

FINDLAY CITY COUNCIL MINUTES

REGULAR SESSION

MAY 4, 2010

COUNCIL CHAMBERS

PRESENT: Collette, Monday, Nichols, Schedel, J. Slough, M. Slough, Urbanski, VanDyne, Ward

ABSENT:

President Schuck moved to open with the Pledge of Allegiance and a moment of silent prayer.

MINUTES: Mr. J. Slough moved to accept the minutes, as circulated, of the April 20, 2010 City Council meeting. Mr. Ward seconded the motion. Motion carried. Filed.

ADD-ONS:

none.

REPLACEMENTS:

none.

RECOGNITION/RETIREMENT RESOLUTIONS:

none.

WRITTEN COMMUNICATIONS:

none.

ORAL COMMUNICATIONS:

John Kostyo, Findlay, Ohio – River Place Ordinance

Mr. Kostyo began by saying the voter initiative was approved by fifty-six percent (56%) of Findlay voters on November 4, 2008. The Board of Elections certified this vote on November 24, 2008. The measure was not challenged by the City of Findlay as provided by law, and is now the law of the City of Findlay. It is in our Courts and not the assertions of the Law Director where the constitutional determinations of laws occur. Mr. Kostyo feels the City of Findlay's Law Director has failed to make good on many promises to prepare litigation, seeking declaratory judgment, or ask for a court ruling. The Ohio Supreme Court has held that time itself is a critical factor and that extreme diligence and promptness are required to assert violations in election matters, such that in an aggregate party who waits more than two (2) months before filing suit has shown a lack of diligence precluding relief. It has been said the River Place Ordinance cannot be given legal effect/affect because it impairs existing contracts – it does not. The Development Agreement and Ground Lease signed by the Thayer Group on December 18, 2007 have not been enforced. In reviewing the writing do not meet elements necessary for contract in Ohio. A contract is a promise or set of promises for which action may be held for breach. The essential elements include offer, acceptance, consideration, and a meeting of the minds. These writings have not been enforced. The conditions written are subjective in nature and subject to the unqualified satisfaction of the Thayer Group that makes enforcement impossible. There are no terms that can be enforced because no terms have reached that level of satisfaction. No part of the River Place Ordinance impairs the enforcement of these contracts because they have not and cannot be enforced. He would like members of Findlay Council to consider the exact language of the River Place Ordinance. The only part cited at this time is the restriction on commercial or residential development. It does not restrict the use of the land by the City of Findlay or the Army Corp of Engineers for flood control purposes. He feels there is no reason for Findlay Council to read more into the ordinance as passed by the voters of Findlay than the words used in it. There are no terms in the River Place Ordinance that require Council's legislative clearing. At best, the measure may be seen to relieve some public officials of potential professional liability. Mr. Kostyo asked Councilmembers why they would now consider a measure as proposed to disregard fifty-six percent (56%) of the voters in the City of Findlay. He then asked if the votes cast for you were disregarded by some authority, you would call that an act of tyranny, so it must be asked of you, if you disregard the votes of fifty-six percent (56%) of the voters of the citizens of the City of Findlay who approved the River Place Ordinance, you make yourselves tyrants. He feels it is time for each Councilmember to declare whether you are representatives or tyrants. The United States Constitution begins with the words "we the people". Our Ohio Constitution begins with the words "we the people of Ohio". You can now tell the citizens of the City of Findlay whether these words still have meaning in this city. He is asking Councilmembers to vote against the proposed ordinance and vote in favor of what the people of this city have done.

