

**CITY OF NEWARK  
DELAWARE**

**COUNCIL MEETING MINUTES**

**March 12, 2007**

Those present at 7:30 pm:

Presiding: Jerry Clifton, Deputy Mayor  
District 1, Paul J. Pomeroy  
District 4, David J. Athey  
District 5, Frank J. Osborne  
District 6, A. Stuart Markham

Absent: Vance A. Funk III, Mayor  
District 3, Doug Tuttle

Staff Members: City Manager Carl F. Luft  
City Secretary Susan A. Lamblack  
Assistant to the City Manager Carol S. Houck  
Assistant to the City Manager Charles M. Zusag  
City Solicitor Roger A. Akin  
Planning Director Roy H. Lopata  
Parks & Recreation Director Charlie Emerson  
Public Works Director Richard M. Lapointe  
Building Director Thomas J. Sciulli  
Water & Waste Water Director Roy Simonson  
Acting Chief of Police John Potts  
Finance Director Dennis McFarland  
Assistant Finance Director Wilma Garriz

- 
1. The meeting began with a moment of silent meditation and pledge to the flag
  2. MOTION BY MR. OSBORNE, SECONDED BY MR. POMEROY: THAT ITEM 9-B-3, APPROVAL OF POLLING PLACES, BE ADDED TO THE AGENDA.

MOTION PASSED UNANIMOUSLY. VOTE: 5 to 0.

Aye – Pomeroy, Osborne, Athey, Clifton, Markham.  
Nay – 0.  
Absent – Funk, Tuttle.

3. **1-B. CANCELLATION OF APRIL 9, 2007 COUNCIL MEETING**

MOTION BY MR. ATHEY, SECONDED BY MR. OSBORNE: THAT THE APRIL 9, 2007 COUNCIL MEETING BE CANCELLED.

MOTION PASSED UNANIMOUSLY. VOTE: 5 to 0.

Aye – Pomeroy, Osborne, Athey, Clifton, Markham.  
Nay – 0.  
Absent – Funk, Tuttle.

4. Mr. Luft introduced Dennis McFarland, the City's new Finance Director.

5. **2. CITY SECRETARY'S MINUTES FOR COUNCIL APPROVAL**

A. Regular Council Meeting of February 26, 2007

There being no additions or corrections to the minutes, they were approved as received.

6. **3. ITEMS NOT ON PUBLISHED AGENDA:**

A. Public

Carol Riggs, 8 Creek Bend Court, asked for the management study Council was considering to be defined. Mr. Clifton explained that its purpose was to review how the City operated from the Council, staff, and employees perspective, the procedures used, and basically all aspects of City government because some things had fallen through the cracks. Ms. Riggs asked for "fallen through the cracks" to be defined.

Mr. Clifton gave as an example the electric contract with the University, which he thought was the nexus that initiated the idea of a management study. Council thought it was appropriate to have someone look at different issues to determine if the City was doing business the most expeditious and efficient way possible.

Mr. Pomeroy added that the idea behind the management study was similar to organizations that did financial audits and provided direction on how to make an organization better financially. He thought they wanted an independent body to come in (if the cost fit within the City's budget) and give an assessment of the City's organization to determine if it was as efficient as it should be and make recommendations if needed.

Ms. Riggs asked if was being done because of things falling through the cracks with the reservoir issue. Mr. Clifton said a study had nothing to do with the reservoir because he did not feel anything fell through the cracks regarding the reservoir. He looked at a management study as a good business practice and assured that it was not a "witch hunt" for anybody; rather it was a way to deliver a more efficient government to the citizens of Newark.

7. **3-B. UNIVERSITY**

1. Administration

There were no comments forthcoming.

8. **3-B-2. STUDENT BODY REPRESENTATIVE**

There were no comments forthcoming.

9. **3-C. COUNCIL MEMBERS**

Messrs. Pomeroy, Osborne

10. Mr. Athey asked if the resolution the Traffic Committee recently passed was forwarded to DelDOT. Cpt. Potts said that it was communicated to them by email. Mr. Athey also referred to several items that were brought to the Secretary of Transportation's attention at Council's January workshop which have not been addressed. Mr. Luft asked Mr. Athey to email those items to him and he would follow up with Secretary Wicks.

11. Mr. Athey said he attended the recent ice skaters' send off to competition held at the UD ice arena. He thought it was real nice that the DNP had a booth set up where they provided a lot of information about Newark that encouraged people to stay in town and visit our restaurants and businesses.

12. Mr. Markham referred to the emergency exit through Nonantum Hills that was brought up at the community meeting he held at the Newark United Methodist Church. The residents raised questions not only in terms of emergency situations but concern if ever Old Paper Mill Road was closed and the fact that there was no other way out. The residents asked the City to be more proactive and have an emergency exit graveled ahead of time. He thought the City was going to work with the County and State and asked who was taking the lead in moving forward with that. Mr. Luft said Mr. Simonson would be initiating a meeting to look into that.

13. Mr. Markham noted that he brought up a question about water conservation and aquifers and Mr. Simonson looked into that and said the City was in good shape at this time. He thought it might be good to be proactive and add that to the Conservation Advisory Commission's agenda sometime in the future.

14. Mr. Markham advised that Rehoboth Beach made a deal with DSWA for curbside recycling for \$1.00/month instead of the \$6.00 Newark was paying and asked how the City of Newark could get in on that deal. Mr. Lapointe advised that Rehoboth Beach charged residents \$1.00/week and the Town of Rehoboth Beach was picking up the remaining cost.

15. **4. ITEMS NOT FINISHED AT PREVIOUS MEETING:**

- A. Discussion re Grandfathering Extension at 115 E. Main Street  
**(TABLED 1/22/07)**

MOTION BY MR. POMEROY, SECONDED BY MR. MARKHAM: THAT THIS ITEM BE LIFTED FROM THE TABLE.

MOTION PASSED UNANIMOUSLY. VOTE: 5 to 0.

Aye – Pomeroy, Osborne, Athey, Clifton, Markham.

Nay – 0.

Absent – Funk, Tuttle.

