

**Evanston City Council
Closed Session
Aldermanic Library
July 22, 2002**

PRESENT: Aldermen Moran, Rainey, Feldman, Newman, Wynne

NOT PRESENT AT

ROLL CALL: Aldermen Engelman, Bernstein, Jean-Baptiste

ABSENT: Alderman Kent

STAFF: Judith Aiello, Kathleen Brenniman, Pat Casey, Roger Crum, Rich Figurelli, Keith Fujihara, Mark Franz, David Jennings, Debbie Sleet, Ellen Szymanski, Bill Stafford, Judith Witt

GUEST: Jack Siegel, Altheimer & Gray

PRESIDING: Mayor Morton

START: 5:39 p.m.

Alderman Wynne moved that City Council convene into Closed Session to discuss matters of litigation and minutes pursuant to 5 ILCS 120/2 (c) (11) and (21). Seconded by Alderman Rainey.

Roll Call - Voting aye – Moran, Rainey, Feldman, Newman, Wynne. Voting nay – none. Motion carried. (5-0)

Minutes: Closed Session minutes of June 24, 2002 were accepted without change.

Litigation - Worker's Compensation Settlement – Michael Bogard

City Manager Roger Crum stated the recommendation is settlement of \$95,000.

At this time Alderman Jean-Baptiste was present.

Alderman Newman reported he did not see the packet.

Human Resources Director Judith Witt reported that Firefighter/Paramedic Michael Bogard had been awarded a duty-related disability pension in 2001. She described the injuries he incurred while on duty that ended with surgery. After surgery the doctor's opinion was that he could not return to work as a firefighter-paramedic. She reported the amount of salary, temporary disability payments he had received plus medical treatment and legal costs.

At this time Alderman Bernstein was present.

Ms. Witt explained that there is a significant potential for a wage differential award due to his age; recommended they settle for \$95,000. Alderman Rainey moved that Council accept the recommendation.

Ms. Witt and Ms. Sleet left the meeting at this time.

Litigation Update - NU versus City of Evanston

Mr. Siegel reported that Judge Aspen has recommended mediation and recalled that Council had given him authority to ask to be assigned a magistrate. Last week he met with Judge Aspen. Mr. Siegel believed a magistrate who is an experienced judicial officer was appropriate. However Judge Aspen did not think that was the man for the job. He will get a mediator at no cost to the city. This is a bench trial and the judge won't enter into discussions. Mr.

Siegel had spoken with Tom Campbell (representing NU) months ago and he did not want a magistrate. So Mr. Siegel will go back to Judge Aspen. If aldermen have any questions about the process, the judge offered to meet with them. Alderman Newman wanted to meet with the judge. Mr. Siegel explained that mediation is non-binding. There was nothing to mediate but he does not wish to offend Judge Aspen and recommended they go to mediation.

At this time Alderman Engelman was present.

Mr. Siegel could not see spending a lot of time on this; suggested the city manager and one or two aldermen accompany him and meet with the judge. Alderman Rainey stated that any alderman should be able to go and this was a circus. She suggested they offer to do mediation for a day and that they need a decision. Alderman Newman questioned what they were mediating; said it seemed like a gab session and that there were other parties that did not want to be in the northeast historic district. He doesn't know the process and the judge's thinking. Alderman Rainey asked if a mediator could be rejected. Mr. Siegel noted that Judge Aspen wants to heal the wounds between the city and Northwestern and be a great conciliator. The three alternatives are 1. Yes - enter into mediation 2. No - no point to mediation or 3. Any and all meet with Aspen and give their position. Mr. Siegel's recommendation was to go to mediation for one or two days then cut it off.

Alderman Jean-Baptiste questioned what a legislative body could mediate once legislation has passed and wished to discuss that point. Mr. Siegel said that obviously the judge thinks they can. A court can rule an ordinance is valid or not. He questioned calling mediation a waste of time; suggested they get a delegation of aldermen together and visit the judge on Thursday.

Alderman Wynne suggested that they do as Judge Aspen asked. The City has a winning argument and Judge Aspen was ready to rule in the city's favor. She urged them not to do anything uncivil; go through the motions and be patient. Mr. Siegel agreed and said that they need to try to cut the time.

Alderman Feldman brought up the legal issues that Alderman Jean-Baptiste raised and brought up by Mr. Siegel previously which makes the process useless. Mr. Siegel said they don't discuss the merits of the case. Alderman Feldman asked if a mediating process is possible with a legislative body? Mr. Siegel suggested they could pull out the Foster-Walker complex, a noncontributing building, and several other institutional buildings and waive the case.