Discussion:

Mr. Collette clarified to Mr. Kostyo that he had mentioned the citizen of Findlay's vote was certified on a November 24, 2008 by a Board of Elections. Mr. Kostyo replied that it was. Mr. Collette then asked him if his theory was that City of Findlay had thirty (30) days to file a declaratory action (December 24, 2008). Mr. Kostyo provided a certified certificate of result of election questionnaire, certified by Ms. O'Brien. Mr. Kostyo replied that there is a limited period of time controlled by Ohio Law and controlled by decision of the Ohio Supreme Court in matters that are pertinent to elections. The City of Findlay could have brought an action challenging the constitutional nature or the language of the ordinance. He also noted that the Secretary of State before this ever came on the ballot had passed on the ordinance. It had been before the City Auditor Robert Sprague who certified it to the Board of Elections. It is verified by the Board of Elections with Ms. O'Brien's signature. He also provided a copy of the certification by the Ohio Secretary of State. Mr. Collette asked for clarification in that the City of Findlay does not have an opportunity to challenge the ordinance judicially at this time. Mr. Kostyo replied that if it was judicially challenged at this time, the matter of bar, merger or collateral estoppels would apply and prevent the City from directly challenging the ordinance as passed by the voters of the City of Findlay. The City of Findlay had the opportunity, but we do not have the opportunity now.

PETITIONS:

none.

REPORTS OF MUNICIPAL OFFICERS AND MUNICIPAL DEPARTMENTS:

Hancock Regional Planning Commission Agenda – April 21, 2010; Hancock Regional Planning Commission Minutes – March 17, 2010. Filed.

Officer/Shareholders Disclosure Form from the Ohio Department of Commerce Division of Liquor Control for Speedway SuperAmerica LLC, Speedway 8502 to apply for a liquor permit. This requires a vote of Council. Mr. J. Slough moved for a no rejections be filed. Seconded by Mr. Urbanski. 6 Council members in favor, 2 opposed. Filed.

Gregory R. Horne, Acting Chief of Police – Liquor Permit – Speedway SuperAmerica LLC, 8502, 3730 Speedway Drive, Findlay, Ohio. A check of the records shows no criminal record on the following:

Speedway SuperAmerica LLC

Filed.

City Engineer Brian Hurt – Crystal Avenue Improvements, Project No. 32844700

This project is in the final development stages and is included in the 2010 Capital Improvements Plan without budget figures. Detailed project estimates and ODOT funding sources have been established. Refer to the Appropriations Committee for more information. Referred to Appropriations Committee. Filed.

City Engineer Brian Hurt – Parks Capital Improvements

Funds were budgeted in the 2010 Capital Improvements Plan to install carbon monoxide detectors at The CUBE, and to relocate two (2) softball fields from Emory Adams Park to the north east of The CUBE. Project costs are as follows:

FROM:	Capital Improvements – CIT	\$ 40,397.00	
FROM:	HPD Grant	\$ 15,000.00	
TO:	Emory Adams Fields Relocation Project #31981000		\$ 45,397.00
TO:	The Cube #21036000-other		\$ 10,000.00

Legislation is requested. Ordinance 2010-029 was created. Filed.

Traffic Commission minutes – April 19, 2010. Filed.

Treasurer’s Reconciliation Report – March 31, 2010. Filed.

City Engineer Brian Hurt – County Road 236 widening project

An agreement with property owners of adjacent farmland for crop loss regarding the construction of the County Road 236 widening project is needed. The agreement will be for a period of five (5) years beginning with crops lost in 2007 with first year being paid out of project funds. The project has since been closed and any remaining project funds were returned to Capital Improvements. An appropriation of one thousand one hundred forty-six dollars and forty-one (\$1,146.41) is needed to pay the property owners for the 2008 and 2009 losses. Refer to the Appropriations Committee for more information. Referred to Appropriations Committee. Filed.

Acting Chief of Police Greg Horne – appropriation of funds

The Findlay Police Department received six hundred dollars (\$600.00) from the sale of a FN Five-Seven 5.7 x 28 pistol to TNT Firearms. These funds will be used to purchase a LRT riflescope, 4.5-14x40, one piece tactical rifle base, and MKIV scope rings to be utilized by an Officer who was recently appointed to the tactical team. These items are required for his Basic SWAT training in June. A request to appropriate the funds as follows:

FROM:	21012000-064200	\$ 600.00	
TO:	21012000-332000 (miscellaneous tools)		\$ 100.00
	21012000-332100 (small equipment)		\$ 500.00

Referred to the Appropriations Committee. Filed.

