adopted, because it would be a violation of the contract not to follow the base plan as adopted.

4. **Payments for Real Estate.** FMB will pay 2% of the contract price within 10 days of execution of the contract, said Mr. Taylor. An additional 2% of the contract price will be paid every year after that as additional escrow money, and that entire amount of that money will be applied toward the purchase at closing. The contract contains several contingency clauses that allow FMB to cancel the contract if the company found out something it does not currently know, or has problems and discovers it cannot develop the property as planned in a manner that is economically viable for the company. If FMB cancels, the Town will keep 50% of the escrowed money. If the Town cancels the contract, FMB will keep all the escrowed money. In either case, the Town keeps the interest earned on the money. The interest and the escrowed money are applied to the purchase price at closing.

5. **Option for Highway 58 Property (Next to Water Tower).** Mr. Taylor reminded the Council that as Mr. Bunn develops the Circle property, he must do something with the wastewater. Since there is no municipal wastewater treatment facility (WWTF), Mr. Bunn must put together his own package plant. He has space and a plan for doing so on the property he will be purchasing from the Town, but the Division of Water Quality (DWQ) requires him to have a back-up plan, *i.e.*, a "repair area" that can be used if the primary system fails. It has been determined that Mr. Bunn needs a piece of property to present to DWQ as a repair area. The only piece of dry land that is of sufficient size to meet what he anticipates to be the quantity of wastewater he would actually create is a piece of property that he has identified next to the Town's water tower on West Fort Macon Road at the western end of Atlantic Beach. The Town has expressed to Mr. Bunn that this property is also being considered for use by the Town in its WWTF project. An arrangement has been included in

the sale contract whereby Mr. Bunn can purchase an option from the Town so that if DWQ asks where his repair area is, he can reply that it is identified and he can purchase it the moment he needs it. It is subject only to being divested by the Town if it builds a WWTF, in which case he would not need the repair area. Mr. Taylor said that DWQ's investigative staff has told him this option will be sufficient, but it has not yet been confirmed by DWQ.

The option price is \$10,000 payable at closing. The value of the property will be determined by appraisals at the time of purchase. This property cannot be used for stormwater runoff, stated Mr. Taylor, without basically canceling the option. Once the property becomes wetlands, it cannot be used as a repair area. Councilman Harris took U.S. Army Corps of Engineers representatives who work on constructed wetlands to the water tower site and asked if it could be used for stormwater. They told him it could not, because the land was already wetlands and therefore could not be used for stormwater runoff.

Mr. Taylor said he understood that of the roughly 53 acres of property at the water tower site, only about eight acres is dry land, and those eight acres are all that Mr. Bunn would be able to use as a repair area. That acreage would only support a service capacity of approximately 115,000 to 117,000 gallons.

Councilman Dawkins asked Mr. Taylor to explain why the Town would want to enter into a 20-year option for 53 acres of land when FMB only needs six and the Town does not know what might happen 5, 10 or 15 years from now. Mr. Taylor replied that when negotiation began for an easement to the repair area, Mr. Bunn's engineers plotted out 6.1 acres because at that time, the capacity he was projecting was about 89,000 gallons. The contract uses a capacity figure of 150,000 gallons because FMB wanted to have additional capacity; however, Mr. Bunn does not feel the capacity will be much more than 89,000 to 90,000 gallons under the current development plan that was adopted by the Town Council. He then said that if the 6.1 acres are removed from the eight acres, there is not a lot left to work with, and therefore his company would consider purchasing the entire property rather than a small piece. This is something that can be discussed, said Mr. Taylor. The Town may limit Mr. Bunn's ability for capacity to whatever the 6.1 acres would require, and it will be a restraining factor on whatever development Mr. Bunn can do on the Circle. He would not be able to exceed it because the repair area would be the constraining factor. Mr. Taylor said that the reason the option is so long-term is that hopefully, DWQ will allow Mr. Bunn to hold an option without purchasing the property. If he never has to repair the system he installs on the Circle, he would never exercise the option, leaving that property in the ownership of the Town. However, DWQ may require Mr. Bunn to own the repair area. Mr. Taylor does not believe that Mr. Bunn would object to receiving only the 6.1 acres, with the Town retaining ownership of the remaining 47 acres. Councilman Dawkins confirmed this, as he had spoken to Mr. Bunn this morning. He stated that it would be his preference to provide Mr. Bunn with only the 6.1 acres of Town property, and several other Council members agreed.