Jim Baeurle explained that after the January 22<sup>nd</sup> meeting he met with the City Solicitor and Planning Director, as directed by Council, to come up with further restrictions for Council's consideration. However, given the fact that he did not have the benefit of a full Council, he asked if Council would consider tabling this item until a full Council was present.

Mr. Markham asked if there would be any changes to what was before Council if they chose to take action at a later time. Mr. Baeurle said because this was an important issue to him and the City, he would like the benefit of a full Council. Mr. Athey pointed out if they tabled this item, they would also have to grant another extension until the next Council meeting, and because of the number of people who have contacted him about this issue, he would not support another extension.

Mr. Pomeroy said he was not a big fan of tabling items, but when a petitioner doesn't have the benefit of a full Council, it was difficult for him not to give him/her that opportunity. He asked what the protocol was for a situation when two members of Council were absent. Mr. Clifton advised it was Council's pleasure to make the decision, and asked for the question to table the item. Hearing none, he asked Mr. Baeurle to continue with his presentation.

Mr. Baeurle continued by referring to the February 28, 2007 letter sent by his attorney, Stephen Spence, to Mr. Lopata that addressed the restrictions they were agreeable to. Also, on March 12, 2007, Mr. Baeurle sent an email to Council with additional restrictions and clarifications.

The restrictions proposed included:

- On-premise hours of operations would be Monday-Thursday to 10 pm; Friday-Saturday to 12 am; Sunday to 5 pm.

- Off-premise hours of operations would be Monday-Saturday to 7 pm; Sunday to 5 pm.

- No live amplified music.

- No liquor or beer promotional signs on exterior of store or windows facing Main Street.

- No kegs for sale off-premise.

- No on-premise sales of shots or shooters; no drink specials of any kind except for wine promotions.

MOTION BY MR. POMEROY, SECONDED BY MR. ATHEY: THAT THE RULES BE SUSPENDED TO HEAR FROM THE PUBLIC.

MOTION PASSED UNANIMOUSLY. VOTE: 5 to 0.

Aye – Pomeroy, Osborne, Athey, Clifton, Markham.

Nay – 0.

Absent – Funk, Tuttle.

Jean White, 103 Radcliffe Drive, said she did not support grandfathering this nonconforming use and believed Council had the right not to extend the grandfathering since the building would have been empty and the operation, in particular, would have been closed or non-existent for over a year. As a compromise, she suggested imposing the restrictions proposed by Mr. Baeurle and restricting the consumption of alcoholic beverages on the premises to wine only. She thought that would be fair because every time Mr. Baeurle came before Council he wanted a wine tasting upscale business. She thought Council could also require a special use permit.

Patrick Hart, 257 W. Main Street, thought letting the taproom license lapse and requiring Mr. Baeurle to reapply would be a sensible approach and would protect the interest of the condominium owners as well as the citizens who were concerned about an open-ended taproom license.

Frances Hart, 257 W. Main Street, pointed out that Mr. Baeurle said he wanted to have a wine bar, but in his letter to the Planning Commission and City Council he said he wanted to have entertainment and different hours for selling different things. She did not think he was focusing on the wine bar and his plans now sounded like it would be more than a wine bar. She was concerned not only with Mr. Baeurle, but also with whomever might purchase the building after Mr. Baeurle left Newark. She questioned whether a new owner would have to abide by the same restrictions.

There being no further comments, the discussion was returned to the table.

Mr. Pomeroy said he was concerned when Council tried to dictate too much the workings of an individual business. Council members did not know what made a business work or not work. When they try to micromanage by setting hours, dictating what drinks could be served, etc. that got too deep into the minutia and they were overstepping their bounds. His concern was not with what was consumed on-premise because as a person who did not drink wine, if he was going there with a group of people and only wine was offered, he could not get a beer or a gin and tonic. Whether everyone liked it or not, Main Street was populated with establishments where you could get a beer or mixed drink so he thought it was almost odd to limit on-premise consumption to just wine. It did not pass the common sense test in his opinion. The bigger issue he had was with the purchase

of liquor and taking it off premise. That was where he began questioning what was the dynamic of the downtown area. He thought the idea of a wine bar was an ambitious idea and would be a nice addition downtown. There was no concrete plan for Council to look at and approving the request would be a leap of faith on the part of Council. He did not want to create a liquor store on Main Street. He supported the idea of being able to purchase wine that someone sampled because he viewed that differently than a 21-year old going in and buying 17 six-packs of beer. He concluded by saying he believed the restrictions would keep it from becoming something that was not envisioned by Council or the owners.

Mr. Athey reminded Council if this taproom license did not exist and an applicant came before Council to put in a full on/off-premise sale of alcohol, he did not think it would pass especially in that area of town. Folks have made it clear to him they did not want a liquor store at this location so the off-premise aspect of this project was what he had a difficult time with.

Mr. Markham asked if he understood correctly the only way they could restrict anything was by deed restrictions. Mr. Akin said about a month ago he indicated that Mr. Baeurle, or a business controlled by him, held a liquor license issued by the state Alcohol Beverage Control Commission that permitted him to sell certain things. However, Mr. Baeurle was free to restrict his license and restrict the premises to only allow certain sales if he and the City came to a mutual agreement. Putting aside the potential loss of grandfathering, Mr. Baeurle held a license that permitted him certain alcohol selling activities and if the grandfathering issue was resolved, he could legally continue to do that. Mr. Baeurle agreed to make certain restrictions to the types of sales, the hours of sales, etc. as stated in his lawyer's letter. Mr. Akin further claimed a municipality could not restrict what the state license permitted. He understood Council was being asked to accept or reject the grandfathering of a pre-existing nonconforming use for a period in excess of a year in addition to the sort of business he would like to conduct.

Mr. Athey said he was somewhat confused. He thought Council, as a body, could not restrict above and beyond what the state already allowed, but, the applicant could voluntarily restrict him or herself. He understood Mr. Akin said Council could not pass no off-premise sales as a condition, but Mr. Baeurle could voluntarily restrict the off-premise aspect of it. Mr. Akin said that was correct and further explained that as a matter of state and local law in Delaware, the state granted the license and a municipality was without authority to restrict the type of products sold through that license. Council may engage in negotiations with Mr. Baeurle to reduce the products sold, the hours of sale, and restrict his license through the ABCC. Any future purchasers of the license would be also restricted.