COMMITTEE REPORTS:

The **PLANNING & ZONING COMMITTEE** to whom was referred a request for rezoning of 422 West Sandusky Street (Lot 803 east 50 feet, 802, 800-801 and part alley west, 799 and part alley west, 796-798 in the Vance Addition) from I-1 Light Industrial to B-1 Local Business. The main museum building is already zoned B-1 Local Business. By rezoning these lots, it will make the museum property a consistent zoning classification.

We recommend approval of the rezoning request. Mr. Collette moved for adoption of the committee report. Mr. Nichols seconded the motion. All in favor. Filed.

**LEGISLATION:
ORDINANCES:**

ORDINANCE NO. 2010-024 Third reading Adopted
AN ORDINANCE AMENDING CHAPTER 1100 ET SEQ OF THE CODIFIED ORDINANCES OF THE CITY OF FINDLAY, OHIO, KNOWN AS THE ZONING CODE BY REZONING THE FOLLOWING DESCRIBED PROPERTIES WHICH PREVIOUSLY WERE ZONED "C-RESIDENTIAL" AND "B2-GENERAL BUSINESS" TO "UNIVERSITY DISTRICT".

Mr. J. Slough moved to adopt the Ordinance, seconded by Mr. Ward. Ayes: Collette, Monday, Nichols, Schedel, J. Slough, M. Slough, Urbanski, VanDyne, Ward. The Ordinance was declared adopted and is recorded in Ordinance Volume TT, Page 2010-024, and is hereby made a part of the record.

ORDINANCE NO. 2010-025 Third reading Adopted
AN ORDINANCE REPEALING THE INITIATIVE PETITION ORDINANCE PRESENTED TO THE VOTERS OF THE CITY OF FINDLAY, OHIO ON NOVEMBER 4, 2008 AND CERTIFIED BY THE BOARD OF ELECTIONS FOR HANCOCK COUNTY, OHIO ON NOVEMBER 24, 2008 AS BEING APPROVED BY A MAJORITY OF THE ELECTORS VOTING UPON THE MEASURE.

Mr. Ward moved to adopt the Ordinance, seconded by Mr. J. Slough.

Discussion:

Mr. Urbanski commented that he does not take lightly repealing an ordinance. He is concerned and puzzled as to why Mr. Koysto (oral communications) waited until now to plead his case because Councilmembers are expected to listen to him versus what the City Law Director has told us, he is going to listen to the Law Director. If Councilmembers were given to the opportunity to review and discuss what Mr. Koysto has said and brought tonight ahead of time, then Councilmembers would have had adequate time to review his concerns. Mr. Urbanski can verify that all Councilmembers and Administration do not take repealing any ordinance lightly and feel that flood mitigation and everything that goes towards this is very critical and that is why he cannot accept what Mr. Koysto has told us tonight.

Mr., Collette reinforced Mr. Urbanski's comment that flood mitigation is extremely important to Councilmembers. While reading the reasons for revoking the ordinance has nothing about flood mitigation, but has unconstitutional legal issues that he brought up at the last Council meeting. Mr. Collette wondered why these issues were not decided in Court back in December of 2008. He feels a referendum and initiative are very important. He then asked the Law Director to clarify if the City of Findlay has an unenforceable contract as Mr. Koysto stated we do not. Mr. Hackenberg replied that the contract was executed December of 2007, and the initiative came about a year later. The contract was fully in force at the time the initiative was presented to the voters, was passed and certified by the Board. There is Supreme Court cases saying voters cannot repeal a fully executed contract by a municipality. There is one out of Hamilton County in Middletown Ohio within the last ten (10) or twenty (20) years. The two biggest issues he sees is that there is no vehicle, no provision in Ohio Law for Council to place a ballot on issues dealing with the Brandman property (if you want to develop a property, the initiative ordinance states you must first get it approved by the voters, there is no provision in Ohio Law to do so). Findlay is not a charter city; we are a statutory city, so there is no provision in Ohio Law. It deals with three (3) different subjects that is clearly a violation and is referenced in this ordinance with the statute cited. This action can be taken to court where the court will determine whether repealing the ordinance is constitutional or not, but the easy way is to repeal it. Initially, Council was not interested in repealing it, but now seems to be. Ten (10) years ago, there was a costly provision for sidewalks in which the voters passed saying the City would be responsible for sidewalk repairs. This Council unanimously repealed that provision. Councilmembers are to make decisions they feel to be the right decisions where voters are not always going to agree with. Mr. Hackenberg feels it is Councilmembers responsibility to repeal this ordinance and make it right, regardless of the amount of voters (56%) who accepted the initiative petition.