The option for the water tower property expires in 20 years but is renewable, and Councilwoman Anastasi-Styron asked when it was renewable. Is it renewable at the end of the 20 years, or would it be reviewed after three years, five years, etc. Mr. Taylor replied that the option would be renewable at the end of the 20-year period if Mr. Bunn has not exercised the option by that time. Councilwoman Anastasi-Styron said she would feel more comfortable if the option were reviewed sooner. The idea occurred to her that when Mr. Bunn develops the Circle, the owners of the properties that he was unable to purchase might want to eventually ask to tie into what he is doing, in which case he might need a larger repair area. Councilman Dawkins said they might, and that he would rather have the Town control that expansion. Mr. Taylor commented that until tonight's discussion, the thought had been to obtain full value for the property and sell it all, because the value of the property with six of the eight acres of dry land gone would decrease significantly.

Councilwoman Roberson opined that the Town should define the interests of the water tower property, either as a preserve or developable property. Councilman Harris pointed out that the subject is the difference between 6.15 acres and 8.1 acres, or approximately two acres. If the Town retains those two acres, it needs to ensure that it also retains a way to get to it. Those two acres are the furthest away from the highway and are located behind a potential repair area, and if appraised separately, might appraise lower than if they were appraised with the six additional acres. Mr. Taylor will outline the Town's options with regard to the option clause for Council review and discussion at the October 8 work session.

When the time comes for FMB to buy the water tower property, the property value will be determined as a byproduct of an appraisal done at that time. FMB will bear the cost of the appraisal. If the Town does not like that appraisal, the Town will order a second appraisal of its own, and the two appraisers are supposed to work out their differences until they arrive at an agreement. If they do not, a third appraiser will be hired. The third appraiser will act as arbiter, make his own independent valuation, compare it to the two other appraisals, and make a final determination as to the price of the property.

The option clause may be canceled if the Town decides to build a municipal WWTF. If the Town cancels the option, it retains the \$10,000 option price. The Town can require exercise of the option by FMB if the Town decides it does not need the property.

Councilman Harris asked Councilman Dawkins his opinion of including language in the contract stating that the Town has the option to require Mr. Bunn to buy the 6.1 acres or possibly the entire tract. He would be leasing the 6.1 acres, but the option to buy would be controlled by the Town. Councilman Dawkins liked the idea of the Town having that control.

The terms of the current contract allow the Town to buy the property back after the exercise of the option. Councilman Creech wanted language included in the contract that Mr. Bunn

would be allowed to purchase the water tower property only if he needed it for a repair area, and not just because he decided he wants to buy it. Mr. Taylor reminded the Council members that appraisals are made based on the highest and best use of the property. If the only thing Mr. Bunn could use the property for is a repair area for a sewer system, the property will not appraise at the same current appraisal price of \$500,000.

Mr. Taylor reiterated that the option expires in 20 years but is renewable. The idea was to make the option in perpetuity because there was concern that without an expiration date, there might be issues as to whether a valid option was actually signed by the parties.

Mayor Stroud called for a break in the proceedings at 6:45 p.m. The meeting was reconvened at 7:00 p.m.

6. **Termination of Contract.** The contract can be terminated by mutual agreement of the Town and FMB, said Mr. Taylor. Secondly, there are a series of conditions that Mr. Bunn must meet before going to closing. These conditions are commonly seen in most commercial development situations.

There is a Due Diligence Period of 18 months from the date of the contract, as there are some items that are peculiar to this contract. One is that the buyer will get all of his money back if the title of the property in the Town's name is no good. Secondly, the Town keeps 50% of the deposits collected if the contract is canceled due to any of the following:

- a. Unsatisfactory environmental audits or surveys.
- b. FMB is unable to build or access a sewage system with 150,000 gallons daily capacity, including obtaining permits and approvals to build its own system.
- c. Insufficient water supply for the project.
- d. Buyer's development plan is not approved by the Planning Board and other regulatory agencies.
- e. Approval of closing Central Drive is not obtained. (The Town is not allowed to contract away its legislative powers. To close or reconfigure streets, the Town must give notice to property owners, hold public hearings to help the Council determine whether it is in the public interest to close or reconfigure the streets, and publish notice of the public hearings for four weeks.)
- f. Approval of East Drive, West Drive and Atlantic Boulevard reconfiguration is not approved.
- g. FMB is unable to purchase John's Motel and Summer's End Motel properties.
- h. FMB is unable to properly ensure the development project.
- i. FMB is unable to obtain adequate financing for the project.
- j. For any reason that the Buyer decides that the project is not feasible.

