

**CITY OF CEDARBURG
PERSONNEL COMMITTEE
MAY 2, 2017**

**PER20170502-1
UNAPPROVED**

A meeting of the Personnel Committee of the City of Cedarburg, Wisconsin, was held on Tuesday, May 2, 2017 at City Hall, W63 N645 Washington Avenue, second floor, Council Chambers. The meeting was called to order at 7:00 p.m. by Council President Mike O'Keefe.

Roll Call: Present - Council Members Mike O'Keefe, Jack Arnett, Patricia Thome (temporary appointment to the Personnel Committee)

Also Present - City Administrator/Treasurer Christy Mertes, City Clerk Constance McHugh, City Attorney Mike Herbrand, Mayor Kip Kinzel, Council Member John Czarnecki, Plan Commission Member Mark Burgoyne, Plan Commission Member and Economic Development Board Member Greg Zimmerschied, Vera Brissman, and Alison Henderson of the News Graphic

STATEMENT OF PUBLIC NOTICE

Council Member O'Keefe verified that notice of this meeting was provided to the public by forwarding the agenda to the City's official newspaper, the *News Graphic*, to all news media and citizens who had requested copies, and by posting in accordance with the Wisconsin Open Meetings law.

APPROVAL OF MINUTES

Motion made by Council Member Thome, seconded by Council Member Arnett, to approve the minutes of the October 24, 2016 Personnel Committee meeting. Motion carried unanimously.

CONSIDER/REVIEW ETHICS COMPLAINTS RECEIVED

Attorney Herbrand said the City Clerk received three ethics complaints. According to Sec. 2-5-7 of the City Code, upon the sworn complaint of any person alleging facts which, if true, would constitute improper conduct under the provisions of this Chapter, the Personnel Committee shall conduct an investigation of the facts of the complaint; if the investigation indicates there may be a reasonable basis for the complaint justifying further investigation, the Committee shall conduct a public hearing in accordance with the common law requirements of due process, including notice, an opportunity to be heard, an opportunity to cross-examine witnesses and to present testimony and other evidence in support of the accused's position and an opportunity to be represented by counsel or other representatives at the expense of the accused. The Committee shall make written findings of fact and issue a written decision concerning the propriety of the conduct of the subject official or employee and shall refer the matter to the Common Council for final disposition.

Attorney Herbrand explained that this is a three step process: 1) the Personnel Committee must find there are enough facts that warrant an investigation; 2) if so, the investigation must then be conducted;

and 3) a decision must be made if the complaints rise to the level of a public hearing. The Common Council will make the final ruling.

Attorney Herbrand emphasized that he is the City Attorney, and as such, advises the Common Council. He recommended the Personnel Committee consider retaining independent counsel to investigate the complaints if the Committee believes investigations are warranted. Independent counsel will report back to the Personnel Committee, who will make a decision as to whether to hold one or more public hearings on the matters. Attorney Ron Stadler's firm indicated his office is available to assist with this, or another attorney could be appointed. Mr. Stadler has served as special counsel to the City in the past.

Council Member Arnett asked what Attorney Stadler's hourly rate is. City Administrator/Treasurer Mertes said his rate is over \$200 per hour.

Council Member O'Keefe asked if an investigator could be hired to compile the facts and special counsel be involved to help interpret the facts and the law. Attorney Herbrand said he can check to see if Mr. Stadler's firm has investigators.

Council Member Arnett asked if the Police Department could do the investigation. City Administrator/Treasurer Mertes said Chief Frank declined to investigate the two complaints that were sent to the District Attorney's office because they are not criminal matters but are potential conflicts of interest. She said it may be possible to have another area Police Department assist with the investigation.

Attorney Herbrand said he does not believe another Police Department will assist in the investigations as they are not criminal complaints.

Council Member Arnett suggested the Committee go through the facts and determine if further investigation is necessary.

Council Member O'Keefe agreed that each complaint should be discussed separately. The Personnel Committee can then decide if independent counsel should be retained for any investigations.

Council Member Thome said the Sheriff's Department investigated the two complaints that were submitted to the District Attorney. She asked if more than one investigation is typical.

Attorney Herbrand said if the Personnel Committee feels there should be penalties for any violations then the guidance of an outside attorney should be obtained.

Council Member Arnett asked how this can be accomplished less expensively. City Administrator/Treasurer Mertes said the Sheriff's report can be used for two of the complaints.

Council Member O'Keefe said the complaints should be examined one at a time. He said he does not see a smoking gun for any of them, but the Committee does need to consider transparency as the complaints are against a Council Member and two members of a City board and commission. He said he understands that costs may be involved; however, to not ask special counsel to investigate may not pass the smell test.

Vera Brissman complaint against Plan Commission Member Mark Burgoyne

Council Member Thome said she also understands the money aspect, but this Committee needs to follow through. In terms of the complaint against Mark Burgoyne, she asked what the violation is since he recused himself from voting on the St. Francis Borgia matter at the March 6 Plan Commission meeting.