Mr. VanDyne asked for clarification on whether or not the ordinance prohibited Councilmember from putting any flood mitigation structures on the property. Mr. Koysto mentioned that the ordinance does not prohibit us from doing so. Mr. Hackenberg replied that flood mitigation was not even contemplated back when the initiative petition was created, so that language is not in it. He cannot comment on whether or not if the flood language was in it if it would have any affect on it. If the Corp of Engineers or the City wanted to use some of the property for flood mitigation or not, that would be an open issue.

Mr. Collette added that the flood mitigation is a critical issue. It is every Councilmembers' concern as they are now want to make sure the property can be flood-proof. If the initiative is a non-issue, on that point, he is not sure if all Councilmember feel as strongly about overturning it. There was a contract with Mr. Burgess where the City bought additional land for the City Street Department, so we have expanded money based on that contract with Mr. Burgess. Mr. Collette then asked why the City does not sue Mr. Burgess for some of the money the City expended. Mr. Hackenberg replied that this has been looked at. A lawsuit could have been generated if it had been fruitful in the end result. Mr. Burgess's company are in many lawsuits all over the country, so we didn't see any benefit in proceeding with a lawsuit. Mr. Burgess's company is out of Kentucky and we do not have much jurisdiction over Kentucky. That is a contract we were involved with by some other party that won't be named tonight. The previous Administration did not go out looking for that company to do business with, it was presented to them. Another reason this initiative should go away is because it sets a dangerous precedent for any future ordinances that may be sprung upon the City by the voters in a particular part of town that at some point any development should happen. Mr. Hackenberg stated he is not against the initiative or referendum, but he would like to see it used judiciously and wisely, but most importantly, legally - one that can be enforced. Mr. Hackenberg is willing to defend Councilmembers as Defendants on this if it would go to court, but the easiest way to get rid of an ordinance that Council does not agree with and should not be on the books, is to repeal it. This ordinance is precedent in at least one (1) initiative situation, but we repeal ordinances frequently because they are no longer of any value and are unenforceable.

Mr. Ward commented that the whole situation coming back to the flood in 2007, a lot of citizens were concerned about flooding in Findlay because it was one of the largest we had in a long time and cost the City a lot of money, but at the same time, looking at this project where the majority of citizens rushed this initiative petition to get it passed. We reviewed studies and met with Engineers who told us we could still build on this property which would not affect the flood plain or flood. Even though fifty-six percent (56%) of Findlay citizens voted in favor of the initiative, he feels there was a lot of frenzy and fear because of the flood at that time, which was justified, but we still need to make sure it doesn't happen again. When the initiative was passed, Mr. Ward cannot believe that citizens didn't think that Councilmembers did not do their due diligence, which they did through studies and engineering. If flood mitigation would be built properly there, it would not add to the flood plain. He has no issues with the ordinance to repeal the initiative petition that the Law Director has presented tonight. With the timing of the initiative, he will vote to repeal the initiative and approve the ordinance.

Mr. Collette replied that he agrees with everything Mr. Ward has just mentioned, and it is the easiest way as Mr. Hackenberg has stated, but he is concerned if it is the right way.