Mr. Baeurle thought what he was doing was trying to figure out what Council could live with and then offer those restrictions. He said if he did not have the off-premise sales, there would be no concept. He would not have a viable business vehicle if he could just sell wine on-premise. The concept that has been working across the country was people coming into places that offered a full variety of products on-premise with most allowing a number of products purchased off-premise. If he could not do that, there would be no uniqueness. He also asked Council to keep in mind if there was no extension and he found another tenant for the space, more than likely it would be a café that would ask Council for a full license. He reiterated that the uniqueness of the grandfathered license was because it was a taproom/on/off and the off portion was the key ingredient to the uniqueness of what was being offered. He said if Council said the off-premise was for the sale of wine only he would have to live with that.

Mr. Markham was glad to see the no keg restriction. He asked if six-packs of beer and liquor would be available for off-premise. Mr. Baeurle said up until this evening his feeling was that the off-premise portion would offer what a normal package store offered. If that was a menu Council did not want to see, Mr. Baeurle wanted wine to be available for purchase off-premise.

Mr. Pomeroy reiterated that this whole project has been a leap of faith and unique, including the condominium concept. He thought part of the uniqueness was the idea and whether it would work. He did not think it was probable that 21 year old kids would go to a wine bar and drop a significant amount of money on bottles of wine just for the pure purpose of getting drunk. He only had concern if it was a regular liquor/package store.

Mr. Baeurle said if the off-premise sales was just wine he would like the hours of operation to be consistent with when the wine bar was opened or closed. He suggested it be Monday-Thursday to 10 pm; Friday-Saturday to midnight; and Sunday to 5 pm. The taproom license has a Sunday restriction of 5 pm.

Mr. Athey asked if there was anything in the state law that restricted the hours of operation for the taproom license. Mr. Akin said he got clarification from the Commissioner that Delaware law says liquor sales must comply with local zoning laws so to that extent a municipality may control the hours of service of alcohol, but he was not sure that the proposal being made by Mr. Baeurle was prohibited under the Zoning Code. He claimed the bottom line was under state law, local sales in a municipality must comply in terms of hours with local law.

Mr. Clifton clarified that Mr. Baeurle was now requesting that the hours of operation for the off-premise be the same as the hours of the wine bar, and the other restrictions originally proposed would apply. Mr. Clifton thought the quality of life for the residents and for the City in general were the real issues. He questioned if the restrictions, if imposed, would stay with the property regardless of the owners. Mr. Akin said the restrictions would stay with the property, and in the future, if Mr. Baeurle or a potential buyer couldn't live with a restriction agreed to, they were free to ask Council to lift or amend those restrictions. Mr. Baeurle said he hoped the restrictions they have agreed to put people's fears to rest that it won't morph into something that nobody wanted.

The following restrictions were agreed to:

- On- and off-premise hours of operations would be Monday-Thursday to 10 pm; Friday-Saturday to 12 am; Sunday to 5 pm.
- No live amplified music.
- No liquor or beer promotional signs on exterior of store or in windows facing Main Street.
- No kegs for sale off premise.
- No on-premise sales of shots or shooters; no drink specials of any kind except for wine promotions.

Mr. Athey asked Mr. Baeurle if he would be willing to add a restriction that none of the off sales of wine would be in excess of 1.5 liters. That would mean no sales of 5-liter boxes or jugs of wine. Mr. Baeurle said the essence of this concept was people buying wine by the case.

Stephen Spence, Esquire, attorney for Mr. Baeurle, said they have no control over packaging. If a particular wine manufacturer or distributor wanted to sell wine in a 5-gallon jug and it was a great wine, Mr. Baeurle may want to sell it. Mr. Athey said he was not aware of any great wines being sold in 5-gallon jugs. The market has been changing and Australian wines were now being offered in boxes. Mr. Athey withdrew his request.

Mr. Markham was glad to see they got back to primarily wine, some alcohol to go with it so other people could partake, and off-premise sale of wine only. That was what he envisioned back in November when this project first came before Council.

Mr. Osborne said he had no objection to the wine tasting concept and selling other drinks on-premise, but he opposed a package store at this site.

Mr. Baeurle said for the record that he was agreeable to the restrictions. Also, he asked if the restrictions meant he would not have to come back before Council and ask for another extension. Council agreed that the extension would be offered with the deed restrictions. Mr. Spence will draft the restrictions and provide them to Mr. Akin for his review.

Mr. Akin asked Mr. Baeurle if he could assume that some architectural steps would be taken to keep the noise inside the wine bar in light of the fact that a condominium would be above it. Mr. Baeurle said yes and assured Mr. Akin that he would not allow this use to interrupt his investment or those people buying the units. He said he would have never torn down the Stone Balloon and gone through this process to create anything that was like or closely linked to the Stone Balloon. He planned to do whatever he needed to do to make sure the wine bar was an amenity to the building.

Mr. Lopata clarified that Council would be approving a permanent extension with the restrictions imposed. The only way the grandfathering would end would be if the use was abandoned for a year, subsequent to putting it in.

MOTION BY MR. POMEROY, SECONDED BY MR. MARKHAM: THAT COUNCIL APPROVE AN INDEFINITE EXTENSION AS ASSOCIATED WITH THE PROPOSED AGREED UPON VOLUNTARY DEED RESTRICTIONS.

MOTION PASSED UNANIMOUSLY. VOTE: 5 to 0.

Aye – Pomeroy, Osborne, Athey, Clifton, Markham.

Nay – 0.

Absent – Funk, Tuttle.

**16. 5. RECOMMENDATIONS ON CONTRACTS & BIDS:**

A. Contract 07-03, Purchase of Hot Mix, Cold Patch, Stone & Concrete Products

Ms. Houck summarized her memorandum to the City Manager, dated February 28, 2007, wherein she explained that this contract provided unit pricing for hot mix, cold patch, stone, and concrete for a one-year period on an as-needed basis. She recommended Contract 07-03 be awarded as follows:

Part I Asphalt Products – no bids received – suppliers were reluctant to quote prices for a year with the fluctuation of the cost of oil. Material will be requisitioned by City's foreman on an as-needed basis. The estimated expenditure for these products for the last two years was \$15,500.