Alderman Bernstein expressed frustration; said they will undo what a legislative body did; thought the judge was putting the city in a position to wiggle and had hurt alderman by putting the city in this position. Alderman Rainey stated when confronted with the possibility of eliminating Foster/Walker and other properties, the city would be subject to other lawsuits. Mr. Siegel stated an order can be given by a federal court; mediation is non-binding and any court order would foreclose the city's request for summary judgement.

Alderman Engelman said that dismissal of the complaint could be a court order. Alderman Feldman sees going back on something they believed in, having spent a quarter million dollars; asked what would NU give that would warrant zoning relief? He was willing to negotiate but wanted to be sure no deal was made that compromises their position. Alderman Bernstein asked why mediate? Mr. Siegel could see dropping out a couple of institutional buildings. Alderman Feldman said that a few buildings were the same as all. Mr. Siegel pointed out that nothing could be done in mediation without NU and council agreeing.

Mayor Morton asked if NU wins, could that be appealed? Yes. She asked Council how much more is this worth to citizens?

Alderman Newman has heard a great deal has been spent on this; suggested they are setting up different standards for zoning and the city will be sued in the future. What is at stake is rich people suing the city. Alderman Rainey asked what the Mayor would suggest? Mayor Morton suggested they do what Mr. Siegel had recommended and spoke about her veto of the ordinance. Alderman Jean-Baptiste wanted to understand the Mayor's veto of the Northeast Historic District, which the Mayor will provide. She explained that this was the first time the preservation ordinance was tested; suggested there be more attention to the process and did not believe that preservation rules were followed. Whatever area was to be included when they changed boundaries, all should have gone back through the process. She thought they would have to give a concession or cost the city lots of money. She pointed out there

is only one property on Sheridan Road with a private owner in the district; recognized that some are afraid of encroachment; asked if the city loses, would they appeal?

Alderman Newman said the strongest part of the suit were questions about due process which were dismissed. The 1st amendment claims were weakest. The fact that they held oral argument means the city has a strong case. He said that people in the 1st ward care. The mistake was on Sheridan Road and whether it will be residential street. NU's strategy has been to drive up the cost of the suit by taking depositions and claim that it was a conspiracy with Fair Share. He stated that he and Alderman Rainey never had conversations. He suggested they look at the merits of the suit. Mr. Siegel agreed that the city has a strong case. Alderman Newman did not know what Judge Aspen is thinking about, what they are mediating and wanted to know the parameters of the lawsuit. He speculated that NU's strategy was to spend up the wall and attempt to elicit concessions. The group will ask the judge what he is sending them to the table for. Alderman Rainey asked why couldn't Mr. Siegel ask the judge.

Mayor Morton stated the area was not for housing. Alderman Newman said that NU was asked whether they intended to tear down buildings. There was a plan in place in 1992, which was found in the discovery process. NU wanted zoning on Sheridan Road changed to U1.

Alderman Feldman recalled when the Human Relations Commission and Human Services Committee were pursuing steering and found that realtors were steering, the city took them to court and hired top-notch attorneys with legal bills over \$400,000. Some said stop; others said the city could not afford it. There were different settlements with various realtors. The insurance company's were defending agents and spending heavily but people on the Council were willing to go on. He asked why they cannot operate on principal?

Alderman Jean-Baptiste wanted to hear the perspectives of others – how legislators can mediate - be in a position of reacting to everything proposed and clear on what can be done.

In response to Mayor Morton Mr. Siegel reiterated that the judge suggested that if aldermen have questions he would be glad to meet with them. He noted that he has limited authority – was authorized to ask to go to a magistrate. In bench trials settlement is through a magistrate which was done with McNally. If they met with the judge he could explain what he has in mind.

Alderman Bernstein said the principal is that six aldermen over-ride the Mayor's veto of the Northeast Historic District ordinance. All Council does is legislate and he asked what a mediator can negotiate?

Alderman Newman moved that the Council authorize Mr. Siegel to participate in mediation, limited to the lawsuit and for a 30-day period; confirmed the federal mediator would be a volunteer. He said that NU wants to get into zoning issues on Sheridan Road. Mediation does not preclude talks between the city and NU in the future. Nobody would accompany Mr. Siegel to meet with Judge Aspen.

