

# HARBOR BRANCH OCEANOGRAPHIC INSTITUTE

## FOUNDATION

### Minutes Special Meeting of the Board of Directors Held at the Harbor Branch Oceanographic Institute March 30, 2017

PRESENT: Michael Brown, Sr.\* , C. Amos Bussmann\*; Joe Duke; Dr. Joseph Ferro\*(joined 10 minutes after the meeting began); Nancy Higgs; Marilyn C. Link; Mary Beth McDonald; Michael D. Minton\* (joined 35 minutes after the meeting began); Mike O'Reilly, Chair; John Papa\*; Dr. Anton Post; Marjorie Raines, Treasurer; William J. Stewart, Esq., Secretary/Legal Counsel; Michael Toner, Vice Chair

ALSO PRESENT: Dr. Dan Flynn\*, FAU VP of Research; Elizabeth Rubin\*, FAU Associate General Counsel; Stacey Semmel\*, FAU Associate Vice President for Financial Affairs and University Budget Director; Debbie Dutton, Director of Operations; Katha Kissman, President & CEO; Cyndi Permenter, Administrative Assistant

ABSENT: Sherry Plymale

\*participated virtually

#### Call to Order

The meeting was called to order by Chair O'Reilly at 3:09 pm.

#### Approval of the Minutes

The minutes of the January 24, 2017 Board Meeting and the February 10, 2017 Special Board Meeting were approved unanimously.

#### Purpose of Meeting & Discussion

Chair O'Reilly opened by referring to the interference into Foundation operations over the past few months by FAU VP of Research, Dr. Dan Flynn. This interference was despite the large amount of funding the Foundation has provided, such as new research, and that our CEO has run a lean and efficient operation. He referenced numerous interactions including Dr. Flynn's latest letter to him of February 21, 2017 which was accompanied by a mandated FY18 budget for the Foundation. He further referenced his own letter response to FAU Board of Trustees Chair Anthony Barbar as of February 23, 2017. He noted that in his view the actions and mandated budget were unacceptable; the budget in particular as it eliminated two-thirds of the staff including the Foundation's CEO. It also reduced professional services by 77%, eliminated the Foundation's independent legal counsel, and moved "savings" to Facilities increasing that line by \$240,000. Chair O'Reilly stated, "In my view, FAU wants Foundation's money to spend as it wishes." [Referenced emails, letters and other documentation circulated to the Board in advance of the meeting.]

Chair O'Reilly then asked the Chairs of each active Committee to share comments or thoughts about the proposed actions by FAU.

#### *Grants Committee*

Committee Chair Toner reminded the Board of the work which had been done by the Committee beginning when Dr. Margaret Leinen was the Executive Director of HBOI and further fine-tuned by the Foundation CEO and her staff to institute policies and procedures for good stewardship and effective grant making. He noted the Committee's commitment to ensuring significant grant impact with measurable outcomes. In particular, the Foundation stepped up to provide funds during the governmental sequestration and noted that over \$11 million in discretionary grant funds had been committed to HBOI to date on top of stewarding over \$17 million SLP funds since 2012. On the latter, because the Foundation is the legislatively-dictated recipient of SLP funds, it has requirements that must be monitored and followed; failure to have control over the use and compliance of these funds could jeopardize funding from the State. He stated how hard our staff worked to ensure compliance for all our grants and he did not see how the concept of FAU making grants to itself could be acceptable by the Board.

### *Finance Committee*

Committee Chair Raines stated that since FY14 in particular, the Finance Committee and Staff have worked to streamline operations and efficiencies and there is documentation to support this. When the Committee has asked staff for additional information, they have provided complete and prompt responses. The Foundation is run lean and efficiently through strong good governance. CEO has led the organization extremely well as has been communicated by the observations of newer board members who serve on other nonprofit boards. "Policies, procedures and controls are number one in any nonprofit or other industry and ours are good." Several line items have come in below the budget most of the time because of the CEO's active management and oversight. The current budget is beneficial to not only the Foundation but also to HBOI to provide needed operations and services to fulfill mission. The endowment has grown, returns have been strong, and the Finance Committee has worked to achieve these returns with the lowest costs, reducing management fees by \$60,000. All annual operating budgets have been well vetted. The CEO has strong relationships with all the Chairs which supports this. The CEO leads the Foundation extremely well and is very effective. There are policies, procedures and controls which are watched and followed. Chair Raines also stated when she was the Chair of the Audit Committee, for best practices and rotation an RFP process was launched to determine a new auditor. It was efficiently supported by the CEO and our legal counsel. All audits of operations and the SLP program were clean with no significant findings. Audit recommendations and suggestions were discussed and implemented. Chair Raines felt any change to allow FAU to handle Foundation operations would result in the Board becoming a rubber-stamp board and abdicating their fiduciary responsibility. She encouraged her fellow Committee members to share any thoughts if they disagreed.