Attorney Herbrand said this is a valid point.

Council Member O'Keefe said that while these complaints could be construed as harassment litigation and attempts to remove people from certain boards and commission, the Personnel Committee and Council need to maintain integrity. He agrees there was no harm done because Mr. Burgoyne recused himself.

Council Member Arnett said Mr. Burgoyne serves on the Plan Commission and the St. Francis Borgia Pastoral Council. Perhaps he should have disclosed his connection to St. Francis; however, he did recuse himself from voting at the Plan Commission meeting on March 3. He said the Plan Commission only makes recommendations to the Council and does not have the final say. He said there is no financial gain to Mr. Burgoyne. He suggested perhaps a letter of reprimand be issued to Mr. Burgoyne.

Council Member Thome said the complaint against Mr. Burgoyne was made on March 3 and the Plan Commission met on March 6. She said his recusal negates the concerns, but maybe the matter should be taken through the process. She is not comfortable issuing a letter of reprimand if it is not necessary.

Council Member O'Keefe agreed. He said there was no harm done; therefore, a letter should not be issued.

Attorney Herbrand suggested outside counsel be retained if the Committee assumes the facts in these complaints are true or if the members are unsure if the facts are true.

Mr. Burgoyne said that he is in fact on the Pastoral Church Council, but this Council does not deal with financial matters but looks at the spiritual needs of the Church. He is also the liaison to the School Committee for the purposes of bringing back information.

Mr. Burgoyne said he received the complaint against him at 4:30 p.m. on Friday, March 3. He was afraid it would be a distraction at the Plan Commission meeting on March 6. He did not think he should abstain from voting on the St. Francis matter but did so because he did not want to be the main object of the meeting. He said this was a tough situation and he feels he made the right decision.

Attorney Herbrand reminded the Committee this is not a public hearing. He urged the Committee to look at the complaints. He said all subjects will have the opportunity to speak with the investigator or special counsel if the Committee finds that investigations are warranted.

Council Member Arnett said he does not mind hearing comments. Council Member Thome said if the Committee can learn more it will be helpful in determining if investigations are needed. Council Member O'Keefe said limited questions should be addressed tonight.

Council Member Arnett said that perhaps Mr. Burgoyne should have disclosed his affiliation with St. Francis Borgia.

Mr. Burgoyne said he did speak to the City Planner about this a year or so ago. He said the Planner said he did not feel there would be a conflict. Mr. Burgoyne said he voted on decisions regarding four other churches during his 28 years on the Plan Commission. He felt there was no reason for him to abstain from voting other than for appearances.

Council Member Thome said Cedarburg is small town and has a lot of volunteers. She said activities of these volunteers are bound to overlap. She said she does not want to drive away any volunteers.

Council Member O'Keefe questioned where things like this end. He said Council Member Arnett is in the commercial real estate business and maybe he knows someone that is involved in the St. Francis project. Council Member O'Keefe said he too is a member of St. Francis Borgia. He is also a landlord that rents out a property. He said it could be construed that he should not vote on the budget as a Council Member if his taxes will somehow be lowered.

Attorney Herbrand said these are all valid points. He said a conflict of interest arises when someone receives something special and unique to that person. He said it must be a personal benefit to that person more so to anyone else in the community.

Council Member Arnett made a motion to dismiss the complaint against Mr. Burgoyne because there is no further justification to warrant an investigation. Motion seconded by Council Member Thome and unanimously carried.

Vera Brissman complaint against Council Member John Czarnecki

Council Member O'Keefe said he does not think there is a smoking gun here either. He said Council Member Czarnecki's company used an architectural firm that is now being used by HSI on the St. Francis Borgia project. He said Council Member Czarnecki has not benefitted financially from this project. He said there is no link between the developer and Council Member Czarnecki.

Council Member Thome said she understands that at one time Council Member Czarnecki had a business relationship with AG Architects and perhaps he should have erred on the side of caution and disclosed this. However, she does not believe there was a financial gain.

Council Member Arnett said Ms. Brissman, in her complaint, made statements that are not true. AG Architects were hired by HSI and are not the developer of the project. Her primary accusation is that AG Architects lists Council Member Czarnecki's firm as a client on their website. He said there is no financial benefit. The Sheriff's reports states that Ms. Brissman was asked if she was aware of an entity that had direct knowledge that Council Member Czarnecki colluded unethically to further the Arrabelle project, or if he received anything of value to move the project forward. She confirmed she did not.

Council Member Czarnecki said that neither he nor any of the principals in his company, The 2100 LLC, that developed an apartment project in Wauwatosa, are involved with HSI, the developer of the St.

Francis Borgia project. He said HSI is considered a competitor. He has not been contacted by HSI or the HSI's architect, AG Architects.

Council Member O'Keefe said he will play devil's advocate here. If there is no real link between Council Member Czarnecki and the developer or architect, he asked if there is any harm in investigating for sake of transparency and integrity.

