

**Evanston City Council
Closed Session
Aldermanic Library
September 23, 2002**

PRESENT: Aldermen Feldman, Newman, Jean-Baptiste, Wynne, Moran, Engelman

NOT PRESENT AT ROLL CALL: Aldermen Kent, Bernstein, Rainey

ABSENT: None

STAFF: Judith Aiello, Maureen Berry, Kathleen Brennan, Pat Casey, Roger Crum, Mark Franz, Doug Gaynor, Herb Hill, David Jennings, Frank Kaminsky, Bill Stafford, Elke Tober,

GUESTS: Marty Stern, U.S. Equities
Jack Siegel and Bob Markin, Alheimer & Grey
Dick Ryan and Mark Smolens, Ryan, Smolens & Jones
Township Assessor Sharon Eckersall
Robert Graettinger, R.S.Hoover & Associates

PRESIDING: Mayor Morton

START: 5:17 p.m.

Alderman Feldman moved that City Council convene into Closed Session to discuss matters of litigation, real estate, and Executive Session Minutes pursuant to 5 ILCS 120/2 (c) (11) (5)(6) and (21). Seconded by Alderman Jean Baptiste. Roll Call - Voting aye – Feldman, Newman, Jean-Baptiste, Wynne, Moran, Engelman. Voting nay – none.
Motion carried. (6-0)

Minutes: Closed Session minutes of September 9, 2002 were accepted without change.

Real Estate -- Purchase/Sale of land -- Sherman Plaza Ventures

City Manager Roger Crum reported Council would be updated on Sherman Plaza project. No decisions were needed.

Assistant City Manager Judith Aiello announced the Economic Development Committee and Plan Commission would review the new plans and the budget is being finalized. The "state of the art garage" will cost more than the Maple Avenue garage and will be value engineered. They are looking at options for on site management and will bring back a contract in early November. They need the construction proposal in early November.

In response to Alderman Newman, Ms. Aiello said this garage would be the same quality as the Maple Avenue garage. Mr. Stern noted that this is a 13-story garage with elevators and a different floor plate. Alderman Newman pointed out that this garage is for all downtown businesses. Ms. Aiello reported there would be enhancement of the tower, improved lighting and some small items will be improved upon based on the Maple Avenue garage. In response to Mayor Morton, Ms. Aiello said the configuration is similar to the Maple Avenue garage, but floors are not as large and it will be taller. Mayor Morton reported that people tell her the Maple Avenue garage is confusing to use. Mr. Stern noted that Maple Avenue has five bays and the new garage will have two bays and is more typical of downtown garages. Alderman Newman asked that any complaints about the garages be sent to the Parking Committee.

Ms. Aiello said the developer would be ready to start on the garage by end of November/December. The City has told the developer, the Sherman Avenue garage won't be closed until after Christmas. She reported there is some disagreement on

interpretation of language in the redevelopment agreement. The developer needs greater flexibility because several lenders are involved. Documents would be brought to the October 14 meeting for introduction.

Mr. Stern said they were told they can start with 65% leased, construction loan and pre-sales for condominiums for two-three months, if they take the agreement as is. The developer asked to tear down garage sooner. Mr. Stern came up with intermediate condition: have 50% of 65% of pre-sales for January and demolition of garage and April construction loan. Ms. Aiello said all would be demolished except on the Church Street side. The developer will do a build out for Osco the last building to be demolished. As soon as every structure is demolished they will start building the garage.

Alderman Rainey was present at this time.

Alderman Newman noted the city is borrowing \$31 million before the development starts with risk on pre-sales of condominiums. If the economy tanks and they cannot get condominiums up and have the garage torn down, they are at the mercy of the pre-sales. Mr. Stern and Alderman Newman discussed the differences between the Hill project and this one. The risk is that condominiums come in later. Alderman Newman asked who is liable for lost revenue if the condominium project does not go forward? Mr. Stern said the city is responsible for the bonds but air rights become security. The issue is timing. Ms. Aiello pointed out that currently the developer is paying principal and interest on \$14 million to acquire the land. Mr. Crum reminded Council that the city couldn't continue to operate the Sherman Avenue garage. Mr. Stern recommended a commitment of 50% of what a bank requires for pre-sales.

