

**CITY OF NEW BERLIN
PROCEEDINGS OF COMMITTEE OF THE WHOLE MEETING
Tuesday, September 22, 2009**

Please note: Minutes are unofficial until approved by the Committee of the Whole at the next regularly scheduled meeting.

ROLL CALL: Mayor Jack F Chiovatero called the meeting to order at 7:06 PM. Present were Aldermen Hopkins, Wysocki, Seidl, Harenda, Moore and Ament. Aldermen Poshepny resigned. Also present were: City Clerk Marilyn Gauger, City Attorney Mark Blum and Human Resource Director Tami Potkay.

This meeting was noticed on September 17, 2009 in accordance with the Open Meeting Law.

APPROVAL OF MINUTES

Motion by Alderman Hopkins to approve the September 8, 2009 Committee of the Whole as printed. Seconded by Alderman Moore and carried with Alderman Ament voting as being present.

Motion by Alderman Seidl to amend the September 16, 2009 COW Budget Workshop minutes: change the second line from 6% to 6.25% with regards an increase in taxes with the proposed current budget however to have the City Clerk review the tape. Seconded by Alderman Ament and carried with Alderman Moore voting as being present.

The following items will be considered for approval or denial by the Aldermen with a recommendation to Common Council on the Consent Agenda.

UTILITY AND FINANCE

Claims

For: September 23, 2009

Motion by Alderman Ament to approve the Water Utility claims in the amount of \$160,319.38, Sewer Utility claims in the amount of \$458,919.07, of that amount \$442,224.31 represents payment to MMSD and Bi-weekly claims in the amount of \$620,349.48, all of which represents payment to vendors. Seconded by Alderman Moore and carried unanimously.

LICENSES/PERMITS

Bartenders

Motion by Alderman Seidl to approve the Bartender Licenses for the year 2009-2011 to Anthony Bonville, Edmund Cutting, Ashley Mlagan, Jeana Paffhausen, Amanda Pittsley and Tyler Werwinski. Seconded by Alderman Hopkins and carried unanimously.

MISCELLANEOUS - none

DEFERRED, REFERRED & TABLED ITEMS

Changing of the regular BPW monthly meeting time, from 8:00AM to 6:00PM, to the BPW for their discussion and recommendation back to the Common Council/REFERRED TO BPW ON 7-28-09

No action taken.

Direct City Clerk to advertise for Aldermanic District #5 vacancy in selected newspapers/DEFERRED 9-8-09

Alderman Harenda read his RAS that was Declaring the Vacancy of District #5 and Initiating Selection Process which included the selection process that is part of Council Rule #34.

Motion by Alderman Harenda to direct the City Clerk to advertise for Aldermanic District #5 vacancy. Seconded by Alderman Ament.

The following discussion (verbatim) took place on the motion:

Mayor Chiovatero: Good evening Alderman Poshepny or former Alderman Poshepny, I don't know how you want to be addressed. I know there was some concern that you expressed to me and others about your letter of resignation. Can you explain this letter, the one we received in early August your first letter?

Alderman Poshepny: I want to thank the people of New Berlin, the people of New Berlin City Hall and my compatriots on the bench as to how wonderful they have been during this sickness. You are talking to a guy here who has been in more hospitals in this past seven months than I have been in my whole life, including visitation. It just came. As you

probably know, I imagine it is common gossip around here, that in losing a good part of my health, I have also lost my wife who just didn't care to take care of me in my old age. During this era or episode or whatever you want to call it I have called my daughter in and gave her power of attorney and during this first flush of organization or trying to get this organized I guess things got mixed up. She, my daughter, tended to do a lot more than maybe she should have. In this was mixed this letter of resignation. This was talked about because I was very seriously ill and we did talk about retiring or resigning or what have you. For some reason or another that letter was written by her, not by me, but it was written by her and she mailed it. And I think she mailed it to everybody on the Council or a few people. It's kinda funny as old as I am this is the first time I think I met the Lord face to face and I have done that three times in the last six months. You get to thinking about a lot of things and among those that I have thought about are the two or three projects I would have like to have completed for the City of New Berlin. I do say this was a mistake; it was never my intention of quitting the job, never my intention. But she was concerned about her father both physically and mentally and the first few months she was trying to organize and just trying to keep things together, it was pretty tough. I can see where she would get excited and she would have to go back to Baltimore to do her stuff and then come back to Milwaukee and do my stuff. I just thank her for it. But, I do think she has learned a lesson that she pushed this just a little too fast. Because, like I said, right from the beginning I just never thought that

Mayor Chiovero: Joe we got a copy of the letter right here and you know one of the issues that was brought forth was the fact that is that you signed this. Did you sign this?

