

**CITY OF NEW BERLIN  
PROCEEDINGS OF THE COMMON COUNCIL  
Tuesday, September 26, 2006**

**Please note: Minutes are unofficial until approved by the Common Council at the next regularly scheduled meeting.**

Mayor Jack F Chiovaturo called the City of New Berlin Common Council Meeting to order at 11:20 PM after the Public Hearing, Committee of the Whole and Privilege of the Floor.

Present were Aldermen Hopkins, Augustine, Gallagher, Harendra, Hegeman, Moore and Ament. Also present were: City Attorney Mark Blum, City Clerk Marilyn Gauger, City Engineer JP Walker, Facilities Maintenance Director Bob Schulpius, IT Director Nick Roethel, Park, Recreation and Forestry Director Mark Schroeder, Project Engineer Cathy Swalbach, Division Engineer Eric Nitschke, Finance Director Mike Holzinger, Fire Chief Ed Dobernig, Fire Department Office Coordinator Deb Delikat, Streets Supervisor Don Ullman, Streets Office Coordinator Sue Hanley, Librarian Katie Schulz, Police Captain Frank Zsohar, Utility Manager Rick Johnson, Community Development Director Greg Kessler, Utility Manager Jim Hart, Police Lieutenant Mike Glider, Police Chief Steve Morris, Assistant Fire Chief Tom Dobernig, Police Lieutenant Randy Alf, Assessor Paul Koller and Planning Services Manager Nikki Jones.

***This meeting was noticed on Thursday, September 21, 2006 in accordance with the Open Meeting Law.***

Those present recited the Pledge of Allegiance.

**REPORTS**

City Clerk – There was a 17.9% turnout for the Partisan Primary. Elections results for each ward are on the City's website at: [www.newberlin.org](http://www.newberlin.org). The General Election is Tuesday, November 7<sup>th</sup>.

Council President – none

Mayor – Proclaimed the following: National Breast Cancer Awareness for October; Energy Star/Change a Light Day for October and Prostate Cancer Awareness Month for September

City Attorney - none

**COMMUNICATIONS - none**

**PLAN COMMISSION**

**Ordinance #2330 that approves the rezoning of property known as S & B Retail Investments LLC located at 14901-14955 W. National Avenue**

Motion by Alderman Ament to adopt Ordinance #2330 that approves the rezoning of property known as S & B Retail Investments LLC located at 14901-14955 W. National Avenue from B-2 to B-2/PUD and amend the City Center PUD to include the following language as Addendum A, "All applications for new construction within the New Berlin City Center PUD shall be required to submit an application for Conceptual Use, Site, and Architecture. Applicant shall submit conceptual site plan and architectural elevation sketches for review and comment by the City and its design consultants" and accept the Plan Commission Report. Seconded by Alderman Hegeman and carried unanimously.

**Resolution #06-40 that approves the Honeyager Field Subdivision Final Plat**

Motion by Alderman Ament to approve Resolution #06-40 that approves the Honeyager Field Subdivision Final Plat for the property located at 14055 W. Howard Avenue and accept the Plan Commission Report. Seconded by Alderman Hegeman and carried unanimously.

**Ordinance #2331 that approves the rezoning of property known as Woodridge Community Church**

Motion by Alderman Ament to adopt Ordinance #2331 that approves the rezoning of property known as Woodridge Community Church located at 13800 W. Howard Avenue from R-4.5 to R-4.5/C-2 and accept the Plan Commission Report. Seconded by Alderman Hopkins and carried unanimously.

**BOARD OF PUBLIC WORKS**

**Ordinance No. 2329 to amend the Municipal Code STREETS AND SIDEWALKS Section 230-13**

Motion by Alderman Augustine to adopt Ordinance No. 2329 to amend the Municipal Code STREETS AND SIDEWALKS Section 230-13 with the wording in sentence 1 to read: "and keep grass mowed in such areas unless designed to remain natural". Seconded by Alderman Moore and carried unanimously.

