

THURSDAY-2:00 P.M.

DECEMBER 20, 2007

CLOSED SESSION

Following a motion made by Councilman J. A. Stimatz, seconded by Councilman R. E. King, Mayor Atkinson declared the meeting into Closed Session. Those attending were: Mayor Atkinson, J. M. Baker, L. A. Hummer, R. E. King, B. S. Meggs, E. K. Rivers, V. C. Watts, City Manager R. C. Olson, City Clerk D. S. Pierce-Tamplen, City Attorney W. H. Morgan and County Board of Elections Attorney M. Cox.

1} **CONSULTATION WITH CITY ATTORNEY – CALL FOR AN ELECTION:**

Mayor Atkinson called upon City Manager Olson for comments.

Mr. Olson stated that the problem with this whole issue as you are all aware of, he has written you a half dozen memos and every time he writes you a memo, things change. The reason that he was a little late for this meeting was that he, along with Bill and Mike Cox were on the phone with Susan Nichols, who is a Special Deputy Attorney General that handles the election issues. At this time he would like to turn the meeting over to Mike to basically explain what happened yesterday in Raleigh and what affects it has. There is a provision in our Charter we cannot follow. We were following the Charter and we have been told by the Attorney General's office that our Charter provision is invalid because we are required to get pre-clearance of any election by the Department of Justice. Then there has to be 75 days between that and the actual election. Now, he will turn it over to Mike.

Attorney Mike Cox said that he never knew the real meaning of monkey wrench until now. He asked to give a brief update on what has happened in the last few days. Mr. Stallings basically withdrew his appeal on Tuesday roughly around 11:30 a.m. so that matter was no longer before the State Board. Yesterday, Mr. Brooks' appeal went forward. He thinks it was the third case on the agenda. It was very confusing what happened at the State Board. He cannot sit here and tell you that he understood everything that happened. He is not sure anybody in that room did yesterday. We had a few surprises. He will tell you that Mr. Brooks' petition was dismissed, his appeal was dismissed. That was very clear to him. What was not clear were some comments made by the Chairman of the State Board of Elections and in the motion to dismiss Mr. Brooks' appeal a part of the motion was to hold a new election. So there are some questions about that and how it applies to the City Charter. He cannot sit here and tell you that he

knows the answers right now because it happened yesterday and it was very quick. There has been some concern about Mr. King being certified and the Chairman yesterday made some comments that should not have happened. He made them publicly. That may have been a little premature because you had four of the top election officials in the State say that Mr. King should have been certified - Mr. Gary Bartlett, John McLean, Susan Nichols and Don Wright. There was some concern yesterday when the Chairman said that and he will say that was the chairman that said that and it was not a vote on that and it was not part of the motion, but it may have some type of litigation come from that from other sources. He does not know what else to add about that. That is kind of a summary of where we were yesterday and he thinks that we were all trying to figure out what happened after the meeting.

Mr. Olson said that it is still the belief of everyone involved that the Chairman misspoke when he said what he said. That he was not familiar with the election laws and everything else.

Mr. Cox said with all due respect to him, it was something that we were not prepared to address.

Mr. Olson said that he thinks that he has admitted that privately to people too. He did something that he should not have done but that is beside the point.

Mr. Cox said that it is easy to make a knee jerked reaction because there are certain laws that a protest opinion on when you can certify and when you cannot. This is complicated to say the least. You have a perfect storm brewing here. The experts do not have the answers right now. He can't expect himself as a general practitioner to be able to set here and tell you everything that happened yesterday. Based on the advice that we are given right now, you probably need to defer setting an election date. There are some issues with the pre-clearance that need to be addressed. He will let Rich and Bill discuss that matter with you.

