

February 4, 2003

CALLED MEETING
FLOYD COUNTY BOARD OF COMMISSIONERS
February 4, 2003 **11:00 A.M.**

PRESENT: Chairman Garry Fricks, Commissioners Tom Bennett, Chuck Hufstetler, Jerry Jennings, and John Mayes.

OTHERS

PRESENT: County Manager Kevin Poe, County Attorney Tom Manning, County Attorney Virginia Harman, Clerk Michele Fountain, Comptroller Al Leonard, City Attorney Andy Davis and City Attorney Davis Smith.

CALL TO ORDER: Chairman Fricks called the meeting to order.

INVOCATION: Commissioner Hufstetler led the Invocation.

DISCUSS PARKING DECK PROJECT.

County Attorney Tom Manning presented copies of a proposed Ground Lease. He recommended that they go into a Closed Session (*Executive Session*). He stated that he knew that the County does not normally do that, but we do that as allowed under the Georgia Code in order to discuss potential litigation that may arise in this matter both by and possibly against the County. He stated that he thinks the Commissioners would benefit from hearing their (*the attorney's*) opinion in that regard. There are procedures to follow in order to do that. He stated, for the press in attendance, this is not to cut them out but because, if there were ever to be litigation that arose in this matter, then it would be a great benefit if they (*the Board*) had the attorney's legal analysis and that was available. He stated that to keep the playing ground level, he proposed that they discuss in Closed Session (*Executive Session*) only the issues of potential litigation with regard to this matter, then the meeting will be opened back up.

Chairman Fricks called for a Motion to enter into Closed Session (*Executive Session*). MOTION was made by Commissioner Bennett. SECOND by Commissioner Hufstetler. Chairman Fricks stated that they were looking at the benefit of Floyd County citizens for protection, from potential litigation. This will be their second Closed Meeting in four years. Commissioner Jennings asked if they can have in the meeting persons who are pertinent to the issue, and mentioned the City Attorney. It was suggested by County Attorney Harman that they leave and then are brought back in after they find out the issues, so that there will not be any issue of waiver of attorney client privilege. County Attorney Manning noted for the Press, the Closed Session (*Executive Session*) will be only to discuss any particular litigation, that issue only, and he reminded everyone that we cannot go under the law any further than those discussions.

VOTING:

YES

NO

Commissioner Hufstetler

" Mayes

" Jennings

" Bennett

Chairman Fricks

Motion Carried

At this time the room was cleared for the Executive Session except for the following:

Chairman Garry Fricks, Commissioners Tom Bennett, Chuck Hufstetler, Jerry Jennings and John Mayes, County Manager Kevin Poe, County Attorneys Tom Manning and Virginia Harman, Clerk Michele Fountain, and Comptroller Al Leonard.

Shortly before the end of the Executive Session Commissioner Hufstetler, having a prior commitment, left the meeting.

MOTION was made by Commissioner Mayes to end the Closed Session (*Executive Session*). SECOND by Commissioner Jennings. VOTING:

YES

NO

Commissioner Hufstetler

" Mayes

" Jennings

" Bennett

Chairman Fricks

Motion Carried

Commissioner Jennings stated that it is his understanding that they have in hand a statement from Marriott that, with the signing of this Ground Lease, we will have a Franchise Agreement for a Marriott Hotel. We have assurance from a Bond Counsel that the bonds for the Parking Deck are ready to go for sale. We also have a statement from the Gainesville Bank and Trust of a Loan Agreement to build the hotel. The Ground Lease, which had been worked on by the County Attorney, is ready. County Attorney Manning stated that there are some changes from the last version that they received from the City. Commissioner Jennings asked that the County Attorney walk them through the changes. County Attorney Manning stated there have been some changes suggested by Brinson, Askew and Berry on behalf of the City. The latest draft incorporates the changes that were acceptable in their view by the County, consistent with what the County has wanted all along, and proposed changes back from us. He noted that Brinson, Askew and Berry were seeing those last changes for the first time, since it had been worked on the previous afternoon. So there may be some tweaking with their proposed changes and they have to be agreed upon by Songy Rome, represented by John Manning. County Attorney Manning then reviewed the following changes:

