REGULAR MEETING
April 6, 1998

CALL TO ORDER:

A regular meeting of the Beaverton City Council was called to order by Mayor Rob Drake in the Council Chambers, 4755 SW Griffith Drive, Beaverton, Oregon, on Monday, April 6, 1998, at 6:35 p.m.

ROLL CALL:

Present were Mayor Drake, Couns. Wes Yuen, Evelyn Brzezinski, Dennis Doyle, Forrest Soth, and Cathy Stanton. Also present were City Attorney Mark Pilliod; Chief of Staff Linda Adlard; Finance Director Patrick O'Claire; Human Resources Director Sandra Miller; Community Development Director Joe Grillo; Police Captain Paul Danko; City Engineer Terry Waldele; Project Engineer Bob Tamola; Assistant City Attorney Bill Kirby; Assistant Operations Director Ron Koppel, and City Recorder Darleen Cogburn.

CITIZEN COMMUNICATION:

Nell Langeluttig, 112470 SW 1st, Suite 201, Beaverton, said she was representing the Central Beaverton NAC and read from her letter (in the record). She reviewed issues surrounding the proposed Chronic Nuisance Ordinance and emphasized the three main points in her letter as follows: 1) Did the City Attorney have the desire and the courage to use the tool - the ordinance; 2) Where would the resources come from for the enforcement; and 3) The scope of the ordinance was limited to criminal activities.

Langeluttig concluded by suggesting the Council extend the proposed ordinance to civil nuisance or enact a parallel civil chronic nuisance ordinance.

Coun. Stanton asked if the main points of the letter were discussed at the NAC and a vote taken.

Langeluttig said the committee had not voted on the letter, but chronic nuisance issues had been discussed several times over the last six to eight months in the NAC meetings.

Mayor Drake said he also was concerned with her point about enforcement resources.

Langeluttig said the NAC was in an area with multiple family housing and several messy situations had been cited repeatedly but had not been cleaned up. She commented that Code Enforcement cited those areas over and over, and that was why she felt civil chronic nuisance was as important as criminal chronic nuisance.

Betty Bolz, 7305 SW Trillium Ave, Beaverton, noted that she wanted to bring to the Mayor and Council's attention that on 3/31/98, she slipped on a sidewalk on Hart Road by the Hearthstone Assisted Living Community. She said she had cut and blackened her eye. She noted she had talked to the Traffic Commission about the unsafe sidewalk situation in that location.

Mayor Drake asked if she had talked to Steve Baker, Operations Director, and said he had not heard of the situation from Traffic. He added that he appreciated her telling him about it.

Bolz said she had brought this up a couple of years ago and asked when it would ever be done. She emphasized that there were senior centers in the area and the sidewalk needed to be fixed to make it safe for everyone.

Mayor Drake said he thought they had worked on it and noted that she had brought multiple concerns to Council in the past. He said he would talk to Baker the next day.

Coun. Brzezinski said she wanted Bolz to know the Councilors were very sorry she had fallen; they did not want anyone to get hurt.

Henry Kane, 12077 SW Camden Lane, Beaverton, said he would not refer to his prior correspondence on Miller Sanitary. He explained the Land Use Board of Appeals (LUBA) would permit the City to withdraw the matter for further consideration and there was nothing lost by doing that. He said he was doing his best to expedite the record on appeal so the matter was not tied up for two or three months while LUBA had to resolve the objection. He noted that would be against his interest because if the record on appeal was not objectionable, then he would have twenty-one days, but if it was objected to, then he could campaign on it.

Kane said with respect to Tri-Met, the City should simply ask Tri-Met to keep its promise to the City and to the voters who voted for Westside Light Rail. He said they promised an esplanade and covered tracks. He noted that he had driven through Hillsboro and downtown Portland and the tracks were covered and he did not like the discrimination.

Kane said he understood that testimony was yet to be taken for the public nuisance ordinance on the agenda that evening. He said he would support the concept of private enforcement and suggested that consideration be given to graffiti enforcement provisions. He explained that graffiti was on the postal box in his neighborhood and proposed that neighbors could call the City to paint over the graffiti or to pick up some paint remover from the City.

Coun. Brzezinski suggested Kane call 629-0111, the non-emergency number and give the address where the graffiti was located. She said the police might be able to identify the party responsible for graffiti by taking a picture of it and comparing it to pictures on file. She said the post office

might be responsible for removing the graffiti from the post office box, but it needed to be reported to them.

Kane said that if the City did not have a graffiti ordinance, they should pass one. He noted that when he was on the Oak Hills Board of Directors they had a budget of $700 a month to clean up graffiti and vandalism.

Kane said the Garbage Haulers Association, which had very deep pockets, was financing Miller Sanitary's fight. He stated that it would take so much time and money and resources tying up the City Attorney's office for a routine maybe five or six figures. He said he felt that Mr. Kearns would put on a full fight to support the City's action. He suggested they look at the case of the City of Banks vs. Washington County, when no other County legal business was transacted. He said if the City responded with a full answering brief, it would take a lot of time.