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## **UTILITY COMMITTEE**

### **Construction Contract for the Sanitary Sewer Relay Project On Honey Lane and Elm Grove Road**

Motion by Alderman Gallagher to approve the Construction Contract for the Sanitary Sewer Relay Project On Honey Lane and Elm Grove Road at an amount not to exceed \$446,158.70 which includes lining, relay, manhole replacement, test and seal grouting to the lowest responsive and responsible bidder Underground Pipeline, Inc of New Berlin contingent upon approval of the work from the Milwaukee Metropolitan Sewerage District and the Wisconsin Department of Natural Resources with source of funds from Wastewater Impact Fees. Seconded by Alderman Hopkins and carried unanimously.

### **Water Utility 2007 Operating and CIP Budget**

Motion by Alderman Gallagher to approve the Water Utility 2007 Operating and CIP Budget in the amount of \$2,660,283. Seconded by Alderman Ament and carried unanimously.

### **Wastewater Utility 2007 Operating and CIP Budget**

Alderman Gallagher indicated the Utility Committee did not get to this item at their meeting tonight.

### **Construction Contract for Shouldering on Forest Knoll Drive**

Motion by Alderman Gallagher to approve the Construction Contract for Shouldering on Forest Knoll Drive to the lowest responsive responsible bidder Payne and Dolan, Inc of Waukesha in an amount not to exceed \$67,769.50 with source of funds from Forest View Water Main Replacement Fund. Seconded by Alderman Hopkins and carried unanimously.

## **WATER RESOURCE MANAGEMENT COMMITTEE**

Motion by Alderman Harenda to remove from the table Resolution No.06-38. Seconded by Alderman Hopkins and carried unanimously.

**Motion on the Table:** Motion by Alderman Harenda to approve Resolution No. 06-38 To Reallocate Funds from Buena Park Drainage Improvements Storm Sewer Projects (2004 CIP Budget) to Industrial Park Drainage Easement Project. Seconded by Alderman Hegeman and carried unanimously.

### **2007 Water Resource Management Utility Operating Budget**

Motion by Alderman Harenda to approve the 2007 Water Resource Management Utility Operating Budget in an amount not to exceed \$1,345,481. Seconded by Alderman Ament and carried with Alderman Gallagher voting no.

**Clerk's Note:** *Per Accounting Manager Ralph Chipman the correct amount for the 2007 Budget is as follows: Revenues at \$5,045,258; Expenses at \$4,960,780 and the CIP at \$157,000.*

Motion amended by Alderman Harenda to move from Acct #52130 Salary to Acct #59060 Drainage in the amount of \$34,145. Seconded by Alderman Ament and carried with Alderman Hopkins, Alderman Gallagher and Alderman Moore voting no.

### **Professional Service Contract for the Industrial Park Drainage Easement Final Design**

Motion by Alderman Harenda to award the Professional Service Contract for the Industrial Park Drainage Easement Final Design to HNTB Corporation in an amount not to exceed \$31,500 with source of funds from CIP 2004 Account. Seconded by Alderman Hegeman and carried unanimously.

## **MAYORAL APPOINTMENTS**

### **Parks, Recreation & Forestry Commission**

Motion by Alderman Ament to approve the appointment of Allison R Thompson with term expiring 4/30/2007. Seconded by Alderman Hegeman and carried unanimously.

### **Safety Commission**

Motion by Alderman Hegeman to approve the appointment of Assistant Fire Chief Scott Gillard with indefinite term during employment. Seconded by Alderman Ament and carried unanimously.

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**Youth Advisory Board**

Motion by Alderman Augustine to approve the appointment of Kyle Lesniewski/District #2 with term expiring 5/31/2007. Seconded by Alderman Hegeman and carried unanimously.

Motion by Alderman Moore to approve the appointment of Joe Levene/District #6 with term expiring 5/31/2007. Seconded by Alderman Ament and carried unanimously.

**DEFERRALS, REFERRAL & TABLED ITEMS**

**Sts Constantine and Helen Greek Orthodox Church /TABLED 3-15-05**

See after Closed Session.