- Number 5, on Page 4 – The reason that was done was because they wanted it clear that it was a Marriott Courtyard and that the tenant could not come in and change the use of the premises as a hotel. They proposed language that did not have a problem with doing some things in addition to that, but there had to be a Marriott Courtyard Hotel. County Attorney Manning asked City Attorney Davis for comments regarding the change. City Attorney Davis stated that they did not draft the original lease, he thought it had been drafted by John Manning.
- Number 6, on Page 5 – The previous language did not require our approval before they could sublease and they suggested that “they could sublease, but it was subject to the Development Authority’s approval, which would not be unreasonably withheld.” County Attorney Harman stated that this paragraph had not appeared to require the landlord’s approval, but later on in the document there was a paragraph that did require approval.
- Page 6, 7E – Initially there was here a cap of \$40,000 that was put in the initial lease. He stated that David (*Smith*) worked on some language that said they should pay whatever the ad valorem tax is and they added the underlined portion to make sure that it was clear that it would be ad valorem taxes as if it was privately owned. He stated that this clarified that.
- 8A – The language there was to require insurance coverage on a portion of the Parking Deck that the hotel people will be using. This is so that if there was an injury there, it would be clear there was coverage.
- Page 7, 8B – Is the same.
- Number 11, on Page 9 – They felt before these changes, they could arguably use this for anything and they wanted to make sure the use was as a Marriott, so they referred back to Paragraph 5 where that was outlined.
- Page 19, Paragraph 35 – All of the language in the lease, under Paragraph 35, after “a” seemed to give the hotel’s lender a right to foreclose on the leasehold interest, but they wanted it

to be clear, they thought “a” was somewhat ambiguous. They did not have the right unless they exercise the option to purchase the whole property for the \$260,000. They did not have a right to foreclose on the real estate. They could exercise the right to purchase, pay the \$260,000, less what they have already paid under that payment and they would have the real estate, then, if they defaulted, the lender could come and have it all.

➤ 36B – County Attorney Harman stated this is the issue that they are going to exercise the option, they made it clear that they can only exercise the option if they are not in default, and if they exercise the option, they will have to cure any existing default before they can do that. It would not relieve the obligation to pay the sum due for the lease of the parking spaces or other payment obligations under the payment spreadsheet. In other words, it is being made clear that when, in the next provision, they talk about the exercise option, so the cash flow continues. County Attorney Manning stated that his understanding is, regarding the payment spreadsheet, is that if they exercise the option, they still have to make all the payments that they otherwise were required to make on the spreadsheet, except any remaining payments on the Ground Lease.

➤ 38 – County Attorney Manning stated that at one time that 15% of the parking spaces was 59 spaces, now he is seeing 64 and he has no idea about the change. City Attorney Davis stated that it changed because of the 15% ownership and the reconstitution of the redrawing, so 64 became the number. County Manager Poe stated that if there is some change in total number of spaces, they are just asking for 64 spaces, no more. Commissioner Bennett stated that 64 spaces would indicate there were 427 available and he does not think that is correct, from what he heard. He also stated that it sounds like they decided they need 64 and required that number. County Manager Poe stated that basically they have said that they need 64 spaces, which does not come up to 15%, but they have gotten off the 15%. Changes in number of rooms was discussed. County Attorney Manning stated that they do not pin them down on the number of rooms in the lease. County Manager Poe noted that originally there were 365 spaces. It was originally based on an 80 room hotel and now they are at a 90 room hotel.