Councilwoman Hummer stated that she gave the Mayor a heads up that she had some concerns. She wants to say to both attorneys, Mike and Bill Morgan that Bill has kept us informed all the way through. He has told us we should wait until after that ruling and we kind of ignored that. We went ahead with the swearing in and she feels like that she knows that Rich said that the Attorney General gave us permission but she spent the whole night going through the paper trail and everywhere, we were advised by our legal counselor that it would be advisable to not to hold the meeting on the 10th and not even swearing in on the 20th. After the State Board of Elections rules it is ten days before it is valid. That is one thing. But, the main thing is Bill, the memo that you sent to us after talking with Don Wright and Bob Joyce. When the memo started out you were

trying to find out if Darryl could be seated and be able to vote at the next meeting. Then you found out and it says, "Statutory law clearly requires that no one be certified with an appeal pending." This is nothing personal but that is the law. She got really alienated because she wrote a letter and asked that same thing. That is the key in her opinion. That was the answer that we got. We just tapped danced all around that.

Mr. Morgan said the problem was that was what he was told initially, but then there was certainly a one hundred degree turn.

Ms. Hummer said that she can walk in the City Clerk's office and look up the General Statutes relative to this. She can interpret it; she has interpreted it to a point. If those people in Raleigh can't read or can't interpret legally they do need to have an educational program. She has heard that it puts Mike in a bad position. Here we sit and we have this going now. Her comments were going to be we should not go forward with the special election. If Michael Brooks goes to court Rickey could be removed until a law suit is settled. We could all be.

Mr. Olson asked to interject something and Bill if you disagree with him to say so. We are required to swear in at the first meeting in December anyone that has been certified. That is State Statute. We had no other option but to swear Councilman King in. That is the law. And, the Local Board of Elections got the advice from the State Board of Elections that they could certify Rickey and they certified him.

Mr. Morgan said not that they could but they should.

Mr. Olson said that they shall certify Rickey. We had no other recourse but to do that. If former Councilman Brooks files a legal challenge we will have to deal with that at that particular time. But, he will tell you right now that Michael believes that flippant comment by the Chairman of the Election Board gives him some type of standing where he will prevail in some type of legal issue and that is the consensus of everyone including the Attorney General's Office that he misspoke and he thinks after they talked with him in a sidebar that he realized that he misspoke. But now a seed has been planted in a former council person's mind that somehow he is going to prevail or he stands a good chance to prevail.

Ms. Hummer said that we still have that ruling that was given to Bill and it is per NCGS 163-182.15 and even though the Board said that we should certified him we should have questioned that more so that we wouldn't be sitting here going through this now. It could turn into a real mess and cost us a great deal of money because we got some misinterpretations. That really concerns her.

Councilman J. A. Stimatz said that he thinks we can have these concerns but he thinks that we had no choice. The State told the Board to certify King and the Board had to certify and it is not our place to challenge that. It is not our place to second guess that. If they certify a candidate we have to accept and we are required to swear them in. He doesn't think that we did anything wrong. We went against the advice of our attorney in that we followed what was handed to us by the State. If the State messed up that is their issue and they are going to have to deal with it and that is his understanding. He sees no fault ought on anybody at the County or the City level on this issue. We are just stuck in this place and that is fine. The question is where do we go from here. He doesn't want to beat it to death.

Ms. Hummer said that she understands what you are saying but when a council person sees something wrong you have the responsibility to publicly question that. And, you say that we had no other choice, we had the right to question it. You know, even the Mayor Pro Tem could have to be done over. All of this could be a holy mess. And, it is not laying the blame as we don't know where the blame lies.

Mayor Atkinson asked Mr. Olson if the audio portion was on out in the lobby. The speakers are on.

Mr. Olson replied that it is not going to the TV.

Mr. Olson said let him explain what the predicament is that we have right now. Section 2.0 of the Charter says, "This Council must meet within ten days after a vacancy has been declared." We have to hold the election between 45 and 60 days. He has handed you a sheet of paper that says, "Section D, the date of any new election order in the county covered by pre-clearance requirements of Section 5 of the Voting Rights Act of 1965 shall be set no earlier than 75 days from the date of the new election ordered in order to prepare, submit and obtain pre-clearance approval." Basically our Charter is invalid because of that.

Councilman Stimatz said thank you Mr. Mayor, it says new orders, new elections ordered by the State Board of Elections. This is not a new election ordered by the State Board of Elections, this is a special election chartered that we are going to do. He is just saying that this can be interpreted two different ways.

Mr. Olson said that this is a new election that has been ordered by the State Board of Elections.