Part II Stone Products – award to Penn/MD Materials for an estimated cost of \$10,000.

Part III Concrete Products – award to Newark Concrete, the only bidder, for an estimated cost of \$22,000.

The estimated total cost of this award as recommended was \$32,000.

MOTION BY MR. OSBORNE, SECONDED BY MR. ATHEY: THAT CONTRACT 07-03, PURCHASE OF HOT MIX, COLD PATCH, STONE, AND CONCRETE PRODUCTS BE AWARDED AS RECOMMENDED FOR AN ESTIMATED TOTAL OF \$32,000.

MOTION PASSED UNANIMOUSLY. VOTE: 5 to 0.

Aye – Pomeroy, Osborne, Athey, Clifton, Markham.  
Nay – 0.  
Absent – Funk, Tuttle.

**17. 5-B. CONTRACT 07-01, MOWING OF RESERVOIR & BASIN/OPEN SPACE AREAS**

---

Ms. Houck summarized her memorandum to the City Manager, dated March 2, 2007, wherein she explained that this was a three-year contract that provided for the mowing, trimming, and clean up at 11 City owned/maintained stormwater basins, open space areas, and the reservoir grounds.

Ms. Houck recommended that Contract 07-01 be awarded to Tri-State Lawn Care for the total cost of \$27,512 a year for a three-year period.

MOTION BY MR. OSBORNE, SECONDED BY MR. ATHEY: THAT CONTRACT 07-01, MOWING OF RESERVOIR AND BASIN/OPEN SPACE AREAS, BE AWARDED TO TRI-STATE LAWN CARE FOR THE TOTAL COST OF \$27,512 A YEAR FOR A THREE-YEAR PERIOD.

Mr. Markham questioned the four mowings a year (Option #1) versus six mowings a year (Option #2). Ms. Houck said the City has been satisfied with the four mowings a year. Mr. Markham said his concern was if there was more rainfall causing overgrown weeds, etc. Ms. Houck said that would not be a problem and the City would be able to react to that need.

Question on the Motion was called.

MOTION PASSED UNANIMOUSLY. VOTE: 5 to 0.

Aye – Pomeroy, Osborne, Athey, Clifton, Markham.  
Nay – 0.  
Absent – Funk, Tuttle.

**18. 6. ORDINANCES FOR SECOND READING & PUBLIC HEARING:**

A. Bill 07-08 - An Ordinance Amending Ch. 20, MV&T, By Bringing the Code into Conformity with the State Code as it Relates to the Operation of Vehicles on Approach of Authorized Emergency Vehicles

Ms. Lamblack read Bill 07-08 by title only.

MOTION BY MR. ATHEY, SECONDED BY MR. MARKHAM: THAT THIS BE THE SECOND READING AND FINAL PASSAGE OF BILL 07-08.

The chair opened the discussion to the public.

Bruce Diehl, 205 Meridan Drive, asked if this bill was what was referred to as the “move over law” and was told that it was that bill. He suggested using Channel 22 to educate residents on this type of law.

There being no further comments, the discussion was returned to the table.

Question on the Motion was called.

MOTION PASSED UNANIMOUSLY. VOTE: 5 to 0.

Aye – Pomeroy, Osborne, Athey, Clifton, Markham.  
Nay – 0.  
Absent – Funk, Tuttle.

**(ORDINANCE NO. 07-09)**

**19. 6-B. BILL 07-10 - AN ORDINANCE AMENDING CH. 17, HOUSING & PROPERTY MAINTENANCE & CH. 22, POLICE OFFENSES BY ADOPTING NEW GRAFFITI REGULATIONS**

---

Ms. Lamblack read Bill 07-10 by title only.

MOTION BY MR. POMEROY, SECONDED BY MR. OSBORNE: THAT THIS BE THE SECOND READING AND FINAL PASSAGE OF BILL 07-10.

Mr. Luft advised that this ordinance was revised since it was originally introduced last November and asked Mr. Sciulli to summarize the changes.

Mr. Sciulli advised that the original bill, Bill 06-35, was tabled on November 27, 2006 because of inconsistencies in definitions between Chapter 17 and Chapter 22, and the consensus that chalk be removed as a graffiti implement. The definition of graffiti implement was now the same in both chapters. When the original bill was reviewed, a few other items came to light that needed to be addressed. The main change was the elimination of the section dealing with the possession of graffiti implements from Ch. 17 because it was a criminal offense and the Property Maintenance Inspectors could not prosecute criminal offenses. That had to be done by the Police Department. Community service has always been in the penalty section of the original graffiti ordinance and was inadvertently removed from the first bill. It was put back in Bill 07-10.

Mr. Markham referred to graffiti implements that talked about a solid form of paint, wax, epoxy or other similar substance and asked it that meant a candle was a graffiti implement. Mr. Sciulli said by the strict reading of the definition, a candle would be considered a graffiti implement. Section 302.9(a)(6) referred to a paint stick or graffiti stick as any device containing a solid form of paint, wax, epoxy, or other similar substance capable of being applied to a surface by pressure and leaving a mark of at least one-eighth of an inch in width.

Mr. Luft thought a certain degree of judgment would be used by both the Building Department and the Police Department.

Mr. Akin pointed out that a paint stick or graffiti stick was a device containing wax and a candle was wax only and that was where the police would make the distinction.

Cpt. Potts said it depended on how it was being used. If it was being used as a graffiti instrument, they would charge for that. He gave the analogy that it would be just like having a baseball bat and if it was used in an assault, it would be a weapon. If it was not used in an assault, it was not a weapon.

Mr. Markham said he had a problem in that he had children who were very craft oriented and he was worried about the wording about leaving a mark at least one-eighth of an inch in width.

Cpt. Potts pointed out the police would use their discretion and the primary offenses occur in the evenings and not in the daytime when children go to and from school or going to a craft class at the Y. He reinforced that discretion would take part in the enforcement of the ordinance.

Mr. Luft said some of the implements could be used in a detrimental way but when they were used as they were designed to be used (such as school work), that was not a problem for either department.