Ms. Aiello reported the timetable to build the new garage is 14-18 months. Alderman Newman asked if the condominiums are built later would there be additional cost to the city? No. The 13-story garage will be a freestanding structure, with no common walls or shared footings. Ms. Aiello reported a good opening on condominium pre-sales the two prior weekends; that the developers would be at the International Shopping Center Show in Las Vegas looking for retail tenants. 65% of space is under serious negotiation according to Mr. Stern but the developer does not have financing commitment yet. Alderman Rainey questioned lender requirements regarding loan commitment for pre-leasing. Mr. Stern said it was close to 65%. On condominium sales there is negotiation with lenders and some want more equity.

Ms. Aiello said they would have a final round of numbers and are in good shape with numbers on the garage. Alderman Newman asked when they would know publicly who has leased space in the development? She thought probably in November. At this time Alderman Kent was present. Ms. Aiello noted that the redevelopment agreement allows one restaurant of up to 5,000 square feet. The developer is negotiating with a higher end restaurant for 12,000 square feet. Mr. Stern asked for feedback. Alderman Newman was concerned about the effect upon the Hill project who still has space for rent; that Hill made positive events and deserves an explanation. Mr. Stern recalled that Hill asked for an increase in restaurant space, got it and was encouraged to get the best for Evanston. Ms. Aiello said that Hill's space on Clark is leased to Chili's.

Ms. Aiello said another negotiation/discussion concerns when the developer will pay the city for parking spaces. They have requested a payment schedule for the condominiums and will come back with recommendation; thought they would know more after going to market. Another change is an increase in non-retail space on the second floor under the condominiums where there are more columns. There are changes to penthouse with more living space and less balcony space. They have increased ceiling height and total height of project by 30 feet. On design changes, Barnes & Noble had more input with a change from a Federal look to modern look. Of the 28,000 square foot of office space, Alderman Newman noted they were told at the Economic Development Committee that Evanston has a high office vacancy rate. Mr. Stern said the net increase for office space is 13,000 square feet from 15,000 to 28,000 square feet. Ms. Aiello described it as loft-like space. Alderman Newman hoped they don't take a tenant from somebody else. Ms. Aiello pointed out that Barnes and Noble came to them. Alderman Rainey asked if the office space is a single space? No. Alderman Newman called the office space a Cadillac product. Alderman Kent was interested in a restaurant that was not high end. Mr. Stern said families are welcome at the restaurant they are contemplating. Ms. Aiello commented that Chili's is a family restaurant. The proposed 12,000 square foot restaurant is not a chain. Mr. Stern assured Council that they would try to get consent to talk about who the tenants will be.

Litigation Update - NU vs. City

Mr. Siegel expressed disappointment with the judge's opinion but said it was not all bad. Four counts were dismissed and the other two counts sustained. One count is animus toward the university in which NU will have to prove that the sole motivation of six aldermen to vote for the historic district was animus. The other count concerns former Alderman Dennis

Dummer and is based on an affidavit by Mr. Sunshine. Mr. Siegel said there are several alternatives. One is to file a motion for partial reconsideration on the two counts and had prepared a draft of such a motion. The motion regarding animus, says NU was not treated differently so how can NU say there was animus. On Count 5, he believed that Mr. Sunshine's affidavit made the first suggestion. Former Alderman Drummer was a lone ranger and not authorized to negotiate with the University. There was some discussion among alderman about his proposal but that it did not indicate extortion.

Mr. Markin was confident that NU could not meet the standard on animus. The only other point was the late amendment added on non-contributing buildings.

Mr. Siegel explained a motion to reconsider is to set the record straight. This strategy was debated because judges don't like to be told they are wrong. After examining the draft, he was hopeful that Judge Aspen would approach it in an unbiased manner. It would alert him to problems in his opinion. Mr. Siegel recommended a motion to reconsider particularly on count 5. He said there was no basis in the brief for animus from six aldermen. He explained technically this is a partial summary judgement. There is no certifying a direct appeal. Under federal rules, the judge certifies and the 7th Circuit decides to take it. A third possibility is to ask the judge to confine to certain issues. The third alternative is to go to trial.

In response to Alderman Wynne's question about the standard for refile on the 5th count, Mr. Markin said that Mr. Sunshine had changed his testimony in an affidavit. What was the matter of law he got wrong? Mr. Markin said that he was not permitted to change from the deposition. They have 30 days to file when somebody made a contradictory statement. Alderman Wynne thought that Judge Aspen knew what was in the Sunshine and Drummer depositions. Mr. Markin said it appeared in a section on animus and was not in the unconstitutional issues. If they file a motion for summary judgement and it does not happen, what then? Mr. Siegel said all they were saying was Counts 1 and 5 are material issues of fact. They are saying about Sunshine's deposition that when the affidavit contradicts the deposition it has no standing. Mr. Markin made the point with an attachment of 15 pages of testimony.