Alderman Engelman questioned the limitation to the lawsuit, which included the Northeast Historic District and boundaries, and issues that included actions over the years. Mr. Siegel responded that he understood the thrust was to set aside the ordinance. Alderman Engelman questioned what is in or not in? He has heard that no one would take one piece out. Alderman Newman said he had no problem with removing Foster/Walker; said that NU consolidated everything – the tax parcel has 50 buildings. Alderman Engelman said if limited to the historic district, if nobody wants to remove one or two properties, why mediate? He said to mediate is to have discussion/dialogue – a dialogue larger than the historic preservation district. He believed that Judge Aspen has heard all scream about the terrible relationship between NU and the city; thinks he can be God. Alderman Engelman did not think the city has the ability to negotiate because Council cannot reach consensus.

Alderman Jean-Baptiste stated they need unanimity to advance and an open honest discussion on larger issues. Alderman Bernstein said a vote on mediation couldn't work; his perception is the judge is arrogant; believes he has power and will send this to the appellate court. Alderman Feldman would be happy to engage in a broad discussion with NU. Alderman Rainey suggested that NU drop the lawsuit. Alderman Newman said NU would claim for fees and being singled out. Alderman Newman stated the city has a strong case.

Alderman Bernstein suggested amending the directive that prior to entering into mediation, indicating to the judge that they cannot alter what a legislative body has done. Let him know the city is mediating to accommodate. Alderman Newman repeated he has no problem in mediation with a hearing on non-contributory structures. They were included because of the way NU's land was mapped.

Alderman Jean-Baptiste suggested that they must think of larger picture, look at this as an opportunity to talk about everything – to feel each other out.

There was some discussion about former Judge Abner Mikva as the federal mediator.

Mr. Siegel confirmed that Council agreed to a special mediator at no cost to the City.

Litigation Update -- Keefe-Shea Case

At this time Public Works Director David Jennings, Assistant Director Keith Fujihara and Water & Sewer Superintendent Rich Figurelli were present.

Mr. Siegel report Judge Hall twice refused to grant a preliminary injunction to Keefe-Shea. The appellate court had ordered this remanded to the trial court with the injunction intact.

Mr. Siegel recommended that they explore the possibility of rejecting all bids, taking the position of the appellate court finding that DiPaolo did not comply with M/B/EBE requirements. The city has a communication from DiPaolo that the contract will be \$1.9 million higher. Instead of saving \$600,000 the city faces the possibility of \$1.9 million over what was bid. It could be argued that they are not willing to abide by the contract. If they go back to Judge Hall, regardless of how she rules on the preliminary injunction, it could go on and on. The contract was \$10 million when they began and is now up to \$12 million. To continue is to spin their wheels. He will speak to attorneys for both sides. Another problem is the 7th circuit ruled that minority/women set-asides are unconstitutional. He would not raise that. Mr. Siegel asked to authorize a resolution that DiPaolo has indicated in writing they are no longer willing to abide by contract. It is beyond acceleration clauses. Alderman Rainey asked when they got that? Mr. Crum said that DiPaolo indicated increased costs in a letter. The last number was \$1,978,000 from DiPaolo.

Alderman Newman agreed with the rebidding suggestion and asked the cost. Mr. Siegel did not know the cost. Alderman Newman noted the city was not able to take the low bid and took the waiver because the city specialist allegedly gave wrong interpretation of the law.

Alderman Moran agreed with Mr. Siegel to rebid. The objective is to get the job done. They need to get DiPaolo and Keefe Shea to agree. A trial court cannot overrule an appellate court. DiPaolo is not the responsive bidder. If they could award to Keefe Shea, if can award \$1.9 escalator, and if they cannot, start over. The best thing is to try to negotiate, otherwise the City is a loser. Mr. Siegel has attempted to get the parties together. Alderman Engelman assumed they rejected all bids and rebid. Mr. Siegel assumes the city would be sued. He said that lost profits couldn't be recovered. Mr. Crum said they want to get out of the courts and get this project underway.

Mayor Morton said she knew there was going to be a lawsuit and aldermen would not have known. She read everything and aldermen did not have access to everything. Alderman Rainey asked if Keefe Shea ever hired a tunneler?

At 7:06 p.m. Alderman Feldman moved to convene into open session and recess. Seconded by Alderman Wynne.
Motion carried unanimously.

Mary P. Morris,
City Clerk