Mr. Cox said that they caught us 100% off guard yesterday with that. That was not even to us a real issue. Part of the State Board's order to him doesn't make sense because they dismissed Mr. Brooks' appeal but at the same time said that

we are ordering a new election. He honestly thinks that some of these were knee jerk reactions yesterday. Ms. Nichols from the Attorney General's office is a little confused.

Mr. Stimatz asked if we had recourse in the courts.

Mr. Olson said that we just had these discussions and that is why he was late and Susan Nichols he believes gave a very justifiable opinion on this. Stallings' term has expired. We don't have a vacancy of a city council person now.

Mr. Stimatz said that we do have one.

Mr. Olson said that we do but we don't. Technically as soon as Darryl's term expired on December 10th there is no one in that seat. There is nothing that says that he holds over and stuff so you have to have a new election ordered by the State Board of Elections. If it happened prior to his term expiring then the City Council can order the new election. Is that basically what Susan said?

Mr. Cox said that he thinks so.

Mr. Olson said that it is splitting hairs here but he understands her reasoning and thinking behind that. It makes very logical sense. Darryl is no longer on the City Council as his term expired on the 10th so now the State Board of Elections has to order a new election to fill that seat even though we have a vacancy and he believes the Charter allows you because you have a vacancy to fill it.

Councilman E. K. Rivers said that the problem that he has with the whole thing is that from day one and he stated it for the record is that there is not fair representation from the Third Ward. Our Charter specifically and even if it had been a protest or the election had been stopped by the Justice Department is that because we don't have an A seat and we don't have a B seat. You just have two seats per ward. Not an A seat and not a B seat like it use to be in the past. So what has occurred and if you read in your Charter it will tell you that the qualified Council Member is seated until their successor has been established. So, in reality the Third Ward only has one representative. That is the reason why they were saying King should not have been certified because you don't have an A or B seat. Our Charter does not break it down as an A or B seat. It just says the top two vote getters get in. If the Third Ward had been challenged then because it says that the Third Ward Representatives should have been seated until their successors have been elected. So right now, you can't bring two people back in to one seat. His problem is because the Third Ward only has one representative. That is not what the City agreed and that is what the Justice Department is looking into.

Mr. Olson said but the other issue is we have had vacancies among the City Council before and he thinks Dianne said that Council appointed someone to fill the slot.

Mr. Rivers said yes that was before we went to the two-year term. We use to have an A, B and C. Now you don't have any such things as an A, B, C. Now, we don't have any such things anymore. You just have the top two vote getters and they are elected. Because if we go 180 days the Third Ward only has one elected official and that is not fair representation on this Board. It should be two and the rules of our Charter specifically states that the candidate holds there until their successors have been established. So, in this case, how are we going to fill the one seat that is missing? You can't do it because you do not have an A and B unless Stallings remains seated.

Mr. Olson said that Stallings can't be seated because he no longer resides in the Third Ward.

Mr. Rivers said then that means that the Third Ward has no representation.

Mr. Olson said that you would have that issue if anyone vacated their seat, moved out or died. It would be a shorter period of time he will grant you that.

Mr. Rivers said but then you would have a particular seat, but when a person runs and all he is saying is when the election time comes we do not have an A or B seat and that is something that Council might want to amend. But, the whole key to it is that our Charter says that until his or her successor has been elected they remain in their seat until. If he resigns today, that is not the Fourth Ward seat that is Kirk Rivers' seat. Ms. Watts holds a seat, so we have individual seats, so if he resigns that is totally different. In an election both of our seats are up. If the Justice Department had said that the election was to be held off before we had the election we could go a whole year and a half and the people that are in the seat will hold their seat until the election. Is that true?

Mr. Olson replied partly. Say for example, who is to hold over in the Third Ward?

Mr. Rivers said that is why they said that Councilman King should not have been certified because there is not an A and B seat.

Mr. Olson said that he will tell you that under the philosophy of that individual stays until his successor has been qualified which is typical in any type of election but because of the way that we elect people it makes it very difficult because does Michael fill that seat as we know that Darryl can't fill that seat.

Mr. Rivers asked why?

Mr. Olson said because like you said there is not an A or B seat. There are just two holes up there that are filled by two individuals.

