

City of Coral Gables City Commission Meeting
Agenda Item I-2
November 17, 2009
City Commission Chambers
405 Biltmore Way, Coral Gables, FL

City Commission

Mayor Donald D. Slesnick, II
Vice Mayor William H. Kerdyk, Jr.
Commissioner Maria Anderson
Commissioner Rafael “Ralph” Cabrera, Jr.
Commissioner Wayne “Chip” Withers

City Staff

City Manager, Patrick Salerno
City Attorney, Elizabeth Hernandez
City Clerk, Walter J. Foeman
Deputy City Clerk, Billy Urquia

Public Speaker(s)

James Crosland, City’s Labor Counsel

I-2 [Start: 2:29:34 p.m.]

City Attorney Item – Presentation of proposed settlement regarding Margaret Pass

City Attorney Hernandez: And then you have a presentation of a proposed settlement presented by the City’s Labor Counsel, and the City’s Administrative Trial Board attorney, Mr. Crosland. I am going to recuse myself.

Commissioner Cabrera: Now, are you recusing yourself because of Mr. Crosland’s presentation?

City Attorney Hernandez: Mr. Crosland is going to be handling it; there has been an allegation raised by an employee and at the beginning of this matter, I recused myself...

Commissioner Cabrera: I’m sorry, I’m sorry, you did; I apologize.

Mr. Crosland: Mr. Mayor, Mr. Vice Mayor, members of the Commission, Mr. Manager; we have before us a proposed settlement agreement and general release regarding Margaret Pass, and the City as you know, this had been a preceding pending before the Trial Board for quite a while. There had been several delays in the proceedings, principally because of some medical issues involving Ms. Pass, and on this occasion I am recommending that the Commission approve the settlement, first of all, from a strictly business standpoint, and that always has to be considered in litigation, I recommend that this is a good settlement for the City. Around the first of this year, first part of the year, the settlement position from Ms. Pass and her attorney was in the \$350,000 dollar range; you may remember that in the spring, a proposal was brought to you, not

recommended by either Ms. Hernandez or me, but just a proposal for your consideration, somewhat less \$275,000, that, that not meet with your approval; we had the Trial Board scheduled for early this Fall and in further talks we have reached a tentative agreement, the financial terms are a total of \$99,000 spread over two years. The terms are \$50,000 payable fifteen days from the date of approval of this agreement, and then the remaining \$49,000 twelve months from the first payment. I should note that included in this package are all of the attorney's fees, its up to between Ms. Pass and her attorney how they want to divide that up, we don't know, but there are no costs involved with this settlement beyond the \$99,000; there are no fees to our attorney, no additional cost for expenses. I guess from another standpoint, another consideration is had we gone to the Trial Board or should we go to the Trial Board, what other additional expenses are at risk?- certainly fees for us proceeding with the case, it was estimated by both sides that it would take at least five days to try the case, and the exhibit books that were submitted to the Trial Board, pursuant to its rules, were about a foot and-a-half thick each side, a lot of documents, a myriad of witnesses; and this is a case that probably is best put behind us. So I'm here of course to answer any questions you have, but from a settlement standpoint – Oh, I would point out something about going to the Trial Board, I'm sorry, I almost forgot that, aside from the fact that if we proceeded to the hearing, the additional cost, the litigation fees and cost, there is of course the possibility that we would have an adverse result, and remember the Trial Board, this whole provision and new Charter, this Trial Board decision is binding on the City. Now there could be additional costs involved in appellant proceedings, and I don't say that just totally in theory because it's happened before here. I don't know how many of you remember this, certainly your Dad was here Mr. Kerdyk, but we had a Trial Board proceeding many, many years ago, had an adverse decision from the Trial Board, and sued the Trial Board on a technicality and won the case and got it overturned. So, its not totally theory when I say there could be appellant proceedings, maybe or maybe not in this case, but in any event that's it in a nut shell, and we think this is a fair settlement for the City and cost effective.

Vice Mayor Kerdyk: Just a question Jim. Was Ms. Pass ready to go to the Trial Board; was she ready to engage us at the Trial Board?

Mr. Crosland: Yes.

Vice Mayor Kerdyk: She was.

Mr. Crosland: Yes.

Vice Mayor Kerdyk: So it was definitely going in that direction.

Mr. Crosland: Right.

Vice Mayor Kerdyk: That's the only question I have.

Commissioner Cabrera: I have a question for the Manager and then one for Mr. Crosland. Mr. Manager where would we get the \$99,000 if we approve this settlement?

City Manager Salerno: In discussions with the Finance Director it would come from our insurance fund, there is no insurance on the matter.