Mr. Athey referred to the penalties that read that the first offense of this chapter shall be a mandatory fine of not less than \$200.00. The previous language used language "the act of causing graffiti" and he interpreted the new language to theoretically apply to a property owner that didn't clean up the graffiti quickly

enough. He also noted that a storeowner contacted him and said if one of his sales people inadvertently sold a graffiti-causing implement, he did not want to get hit with a fine.

Mr. Sciulli commented that Chapter 17, Section 302 dealt only with the property maintenance aspect of it including the display and storage of graffiti implements. The possession of graffiti implements was included in Chapter 22.

Mr. Clifton asked what the public service entailed. Cpt. Potts said that currently they were working with the Newark Arts Alliance and volunteers to design and produce a mural on the Casho Mill Bridge. He also thought it included some type of community cleanup that was ongoing at the time of the offense.

The chair opened the discussion to the public.

Daniel Siders, 503 Paisley Place, said he objected to the last version of the bill and objected to this version as well. He thought it unfairly targeted minors and questioned whether there was any evidence that said minors were either primarily or exclusively responsible for acts of graffiti. Cpt. Potts interjected that the majority of the defendants were minors. Mr. Siders said he objected to the idea that any minor on principal who has any object of graffiti could be cited for possession of a graffiti implement. He claimed he had in his pocket a paper clip, a ballpoint pen, two highlighters, a pencil and the staple on the agenda, all items that could easily scratch something that could result in him being charged with graffiti. Although he understood the sentiment driving this ordinance, he thought it was over zealous. There were so many legitimate activities that did not require the direct supervision, direction or instruction of an adult. He did not know what the term “craft instructor” meant and questioned if a 16-year old asked to borrow a Sharpie from him could he deputized himself as a “craft instructor” for the purpose of them borrowing such an implement. He also thought if a minor had private property outside their home, and they were not under the direct supervision of a guardian, parent, teacher, or instructor, were they allowed to mark on their private property.

Mr. Siders asked what the penalty was for the distribution and possession section and was told for a first and subsequent offense there was mandatory fine of not less than \$300.00, the first \$200.00 of which shall not be suspendable. Mr. Siders found the penalty extreme especially if he just “lent” someone a pencil. Because there were so many things that could mark a natural or manmade substance that were completely legitimate, Mr. Siders thought it would be very difficult to enforce the ordinance.

Mr. Clifton pointed out that much of what Mr. Siders discussed would really not come into play until an act was committed. Mr. Siders reiterated that it would be unlawful to loan a pencil to a minor, which was an example why he found the ordinance problematic. Cpt. Potts interjected that Mr. Siders was over reaching—the act of giving someone a pencil or a pen was not going to be a problem.

Mr. Luft added that part of the problem with graffiti violations was the supply of the materials. Therefore, the Police Department spent a great amount of time investigating those violations in order to make allegations and arrests. Part of the process was the supply side. For instance, if materials were being supplied to a minor, then the supplier would also be in jeopardy if it was related to graffiti acts and property damage. Cpt. Potts added that the proposed restrictions were also in effect in New Castle County.

Mr. Sciulli reminded Council that the genesis of the bill was Council asking staff to look at two recent ordinances that were passed by New Castle County. This bill mirrored what New Castle County and other jurisdictions have adopted.

Mr. Akin stated that it was really a rule of reason. The pen in someone’s pocket was not a graffiti implement nor was it one when bought, nor was it one when the store sold it to an individual. But, if that person wrote on the side of a

building, they would be committing the crime of graffiti and the pen would become an implement. On the other hand, if a minor who was on the side of a building in the central business district with a can of spray paint was arrested and after questioning the police learned he bought the can of spray paint from a hardware store in Newark, the police could go back to the hardware store and explore the circumstances of the sale. If it violated this ordinance, the hardware store committed the offense of selling a graffiti implement to a minor.

Jean White, 103 Radcliffe Drive, thanked staff for removing chalk from the ordinance. She suggested including a certified youth leader in addition to the list of people permitted to furnish any graffiti implement to a minor. She commented that since candles were made of wax then candles would be required to be under surveillance visually or behind a locked cabinet. Therefore, she thought Council had to exempt candles from the ordinance. She was also concerned about the possession offense. Children who carry on their possession "graffiti implements" would violate this law. She was also concerned about the number of graffiti places or times that could be a scratch on a car or on a wall that was 1" long or it could be someone who did vandalism and spray painted the whole side of a building or a number of buildings. She asked what constituted one offense or 10 offenses. She thought there needed to be some flexibility in the penalty that had to do with the severity of the graffiti and the age of the violator. She believed \$300.00 was a lot for a first offense. She believed in warnings for a first offense. She was concerned about a parent who made minimum wage (\$246/week) who had a 10-year old arrested for graffiti and fined \$300. The parent would have to pay that fine. If it was a smaller fine, the child could earn the money to pay the fine. For a single parent family, the \$300 fine would be very difficult to pay. Therefore, she thought there had to be some flexibility for both the age of the minor and the extent of the graffiti for a first offense.

There being no further comments, the discussion was returned to the table.

Mr. Markham thought community service for a first offense would have a much bigger impact than paying a fine. He said he was still struggling with the possession issue. He understood if the police found someone near the act of graffiti they could use the fact that they had possession of the graffiti implement and used that to trace them back to the distribution point. However, he still had issues with the possession by a minor of all the different implements.

Mr. Pomeroy said you had to go back to pure common sense and realize the Police Department would not be going to pep rallies trying to bust booster clubs or shaking down 15-year olds walking down the street to see if they had magic markers on them. He appreciated the comments but to a very real extent, the language in the ordinance could be problematic once you got down to a micro level. He felt one had to look at the way in which this would be practically applied. He believed the police would focus on real graffiti problems and not go after people carrying around a bag of magic markers or coming back from art class. If that would occur and became a problem, Council could amend the ordinance. Graffiti was a real nuisance issue in this area and he thought Council had to give the departments the tools they needed to combat it. He agreed that the judge should have some discretion on the penalty for a first offense. He did not think anybody would get arrested for buying candles.

Mr. Athey agreed with Mr. Pomeroy in that they had to give the departments the tools they needed to combat graffiti. He was confident with the ordinance as written.