Mr. Rivers said that if the Council wants to see it in black and white, go to Session Law 2001-227, House Bill 636, Article II, Governing Body, Section 2.2. City Council; Composition; Terms of Office. It says that, "the Council shall be composed of eight members who shall serve terms of two years or until their successors are elected and qualified." In the eyes of the Department of Justice we are not operating accordingly because we do not have eight council members.

Mr. Olson said that he would tell you right now it is very common for a city council to not have a full city council because of someone leaving or someone dying, someone moving or something. The problem is that it takes so long to get someone to fill that spot.

Mr. Rivers said that he is just telling you what is a special election and what is a new election. If he resigns that is a special election. We just came from a new election and it is verified based off when cities get sued they postpone an election it is not a special election when the Department of Justice releases them to have an election. The Department of Justice can hold up an election and it is not a special election when they hold it up. They are just now saying that you have been granted the authority to hold your election that you have. We are in a new election and not a special election.

Mr. Olson said the order will be issued by the State Board of Elections to call for a special election. It is very specific it is a new election for the second seat in the Third Ward. That is what their order that is to be issued will be. Unless it is challenged by the DOJ we have to abide by that. The problem is and it gets back to what he handed out to you all. Our Charter contradicts Section D of that because we have that 60-day window. It tells us that we can't have an election for at least 75-days. So, we worked very hard on getting that time line to you and he is telling you right now that time line won't work. He can't give you a date right now. There is no way that he can give you a date right now because we have to have it pre-cleared and everything else. Unfortunately what they may cause happen is that the seat in the Third Ward may be vacant for an extended period of time. Not just three months it could be six months because of the pre-clearance and everything else.

Councilwoman V. C. Watts said that she wanted to get back to Councilmember King. She has been listening to everything that everyone has said but the fact of the matter is that he rightly won in the election. She understands the stipulation as to what Ms. Hummer has been saying about him being certified at the proper

time. But, the bottom line is that he would be certified because he won. And, she wants to know and she is not hearing it what are we doing and what are we going to do with the situation with Mr. Rickey King. You guys have jumped over to the election and she wants to know if his seat is stable.

Mr. Olson replied that his seat is stable. The State Board of Elections has no authority over a candidate once they have been sworn in. The Court System is the only one that can change that. That is what Michael Brooks was told yesterday. They told him that they did not have jurisdiction over that. He is a city council person right now and you have to run this through the court system.

Mr. Morgan stated that until a court order rules otherwise, Rickey is a representative for the Third Ward.

Ms. Watts said her next question is and from what you have said and this is her fear, is that a possibility here in this case. She sees that smile over there.

Mr. Cox said that lawyers always get the question of can you sue. Actually you can always sue somebody. Michael got a little bit of ammo yesterday that may send him but he can tell you that four of the top election officials in this state have said that Mr. King is properly certified.

Mr. Olson asked to take it one step forward. This is where he thinks it will come to light. The petition was dismissed yesterday. Ok, right now Rickey King could be sworn in today. What is the harm and what is the problem. There is none. Because the election could be certified as all protests have been dismissed and it doesn't change Rickey's status. He is still a council person. The worst thing that could happen is he took office twenty-two days early. That is the only thing. That is it.

Councilwoman Hummer said that she has read someplace if for instance someone files a lawsuit, the court can order all of us to run again. They can do pretty much what they want too. They can kick everything out and she has read that.

Mr. Morgan said that they could but that is highly unlikely.

Mr. Stimatz said a meteor could hit this chamber too.

Ms. Hummer said that she wants to say this that is why she did not raise her hand for mayor pro tem because like Kirk said, there was not full representation from the Third Ward. May she ask another question? Did we not get pre-qualification for what we did or what we are trying to do today? In other words we were not pre-qualified to call for this.

Mr. Olson said that we were under; he was under the belief that since our charter was pre-cleared that basically, first of all to be honest with you, he never knew that was a rule and regulation until it was brought over by Mike today. But, our charter and it is his understanding that it has been pre-cleared. So basically, the Justice Department by approving that time frame, he believes circumvented that rule. That ruling is after our Charter approval so it would take precedent, would it not Bill?