Council Member Arnett said there will be attorney fees to tell the Committee nothing. He said there is no link and no reason or justification to move forward with an investigation.

Council Member Thome said she agrees there is no special or unique benefit to Council Member Czarnecki.

Motion made by Council Member Arnett to dismiss the claim against Council Member Czarnecki because there is no further justification to warrant an investigation. The motion died due to a lack of a second.

Council Member Thome made a motion to move forward with an investigation by special counsel for the purposes of transparency. The motion died due to a lack of a second.

Council Member O'Keefe said a number of matters will be coming to the Plan Commission and Common Council relating to the St. Francis project. He asked if Council Member Czarnecki will be allowed to vote on these matters.

Attorney Herbrand said Council Member Czarnecki is innocent until proven guilty.

Council Member Thome said she wants to be sure that every vote taken is transparent and will be upheld.

Council Member Arnett said the conclusion of Attorney Herbrand's legal opinion to Council Member Czarnecki stated the fact that The 2100, LLC and HSI have engaged the services of the same architectural firm does not give rise to a conflict of interest as Plan Commissioner or Council Member. There is no evidence that Council Member Czarnecki will receive anything of value from AG as a result of his actions as a Plan Commissioner or Council Member.

Council Member O'Keefe made a motion that based on there being no merit to the complaint against Council Member Czarnecki there should not be an investigation. The motion was seconded by Council Member Arnett. The motion carried with Council Members O'Keefe and Arnett voting aye and Council Member Thome voting nay.

Council Member Czarnecki complaint against Plan Commissioner and Economic Development Board Member Greg Zimmerschied

Attorney Herbrand said that assuming this complaint is true and it constitutes a violation of the City Code in that a financial or special benefit was received, the Personnel Committee shall conduct an investigation.

Council Member Thome said that it is stated in this complaint that Plan Commissioner Zimmerschied stated to her that there was “a different group out there” to develop the St. Francis Borgia site. She said Plan Commissioner Zimmerschied never told her that himself, but rather she heard from other sources that there was a local group that had an interest in the site and Mr. Zimmerschied was a part of it.

Council Member Arnett said Plan Commissioner Zimmerschied is allowed to say another group may be involved and is allowed to change his vote at the Plan Commission. He said the question is whether Plan Commissioner Zimmerschied is part of this group.

Plan Commissioner Zimmerschied said at no time was he ever part of a group with an interest in developing the St. Francis Borgia site. His vote on March 6 against the proposal was a vote of conscience and was based on the density of the project. He said he knows there was a group interested in the site after the first proposal and before HSI was involved, but he was not a part of it. He changed his vote based on his thoughts about the density. He said he looks forward to working with the developer to make it the best development for the City.

Council Member Thome said she has served on the Plan Commission and Economic Development Board with Mr. Zimmerschied and has seen him recuse himself many times over the years. She said that based on her personal experience she feels if the intent was to pursue something, Mr. Zimmerschied would have stepped back.

Council Member Arnett said he was also mentioned in the complaint. He clarified that he did mention there is another group interested in developing the site, but at no time did he say that Plan Commissioner Zimmerschied was a part of it.

Council Member O’Keefe said it is curious that Plan Commissioner Zimmerschied voted to recommend a higher density proposal at an earlier Plan Commission meeting and when the density was lowered and townhouses added as he suggested, he voted against the proposal.

Plan Commissioner Zimmerschied said he was impressed with HSI’s approach to the project at the original Plan Commission meeting but also thought it was too dense. At that time he thought HSI deserved a chance. He did not expect the project to return to the Plan Commission. He said the members on the Plan Commission are not “yes” men. He considered citizen input and other factors and felt there was a better solution when he voted against the proposal at the March 6 Plan Commission meeting. He said he has been very insistent all along that this should be an appropriate development for the site.

Motion made by Council Member Thome to dismiss the complaint against Plan Commissioner and Economic Development Board Member Zimmerschied because there is no further justification to warrant an investigation. The motion was seconded by Council Member O’Keefe. Motion carried unanimously.

Council Member O’Keefe said these conflict of interest complaints are tough issues. He said he does not want to deter residents from volunteering on boards, committees and commissions. He said expenditures of public dollars on investigations are not justified in these cases.

PERSONNEL COMMITTEE

May 2, 2017

PER20170502-7

UNAPPROVED

Council Member Arnett asked that City Administrator/Treasurer Mertes provide him with the amount of money spent on legal fees for these matters.

Plan Commissioner Zimmerschied said members of City boards, committees and commissions should always error on the side of being open. He said there is no shame in recusing oneself from certain matters. He said board, committee, and commission members should disclose their associations or affiliations. He suggested the Personnel Committee take a closer look at this.

ADJOURNMENT

Motion made by Council Member Arnett, seconded by Council Member Thome, to adjourn the meeting at 8:15 p.m. Motion carried unanimously.

Constance K. McHugh, MMC/WCPC
City Clerk