Mr. Clifton agreed with Mr. Pomeroy and added if they were to define the ordinance further, they would have to define baseball bats and chef knives. He was confident the Police Department would look at the whole picture.

Mr. Pomeroy asked if there was any interest in discussing the penalty phase because he thought it was a fair point raised by Ms. White. Mr. Luft pointed out that

there was a section in the ordinance that read, "In lieu of, or as part of, the penalties specified in this section, an adult may be required to perform community service..." Mr. Akin added that the City did not have jurisdiction to prosecute minors in the Alderman's Court.

Mr. Lopata added that the graffiti removal fund to remove graffiti as soon as possible was used by the local businesses, which he asked Council to recognize if they were going to think about amending the fines. Following the removal of graffiti, a property owner may apply to the Finance Director for the reimbursement of some, or all, of the cost of graffiti removal.

Question on the Motion was called.

MOTION PASSED. VOTE: 4 to 1.

Aye – Pomeroy, Osborne, Athey, Clifton.

Nay – Markham.

Absent – Funk, Tuttle.

**(ORDINANCE NO. 07-10)**

**20. 7. PLANNING COMMISSION/DEPARTMENT RECOMMENDATIONS:**

- A. Request of Richard Handloff & H.G. Young, Jr. for the Minor Subdivision of 108 E. Main Street, Subdividing the Existing Property for the Purpose for Converting the Property into Four Condominium Areas **(RESOLUTION PRESENTED)**

Gibby Young, one of the owners of the property, advised that they applied for a subdivision to condo the building in what was the CVS Drug Store, the rear portion (the dance studio), the common area which included a strip along the side and parking in the back, and everything above the first floor.

Mr. Osborne questioned if Mr. Young had a tenant in mind to which the answer was no. They were asking for the subdivision to give them more flexibility because they were having a real problem obtaining tenants because of the impact of any future construction on the second floor. They did not want to exclude themselves from anybody who might want to serve alcohol. The way the law was written now, because it was one parcel and touched some residentially zoned property in the rear, they were prohibited from the sale of alcohol in the old CVS building.

Mr. Markham brought up the fact that the City was in litigation with this particular property. Mr. Akin commented that the case was now in the Supreme Court on Mr. Handloff's appeal of the denial by Council of their subdivision plan for the overall development of the CVS property for commercial on the first floor and apartments above. Mr. Markham questioned whether Council could separate the two issues.

Mr. Lopata advised that the request for subdivision would not have come before Council if it had any ramifications to the case. He had discussed that with Mr. Akin when Messrs. Young and Handloff applied for the subdivision. This was a request to separate the property into four parcels and had nothing to do with the number of units above. Messrs. Young and Handloff have appealed Council's decision on the apartments and there has been some discussion about a possible settlement, which would come back to Council. Council's approval of this request would not prejudice the City in any way.

Mr. Athey said if they were called parcels he would understand but the word "condominium" implied a structure or building. He thought if they were to approve this request they were approving a condominium which meant the existing parking would not count toward whatever the applicants' future plans may be for the second floor. Mr. Lopata said if they asked to build something on the second floor, parking

would be required for the use. The parking was required within 500' of the use whether it was on the same parcel or a different parcel. He emphasized that they still must meet the parking requirement for any use downtown. Mr. Athey thought it sounded like they were complicating their situation.

Mr. Young said he thought the word 'condominium' was throwing Mr. Athey off. This was basically a subdivision and the only reason the word 'condominium' was used was because in a real estate transaction like this there had to be a common agreement of the owners of all the parcels. Approval by Council would give them separate tax parcels and state law required them to be governed by an agreement. Theoretically they could sell off the dance studio or the CVS portion if they so desired, and they could sell off the rights to the second floor. That was where the term condominium came in.

Mr. Lopata added that the sole reason for doing this had to do with the alcohol regulations.

The chair opened the discussion to the public.

Frances Hart, 257 W. Main Street, did not understand how Council could approve this without having the parking issue settled first.

There being no further comments the discussion was returned to the table.

Mr. Lopata explained that this was an issue having to do with putting parcel or condominium lines on this property relative to the alcohol regulations. All the other zoning requirements were still in place. Parking issues were not relevant here because no use was being proposed.

Mr. Markham asked if the owners found a restaurant for this site, would they have to come back to Council for a parking waiver. Mr. Lopata said he would have to come back to Council for a Special Use Permit and he may have to come back for a parking waiver, depending on the scale of the restaurant.

Mr. Athey said he did not have a big problem with the request but saw it as an attempt to get around the law. He was concerned about setting a precedent and questioned whether the City would get more of the same requests because people had the same issue. Mr. Lopata referred to his recommendation in his report where he explained the only reason he was recommending approval was because of the special use permit requirement. If this was a situation where they were skirting the alcohol regulations and there was no other rule that would apply, he would have significant concern. The five-vote requirement for a restaurant and all the other restrictions made sense in this situation especially in light of the fact that Council just approved a wine bar across the street.

MOTION BY MR. POMEROY, SECONDED BY MR. ATHEY: THAT THE RESOLUTION BE APPROVED AS PRESENTED.

MOTION PASSED UNANIMOUSLY. VOTE: 5 to 0.

Aye – Pomeroy, Osborne, Athey, Clifton, Markham.

Nay – 0.

Absent – Funk, Tuttle.

**(RESOLUTION 07-G)**

**21. 8. ORDINANCES FOR FIRST READING**

- A. Bill 07-11 - An Ordinance Amending Ch. 2, Administration, Article IX, Personnel, By Adding a New Section Regarding Benefits for Job-Related Injury Leave

Ms. Lamblack read Bill 07-11 by title only.

MOTION BY MR. ATHEY, SECONDED BY MR. MR. MARKHAM: THAT THIS BE THE FIRST READING OF BILL 07-11.

MOTION PASSED UNANIMOUSLY. VOTE: 5 to 0.

Aye – Pomeroy, Osborne, Athey, Markham, Clifton.  
Nay - 0.  
Absent – Funk, Tuttle.

**(2<sup>ND</sup> READING 3/26/07)**

**22. 8-B. BILL 07-12 - AN ORDINANCE AMENDING CH. 2, ADMINISTRATION, BY REVISING THE PAY PLAN FOR MANAGEMENT EMPLOYEES**

---

Mr. Lamblack read Bill 07-12 by title only.