Mr. Morgan said that this is not statutory law as it is an administrative regulation. He thinks that the General Rule would be the more restrictive control. This is more restrictive than the Charter so this would control. But, regarding the election process, we were told a week ago that our Charter superseded the general statutory law. He can say one supersedes the other in all cases and it is usually the more restrictive that supersedes the less restrictive.

Councilman Stimatz asked to clarify. The problem is that the Board ordered a new election. If they had been mute, this administrative ruling would not have come into effect. Our Charter would have taken precedent and what he is hearing is that the Deputy Attorney General has said since they passed that ruling that changes the ballgame. We felt that we were going to call a special election and that was fine until the Board yesterday said that they were going to order a new election. That is what kicked this in. He does not think that we were under a delusion and he thinks that we all read it right and we all know what we are doing. Nobody expected the Board to call for a new election. That is like out of the blue. And, following that not a statute but an administrative ruling says you have to do this. If he understands it correctly, our Charter is in effect has been approved by DOJ and that is our pre-clearance and that is why we would not have to go through that hoop. But, since it is a new election called by the State, now this Administrative Rule comes into effect. We could ask Justice for relief, correct?

Mr. Olson said that we could but he thinks right now it would be better if we go to the Department of Justice and get the Special Election date. Just jump through the hoops and everything else. Do what they want us to do and everything else.

Mr. Stimatz said that they may not require us and his point is why don't we ask them. Why don't we ask them, say look, until they ordered this new election we proposed X. We were following our Charter.

Mr. Morgan said that we can't do anything until we have a written order and when is that to be issued. Do we know that?

Mr. Cox said that is a good question what with the holidays being here. His hunch is it will probably be the week after Christmas to get a written order.

Mr. Stimatz said then his thought would be if we go to DOJ and ask them. It is an administrative question. It is not statutory and it is not judicial it is administrative.

Mr. Olson said that part of our problem is that we have to give DOJ a date. He is not sure what date we will give them. That is our problem.

Mr. Stimatz said that we should ask them if we can in fact follow our time line from the date that we are told that we can go with it. Can we use the 60-day instead of the 75-day. That is all and we just say to them that we are pre-cleared, this is our thing and we thought that we were going to use it and rather than waiting the extra 15 days can we do 60. That is all.

Mr. Olson replied that the way that he looks at it Tony, if we wait the extra 15-days whoever gets sworn in is going to miss maybe one council meeting. Whoever gets elected plus if there is a run-off election that individual is going to miss another council meeting. That is the case now if we have a run off election under the time frame that we have given you. This is something new to himself, Bill and Mike and we are learning as we go through this process.

Mr. Morgan said not only that but he is afraid that the folks in Raleigh are learning as we go through with it also.

Mr. Olson said that when we don't have the expertise we look to the Institute of Government and we look to the Attorney General's office. We have done that.

Councilwoman Hummer said that she would like to ask the City Clerk haven't we always had to get pre-clearance from the Department of Justice for an election. This is something else by delaying it or asking for special change in circumstance. They could come back and say they didn't get pre-clearance so that could put another wrench in it. It has always been her understanding that we have to afterwards.

Mr. Rivers said it was when the City got sued. What happen is when the city got sued any annexation had to be approved. The City agreed that basically all election annexations you have to have an equal representation on this Council. The DOJ calls on every annexation. Every annexation he gets a call because what they are doing is they are checking to make sure that the agreement that was reached and it was in 1984 and they are making sure that this Council has an equity base and that is part of it. They have to review all and make sure that everything is within fairness to the citizens of the City of Elizabeth City. His

whole thing is that all he is asking that he would love for this to get done as quickly as possible because his whole question is that we are operating in violation of our own Charter because it says that we must have eight members. That is the only thing that he is asking that we move forward and then his other question is. If that be the case, and if this rule stated that the person has been disqualified then that means that Brooks is still the sitting councilmember with King. Our charter states that the sitting Councilmember stays until his successor has been selected. He is not interpreting it as that but that is what it says.

Mr. Olson replied that he doesn't think that the Charter contemplated someone losing an election. That is someone who vacates the seat during a term.