**Ordinance No. 2316 that denies the rezoning of property known as Tiziani located at 4485 S. Racine Avenue to amend the previously approved Q-1/PUD Ordinance No. 1046 to more accurately reflect the legal description of the property and to include additional permitted uses for Lot 1 only with the Q-1/PUD for Parcel No. 1231.996.003/REFERRED BACK TO PLAN COMMISSION 6-13-06**

No action taken.

**Water Resource Management Utility Reimburse Water Utility for Digger's Hotline locate requests at \$20,000 per year beginning 2007/TABLED 8-8-06**

Motion by Alderman Harenda to remove from the table. Seconded by Alderman Ament and carried unanimously.

**Motion on the table:** Motion by Alderman Gallagher to approve the Water Resource management Utility reimbursing the Water Utility for Digger's Hotline locate requests at \$20,000 per year beginning 2007. Seconded by Alderman Ament and carried with Alderman Hopkins, Alderman Harenda and Alderman Hegeman voting no.

Motion by Alderman Harenda to reconsider Water Resource Management Utility budget. Seconded by Alderman Augustine and carried unanimously.

**2007 Water Resource Management Utility Operating Budget**

Motion by Alderman Harenda to approve the 2007 Water Resource Management Utility Operating Budget in an amount not to exceed \$1,345,481. Seconded by Alderman Ament and carried with Alderman Gallagher voting no.

**Clerk's Note: Per Accounting Manager Ralph Chipman the correct amount for the 2007 Budget is as follows: Revenues at \$5,045,258; Expenses at \$4,960,780 and the CIP at \$157,000.**

Motion by Alderman Moore to add in the \$20,000 to the Water Resource Management budget. Dies lack of a second.

Motion by Alderman Harenda to approve the 2007 Water Resource Management Utility Operating Budget in an amount not to exceed \$1,345,481. Seconded by Alderman Ament and carried with Alderman Gallagher voting no.

**Clerk's Note: Per Accounting Manager Ralph Chipman the correct amount for the 2007 Budget is as follows: Revenues at \$5,045,258; Expenses at \$4,960,780 and the CIP at \$157,000.**

**Resolution No. 06-38 To Reallocate Funds from Buena Park Drainage Improvements Storm Sewer Projects (2004 CIP Budget) to Industrial Park Drainage Easement Project/TABLED 8-22-06**

See Water Resource Management Committee above.

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**CONSENT AGENDA**

Motion by Alderman Ament to approve all of the following items listed. Seconded by Alderman Hegeman and carried unanimously.

**MINUTES** - Common Council minutes from August 22, 2006.

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**UTILITY AND FINANCE**

September 13, 2006

- Water Utility claims in the amount of \$86,992.12, Sewer Utility claims in the amount of \$25,216.42 and Bi-weekly claims in the amount of \$607,560.91, all of which represents payment to vendors.

September 27, 2006

- Water Utility claims in the amount of \$54,830.84, Sewer Utility claims in the amount of \$205,811.06 and Bi-weekly claims in the amount of \$1,260,093.84, all of which represents payment to vendors.

**LICENSES & PERMITS**

**Bartenders**

- Bartender License for the year 2006-2008 to Matthew Dempsey.
- Bartender License for the year 2006-2008 to Christopher Bean, Terra Buttke, Ramzan Charania, Robert Fugger, Ashok Gajjar, Kenneth Hallberg, Brian Key, Pamela Magruder, Sheila Krawczyk, Amanda Mottl, Lidia Garcia, Khalid Parvez.

**Extension of Premise and Loud Speaker Permit**

- Nickels Pub/13915 W Greenfield Avenue for an outside party on Saturday, October 7, 2006 until 7:00 PM.

**Fireworks Permit**

- New Berlin West High School/18695 W Cleveland Avenue for Friday, October 6, 2006 & waive the Fire Department fees.