Alderman Moran was pessimistic about the success of the alternatives and thought the Drummer issue was invalid. Mr. Siegel noted under federal rules a judge can narrow issues. Alderman Moran said the issues are clearly drawn. He urged they try the case and get it finished. Mr. Siegel's position is he doesn't think it likely the motion to reconsider will be granted. He received a letter from Howard Zweig who offered to discuss and settle and his response was no zoning for a fire engine.

Alderman Newman knows Judge Aspen is a good judge and good judges want points to be made. He discussed NUs approach in the past to land use issues. He thought the only thing Dennis did was to follow up, and did what he thought best for the city but that was not clear in either brief. He thought the facts were so confused that the judge did not understand Count 5. Judge Aspen did not have full factual briefing and Dennis Drummer was tarnished unnecessarily. He did not want a trial based on extortion. He stated that Drummer's reputation needs to be defended. Alderman Newman moved to discuss the motion to reconsider. Seconded by Alderman Feldman. Alderman Bernstein thought ultimately the city would have to go to trial and had no problem with motion for reconsideration. He did not like Drummer being besmirched in media. Alderman Jean Baptiste thought Drummer was defensible. Alderman Feldman said there was no malice in decision and the judge wanted to solve everything. He asked is it possible a federal judge would make a mistake?

Alderman Engelman believed ultimately there would be a trial and no chance the city would lose. He said that counsel did a magnificent job. He urged they do everything possible to defend Drummer's reputation who did nothing wrong. He urged that all adjectives be removed from the motion and to take the shot that is not accusatory nor vindictive. He thought an intelligent judge will take it for what it is.

Alderman Newman said Engelman made good points on the adjectives. He said they need to be tough with Sunshine if the city wants the lawsuit to go away.

Alderman Newman moved to direct attorneys to file a motion to reconsider. Seconded by Alderman Feldman. 6 ayes and 3 nays by a show of hands. Alderman Rainey questioned timing and what if they fail this time? Mr. Siegel said the status conference will be Thursday October 3. If they file tomorrow there are two different rules. One says 10 days, another if taken for 11 days, don't count Saturday/Sunday. Alderman Wynne asked if Judge Aspen is on senior status? They will go to trial by end of the year. Mr. Markin thought that NU would go first. Mr. Siegel asked if he should respond to Howard Zweig. Mr. Crum thought there was no reason to respond until after the status conference.

Litigation update

First Assistant Corporation Counsel Herb Hill submitted a synopsis of all outstanding liabilities – over \$25 million including the Prado-DeVaul case. Detailed summaries would follow. Right now general liability claims \$25 million do not include next year's insurance costs of \$700,000 – making it \$26 million. Alderman Engelman asked how much is in insurance fund? Less than \$1 million.

Mr. Murray is the attorney on the Bettye Palmer case and contacted him with a demand for \$1,250,000. The trial is set for October 3. There has been no discovery and the City may seek a continuance. They are trying to resolve. Total authority to settle is \$75,000. Alderman Rainey asked about Bettye Palmer's health. Mr. Gaynor stated she is not working and is a part time employee without benefits. Alderman Newman was concerned because on the \$11 million case \$900,000 was offered but we did not take. He urged more be spent more on these cases; proposed they put in time on cases and when they have numbers to get back to them.

Mr. Hill said the Palmer case was brought to Council five times. This \$1.2 million demand came two days ago. Former attorney Prendergast started with \$50,000. Attorney Poulos got involved – then terminated negotiations. Mr. Murray did not respond to \$50,000 offer. Mr. Smolens gave him medical costs of less than \$3 thousand dollars. Police officers handled this situation properly. The \$75,000 authority to settle is based on having a dozen police officers be deposed. Mr. Crum asked if they wished to counter \$1.2 million? Mr. Smolens has a recurrence of Bell's palsy and will get back in several months. Mr. Hill did not believe will settle for \$75,000. Alderman Engelman asked about the Vineyard Christian Fellowship? Mr. Siegel was not happy to read of decision about cultural facility.

Township Trustees - Litigation

Township Assessor Sharon Eckersall and attorney Robert Graettinger were present at this time.