Only one item survives after the Due Diligence Period, and that is the closing and reconfiguration of the streets. If Mr. Bunn does not inform the Town by the end of the 18 months that any of the aforementioned conditions exist and he wants out of the contract, then he is locked into the contract. Even after the Due Diligence Period, however, Mr. Bunn may terminate the contract if the Town has not obtained closure of Central Drive and reconfiguration of East Drive, West Drive, and Atlantic Boulevard, or he may ask for extension of time for closing to do so, because the closure and reconfiguration of those streets are critical to the Plan.

Two additional conditions are included in the contract. First, there is currently an easement belonging to the Town which splits the former Ziggy's By the Sea property. Mr. Bunn wants to build over that easement, and therefore wants to trade it for the easement by the Crab's Claw Restaurant which is of equal size, condition, length, and quality. The second condition is that the Town must receive evidence of FMB's funding for the project.

7. **Closing Date.** The Closing Date is 24 months from the execution of the Contract. The date may be extended by as much as another 180 days by the Buyer.

8. **After Closing.** FMB must develop the project according to the Plan, as modified, and must report to the Town Council every two months. Councilwoman Anastasi-Styron requested that the Town receive reports every two months during the Due Diligence Period as well.

The project must start development within three years from the date of closing or the Town may repurchase the property at the price sold plus prime interest and costs of improvements. The Town will get permits, surveys, studies, etc. at FMB's cost.

Any deed selling property in development will contain restrictions as to use which conforms to the development plan.

9. **Town Commitments and Promises That Will Survive Closing.**

- a. The Town has the authority to sell the property and has done so properly.
- b. The sale is legal and the Town can convey good title.
- c. No other governmental body has to consent to the sale.
- d. The Town can pass good title without encumbrance (except the Maze lease and the easement for Our Place).
- e. The Town is not being sued or otherwise in a legal proceeding to stop this sale.
- f. The Town is not subject to a valid legal order not to sell, etc. this property.
- g. The Town knows of no environmental law violations or claims or basis for same.

- h. Any promises or representations made by the Town.

Councilwoman Anastasi-Styron asked what would happen if FMB filed bankruptcy and reorganized or sold, namely, what recourse Mr. Bunn would have to be released from the enforceability of the contract. Mr. Taylor replied that anything in the contract would be binding upon a bankruptcy trustee, who would take the company under management. If the company were sold, the contract would be binding upon any future buyers. The Town has the right of first refusal.

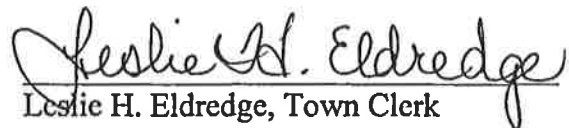
Mr. Taylor said that at the October 8 work session, the Town Council members would try to resolve any contract issues on which they disagree. He will revise the contract based on this evening's discussion and provide a new draft to the Council before October 8, and will also meet with Mr. Bunn to discuss the proposed revisions.

#### ADJOURNMENT

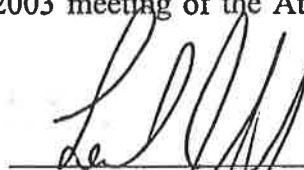
Councilman Harris, seconded by Councilman Creech, moved to adjourn. The motion carried unanimously, 5-0, and the meeting was adjourned at 7:45 p.m.



Submitted by:

  
Leslie H. Eldredge, Town Clerk

These minutes were approved at the October 20, 2003 meeting of the Atlantic Beach Town Council.

  
L. Joseph Stroud, Jr., Mayor



**TOWN OF ATLANTIC BEACH  
ATLANTIC BEACH CIRCLE DEVELOPMENT PLAN  
CONTRACT WITH FMB  
EXECUTIVE SUMMARY OUTLINE**

- 1) **Real Estate Sold:** 5 parcels, 2 of which are adjoining
  - a. "Pavilion Location", 115 Atlantic Blvd., .762 acres +/-
  - b. Two Tracts on West Bogue / West Drive, .370 Acres +/- total
  - c. West Atlantic / West Drive, .189 Acres +/-
  - d. "Maze Location", East Atlantic / East Drive, .537 Acres +/-
  
