

**Evanston City Council  
Closed Session Minutes  
Aldermanic Library  
Monday, October 10, 2005**

PRESENT: Aldermen Wollin, Bernstein, Holmes, Tisdahl, Rainey, Hansen

NOT PRESENT AT  
ROLL CALL: Aldermen Jean-Baptiste and Moran

ABSENT: Alderman Wynne

STAFF: Judith Aiello, Julia Carroll, Doug Gaynor, Herb Hill, Vince Jones, Gavin Morgan, Elke Purze, Debbie Sleet, Bill Stafford

GUEST: Dick Ryan, Ryan, Smolens and Jones

PRESIDING: Mayor Lorraine H. Morton

START: 5:05 p.m.

Alderman Bernstein moved that Council convene into Closed Session for the purpose of discussing matters related to litigation and closed session minutes pursuant to 5ILCS Section 120/2 ( c) (11) and (21).  
Seconded by Alderman Rainey.

Roll call. Voting aye – Wollin, Jean-Baptiste, Bernstein, Holmes, Rainey, Tisdahl, Hansen. Voting nay – none. Motion carried. (7-0)

**Minutes**

Closed Session minutes of September 12, 2005 were accepted without change.

**Litigation**

**Worker's Compensation Settlement – Firefighter Gary Swanson**

City Manager Julia Carroll asked for authority to settle for up to \$175,000 due to outstanding medicals that would obligate the City for up to \$100,000. The demand is for 70% loss of a person as a whole. Ms. Carroll thought they could settle for 60% which would be around \$175,000. Alderman Rainey moved approval. Seconded by Alderman Bernstein. There were no objections.

1st Assistant Corporation Counsel Herb Hill announced that three cases, Magaly/Prado, Eloina Prado and Rafia Khan had settled for a total of \$7,350,000. Current outstanding liabilities are \$1,385,000 down from over \$21 million. \$4.5 million was paid to Magaly/Prado, \$2 million to Eloina/Prado and \$850,000 to Rafia Khan.

**Nancy Klong v. Bernard Campbell and COE**

This was a motor vehicle accident involving a police vehicle at Sherman/Davis. Property damages have been paid. The plaintiff incurred \$12,374 in medical bills (\$8,000 for soft tissue alone). Mr. Hill requested authority to settle up to \$36,000. Alderman Tisdahl moved approval. Seconded by Alderman Jean-Baptiste. There were no objections.

**Castaneda v. Eckersall**

Mr. Hill reported that the judge barred the plaintiff from filing her response brief because counsel failed to file it in a timely matter. So the case would be argued the following week without any counter argument from the plaintiff in writing. Attorney Hoover did not object. Mr. Hoover wants to settle the case for up to \$45,000. Mr. Hill recommended they get rid of this case. Alderman Rainey asked how much has been paid on to date on the case. Alderman Bernstein moved they settle for up to \$45,000. There were no objections.

**Keefe-Shea v. COE and the DiPaolo Co.**

Mr. Hill explained that this was on appeal to terminate Phase 6B of the Relief Sewer Project. If the contract can be terminated, the City can bid out a newly designed project. Plaintiff's attorneys argued that terminating the contract violated the Appellate Court order and the City could not proceed with DiPaolo. He thought the oral argument went well and there is a good chance of success. Two of the three judges asked the right questions about why the City terminated this. No money is at stake at that point. If the City wins, the project can be bid out in a few months.

**Main & Chicago LLC v. COE**

Mr. Hill reported receipt of the order that day. The appeal was unsuccessful. Jack Siegel will file a notice for a re-hearing. The judges found the facts in favor of the plaintiff who had expended substantial sums on the property, terminated tenancy, hired an architect which all relied upon getting underlying zoning. The City over a five year period had changed the zoning from B3 to C1a and this property was excluded because it was in the pipeline. The timeframe was from the time Flanagan bought the property until his death. The judges did not buy the City's argument that the project was abandoned. Mr. Hill said the legal standards were the same. The City argued the record was not complete and they had an unsubstantiated affidavit from Flanagan. The court ruled the timeframe was small enough; the expenditures were over \$2 million and the owner relied on the underlying zoning. Mr. Siegel will file a notice of appeal and see what happens. Alderman Rainey confirmed they don't know what the plans are for this property.

**Klujewski v. COE**

Dick Ryan and Alderman Moran came into the meeting at this time.