Alderman Engelman asked Mr. Graettinger what this case is about and why he can defend it. Mr. Graettinger has practiced law for 10 years as a litigator; worked for the Chicago Corporation counsel in traffic court and did bench trials. At the Attorney General's office he practiced for four years, defending consumers against almost every agency in Illinois government on civil rights violations.

Mr. Graettinger stated that Mr. Castenada charges wrongful discharge and invasion of privacy. The allegation was to defraud through employment records. The allegation does not have standing. Allegations of defamation complaint do not state where publicized. He does not believe the complaint can stand and will file a motion to dismiss. Judge Bronstein who is thorough, fair and quick will hear this. He cannot guarantee success. If it goes beyond the motion to dismiss, he would ask for summary judgement. Mr. Siegel stated he had filed a motion to dismiss because he felt a possible conflict of interest could exist.

Alderman Engelman asked about billing rates and who handles this case? Mr. Graettinger will handle. Alderman Engelman noted in the contract the right to hire other attorneys if he is not available. Mr. Graettinger said that was in case he was not available to guarantee continued counsel. How many attorneys are in the firm? Three, two partners and Mr. Graettinger is of counsel. All attorneys are out of law school at least nine years.

Alderman Moran stated on any retainer agreement it is implicit if they have to go to court that another attorney would be there. On the agreement with firm the lead person to defend is Mr. Graettinger. Why would the retainer agreement say they have the right to hire another attorney? Mr. Graettinger has worked with contract and this has never come up; said it was boilerplate, will get it clarified and will strike it. If they get to the point where it is necessary to hire expert witness the contract will say that. Alderman Moran advised they look at the language.

Alderman Rainey confirmed that no fees have been billed and Mr. Graettinger was told he would be paid. Alderman Bernstein went through the various positions held by Mr. Graettinger, number of trials and asked about other legal work. Mr. Graettinger does contract work representing physicians and also represents an individual who runs an engineering firm on billboards. The majority of cases are civil cases that are settled.

Alderman Rainey asked Ms. Eckersall how she selected Mr. Graettinger? Ms. Eckersall said through friends, the law firm of Shippers and Bailey recommended Mr. Graettinger. Alderman Newman commented that attorney referral was not a bad way to pick an attorney and Alderman Engelman noted that law firms have high standards.

In response to Alderman Jean-Baptiste about different obligations, Mr. Siegel explained he had filed a motion to dismiss totally on grounds that the plaintiff was an employee at will. The Gloria Harris case was won and clear that she was the assessor's employee. Mr. Siegel's position is that he does not belong in the case; alleged violations of invasion of privacy were not in the purview of township. Because an elected official has to be defended, Mr. Siegel was in the case for the Township.

Mr. Hill explained on financial arrangements that the bills are on the city's bills list and would come from township funds. \$5,000 is set aside for legal expenses. The township would face double billing procedures. Alderman Feldman understood they were obligated to pay and did they have any say in whether this attorney is hired. Mr. Hill read the state statute that provides for sufficient funds to run the office. There were questions about what is sufficient to run the office. Mr. Hill noted the Township picked up the assessor's bill on the Gloria Harris case. Can Ms. Eckersall hire an attorney? Mr. Siegel said as a matter of practicality hire the guy at \$200 an hour. Alderman Rainey said if they give carte blanche where do they draw the line? Mr. Siegel advised them to look at the case; said there is nothing to it. Mr. Crum suggested asking Ms. Eckersall to report back.

Alderman Newman, said assuming they don't pick an attorney, was any amount of money or any limitation on the amount contributed to defense? Can they authorize \$10,000 based on issues and time? Mr. Hill stated the township can do a budget transfer. Alderman Newman asked if Ms. Eckersall is found guilty on defamation who pays? Mr. Siegel said the township charge was on wrongful discharge. On the defamation claim, if Castenada wins, Ms. Eckersall pays.

Alderman Bernstein moved that funds be authorized to pay attorney's fees. Seconded by Alderman Wynne. Mr. Hill stated there would be a double check allocation – and transfer of funds, of \$5,000 or \$10,000. Alderman Rainey asked to be kept informed. Mr. Hill will monitor this litigation.

At 8:07 p.m. Alderman Jean-Baptiste moved to convene into open session and recess. Seconded by Alderman Feldman. Motion carried unanimously.

Mary P. Morris,
City Clerk