### *Audit Committee*

Committee Chair John Papa stated as a somewhat newer Board member he was very impressed and delighted with board operations and the level of leadership and support from the staff. "This has been a marvelous experience; the work is great and the internal controls in place are strong and well observed. This year's audit report reinforced that we have an operation that is lean and mean." He referred to one observation that created a stir [change of SLP processes and FAU's Division of Research reaction] and noted this just reinforced the need for an independent board to fulfill fiduciary responsibility. Chair Papa stated he has not seen anything that requires additional efficiencies.

Chair O'Reilly then asked Secretary/Legal Counsel Bill Stewart for historical context. Mr. Stewart went back to 2004 when there were the hurricanes. The HBOI campus was seriously damaged. The greenhouse operations on Peacock Road were beyond repair and there was not enough capital to restore it properly. At the time, investments on science were at break even. The then Board formed a committee to look into options; director Adrian Smith served as chair of that committee. They looked at several options. One plan from a developer by the name of Jacoby would restore the campus and build residential structures on the other side of the channel. This would have solved the restoration problem but did not offer the Institution any cash flow. Selling the property outright was possible but not deemed a preferred solution.

Conversations with FAU started in 2005/2006 with then President Frank Brogan. Then Senator Ken Pruitt became involved and suggested getting government financing so the State could purchase the property and lease it to FAU. FAU would then acquire a renowned research institute with the transfer of intellectual property. Senator Pruitt through the legislature added funding of \$44.6 M for capital improvements of the campus and additional funds for one year of operational support. Additional Institution property which was primarily wetlands would be purchased by the State of Florida for \$27 M which allowed the remaining entity [renamed Harbor Branch Oceanographic Institution Foundation] to restore its endowment. This was all codified by the Memorandum of Understanding (MOU).

When the idea was presented, the Board had an all-day meeting. Directors were concerned about how the Johnson family would perceive the transfer of the Institute to FAU. The two Johnson family members on the Board at the time (Joe Duke and Dr. Donald Marszalek) gave their blessing to move forward with FAU. "I don't think it would have happened without that." The agreement was negotiated in December 2007. FAU took over responsibility for the employees and intellectual property. Everything went relatively smoothly. The arrangement was cemented when Dr. Margaret Leinen came on as the Executive Director of HBOI. She saw clearly that the Foundation's existence enabled HBOI to have access to funding that they might not have had. She concurred with the Board at its retreat held in 2012 that the Foundation should remain independent with the understanding that its funding should be directed to the Institute or to or for the benefit of the Institute. Bill Stewart again referenced Mike Toner's earlier example of the Board's ability to help quickly with the sequester.

Marilyn Link questioned what the issue was at the time of FAU's acquisition of HBOI and why the Foundation's endowment funds were not transferred to the FAU Foundation as a restricted fund. Bill Stewart replied that advantage was the focus of the Foundation would remain dedicated to the Institute and oversight of the endowment by this independent entity would ensure that it would not be re-focused to other aspects of FAU (ensuring donor intent). In

addition, the SLP program was an issue because those funds could only go to the Foundation as it was legislatively dictated as the recipient. Keeping focus on the Institute was important.

Bill Stewart went on to say that one of the things that happened with the change of hierarchy and leadership at FAU was that the new leadership, who were not in on the original discussions, believed that the Foundation was like any other DSO of FAU. It was not a DSO established by FAU; rather we became a DSO by MOU. "Our MOU is a contract. It clearly states that implementation or employment of funds is at the Foundation's sole discretion including defraying operational costs. The Foundation is different than other DSOs. If we do not control our budget with an independent staff, we lose control of the Foundation's endowment and the SLP program." Bill Stewart stated in his opinion it would present a conflict of interest if operations were run by FAU.

Bill Stewart concluded that to date, the Foundation has not been able to generate a meaningful discussion with FAU on their proposed budget changes. It was presented as "take it or leave it" and deadlines were imposed. "All we want to do is support the Institute. The current dispute is not good for the Institute not only for all the reasons stated but also because this has left many unsettling feelings. For example, will the Foundation be willing to give money as freely as it has in the past? This is also not good for Foundation because our staff is in turmoil about their futures. Unless we do something, it will get worse. So how can it be resolved?" He noted the civilized way is to ask a third party to intervene. This doesn't mean that there can't be discussions along with way. But he felt we are at the point where we need to simply ask a court to determine the rights of each side to get a final resolution.