**MISCELLANEOUS**

- Resolution No. 06-41 Final Resolution Relating To Industrial Development Revenue Bond Financing On Behalf Of Infracore Manufacturing Corp. And St. Thane LLC.
- Award contract for Municipal Area Fiber Optic project at an amount not to exceed \$36,400.
- Resolution No. 06-43 A Resolution To Transfer Funds From Contingency Account and Municipal Area Network Account to the Information Technology Equipment Account.
- Set a Public Hearing Date of October 2, 2006 before Plan Commission for Mrs Sandel for a petition filed to rezone the property located at approximately 18790 W Cleveland Avenue (Tax Key's 1184-986 and 1187-995) from R-1/R-2 and C-2 to R-1/R-2 and C-2 to Field Delineate the C-2 Zoning District.
- Special Assessment Review Committee be abolished.
- NB School District request to hold regular and special meetings of the Board of Education for 2007.
- ***Set Public Hearing on City of New Berlin Operating Budget for Tuesday, October 24, 2007.(This item should have been removed from the consent again because it was not a unanimous vote; however the motion was approved at Committee of the Whole)***

**DEFERRED, REFERRED & TABLED ITEMS**

Request for Approval Use of the former library as a City Community Center/food pantry/REFERRED TO FACILITIES (STAFF) COMMITTEE AND PARKS, RECREATION & FORESTRY COMMISSION

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**ITEM/S REMOVED FROM CONSENT AGENDA**

**Bartender License**

Motion by Alderman Gallagher to approve the Bartender License for the year 2006-2008 for Ashley Wagner. Seconded by Alderman Moore and carried with Alderman Hopkins and Alderman Harenda voting no.

**Resolution No. 06-39 Resolution To Extend The Deadline For The Use Of Park & Recreation Trail Facilities Impact Fees For An Additional Three (3) Years**

Motion by Alderman Moore to adopt Resolution No. 06-39. Seconded by Alderman Hopkins and carried with Alderman Ament voting no.

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**2007 City of New Berlin Operating Budget**

Motion by Alderman Harenda to recommend to Common Council the 2007 Operating Budget in the amount of \$31,480,061 with a general tax levy at \$21,188,365, with a tax rate of \$5.0105 per \$1,000 of assessed value. Seconded by Alderman Hopkins and carried with Alderman Gallagher, Alderman Moore and Alderman Ament voting no.

- **Set Public Hearing on City of New Berlin Operating Budget for Tuesday, October 24, 2007.** (This item should have been removed from the consent again because it was not a unanimous vote; however the motion was approved at Committee of the Whole.)

**ORDINANCES/RESOLUTIONS – none**

*City Clerk Gauger read the following:*

**CLOSED SESSION**

The basis for the items to be discussed in Closed Session are as enumerated in Section 19.85 (1) (g) of the Wisconsin State Statutes, conferring with legal counsel for the governmental body who is rendering oral or written advice concerning strategy to be adopted by the body with respect to litigation in which it is or is likely to become involved, more specifically: Sts Constantine & Helen Greek Orthodox Church and Walgreen Excessive Assessment Claim.

Motion by Alderman Augustine to go into Closed Session at 12:30 PM. Seconded by Alderman Moore and carried with Alderman Ament voting no per roll call vote.

Motion by Alderman Hegeman to reconvene in Open Session at 2:00 AM. Seconded by Alderman Augustine and carried unanimously.

**OPEN SESSION**

**Sts Constantine and Helen Greek Orthodox Church /TABLED 3-15-05**

Motion by Alderman Hegeman to remove from the table. Seconded by Alderman Augustine and carried unanimously.

**Discussion and possible action on settlement of Sts Constantine and Helen Greek Orthodox Church Claim and PUD application.**

Motion by Alderman Gallagher to approve the settlement agreement that is drafted which includes the PUD that is attached to that Settlement Agreement. Seconded by Alderman Hegeman.

Motion by Alderman Ament to defer to allow me some time to get with the neighbors primarily in that area and several other interested people and explain to them what has transpired and what this means to them in the neighborhood. Seconded by Alderman Harenda, motion failed with Alderman Harenda and Alderman Ament voting yes.

Mayor Chiovatero asked City Attorney Mark Blum if he had any comments.

City Attorney Mark Blum: "Let me just briefly try and relate where we've been in this process. As you may recall this all transpired as a result of an application by Sts. Constantine and Helen Greek Orthodox Church requesting a rezoning of their site adjacent to the corner of Cleveland and Stigler to rezone the property from a residential district to an institutional use. That application was denied by the City in 2002. At that point the Church sought relief from the denial in the Federal District Court under the Religious land use and Institutionalized Persons Act.