Commissioner Cabrera: Our insurance enterprise fund?

City Manager Salerno: Yes, our internal service fund.

Commissioner Cabrera: Is that used for things like this?

City Manager Salerno: Yes.

Commissioner Cabrera: OK. Mr. Crosland, I think my question to you is more from the article I read this past Sunday in the Herald, this past weekend in the Herald, where we have a senior official in our Police Department quoted as saying that the investigation is still ongoing, however, nearly complete, and that the department is in the process of working on a summary; he further states that even though no criminal charges have been filed, he says its an administrative thing. So given the fact that there is still an ongoing investigation according to this article in the Herald, I'm not sure we should be settling with anyone, I mean, are you familiar with the article that I read from?

Mr. Crosland: I glanced at it, I didn't memorize it line for line.

Commissioner Cabrera: Oh, I didn't either; I just have a copy of it.

Mr. Crosland: Well you've raised an interesting issue, and let me point out that during the proceedings that lead to the Trial Board where allegations were listed regarding Ms. Pass and the procedural requirements were met, and before we had our first meeting with the Trial Board, there were other things going on in the Building and Zoning Department that were the subject of an investigation by your Police Department and by the County Department. Those things were not raised in her termination proceedings because I was not privy to those; none of us could be privy to those.

Commissioner Cabrera: The specifics were not, yeah you're right; the specifics of the investigation were not, but there were determinations made based upon the actions that were taken.

Mr. Crosland: There was a determination made regarding the use of so-called "ghost" employees that was one of the allegations.

Commissioner Cabrera: Absolutely!

Mr. Crosland: That was in there. The other principal allegation involved Ms. Pass, in our view at least, allowing an employee to accumulate so-called in-house overtime, which was a practice at one point widespread in the City, or to some degree in the City, I should say. There has been some discussion or some bending about it in the newspapers, or by some people I guess, about other alleged wrongdoings, but none of those were brought to my attention by the then

administration as a basis for her termination, and some things were a matter of a criminal investigation, that I had no access to.

Commissioner Cabrera: No, I understand.

Mr. Crosland: There may be something else going on now that I can tell you, Mr. Cabrera, that I don't know about it.

Commissioner Cabrera: But what the article has demonstrated to me is that there is still something that has not been closed out, and let's face it, Ms. Pass was a department's head, and based on circumstances the actions that was taken by the City justified the suspension and then I guess later on, and I don't want to get misquoted, but I'm assuming termination...

Mr. Crosland: That's correct.

Commissioner Cabrera: So – because its all intertwined; here we are contemplating a settlement on something that is still, whether this officer who I believe was involved in the initial investigation and may still be involved in the ongoing investigation, is inaccurate in his commentary, it seems to me unless staff can correct me, that there is still some sort of investigation that has not been wrapped up.

Mr. Crosland: I don't know about what's going on in the investigation...

Commissioner Cabrera: I know, I know.

Mr. Crosland: I can tell you that one of the issues that pops up with some regularity in disciplinary proceedings is the fact that there are two timelines running; there is a civilian timeline if you will, the City's administrative procedures; the criminal investigation timelines, whether by our department or by the County or some State or even Federal agency, and we don't have any control over that.

Commissioner Cabrera: Yes, but you see that's an interesting point that you bring up, the two timelines, and I think that you sort of help my argument by making that commentary because, not that I'm arguing with you, but by having two timelines, but let's take this out in a fictional manner; let's assume that we do the settlement today in a civil format, and two weeks from now there is a justifiable criminal charge or still something pending that is criminally motivated with the same individual, where does that leave us?

Mr. Crosland: Well what we may do today certainly doesn't prohibit the law enforcement agencies from pursuing whatever....

Commissioner Cabrera: Right – but we could be rewarding inappropriate behavior.

Mr. Crosland: It's also a possibility whatever this investigation may be, that the charges could be totally unrelated.

Commissioner Cabrera: Absolutely it could be.

Mr. Crosland: Again, I'm not arguing with you; I cannot control that process.

Commissioner Cabrera: I know you're not. You know, I guess we have been left in the dark about all this, and I can understand why we would be left in the dark because this is a criminal investigation from the onset. I think there are other elements that caused us to be left in the dark, and those elements are no longer here at City Hall so that's a good thing, but nonetheless you know, I'm kind of in a tough position, and I realize that \$99,000 may not be a whole lot of money, given the fact that as you said this thing could go on, and as Vice Mayor Kerdyk asked you, that there was an intention to continue with the Trial Board. Personally I would be willing to bet that we have already spent well over \$99,000 on legal services, as well as the cost of the Trial Board and all of the costs associated with this exercise.