Chair O'Reilly then asked for Joe Duke to share any thoughts from the original donor's perspective. Joe explained he was married to Jennifer Johnson, the daughter of Seward Johnson, Sr., who was the founder and primary benefactor of Institution. His wife had been a trustee for 10 years but actively involved for 30 years. They have been donors for that long. Joe Duke explained that he has been the "designated representative" by the family to ensure that the donor's intent was being honored. He and the family blessed the union with FAU because he knew that it was good for HBOI but also because it was intended that the endowment would be managed by a board – he knew this because he was involved in setting it up that way. This Board has perpetuated itself by electing qualified new members as needed and has continued the evolvement of this structure. He stated that his father-in-law never intended for the endowment to be managed by a state bureaucracy. He noted that when anyone accepted a position on this Board it was with the understanding that each accepted their fiduciary responsibility including ensuring donor intent should be honored.

Joe Duke noted that Bill Stewart gave an accurate recollection of the history but reflected his further observations that in the recent past FAU has attempted to revise history. He referred to the very recent President John Kelly article appearing in TCPalm as an example of a revisionist approach to the history of FAU, HBOI, and the Foundation. It mentioned a \$69 M transaction but it never accounted for the transfer of the enormous assets to FAU and transfer of intellectual property. "We entered into contract with FAU in good faith with assurances from President Brogan that the Foundation would be equal partners. The Foundation was never to be in a subordinate position or for FAU to have an alternative vision for our Foundation. It was a good faith agreement with assurances by the then President Brogan at the time. And now we are on our on third FAU president." Joe Duke doesn't think the history was passed down very well from president to president. "We got along great with President Brogan; we got along less great with after that. The relationship first went sour when the next FAU President MJ Saunders asked then Foundation leader Jim Seitz to write a check for \$50,000 to help fund the FAU football stadium. President Saunders was told no because that was not what the Foundation funded. And from that point on, at least from the University's standpoint the relationship slowly deteriorated. "We at a point now where we entered into a contractual arrangement that is no longer working. I believe we should let a court decide."

Amos Bussmann agreed with what Joe said. He has had a distinct perspective having served for 17 years or more on the governing board. "What we have working at the Foundation now is the best I've seen. What I don't like is getting fired for doing a great job. FAU is disrupting waters that we have spent years calming. Katha [Kissman]'s done a hell of a job – the best we have had. What FAU wants us to do doesn't add up; I can look at the zeros and the zeros just don't add up. They don't seem to like our independence. Independence has been working pretty good. There's no question about our ability to handle our operations. All of this is a waste of time."

Michael Brown, Sr., asked if FAU had ever questioned either the management, our donors, our grants – anything about the Foundation's governance or operations or is this simply a control issue? Bill referred to the recent Foundation requirement for HBOI to stop awarding projected SLP funds which was a practice the Foundation had stopped in the past when HBOI had overspent funds but which had been reinstated without the Board's knowledge. This was in conjunction with the Foundation's recent decision to hold SLP funds until expended which was an audit recommendation. Bill noted, "Just recently, Dr. Flynn directed our CEO to reverse this policy and process change. Yet our CEO does not have the authority to reverse a Board decision." In further response to Mike Brown's question, Katha Kissman responded that

each year we have presented our operations budgets to FAU and they has been accepted pro forma. They have never offered any questions or concerns about specific line items. There have also been no questions or concerns about the Board's governance of the Foundation. Mike Brown asked, "So there was never any question about our money going to an improper use?" Katha Kissman responded no.

Michael Minton also confirmed for Mike Brown that during his term as Board Chair, he would meet annually with President Kelly and then more recently his meetings were delegated to Dr. Flynn. In those meetings there never was a single question or concerns raised about operations or procedures. The only thing raised in his first meeting with President Kelly was about some of our compensation policies which Mr. Minton reported to the Foundation's Governance Committee. "There were never any concerns about how we administered or dispersed funds." The first inkling Mr. Minton had about any issues came in the late fall/early winter [2016] when Dr. Flynn has raised some objections about the Foundation's policy changes on the SLP process and oversight referencing the legislature and stating a desire to bring all of these into the FAU Foundation along with the other DSOs. Mr. Minton spoke about a recent article that seemed like the inquisition coming out of Tallahassee right now challenging those foundations which used university money to operate their foundations; there is a move to now require foundations to support themselves. "We have always funded our operations out of Foundation funds."