Alderman Poshepny: Honestly, I can't remember. Sincerely, I can't remember. There was a lot of stuff that was just shoved right in front of me. She had this power of attorney and I had no recollection of, I don't know. If you can picture yourself being married all that time and all of a sudden becoming sick, I had never been sick before. It was pure hell and there was an awful lot of conjecture an awful lot of plans with the family and trying to beg out what we want to do, how we want to pull our life out, but as far as pulling my life out and making a continuation of what I started, people get excited and do a lot of things and I'm afraid that either this was her problem or one of my kids or something like that, I don't know. I can't say it 100% if I could see it I could tell you whether it was mine.

Mayor Chiovero: We have a copy that we could show it to you.

Alderman Poshepny: It's my signature, it's my signature.

Mayor Chiovero: I don't know if you are aware of this, but the letter did come postmarked from Baltimore Maryland. So, obviously, your daughter left the city or left the area and sent it from Baltimore, whether she sent it by air or what she thought was the best for you or whatever. I leave it up to some of the council as to what we want to do in this issue. I know that Alderman Wysocki brought up some concerns last time and when your letter of rescinding showed up but it was not your intent to resign is what you are telling us?

Alderman Poshepny: Absolutely, that never entered my mind. Absolutely. Listen we had talked about this as a family, but I don't know how you can get away from not talking about all of your possibilities. It's unfortunate that it happened, but it happened. I don't know how to rectify it except go through you know this.

Mayor Chiovero: Well let me ask the council. Council is there any discussion or anything like that? Alderman Moore?

Alderman Moore: Well, we have Alderman Poshepny before us and my suggestion is that he saying he didn't have an intention of resigning and that it was done under recommendation of his daughter and I think we can see that he has passed by the majority of his physical problems and suggest that we simply disregard his request, his initial request for resignation.

Alderman Ament: Before I make any comments I guess I'm going to fall back and ask the City Attorney. First of all for a legal opinion because this is certainly not what I expected, I did not expect, I thought the decision was already made. First by his letter and then the City Attorney's opinion of State Statute which letter we did receive and I thought this was just going to be a matter of us declaring the vacancy so that the City Clerk could advertise. I didn't expect him to be wheeled in here for us to make that kind of decision at this point I'm not saying we can't make it I'm just saying this is at the very least highly irregular. I look for the City Attorney to give us some direction from a legal standpoint as to what our options are here.

City Attorney Blum: First of all let me just explain what the process is and what the legal significance is of the actions taken. When a resignation is received the Statue provides that it is effective at the time indicated in the letter of resignation or when it was received if no date is indicated. A vacancy exists immediately upon the resignation and there is no action that needs to be taken by the council to accept it. It is effective simply by having been issued. In this situation we received a letter indicating that it would be effective, that Alderman Poshepny's resignation would be effective immediately and it was signed by him and delivered to the council as required under this statue. So, on its face it appeared to be a valid letter of resignation that was signed by him and would be effective as of the date he authored it. The question that I was asked last time had to do with whether that resignation could be rescinded. And the response was that since it becomes the vacancy exists immediately upon the resignation that you could not take that back it not be rescinded because the vacancy already existed and can not be taken back at that point. So, the question that is before you this evening is whether the resignation the original resignation letter was valid in the first instance. And if in fact that you believe it was than the resignation took place when Alderman Poshepny signed it and there is a vacancy which will need to be filled. If in fact you conclude that in fact the resignation was not valid then no vacancy would exist and Alderman Poshepny would still be Alderman of District #5. In deciding that issue you would have to look at a variety of issues you heard Alderman Poshepny's comments this evening and you would have to ask yourself whether it is clear to you that the letter you have before you was not something of his own making and was not his intention to sign. In deciding that you would have to ask yourself how the signature was obtained and the reason for the period of time between when it was authored by whomever and the rescission letter you just receive before the last council meeting and what the reason for the delay. I think the matter before you right now is deciding whether in fact you believe that that resignation letter was valid whether it was issued by Alderman Poshepny or not and as I said in depending on what you conclude that will decide whether in fact there is a vacancy or not.

Alderman Ament: So the next question would be that what do we need to or not need to do at this point because I think one of the terms you use in law a lot of times what a reasonable person would expect or use as a judgment. Do we need to take any specific action other than declaring the vacancy and directing what if we don't take any action? I guess how we handle this one way or another. I'm looking so that we don't drag this out forever with discussion more what is the procedure or recommended things for us to look at here.