➤ Page 23 – Beginning with “discount”, Commissioner Jennings stated that regarding the “not to exceed \$50,000”, their contention was that if the rate for parking spaces goes up, there still should be a 25% discount. So if that comes out to be more than \$50,000, then it will be more than \$50,000, they want it out of there. Chairman Fricks stated that originally it was a \$50,000 cap, but we are now saying that we have the ability in the future years to adjust the market up, as long as it stays within that 25% range, after 20 years. City Attorney Davis stated that when he met with AGL, the specific language, not to exceed \$50,000 was the County language. County Manager Poe stated that the proposal from Mr. Patton was to cap it at \$50,000. County Attorney Harman stated that the language they saw, from the County’s documents, was 25% below market rate. County Manager Poe stated that this has gone back and forth. Commissioner Jennings stated that this is saying that if the value of the spaces goes up, then the county would... County Attorney Manning stated that the previous draft seemed to be saying that if the value went up, that we would be entitled to more than \$50,000 annually, the agreement was going to cap it at \$50,000, and this was struck from the agreement.

➤ Special Stipulations – County Attorney Manning stated that there is not a problem with Number 1. We are not getting a bond for the hotel, but there would be a bond for the parking

deck and it is his understanding that was acceptable. Commissioner Jennings mentioned that Number 5 states it “shall receive proof of a performance bond to cover the project costs of the parking deck.” County Attorney Manning stated that Number 1 speaks to the Letter of Credit instead of a bond on the hotel.

- Number 2 – County Attorney Manning stated that this one speaks for itself; we get to see the Franchise Agreement that we have been waiting on.
- Number 3 – County Attorney Manning stated that this is the proof of financing.
- Number 4 – County Attorney Manning stated that the current entity, Songy Rome Associates, LLC, has not been formed in the eyes of the Secretary of State. So, they say it is just waiting to go, pending approval of this. They want to see that.
- Number 6 – County Attorney Manning stated that this is just the exhibits for this agreement. They have not been seen in final form and they do want to see them and approved of them.
- Number 7 – It was noted that this item had been addressed the previous night.
- Number 8 – City Attorney Davis stated that this had previously been addressed in 1998 by the Downtown Development Authority and was part of the Spreadsheet. He stated that those two issues are not issues. In 1998 the Downtown Development Authority approved the assessment and it is reflected on the Payment Spreadsheet, \$20,000 for the first five years. The Downtown Development Authority minutes were searched and found that this was approved. County Manager Poe stated that either way the City of Rome is acknowledging their obligation, whether they get it through downtown assessment or just come up with \$20,000.
- Number 9 – County Attorney Manning stated that this still has to be worked out with City Attorney Davis. As he understands it, Sutherland, Asbil & Brennon says that this is for work on the AGL lease and other work, there is a significant outstanding bill there and City Attorney Davis may need to talk with them about the meeting yesterday. City Attorney Davis responded that he had not heard back from them.
- Number 10 – County Attorney Manning stated that Songy Rome, LLC, is another new entity that has appeared over the history of the course of dealing with the Pattons, the County and the City. He thinks there is a strong argument that no contractual obligations or rights that exist by virtue of previous agreements signed. If there is, they feel that Songy should sign an Assumption Agreement to the extent there are any rights and obligations in the previous agreements signed by the various parties. So that, for example, if Forum Holdings, LLC, has any obligations or rights, those get transferred to Songy Rome. Same thing with Parkwood. County Attorney Harman stated they are trying to do a little housekeeping so that when this document is executed, if that is the decision, there is no question that we are dealing with the right entity.
- Number 11 – County Attorney Manning stated this is the guarantee, that we had language proposing that we required a guarantee from one or more of the individuals or business