Mr. Hill explained this case was the drowning of Tim Klujewski on August 1, 1999 with Dick Ryan litigating it. He placed signs around the room that were at the beach that indicated no swimming when lifeguards are not present, beach hours and other rules. The plaintiff has three theories on this case. One is that the southern boundary of Lighthouse beach is the break wall which is incorrect. The southern boundary of the beach is 280 feet from the break wall. The beach is clearly marked by buoys in the water and signs on the sand. The other two arguments deal with what Park Ranger Veasley did or did not do on the night of the drowning. He did not affect a rescue because he was not a first responder. His job was to enforce park rules. The third deals with the change in the law from absolute immunity to a willful and wanton standard as to whether the City undertook to supervise activities on the lakefront. Plaintiff's argument is that Mr. Veasley supervised activities, hence the willful and wanton charge. Extensive depositions have been taken. The beach was closed at 3:00 p.m. on August 1, 1999 due to adverse weather conditions (large waves). The young people with Klujewski came to the beach before 5:00 p.m. and came back later after the beach was closed. Tim Klujewski rescued friends in the water but did not survive. When the 911 call came in around 9:37 p.m., the operator did not immediately call out the ambulance/truck. The 911 operator knew that Veasley had been sent to the scene based upon a call from neighbor McMahon about noise in the water. Veasley went on a non-emergency basis to investigate the noise. The 911 call came into Casey at the Center, who then called Veasley to ask what was going on. It was established there were three kids in the water in trouble. Upon verification of trouble 911 called for an ambulance. The Fire Department was monitoring and Captain Dohm called for a dive team, truck and engine. They believe that Klujewski drowned before any rescuer got to the scene.

They had the pre-trial on Friday with Judge Nudelman who is pushing for a settlement. Plaintiff said they have spent over \$100,000 on this case and had asked for \$1.5 million but Hill thought they would settle for less. Council needed to discuss that. Mr. Hill stated a second pre-trial meeting would be held October 14 and there could be direction regarding settlement. The trial date is October 24. He asked if Council wanted to try to settle the case or proceed to trial. Judge Nudelman said the plaintiff has one strong point, sympathy and empathy. Mr. Hill played the 911 tapes with Cara Schragel reporting trouble; then Veasley's call and the response at the 911 center. The ambulance arrived at the scene. Firefighter/Paramedic Scott Hargraves tied a rope to his waist and went into the lake to rescue the three people in the water. The three were rescued by someone who pulled them up the break wall. The timeframe of the tape was discussed by Mr. Ryan and Mr. Hill. Mr. Veasley was standing and watching the rescue which Mr. Hill termed a negative fact. Mr. Ryan pointed out that they should remember that the City does not own Lake Michigan. The lake

is owned by the federal government and the break wall was created to hold sand on the beach by the U.S. Corps of Engineers. Plaintiff claims the wall created the current but weather also causes the current. The weather was so bad that day that the lifeguards closed the beach at 3:00 p.m. Mr. Hill said the swimming area is about 150 feet wide and an expert witness on beach safety will argue that everything was done properly at the beach. The signs are not visible at night. Mr. Hill pointed out the sign did not reflect the change of hours from closing at 8:00 to 7:30 p.m. The other four beaches were posted to close at 7:30 p.m. Factually it makes no difference. He showed an overview of all the beaches in Evanston. The City owns 1.8 miles of public beaches and is responsible for the beaches during posted times and the rest of the time beaches are considered lakefront.

Mr. Hill showed the signs on the back of the lifeguard's chairs which are clearly visible from the parking lot. They also have logs from the lifeguards who left after 7:30 or 8:00 p.m.

Mr. Hill stated that Park Ranger Veasley's testimony is convoluted. Director of Parks/Forestry and Recreation Doug Gaynor described what he saw the night of the drowning and Mr. Veasley was with him.. Mr. Veasley is a former employee who has given two statements. When interviewed he told Mr. Hill that he signed a statement agreeing to testify in court. A second statement was signed by someone purporting to be Veasley, an investigator and was notarized. Veasley claimed he did not sign the second statement. The problem is Mr. Veasley denies making the second statement but Hill did not think that was damaging. Mr. Ryan thought Mr. Veasley would testify that he was forced to sign statements and the signs were there. There are six independent witnesses that will testify that the warning signs were there.

Mr. Hill asked how to proceed at the pre-trial conference. Judge Nudelman thought the plaintiff would settle for \$750,000. Alderman Moran said there is countervailing testimony; saw the uniformity of the young people statements that the signs were not there or that they did not see them as a problem. He found conflicting versions of what happened; was concerned about jury nullification of the willful and wanton standard -- that is, the jury would disregard the jury instructions that say they can only hold the City liable if they prove the City acted in a willful and wanton way. The tripwire on jury nullification is that sympathy is with Tim Klujewski. The defense is that they could not save Klujewski and a line was thrown to the three kids who were pulled in. It would be tenuous to say the three could be saved but he could not. Alderman Moran thought that Veasley was not a problem noting that he had called 911. Mr. Hill said they have identified potential problems in the case. There was discussion of when the kids were there. Alderman Jean-Baptiste was not comfortable trying this case because it is complicated by various views; thought a trial was risky. Mr. Hill described Tim Klujewski and his family as decent people. No alcohol was involved.