City Attorney Blum: First of all as I said before you don't decide whether a vacancy exists. The vacancy exists if in fact a valid resignation took place. So your question is: Did a valid resignation take place? On face value if you look at nothing but the document it would appear that that was in fact was the case. What you have to decide is whether you accept Alderman Poshepny's explanation and his comments this evening to rebut that and so again assuming that you would agree with him that and in fact accept his explanation that it was not a validly tendered resignation then he is still the Alderman of District #5. There is no vacancy and there is no action to be taken. If however, you conclude that there was a valid resignation then therefore a vacancy does exist and you can move on with the advertisement of that vacancy and solicitation of interest in filling that vacancy. Does that answer your question?

Alderman Ament: I think so, I'm sure you will help us if we need to craft something. Thank you.

Alderman Moore: I move that a valid resignation did not occur and because of that and because of the statements by Alderman Poshepny to that extent that we in fact need to disregard his letter of resignation.

City Attorney Blum: Alderman Moore the Mayor was just asking me what an appropriate motion would be at this point. Just so you all have the benefit of all the same comments on that. I believe the motion was made by Alderman Harenda to move forward with advertising for the vacancy. So that motion is still on the floor at this point and the comments that were made by Alderman Poshepny were in response to that. So it would seem to me that first of all that you would need to deal with that motion that is currently pending and then move from there. My sense is if you decide that in fact you accept Alderman Poshepny's explanation and believe there was not a resignation that then you would vote in opposition to that pending motion. And obviously the reverse if in fact you don't accept that explanation you vote in favor of Alderman Harenda's motion. I think we have to deal with that first before anything else could take place.

Mayor Chiovatero: Okay there is a motion on the table any comments, Alderman Wysocki?

Alderman Wysocki: Joe I don't want to put you through a public debate on all of this because I think there is a number of issues behind all of this that... Well, let me make reference to your August 26th letter. Your very first sentence begins: After very serious thought in my improving health situation I would like to rescind my letter of resignation. So,

in your first sentence you indicate it is a letter of resignation. Okay, thank you.

Mayor Chiovatero: Any other comments? Alderman Moore?

Alderman Moore: My suggestion is that we vote in opposition to the motion due to the fact that we heard Alderman Poshepny indicate how that letter of resignation was effectuated.

Mayor Chiovatero: The only comment I will make is Joe is the Alderman was the Alderman whatever we decide of District #5. He was elected by the people of District #5 to represent the people I just know having a mother in this situation right now and up and down and not knowing that there is some confusion at hand. Joe indicated through his personal testimony that he doesn't recall signing that. To me it is obvious to the fact that the letter was mailed from Baltimore and not from Milwaukee or anywhere around here that the letter was sent by his daughter. He stated the letter was written by his daughter and I think we should, if he intends to finish out his term that we give him the right to do that and I just hope to God no one else gets sick and faces the same situation. I know this is highly unusual, I have been trying to keep in touch with Joe and I have been very concerned. He is a friend as well as a colleague and when I saw a letter of resignation it was a great concern and that's when I found out that he didn't send it. His daughter sent it. So, I would just hope you would take that into consideration in your next vote and I would suggest you give Alderman Poshepny the chance to finish out his term, if he so chooses, I'm assuming from what he says he has no intention of resigning in the first place and letting him finish out his term. Any other comments, Alderman Moore?

Alderman Moore: Unfortunately, during Alderman Poshepny's illness I was away from the city and didn't learn about this until after I returned but before his daughter returned to Maryland I think it was the second time, I had the opportunity to speak with her on the phone and she was extremely encouraged by his increasing health and she expressed to me that she would look forward to him retaining his seat as the Alderman.

Mayor Chiovatero: Also to let you know too Alderman Poshepny has taken care of his aldermanic requests, a couple I took care of, but basically there was requests from his constituents which a email was forwarded to me and because of his health I followed through and his constituents are happy as to the results so that is about the basis of my comment. I think the latest one is less two weeks ago. With that are there any other comments? Motion on the table please vote.

City Clerk Gauger: motion carried with Alderman Moore voting no.

Note: Council requested the ad be placed in the New Berlin Now, Waukesha Freeman and Journal Sentinel. The ad will be amended to remove the specific dates for interviews. After publishing 2 times, Council will decide on an interview date and a date for voting.

Common Council to amend City of New Berlin City Code - Chapter 220-4 RECYCLING to include both single stream as well as co-mingled recyclable pick up in the city of New Berlin and direct the City Attorney to prepare an ordinance reflecting this change/DEFERRED 9-8-09

Alderman Seidl indicated per Waukesha County it is not a good time to change the ordinance and he would like to meet with County recycling staff.

Motion by Alderman Seidl to table. Seconded by Alderman Harenda and carried unanimously.

ADJOURN

Motion by Alderman Seidl to adjourn at 7:40 PM. Seconded by Alderman Wysocki and carried unanimously.

Respectfully submitted:
Marilyn Gauger, MMC
City Clerk