Mr. Monday asked Mr. Hackenberg if this ordinance is defeated, will he take it to court to get a judgment. Mr. Hackenberg replied that Councilmembers direct him to, he will. He has already done the research on it and has talked to Municipal Law on it. This case is unique in that Councilmembers would become the Defendants to the lawsuit, so that is why it was decided that the easy way to eliminate the initiative is to repeal it by ordinance.

Mr. Ward asked Mr. Hackenberg if Councilmembers desire to take this to court, will it cost the City money. Mr. Hackenberg replied that it would be a couple hundred dollars in court costs unless we would get opposition. With our expert witnesses, he doesn't envision any large amounts of court costs.

Mr. M. Slough asked the City Engineer if the Army Corps of Engineers insight of this situation have any impact on whether we have a law that prohibits construction. Mr. Hurt replied that acquiring right of way for Army Corps of Engineer projects are one hundred percent (100%) responsibility of the local sponsor, so in this case, the City of Findlay was going to donate the land, and it would be a local responsibility. If there was an ordinance out there that prohibited building flood walls on this property, we then couldn't deem the property as a usable piece of ground. That would be similar to the HMJP properties that prohibit any future flood walls on that property. We would then need to look at piece of property as one we would have to avoid if there is an ordinance in place that does not allow us to install flood walls on that property. Mr. M. Slough replied that his concern is flood mitigation at this stage as flooding has changed dramatically in the last five (5) years, and as a result, he does not want anything to impede the operations of allowing the Army Corps of Engineers to provide the City with whatever is necessary for keeping the river within its boundaries.

Mr. J. Slough then asked Mr. Hurt if this land is going to be used by the Army Corps of Engineers for any sort of flood control. Mr. Hurt replied that all the conceptual plans where the City has shows a flood levy in that location. There are a couple of conceptual plans out there with one of them showing the flood wall closer to the Defiance Avenue area which would put part of the flood levy out of the Brandman property. There is another conceptual plan that places the flood levy closer to High Street and to the Brandman property. There is a very high possibility that area will be used for flood control. Mr. J. Slough then asked if the conceptual plan that is closer to High Street would be a better site. Mr. Hurt replied that one of the reasons the Brandman site is used for a area for a flood levy is because there is an old railroad bed that was already there, so there is some raised ground in that area. If we could use the railroad bed that is already there and build on top of it, we will have less of a levy to build. In Mr. Hurt's opinion, the conceptual plan for the High Street location is a good place to put a flood levy. Findlay needs some area where we can mitigation some wetlands. We do not have many open areas in town to mitigation wetlands. If we move the flood levy back toward Defiance Avenue, that would open up an area to mitigate the land with wetlands and wetland mitigation, so that provides a different benefit. It makes a lot of sense to put a flood levy on the railroad bed, but it is also required from us to mitigate the wetlands that we affect by this project, so there could be an instance where we have to use the railroad bed as wetlands and move the flood levy back.

Mr. Collette then asked Mr. Hurt if it will be a ground type bream. Mr. Hurt replied that there is no reason to build a concrete flood wall. Mr. Collette then asked if it could be construed as commercial or residential construction. Mr. Hurt replied there are facilities in that area now, we have the City Streets Department, MedCorp, salt barn, the maintenance garage, etc. where something will have to be done with all of them if we use the option of building the flood levy towards Defiance Avenue. If we build it towards High Street, it is a possibility that some of the old Manley property could be affected. Whether demolition and relocation is part of the restriction that is on the ordinance now, he is unsure, but demolition and relocation is part of the activity that will need to happen if a flood levy is built.

Mr. J. Slough then asked Mr. Hackenberg if Council passes this ordinance, how it would affect the Army Corps of Engineers wanting to go in that location. Mr. Hackenberg replied that he cannot speak for them, but he is unsure if they would construe this ordinance as an impediment on the title of that land or not. He thinks it wouldn't as the government thinks they are superior to any other law of the country, so our city ordinance probably wouldn't be of too much of their concern. Mr. Collette added that City of Findlay would have to enforce the ordinance. The same citizens that voted for the initiative could try to enforce it.