Mr. Crosland: I don't – perhaps I should have, I didn't bring an accounting today, but I will tell you there has been a substantial amount of fees spent on this thing, and should we go to the Trial Board, prepare for it, gear up again, have a week long hearing, have briefs, let's toss aside this appellant stuff because that is somewhat theoretical, you are going to run another \$50,000 easily...

Commissioner Cabrera: That's assuming this process continues, there is also the chance, the probability should I say that Ms. Pass may drop the entire issue altogether; she has dismissed the item already prior to any discussions of a settlement, at least to the best of my knowledge.

Mr. Crosland: She withdrew her appeal from the Trial Board as part of the facilitation of this process; it was a choice of going ahead with the hearing, but you asked me earlier, was she prepared to go with the hearing...

Commissioner Cabrera: Mr. Kerdyk did.

Mr. Crosland: I'm sorry, come push to shove I think they would have; her preference was to settle the case. I would point out too, that although she did withdraw her appeal of the Trial Board, her attorney did send a letter to me reserving any state or federal statutory or common law remedy she might have. So she took pains to advise the City that should there be any issue about her ability to go back to the Trial Board, she was not waiving any federal or state statutory remedies. Something a lawyer and her should have done, you know, to protect her client's interest. Have I answered your question?

Commissioner Cabrera: Yes, and you know how I feel about this item, because we've had candid discussions with one another, but really the reason I am bringing this issue up was because of the article from last weekend, that's really what motivated me to bring the commentary up to you and to my colleagues.

Mr. Crosland: And I guess, I apologize, but I can't address the quote you gave me because I'm not a part of it.

Commissioner Cabrera: Yes – you know what?- if this article had not come out, I would feel a lot different, but because the only way I can be briefed on some of these issues is by reading it in the media, it does change my position to some extent, to a greater extent.

Vice Mayor Kerdyk: So your recommendation just to follow up with Commissioner Cabrera is to, even though the Police have not come out with their final report yet, is to go ahead and settle with Ms. Pass.

Mr. Crosland: Absolutely.

Vice Mayor Kerdyk: Absolutely.

Mr. Crosland: I mean, this is a question of civil litigation, continued cost and expenses to the City, and whatever happens or might not happen in the criminal arena will happen.

Mayor Slesnick: Do I have a motion?

Commissioner Withers: I'll move it.

Mayor Slesnick: Do I have a second?

Vice Mayor Kerdyk: I'll second it.

Mayor Slesnick: It's been moved by Mr. Withers seconded by Mr. Kerdyk that we approve the proposed settlement agreement between the City and Ms. Margaret Pass.

Commissioner Withers: And Don, really I hear exactly what Ralph's saying, but you know whenever we make these decisions on these lawsuits there is always the unknown out there that you are going against, and in this case if she's totally vindicated I think our exposure is more than \$99,000, if she's not vindicated then you know, there is still exposure there; I'm limiting the City's exposure on the... I mean, how long has this thing been investigated?

Mr. Crosland: Sir?

Commissioner Withers: How long has she been investigated?

Mr. Crosland: Well she was terminated in the fall of 2007, and there was some sort of investigation going on...

Commissioner Withers: Prior to that, a year before that.

Mr. Crosland:...yes, right, so about three years...

Commissioner Cabrera: I know, but we don't know anything.

Commissioner Withers: I know...

Commissioner Anderson: The same quote that gets used every time, the same quote.

Commissioner Withers: I would think there would have been, I could be totally wrong and I could be eating my words, but I would think there would be something in two and-a-half to three years.

Mr. Crosland: All I can tell you that whatever has been investigated in the last three years has been no indictment, no information against her in a criminal sense.

Commissioner Withers: Nothing. So unless there is something new out there.

Vice Mayor Kerdyk: I don't think anybody likes settling anything, but this is, we need to move on from this point forward, especially as it has to apply to the old regime here and put this behind us, and not be exposed to anymore, to any possible further litigation there. As I've said before, you have to vote for this, but hold your nose while you are voting because it's just not what I like doing.

Mayor Slesnick: I have made myself very clear to the attorneys in this matter. When I was first approached as I presumed we all were, I said that I would take Mr. Crosland's advice as I normally do, based on the analysis of the cost and the risk/reward, but when I was presented with the attached recognition of service, I informed the attorneys I would not be voting for this. We have a motion and a second.

Mr. Clerk

Commissioner Cabrera: No

Vice Mayor Kerdyk: Yes

Commissioner Withers: Yes

Commissioner Anderson: Yes

Mayor Slesnick: No

(Vote: 3-2)

Mr. Crosland: Thank you very much.

[End: 2:52:52 p.m.]