- 2) **Use:** In accordance with the Atlantic Beach Circle Development Plan
- 3) **Price:** \$1,845,000.00
  - a. Note: Will be adjusted for actual acreage (x) per acre value in appraisals
  - b. Note: Will be adjusted for lease on Maze location and easement to "Our Place" on Pavilion Location
  - c. Anticipate that increase in price due to acreage and reduction in price due to lease and easement will be almost equal in value.
- 4) **Payments for Real Estate:**
  - a. Down payment / escrow of 2% of Contract price within 10 days of contracting, approx. \$ 36,920.00
  - b. Additional down payment / escrow of 2% of Contract price every year after initial deposit / escrow until closing
  - c. 50% of deposits / escrows will go back to FMB if FMB cancels contract
  - d. All of deposits / escrow will go back to FMB if Town cancels
  - e. All of deposits / escrow will apply to purchase price at closing
  - f. Full balance of purchase price will be paid at closing
- 5) **Option for Highway 58 Property (Next to Water Tower):**
  - a. Property required DWQ for "repair area" of FMB built, privately owned sewer treatment facility to serve circle development
  - b. Option Price = \$10,000.00, payable at closing

c. **Terms of Option:**

- i. Purchase price of property when option exercised – based on appraisal. May be three appraisers.
  1. First Appraisal by FMB - up to 180 days (60 to select, 120 to do)
  2. Second Appraisal by Town – up to 240 days (60 to review, 60 to select, 120 to do)
  3. Third Appraisal by independent – up to 150 days (30 to review and select, 120 to do)
  4. Closing – up to 60 days after final appraisals
  5. Total – up to 630 days (1.7 years)
- ii. Town can cancel option before exercise if builds municipal system
  1. Latest possible time
  2. 60 day notice
  3. No return of \$10,000.00 option price
- iii. Town can require exercise of Option by FMB if decides not need
- iv. Town can buy property back after exercise of option
  1. Purchase price = price offered by 3<sup>rd</sup> party, or price paid by FMB plus prime interest, whichever is less
- v. Offer expires in 20 years, renewable

6) **Termination of Contract:**

- a. By mutual agreement of FMB & Town
- b. *Due Diligence Period* (18 months from date of Contract): FMB may cancel contract if any of these things are found to be a problem or not accomplished during this period:
  - i. Buyer gets all deposits if cancelled due to:
    1. Title of Town in property sold is no good
  - ii. Town keeps 50% of deposits collected if canceled due to:
    1. Unsatisfactory environmental audits or surveys

2. FMB unable to build or access sewage system w/ 150,000 gallons daily capacity, include getting permits and approvals to build own system
3. Not sufficient water supply for project
4. Buyer's development plan is not approved by Planning Board and other regulatory agencies
5. Approval of closing Central Drive is not obtained (see B)
6. Approval of East Drive, West Drive and Atlantic Boulevard reconfiguration not approved (See B)
7. FMB unable to purchase John's Motel and Summers End Motel properties
8. FMB unable to properly insure development project
9. FMB unable to obtain adequate financing for project
10. For any reason that Buyer decides that project is not feasible

- c. Even after Due Diligence Period, can terminate contract if have not obtained closure of Central, and reconfiguration of East, West, and Atlantic, or may ask for extension of time for closing to do so.

d. Conditions:

- i. Town must swap easement to beach w/ FMB (Ziggys to Crab Claw)
- ii. Town must receive evidence of FMB's funding for the project

7) Closing Date:

- a. 24 months from signing of Contract
- b. Closing date may be extended by Buyer another 180 days.

8) After Closing:

- a. FMB must develop according to plan, as modified, and must report to Council every 2 months
- b. Project must start development within 3 years from date of closing or Town may repurchase property at price sold plus prime interest and costs

of improvements. Town will get permits, surveys, studies, etc at FMB's cost.

- c. Any deed selling property in development will have restrictions as to use which conforms with the development plan

9) **Town Commitments & Promises Survive Closing:**

- a. Town has authority to sell & has done so properly
- b. This sale is legal & Town can convey good title
- c. No other governmental body has to consent to the sale
- d. Town can pass good title w/o encumbrance (except Maze lease & Our Place easement)
- e. Town is not being sued or otherwise in a legal proceeding to stop this sale
- f. Town not subject to a valid legal order not to sell, etc this property
- g. Town knows of no environmental law violations or claims or basis for same
- h. Any promises or representations made by the Town