Mr. Rivers said that he is giving you heads up and he is just telling you and you can take it for what it is worth. It says that eight people will be seated and as far as his answer was, he does not see it. You can call it how you want.

Mr. Olson said that gets back to the A and B seats.

Mayor Pro Tem Baker said that it does say that eight people shall be seated but further on in Section 2.8 it has everything to do about vacancies and when they occur and how they are to be filled. All of that is in the same charter.

Mr. Rivers said that is why he called for a special election and not a new election.

Ms. Baker said this is what we are dealing with right now.

Mr. Rivers asked if there was a difference between a new and a special election.

Mr. Cox said that he has asked that question. Because the State Board limited it to just that second seat, he does not know if there is or not. He hasn't gotten a straight answer to that because he has asked that himself.

Mr. Rivers said that if it is a new election, then the person should be seated but if it is a special election which you just read; these are the purposes for having a special election.

Mr. Morgan said that he doesn't know if there is really any difference. Only we can call for a special election. The State Board can order a new election.

Mr. Rivers said that he is not for a new election. He doesn't think Councilman King should have to go through that as he won hands down and no questions asked. And, he is not for that as there was no contest against Councilman King.

Mr. Cox said he was very surprised yesterday when they said a new election. It caught everybody off guard. They did specify the second seat. He is sure of that.

Mr. Morgan stated that we should wait until after we have the written order from Raleigh. We then call for a special meeting here, set the election 75 days or so from that time frame. Go ahead and put our dates in for the filing periods, etc and then we seek the pre-clearance from the Justice Department. He doesn't believe that we should send something to the Justice Department now because we don't have an order.

Mr. Olson said that he agrees but he doesn't think we should have another special meeting but take it up at our first meeting in January. We have met to discuss filling the vacancy. This is this meeting here. By the time we get the order it will probably be the second or third or fourth of January. Probably the third of January so that ten days will put us in the next Council meeting. During this period of time we will get a hold of the Department of Justice. Have those discussions with them and try to feel them out on some dates and some other stuff. Then hopefully by the time we come to you that we will have a date that will be "tentatively" approved by the DOJ. We will still have to seek formal approval of all our time frames and everything else. What concerns him is the charter. We have problems with the wording of the Charter. Now, we have had an almost impossible time trying to fit a special election within 60-days. We just can't do it under the wording of the Charter.

Councilman Stimatz said that he is going to throw this out as he is having a tough time believing that anything that we have discussed needed to be done in Closed Session. There is no reason at all. This should have been discussed in open session. He doesn't see anything sacred here. He is having a real problem with all that has been discussed not being made available to the public.

Mr. Rivers said that he asked Rich that when he came into the meeting.

Mr. Stimatz said that he feels that we have beat this thing to death and this is stuff the public needs to know. They need to understand. They need to understand that people have different views. As Ms. Hummer pointed out, we have a right to question it. She had that question and people should know that was her question. If Ms. Watts is concerned about the election then they should know that. He has a real problem with this. He asked for advice from the attorney.

Mr. Morgan said that it was certainly proper to go into Closed Session to seek legal advice but we have strayed. If you would like to open the doors and each

Council member say what they have said. He thinks it was proper to go into Closed Session.

Mr. Stimatz said that he is not saying that it wasn't.

Mayor Atkinson stated so he is hearing the council members, the attorney and the manager say that it is time to go out of Closed Session, would everyone agree to that.

All said yes.

Councilman Stimatz said that he had a point of order. He would like to have the minutes transcribed verbatim and made available to the public.

Mr. Rivers said that he agrees.

A consensus was made to open the closed session minutes of this meeting.

2} RETURN TO REGULAR SESSION:

Mayor Atkinson entertained a motion to return to regular session.

A motion was made by Councilman J. A. Stimatz, seconded by Mayor Pro Tem J. M. Baker to return to regular session. Those voting in favor of the motion were: Stimatz, Baker, Hummer, King, Meggs, Rivers and Watts. Against: None. Motion carried.

Mayor Atkinson declared the meeting back into full session.

Dianne S. Pierce-Tamplen, MMC
City Clerk

Stephen S. Atkinson
Mayor