MOTION BY MR. ATHEY, SECONDED BY MR. OSBORNE: THAT THIS BE THE FIRST READING OF BILL 07-12.

MOTION PASSED UNANIMOUSLY. VOTE: 5 to 0.

Aye – Pomeroy, Osborne, Athey, Clifton, Markham.  
Nay – 0.  
Absent – Funk, Tuttle.

**(2<sup>ND</sup> READING 3/26/07)**

**23. 9. ITEMS SUBMITTED FOR PUBLISHED AGENDA:**

**A. COUNCIL MEMBERS:**

1. Discussion re Newark Housing Authority

Mr. Luft referred to his memorandum to Mayor and Council, dated February 27, 2007, wherein he explained that the NHA wanted a letter from the City with respect to the disposition of the Cleveland Heights property. Council also received the application prepared by the NHA to the Federal Department of Housing and Urban Development.

Mr. Osborne asked if Council's action was in response to a formal request from the NHA. Mr. Lopata advised that the NHA wrote a letter to Mayor and Council asking for Council to forward a letter to HUD.

Mr. Clifton said he brought this to Council's attention because he did not want (based on a vote by a previous Council) to give HUD the impression that the City was in favor of the demolition of Cleveland Heights. In the past, Council voted to oppose the demolition of Cleveland Heights. Now they were looking for a letter from the City acknowledging receipt of the packet of information.

Mr. Athey thought Mr. Luft's memorandum contained the correct language, that being Council was in receipt of a letter and aware that the Newark Housing Authority had applied for disposition.

Mr. Akin explained that what was requested of the City was a letter stating it was apprised and acknowledges that the NHA intended to dispose of the property. They were not asking the City to approve or disapprove but simply to acknowledge that the City was informed the NHA intended to go forward with that plan.

Mr. Luft proposed using the language in his memorandum that read "receipt of and aware that NHA has applied for disposition." Mr. Markham asked if they could use wording that said they neither approved nor disapproved of the plan, which he thought made it clear that they haven't taken a vote.

MOTION BY MR. ATHEY, SECONDED BY MR. POMEROY: THAT THE CITY MANAGER SEND A LETTER TO HUD USING THE LANGUAGE IN HIS FEBRUARY 27, 2007 MEMO.

MOTION PASSED UNANIMOUSLY. VOTE: 5 to 0.

Aye – Pomeroy, Osborne, Athey, Clifton, Markham.  
Nay – 0.  
Absent – Funk, Tuttle.

24. **9-A-2. RESOLUTION 07-\_\_ : AMENDING THE NEWARK CITY CHARTER, BY ESTABLISHING A NEW PROCEDURE FOR FILLING VACANCIES IN THE CITY COUNCIL, AMENDING THE PROCEDURE FOR THE APPOINTMENT OF THE NEWARK ALDERMAN & DEPUTY ALDERMAN TO CONFORM WITH CHANGES IN STATE LAW, BY AMENDING THE PROCEDURE FOR REGISTRATION FOR NEWARK MUNICIPAL ELECTIONS TO CONFORM WITH TATE LAW, AND BY ELIMINATION OF THE OBSOLETE POSITION OF “HOUSE SERGEANT”**
- 

MOTION BY MR. OSBORNE, SECONDED BY MR. POMEROY: THAT THE RESOLUTION BE APPROVED AS PRESENTED.

MOTION PASSED UNANIMOUSLY. VOTE: 5 to 0.

Aye – Pomeroy, Osborne, Athey, Clifton, Markham.  
Nay – 0.  
Absent – Funk, Tuttle.

**(RESOLUTION 07-H)**

Mr. Athey still had some concern if a vacancy on Council was for less than six months of a term because that could leave a district without representation for as long as six months. He asked if there was a way Council could appoint someone who would sign an affidavit that they would not run for Council. He wanted to avoid having a very important issue before Council (in the district with the vacancy) and not have a representative from the district most affected.

Mr. Akin said an important issue before Council could be postponed until that seat was filled. He thought that the changes in the resolution reflected Council's wishes and that was they were reluctant to create an incumbency by Council vote. He never heard of a request or a requirement that someone sign a binding affidavit saying they would vacate the seat upon an election. He thought that would be unfair to voters if someone performed well during their few months on Council, and they wanted to return that person to that seat.

Ms. Lamblack added that another point brought up at the discussion was the fact that the Mayor was elected at-large, thereby representing the entire City.

25. **9-B. COMMITTEES, BOARDS & COMMISSIONS:**  
1. Appointments to Town & Gown Committee (2)

MOTION BY MR. ATHEY, SECONDED BY MR. OSBORNE: THAT STEPHANIE MCCLELLAN, 79 KELLS AVENUE, TO REPRESENT A NEWARK RESIDENT, AND EZRA TEMKO, 58 WOODHILL COURT, TO REPRESENT A UNIVERSITY OF DELAWARE GRADUATE STUDENT RESIDING IN THE CITY TO THE TOWN & GOWN COMMITTEE FOR A TERM ENDING AUGUST 2008.

MOTION PASSED UNANIMOUSLY. VOTE: 5 to 0.

Aye – Pomeroy, Osborne, Athey, Clifton, Markham.  
Nay – 0.  
Absent – Funk, Tuttle.

**26. 9-B-2. APPOINTMENTS TO CONSERVATION ADVISORY COMMISSION**

MOTION BY MR. POMEROY, SECONDED BY MR. OSBORNE: THAT AJAY PRASAD, 510 BENT LANE, BE REAPPOINTED TO THE CAC FOR ANOTHER THREE-YEAR TERM; SAID TERM EXPIRING MARCH 2010.

MOTION PASSED UNANIMOUSLY. VOTE: 5 to 0.

Aye – Pomeroy, Osborne, Athey, Clifton, Markham.  
Nay – 0.  
Absent – Funk, Tuttle.

MOTION BY MR. POMEROY, SECONDED BY MR. ATHEY: THAT JENNIFER BYRNE, 201 JOHNCCE ROAD, BE REAPPOINTED TO THE CAC FOR ANOTHER THREE-YEAR TERM; SAID TERM EXPIRING MARCH 2010.