organizations that made up the tenants LLC. Chairman Fricks stated that is the one point that precedes the original contract. County Attorney Manning stated that they do not feel there is an original contract in affect anymore, but you may be willing to waive Number 11. He asked City Attorney Davis, if Number 11 is removed, what his thoughts on working out the attorneys fee issue, Number 1 and Number 2, and everybody shaking on this deal with all the other proposed changes and stipulations. City Attorney Davis replied that based on their conversation with John Manning, he does not see any real changes that will be any problems. The Bond Counsel Attorney Fees is really not what that issue is, but he thinks that is more to settle their additional work on AGL. The developer said that they are not going to foot that bill. That is a matter of compromising if there is. County Attorney Manning stated that it is a significant amount. Comptroller Leonard stated that the last time he talked with them it was around \$100,000 for AGL. City Attorney Davis had talked with the attorneys and asked if that became a deal breaker would they accept the bond fee and roll all of that in there. He had not received a response on that question. This has become an issue because the Developer, the County, the Development Authority and the City have said that they are not going to pay it. Commissioner Jennings asked City Attorney Davis if Item 11 was problematic in his opinion. City Attorney Davis that based on his conversations with John Manning, the developers lawyer, "yes." Commissioner Jennings asked County Attorney Manning if there is a statement as far as when all of these documents are signed, how long they have to build the parking deck and the hotel. County Attorney Manning stated that the terms of the lease, on Page 3, are one year from the date of execution of this groundwork. Chairman Fricks asked if it needs to be stipulated what occurs if that were to be the case. County Attorney Harman stated that it is a definitive default under the agreement. Their failure to live up to the contractual obligations would be a definitive default. Commissioner Jennings asked what would happen if they did default. City Attorney Davis stated that the Development Authority could extend the time in which to complete, is assuming it was within a few months. If not, if there hasn't been anything done, then obviously, the event of default would terminate the Ground Lease. If it is somewhere in the partial, the bank would step in. Commissioner Jennings asked if they demanded strict compliance of this element of this lease, basically would that initiate that process. County Attorney Manning noted that if you can't cure a default within 30-days, then you begin to cure. He noted that this is on Page 10 and read the item. He stated that he read that as if they are trying to remedy and using due diligence, then they are still in the ballgame. Commissioner Jennings asked if there was a way to make it a more definitive deadline. County Attorney Harman replied that they could say "with the exception of the required completion date of the events of default." That would carve out the due date as not allowing this kind of due diligence remedy. Terminology would read "with the exception of the requirement of completion within one year of signing of this document, this would apply." There was an affirmative response to this question. Commissioner Jennings asked if there was any disagreement with putting the language just described in there. Commissioner Jennings asked if we execute this Ground Lease and we delete Item 11 from Exhibit B, Special Stipulations and this project does not go forward and we lose the potential of the AGL Ground Lease, do we have legal recourse with the developers, because they did not move forth with this project? This Friday AGL is saying, you lose the \$1 a year for 99 years. Do we have legal recourse with the developers? County Attorney Manning replied that yes, they do still have the attorneys fee issue with the same firm that is handling the bond deal. As soon as that is worked out, the answer is yes. City Attorney Davis stated that based on what the developer said, that is not their issue, it is our issue.

Commissioner Jennings stated that he is prepared to make a Motion.