Marilyn Link reflected that Bill Stewart's suggested solution of having a court decide reminded her of issues around Seward Johnson, Sr.'s will and distributions to Harbor Branch. She said that the court solved that problem.

Joe Ferro asked if there was a premium paid for the property at the time or was it discounted to FAU. Bill clarified that the property was never sold to FAU; it was sold to the State of Florida. The State of Florida then leased part of it to FAU and leased the remaining part to St. Lucie County. The price was determined by appraisal of the real property only. Assets and personal property were given to FAU in exchange for FAU taking over the Institute's overhead.

John Papa noted that the value received was recorded by FAU at a different value. Joe Duke confirmed that FAU recorded the transfer of assets and personal property at \$92 M. The sale of the real property to the State of Florida for approximately \$27 M allowed us to build the endowment back up to a more robust position. It was two separate transactions.

Dr. Dan Flynn asked to correct a misstatement. He noted FAU did engage in good faith with Katha Kissman three times for her to meet with them in Boca. Katha Kissman objected. Dr. Flynn continued: "The [FY18 Foundation] budget [sent to Chair O'Reilly] was developed as consistent with other DSO's. FAU has considerable management experience in supporting DSOs. The reason all of this now being done was because the FAU Board of Trustees received a directive from Board of Governors."

Nancy Higgs shared that she had reread the documents about serving on this board and each Foundation Board member's responsibility. She feels a tremendous responsibility to the Foundation and to ensure how it is best operated. She feels there is nothing to worry about with regard to the Foundation. "It is very sad to me that we would be in litigation with the University but we need to resolve this situation."

Chair O'Reilly stated that we were at decision point. His sense of the Board discussions appeared that we could not move forward to best serve our mission the way things were. "It is best to let a court decide."

Elizabeth Rubin shared that she thought perhaps the Board was confused about what was being offered. FAU was more familiar with the operations of a DSO. "Our [proposed] budget should not affect the Foundation's operations; moving services to FAU should not affect operations. The Board would still make all the decisions." Chair O'Reilly responded that it created a conflict of interest that the Foundation's Board was not willing to accept. Elizabeth Rubin stated that FAU does not tell other DSOs how to use their funds.

Chair O'Reilly then asked Bill Stewart to read a prepared resolution for discussion. Bill Stewart noted this was the first resolution of the year 2017-1.

**RESOLUTION 2017-1  
OF THE BOARD OF DIRECTORS OF  
HARBOR BRANCH OCEANOGRAPHIC INSTITUTE FOUNDATION, INC.**

WHEREAS, Harbor Branch Oceanographic Institute Foundation, Inc. ("Harbor Branch") and Florida Atlantic University ("FAU") entered into a Memorandum of Understanding in December 2007 which established the terms of their relationship going forward for the ultimate benefit of Harbor Branch Oceanographic Institute at Florida Atlantic University; and

WHEREAS, the Memorandum of Understanding provided, among other things, that Harbor Branch would retain its endowment and its status as a recipient of state license plate funds and would have sole discretion with respect to distributions of its funds to defray the expenses of its operations, to restore restricted corpus and retire debt and to and for the benefit of FAU at HBOI or FAU; and

WHEREAS, Harbor Branch transferred all of its intangible and tangible personal property with the exception of its endowments to FAU for no consideration and sold the majority of its real property to the State of Florida; and

WHEREAS, Harbor Branch believes that it has complied with its obligations under the Memorandum of Understanding from the date it executed the Memorandum to the date of this Resolution; and

WHEREAS, FAU has demanded that Harbor Branch adopt an operating budget which eliminates funds to compensate its Executive Director and other staff, independent attorneys, auditors and accountants, and further that those functions be transferred to FAU employees or other professionals retained by FAU; and

WHEREAS, FAU is the primary recipient of Grants issued by Harbor Branch. The result of succumbing to FAU's demands would be that all checks and balances on the development of grant terms, the employment of grant funds and the audit of the use of those funds would be severely compromised; and

WHEREAS, Harbor Branch believes that these demands are contrary to the promises which FAU made to Harbor Branch in the Memorandum of Understanding as these demands make it impossible for Harbor Branch to fulfill its responsibilities with respect to the management of Harbor Branch and the employment, management and audits of its endowment funds and its state license plate funds and simply relegates the Board of Directors of Harbor Branch to managing its endowment investments; and

WHEREAS, Harbor Branch has requested that FAU discuss these demands, but to date Harbor Branch has been told that these demands are not negotiable; and

WHEREAS, Harbor Branch has concluded that the best way to resolve this dispute is to seek assistance from the courts in the form of an action for declaratory relief asking the court to determine that FAU has no right to strip from Harbor Branch the rights and benefits granted to it in the Memorandum of Understanding.