MOTION PASSED UNANIMOUSLY. VOTE: 5 to 0.

Aye – Pomeroy, Osborne, Athey, Clifton, Markham.  
Nay – 0.  
Absent – Funk, Tuttle.

MOTION BY MR. ATHEY, SECONDED BY MR. OSBORNE: THAT KATHERINE SHEEDY, 356 S. COLLEGE AVENUE, BE REAPPOINTED TO THE CAC FOR ANOTHER THREE-YEAR TERM; SAID TERM EXPIRING MARCH 2010.

MOTION PASSED UNANIMOUSLY. VOTE: 5 to 0.

Aye – Pomeroy, Osborne, Athey, Clifton, Markham.  
Nay – 0.  
Absent – Funk, Tuttle.

**27. 9-B-3. APPROVAL OF POLLING PLACES**

MOTION BY MR. OSBORNE, SECONDED BY MR. POMEROY: THAT THE POLLING PLACES FOR THE APRIL 10, 2007 ELECTION BE APPROVED AS FOLLOWS:

District 1 – Pilgrim Baptist Church, 1325 Barksdale Road  
District 2 – Aetna Fire Station #8, Ogletown Road  
District 3 – Aetna Fire Station #7, Thorn Lane  
District 4 – St. Thomas Episcopal Church, 272 S. College Avenue  
District 5 – First Presbyterian Church Memorial Hall, 292 W. Main Street  
District 6 – First Church of the Nazarene, 357 Paper Mill Road.

MOTION PASSED UNANIMOUSLY. VOTE: 5 to 0.

Aye – Pomeroy, Osborne, Athey, Clifton, Markham.  
Nay – 0.  
Absent – Funk, Tuttle.

**28. 9-C. OTHERS: None**

**29. 10. SPECIAL DEPARTMENTAL REPORTS:**

**A. Special Reports from Manager & Staff:**

1. Approval of Quarterly Property Assessment Rolls

MOTION BY MR. OSBORNE, SECONDED BY MR. POMEROY: THAT THE QUARTERLY PROPERTY ASSESSMENT ROLLS BE RECEIVED.

Mr. Markham asked when was the last time a quarterly report was done since this was the first one he has seen since he was on Council. Ms. Garriz advised that this report was given to Council once a year, usually in January of each year. Mr. Markham did not understand why they only got it once a year. Mr. Luft explained that although it was referred to as the Quarterly Property Assessment Rolls, it covered the period from January through the end of June.

Question on the Motion was called.

MOTION PASSED UNANIMOUSLY. VOTE: 5 to 0.

Aye – Pomeroy, Osborne, Athey, Clifton, Markham.

Nay – 0.

Absent – Funk, Tuttle.

**30. 10-A-2. PENSION PLAN PERFORMANCE REPORT – 4<sup>TH</sup> QUARTER, 2006**

---

Mr. Luft advised that total assets increased by about \$3.5 million and the return on total portfolio was 12.17%, which exceeded the total annual plan target of 7.5%.

Mr. Clifton asked if the City was looking into moving away from being self-insured for workmen's compensation. Mr. Luft said that was something the new Finance Director and Mr. Zusag would be looking into.

Mr. Markham questioned the administrative expenses, which totaled roughly \$89,000 for the quarter. He said he did not know the makeup of the pension plan but to the normal individual there were no load funds, which have no costs and could save \$200,000 that could be put back into the pension plan.

Mr. Zusag explained that given the size of the plan, there were \$38 million in assets and the administrative expenses were about \$300,000+ a year. The target was to keep administrative expenses under 1% for the year. He said that cost was not unusual for a pension plan's administrative expenses. That cost included the cost of the actuary as well as the cost of the asset managers, and the cost for principle for writing the checks to the retirees. In terms of whether the City considered no load funds, for an institutional investor for a pension plan, Mr. Zusag said you had to take prudent steps to invest the money. Mr. Markham said he would check with his financial planner to compare the cost.

MOTION BY MR. POMEROY, SECONDED BY MR. ATHEY: THAT THE PENSION PLAN PERFORMANCE REPORT – 4<sup>TH</sup> QUARTER, 2006, BE RECEIVED.

MOTION PASSED UNANIMOUSLY. VOTE: 5 to 0.

Aye – Pomeroy, Osborne, Athey, Clifton, Markham.

Nay – 0.

Absent – Funk, Tuttle.

**31. 10-B. ALDERMAN'S REPORT**

MOTION BY MR. OSBORNE, SECONDED BY MR. MARKHAM: THAT THE ALDERMAN'S REPORT DATED MARCH 6, 2007 BE RECEIVED.

MOTION PASSED UNANIMOUSLY. VOTE: 5 to 0.

Aye – Pomeroy, Osborne, Athey, Clifton, Markham.

Nay – 0.

Absent – Funk, Tuttle.

**32. 10-C. FINANCIAL STATEMENT**

MOTION BY MR. OSBORNE, SECONDED BY MR. POMEROY: THAT THE FINANCIAL STATEMENT ENDING JANUARY 31, 2007 BE RECEIVED.

MOTION PASSED UNANIMOUSLY. VOTE: 5 to 0.

Aye – Pomeroy, Osborne, Athey, Clifton, Markham.

Nay – 0.

Absent – Funk, Tuttle.

**33. 10-D. REQUEST FOR EXECUTIVE SESSION RE PENDING LITIGATION (Durkin v. Newark)**

---

MOTION BY MR. POMEROY, SECONDED BY MR. MARKHAM: THAT COUNCIL ENTER INTO EXECUTIVE SESSION WITHOUT THE PRESS TO DISCUSS PENDING LITIGATION RE DURKIN V. CITY OF NEWARK.

MOTION PASSED UNANIMOUSLY. VOTE: 5 to 0.

Aye – Pomeroy, Osborne, Athey, Clifton, Markham.

Nay – 0.

Absent – Funk, Tuttle.

Council entered into Executive Session at 9:40 pm and returned to the table at 10:12 pm. Mr. Clifton announced there was no action necessary.

**34. Meeting adjourned at 10:13 pm.**

Susan A. Lamblack, MMC  
City Secretary

/pmf