Commissioner Bennett stated that they keep talking about completion time and he asked about starting time. We have twelve months to build this hotel, he is not again trying to write this agreement, but we have been bitten so many times that at some point it becomes physically impossible to build the hotel and have it done within 12 months from the signing of this document. We have had attempts at starting by bringing in construction trailers and putting up silt fence, but in fact starting has not occurred, which only extends the time to redefine starting. Is there a way to try to get a start point. This will have to be signed Friday, so they will have a Friday starting date, but if they have not truly started building in another couple of months of that, it will not be possible to complete the project in 12 months. County Manager Poe stated that it will take 45-days to do the bonds, so they should be able to start within 30-days. Comptroller Leonard stated that they have a 45-day period probably before the bonds will be issued, once they tell Bond Counsel and our financial advisor to go forward. Commissioner Bennett stated that the construction loan will be issued assuming the take out of the bonds. He stated that he had not talked with Gainesville Bank and Trust, but they will not start dispersing construction loan funds, you also have a guaranty in there. He does not think that it is possible for them unless they can build the hotel in six months. But maybe they can do it in six months. He stated that he is just trying to get finality, he does not care if they get it done in 12 months from signing this agreement, his only concern is when are they going to start. Numerous extensions have been given already. Commissioner Jennings asked about 12 months from the formal issue of the bonds for the parking deck. Commissioner Bennett stated that is still prolonging the starting time. City Attorney Davis stated that Batson Cook indicated one day in a meeting that they could start before the issuance of the bonds, because they are an equity partner. It was mentioned that it needs to be to the affect "Batson Cook will begin legitimate construction by." Chairman Fricks suggested 12 months from their groundbreaking. It was asked if payments are mandated regardless of whether or not they have started. They will have to start paying for the parking deck, even if they haven't finished. This would be an incentive. Commissioner Bennett stated that they are putting a lot of reliance on the bank and his concern is that the bank has assured themselves some limited exposure by a guaranty. We have also asked for this, but have been unable to receive it at this point. Commissioner Bennett stated that he really does not want the bank acting as our underwriter. He stated that he did not care if it takes 14 or 18 months to build, as long as the payments are running, but let's try to bring the transaction to finality. Commissioner Jennings asked what Commissioner Bennett suggested. *Commissioner Bennett's response was not audible.* Commissioner Jennings stated there were two issues; one, could they write into it a start date and secondly, the issue of the payments for the Parking Deck begin at that one year completion. County Attorney Harman stated that is already in the document and read that portion of the document. Commissioner Jennings asked if they wanted to give a 30-day period from the signing of the document to the commencement of the project to the one-year completion. It may take some time to get the equipment on site. His thought is for completion to be 13 months from signing of document. It was noted that the commencement date is the signing of this document and it is assumed that it will be this Friday because of the pressure from Atlanta Gas Light. He said that at some point it becomes impossible to construct this building within the 12 months from this commencement date. Comptroller Leonard stated that the bonds will pretty much have to be issued within the next 60 days. Commissioner Bennett asked if the hotel and parking deck had not been started by that

time do we go forward with issuing the bonds in the hope that they do that. That is his concern, if we issue bonds and something falls apart because they are still putting paperwork together. He expressed concern for the expense involved. Comptroller Leonard stated that this is a bond, it will be sold on market, the proceeds come in and the funds are distributed in a judicious manner.

County Attorney Harman stated that she is not sure how they define what would be the start, but if they built into this a start date, which is not met, it would also be a definitive default. At least they would trigger the confrontation early on about what the schedule will be. They may have to play with some language about what is.

MOTION was made by Commissioner Jennings that they accept the Ground Lease with the noted changes that they have discussed and Number 11 on Exhibit B is deleted from the Ground Lease and that we authorize counsel to insert language relative to starting date of the project, that there be some kind of substantial beginning of the project, that there be an official start date for the project. Also the issue of altering the one-year completion date with the language under the default provisions allowing for due diligence in the cure not apply to a default with regard to the completion date. SECOND by Commissioner Mayes. Commissioner Bennett commended the attorneys for correcting many, many flaws in this document from the last time they have seen it. He thinks they have justified themselves in some areas. Chairman Fricks stated that, regarding Item 11, he would feel more comfortable with it being in there, but you have to take the position that without that requirement, he feels like that the deal would not proceed without that issue, so under those conditions they will make it acceptable without that condition. Commissioner Jennings stated that they have, from the County Counsel, some assurance that they are protected reasonably well without Item 11, they would be protected better with Item 11.

VOTING:

YES

NO

Commissioner Mayes

"

Jennings

Commissioner Bennett

Chairman Fricks

Motion Carried

ADJOURNMENT:

There being no further business to come before the Board, MOTION was made by Commissioner Jennings, SECOND by Commissioner Bennett, that the meeting be adjourned. VOTING:

YES

NO

Commissioner Mayes

" Jennings
" Bennett
Chairman Fricks

Motion Carried

FLOYD COUNTY BOARD OF COMMISSIONERS
GARRY E. FRICKS, CHAIRMAN