NOW, THEREFORE, BE IT RESOLVED by the Board of Directors of Harbor Branch Oceanographic Institute Foundation, Inc. that its officers are authorized to direct independent legal counsel to file a complaint for declaratory relief seeking assistance from the court to determine that the actions and demands by FAU are an inappropriate exercise of its rights under the Memorandum of Understanding and that FAU has anticipatorily breached its contractual obligations to Harbor Branch.

BE IT FURTHER RESOLVED that this resolution be incorporated in the Minutes of the meeting of the Board of Directors held on the \_\_\_\_\_ day of March, 2017.

The motion to approve this resolution was made by Mike Toner and seconded by Marjorie Raines.

Chair O'Reilly opened the floor for discussion on the resolution.

Amos Bussmann stated he supported the resolution but hopes that there might be movement from FAU to resolve the issues.

Mary Beth McDonald stated she thought the resolution was a shame. She noted that she serves on the Board of Trustees for FAU and that HBOI has a stellar reputation. She is a graduate of FAU and proud to be one. She thinks court action would put a black mark on both HBOI and FAU that was unnecessary. "Everybody has a history and a love. Change is difficult but the decision to move operations over to FAU would not make any significant change on voting rights or decisions made by the Foundation Board. FAU has no intentions to take over funds. This is only about taking

small parts of administrative duties only. For the sake of FAU and HBOI, maybe we could have another meeting so this doesn't happen."

Chair O'Reilly stated that unfortunately there have been many attempts to get agreement to deal with these issues and this has not happened. Mike Brown agreed and said he would be supporting the motion.

Marilyn Link asked how the specific words in the MOU were different from a DSO. Bill Stewart stated the MOU states that HBOI has the right to make distribution of its funds in its sole discretion. Marilyn Link asked if this was different than other DSOs. Bill Stewart confirmed: "We are different than other DSOs because we were not established by FAU and because we brought substantial assets of our own to the table before we became a DSO through the MOU. We brought \$46 M in an endowment plus four license plates plus \$93 M in value in assets and personal property which we gave to FAU. We were assured by President Brogan that FAU would respect the Foundation and its independence." Marilyn Link asked if the FAU Foundation had an MOU. Bill Stewart said he didn't know, but another aspect is that we were not created as a DSO by FAU. We became a DSO by contractual agreement.

Joe Duke returned to Mary Beth McDonald's comments and said that under this proposed budget, basic functions would be stripped. You no longer have control. Mary Beth McDonald disagreed.

Bill Stewart: "I have a great deal of respect for FAU. The whole deal with President Brogan was that we would be respected and we would work together with us hand in hand. It worked for 10 years. And now it isn't. But whatever happens today will still allow discussions to take place to resolve the issues. All we want to do is support the Institute and we want to get on with that."

John Papa asked the Board to think about it in this way: "On the surface you could say we are being asked to outsource many of our operational functions. But typically when an organization outsources, they are allowed to choose who they are outsourcing to and fire them if they aren't performing. Under this arrangement, we have no control over that. They are trying to force us to use FAU for outsourced services and we cannot choose who under FAU will provide services to the Foundation nor have controls over those functions."

Marjorie Raines commented that this debate has been going on for months. The only way that this will be resolved is to move forward with the motion of the resolution and vote.

Michael Minton shared that while he would be voting against motion it was not because of the concept of the motion but because he felt if we took the first step with this filing for a declaratory action, it changed a private discussion to a public debate. "This would create a self-inflicted wound that will result in the very things we would like to avoid – like being part of the discussion in Tallahassee or possible challenges to our plates. It would give the appearance of vulnerability and cause blood in the water. I hope there are other avenues to pursue before we take this action." Joe Duke responded we have tried many times to find a resolution to this. "I am sick and tired of the FAU administration treating this Board of Directors as delinquent children. Quite frankly, I think it's time for a divorce."

After asking if there was any further discussion, Chair O'Reilly called for a roll call vote:

Mike O'Reilly -- yes  
Mike Toner -- yes  
Marjorie Raines -- yes  
Nancy Higgs -- yes  
Mary Beth McDonald -- no  
Joe Ferro -- yes  
John Papa -- yes  
Amos Bussmann -- yes and he encourages negotiation  
Michael Minton -- no  
Michael Brown, Sr. -- yes

The motion passed 8-2.

#### Adjournment

There being no further business, the meeting was adjourned at 4:20 pm.