The City moved for summary judgment and the trial court found in favor of the City, however that determination was subsequently reversed at the level of the Seventh Circuit Court of Appeals in a decision that came down early last year. I want to read a paragraph from the Seventh Circuit's determination where the Court described the action that should be taken as a result of their finding that the City had violated RLUIPA. "All that is required is that we reverse and instruct the District Court to grant the relief requested by the Plaintiffs but to stay its order for 90 days to give the City a chance to negotiate with the Church such arrangements as may be necessary to eliminate any possibility that the land might be put to a non-religious institutional use without the City's consent."

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Thus the Court ordered that the Church's original petition to rezone to institutional be granted unless the parties were able to come up with a resolution to deal with the City's concern that the site could be subject to other institutionalized uses beyond a church. Since the Seventh Circuit's determination there has been a great deal of communication between the Church and the City reviewing the issue and as a result of those discussions we've come up with the draft planned unit development ordinance that you have before you. Without going through that in detail it allows for the Church to utilize the site for the construction of the Church and other accessory buildings including a school building, a recreational facility and other structures as are set forth in their application. The PUD goes on to provide, however, that the rezoning to an institutional PUD would not take place until such time as the Church pulls a building permit to construct the facility that they applied for. The application was submitted to the City on September 22, 2006. That application provides plans for the construction of the Church and the other related buildings I have referred to. This rezoning will not take effect until such time as that building permit is applied for. The Plan Unit Development Ordinance also provides for some limitations on what otherwise would be permitted uses in an institutional district That is the Plan Unit Development Agreement that is before you.

The settlement agreement provides for both resolution of the land use issue which I have just been describing, as well as the financial component. The financial terms set forth in that document calls for the City to pay the attorney's fees of the Church as are required under the Religious Land Use and Institutionalized persons statute in the sum of \$170,000.00 and then \$200,000.00 to be paid out over time with respect to the Church's damages as a result of the delay in the approval of this particular project.

The normal process that the City would utilize to approve a PUD ordinance is as you know set forth under the statutes. That procedure is that we would receive an application, it would go to public hearing and would be reviewed by Plan Commission and then would come before you for ultimate determination. That is not the process which is taking place here. The reason for that is the language I sighted to you earlier from the Seventh Circuit's determination which basically said that the Court is ordering that the Church's initial application be approved. Since the parties have negotiated a resolution of these issues it will now be reduced to the form of an order, which will be supplied to the Court for its review and approval. Assuming that you would consent to the settlement agreement the next step would be for this to be reviewed by Judge Stadtmueller and then hopefully approved. The bottom line is that this settlement is being reviewed as a result of the Court's order as opposed to the normal review process that would be required under the Statute.

In that regard I would note that the City did receive a protest petition against rezoning which was filed this afternoon with the City Clerk's office. It contains the names of seven individuals who are property owners on Stigler Road immediately to the west of this property. Normally the effect of a protest petition is that assuming that it is valid it would require a three-quarters vote of this Council to approve any rezoning petition. However in this case, since this is a judicially ordered rezoning that protest provision of the statute would not be applicable here. In addition, even if this were to be considered an appropriate protest petition there are some deficiencies in it the most notable being that the statute requires that the signatures be acknowledged and there is no acknowledgement provision in the protest petition as it is drafted. So my advice to you is that we would accept this protest petition but that your conclusion would be that it would not have any implications with respect to the vote that you would take with respect to the settlement agreement and the Plan Unit Development Ordinance. So that would be my comment with respect to the implications of that petition. With that are there any questions from members of the Council about the terms or the implications of this?"

Upon voting on original motion, motion carried with Alderman Harenda and Alderman Ament voting no.

**Walgreen Excessive Assessment Claim**

No action taken.

**ADJOURN**

Motion by Alderman Augustine to adjourn at 2:25 AM. Seconded by Alderman Hegeman and \_\_\_\_\_ carried unanimously.

Respectfully submitted:

Marilyn Gauger, CMC/WCMC  
City Clerk