Mr. Hill asked for a number to negotiate. On the facts he thought \$750,000 was a lot of money to settle. The Recreation staff had acted properly. Mr. Ryan explained lifeguards were there until 7:30 or 8:00 p.m. He asked why would somebody go to a lakefront beach when the waves are high, it is stormy and go into the water. The youth have admitted that there were no lifeguards there when they went in.

Alderman Hansen understood the sympathy would be large; these are kids sneaking onto a beach after it is closed. Even with the sympathy factor she was not convinced they should settle.

Alderman Tisdahl asked if the case is settled what would be done differently at the beaches in the future. Mr. Gaynor said he did not know what they would do in the future -- perhaps they would eliminate the entire lakefront swimming program and post the beaches "swim at your own risk."

Alderman Moran suggested \$250,000 be offered to settle; thought that Judge Nudelman had gotten a signal from the plaintiff that they were between \$250,000 - \$750,000. Since they are not close to trial there is some give and would settle somewhere between those two figures. Alderman Rainey moved that they authorize Mr. Hill to settle up to \$500,000. Mr. Ryan said that the plaintiff's attorneys requested a pre-trial conference; thought they recognized problems with the case and don't want to try it. He noted there is always a risk with a jury trial; suggested the plaintiff might settle for \$150,000. The attorney for the plaintiff is the same as for Prado and Eloina cases, Mr. Di Franco. Alderman Hansen asked if the plaintiff's attorney had come independently to them and asked to settle the case. Mr. DiFranco has indicated to

Mr. Hill that they would settle for less than \$1.5 million. Mr. Hill said he would negotiate up to \$500,000 and report back next Monday. Alderman Bernstein did not want to set a precedent with a settlement. Mr. Ryan said all the prior cases had been won on a motion; thought it would be reversed on an appeal.

### **Election Contest Hearing**

Mr. Hill announced that the hearing will begin at 7:00 p.m. next Monday. The function of the hearing is to determine whether or not the motion to dismiss should be sustained. Does the City Council have the jurisdiction and power to issue the remedies sought by the plaintiff? The remedy sought is to throw out some 200 votes. The Council will not decide to throw out the votes, but that Council has the jurisdiction to hear the matter or not. Taking all the facts as pled in the plaintiff's case do they believe them to be correct? Having stated a cause of action, does Council have a remedy for that cause of action. If that is true, Council will vote to hear the matter at a future date. If aldermen believe that Council does not have jurisdiction or the remedies sought are not something this Council has the authority to do – there has been no City Council that has thrown out some 200 votes and did proportional balloting to declare somebody else the winner of an election.

Council members will receive a summary sheet on Friday with the standards for review. At the hearing each side will get 30 minutes to present their case. Council has the discretion to change that. Alderman Rainey asked how the meeting will be run. Mr. Hill said it is not an evidentiary proceeding. The Mayor is the presiding officer and will call the meeting to order. If they wish, cases will be provided. Mr. Hill said they would take 20 minutes before the hearing to review the rules and did not expect a decision to be made on Monday. The Council can decide to deliberate in public or in closed session. The Mayor would vote only to break a tie and a majority vote is required. Council members can debate among themselves. If the Council says it has no jurisdiction this would go to appeal. Mr. Hill explained the Canvassing Board re-tabulated the numbers. What is being decided is whether this City Council should hear a factual dispute regarding fraud in the election and whether people were provided with items of value to vote one way or the other. If that is the case, the remedy advocated by one side is to throw out many votes and do a re-tabulation based on proportionality. If done that way the outcome of the election would change. The question is, does the law allow the City Council to be the sole judge of the election and to make a ruling of proportional balloting. He explained there has been no case where a municipality has authorized proportional balloting. There are any number of approaches that can be taken, according to Mr. Hill. Alderman Hansen clarified that the Court had said the City Council should hear this matter first. She asked if they deliberate in closed session and come to a decision, do they then have to go into open session to give their decision. Mr. Hill said that Council would need to go into open session to announce its decision and the basis for the decision. Northwestern University is in federal court regarding this issue. Alderman Rainey asked if Council could send this back to the Circuit Court. Mr. Hill responded that the City Council could make a finding that this matter is not within Council's capacity to determine. The election law says the City Council shall be the sole judge and can make any ruling it chooses. By hearing the argument, the Council agrees it has jurisdiction. Council can hear this but don't have the power to make the remedy sought, therefore won't engage in a futile act.

There being no further business to come before the Council, Mayor Morton asked Council for a motion to go into open session and recess. The council so moved at 7:00 p.m.

Mary P. Morris,  
City Clerk