Mayor Drake said regarding Kane's comment about the rail treatment in Hillsboro, Tri-met agreed up to a certain dollar amount and then Hillsboro picked up the rest. He understood the same was done for Portland.

Kane said to his knowledge, this was not offered to the City of Beaverton and a promise was made for $1.4 million to put in an esplanade and enhance the tracks. He noted that this was a sharing arrangement and he had been involved in that fight. He said Tri-Met was loaded with cash and there was no excuse for reneging on a commitment.

Coun. Brzezinski asked Mark Pilliod, City Attorney, if she was correct that Kane joined the City in the suit against Tri-Met, and that the City lost.

Pilliod said Kane was an intervener in that case and Tri-Met prevailed.

Coun. Brzezinski asked Kane for more explanation about his thought that the City should have private enforcement of the chronic nuisance ordinance.

Kane explained that the attorneys, who enforce the anti-trust law, are called Private Attorneys General. He said that such an attorney might have 100 cases, but they could only handle five and the other 95, without private enforcement, would be ignored, to the detriment of the public. He said in anti-trust law, for every case tried by the Anti-Trust Division or the FTC, about 200 were filed by private attorneys. He stated that the City Attorney's Office had any number of time-consuming responsibilities and enforcing this ordinance might not have the highest priority. He suggested the Council also vote in an anti-hobo and anti-camping ordinance.

Mayor Drake reported that the City had done a good job of enforcing the hobo issues and noted that at church he was told about one and by the next afternoon the police had the camp cleaned up. He stated that currently that ordinance was enforced.

COUNCIL ITEMS:

Coun. Yuen asked if there was an update on a call from Dick Schouten the past week regarding sidewalks on Davies.

Mayor Drake said Baker and some of his staff put out cones for a pedestrian/bike path along the bridge area. He said there were flaggers out on a daily basis and cones at night.

STAFF ITEMS:
There were none.

PROCLAMATIONS:

National Volunteer Recognition Week

Fair Housing Month

CONSENT AGENDA:

Coun. Yuen MOVED, SECONDED by Coun. Soth to approve the consent agenda as follows:

Minutes of the regular meetings of February 9 and March 30, 1998

98-81 Boards and Commissions Appointment

98-82 Bid Award – Janitorial Services for City Buildings

Contract Review Board:

98-83 Request for Additional Appropriation for Construction of SW Henry and Esplanade Road

Couns. Doyle and Brzezinski gave changes on the minutes of February 9, page 11, regarding Council liaison assignments to Darleen Cogburn, City Recorder. They noted that assignments had changed since that meeting and Coun. Yuen would be the liaison on Sister Cities.

Coun. Brzezinski asked that it be noted on those minutes that she did still want to have the survey every two years but it had been three years since one had been done.

Coun. Doyle asked, regarding AB 98-82, if the possible extension of the contract one more year was standard.

Pilliod said it was.

Question called on the motion. Couns. Yuen, Brzezinski, Doyle, Soth and Stanton voting AYE, the motion CARRIED unanimously. (5:0)

WORK SESSION:

98-84 Chronic Nuisance Ordinance

Bill Kirby, Assistant City Attorney, said he was there to talk about the Chronic Nuisance Ordinance, and how he envisioned it working. He reviewed the material he had given the Council.

Kirby said provision 918-030 of the ordinance was very simple and clear. He noted that there was an obligation on both sides of the coin: there was a positive obligation not to allow premises to become a chronic nuisance, and an obligation not to fail at preventing them from becoming a chronic nuisance. He reviewed what constituted a chronic nuisance from the definitions in the ordinance (in the record).

Coun. Stanton asked Kirby to be more specific for those who did not have a copy of the ordinance to review.

Kirby said there were things that were offenses in the criminal code for the State of Oregon and things that were offenses in the City code. He explained that what they wanted to do was choose those things that were well recognized as wrong, and criminal offences were thus recognized. He noted that the list had eight items, such as furnishing alcohol to minors, disorderly conduct, or intimidation/harassment. He said the list could be a lot longer, and there was nothing magical about there being eight items on the list. He said Portland's list included assault, menacing, sex abuse, public indecency, prostitution, littering, criminal trespass, theft, arson, gambling, and criminal mischief. He noted that in terms of graffiti, if a person tampered with someone's property without the permission of the owner, it would fall under criminal mischief.

Coun. Soth asked if this would address those kinds of things that were more properly under criminal code, rather than civil code.

Kirby said it would, and explained that one of the reasons for that was because the ultimate sanction would shut down a business for up to six months, which would be a huge sanction on a business. He noted that they wanted to let business owners know it was a serious case which they could go to jail for, and that was why only the criminal sanctions were listed. He reiterated that there was nothing magical about that list, it could be different.

Mayor Drake asked Kirby if he had mentioned abuse of a child, and certainly three times in one month at any place, considering how people view that crime, it would be something to add. He said as the public and Council gave input, he thought that was the type of thing they should add. He stated that he thought the offenses which were in the Portland ordinance were the kinds of things he and the Council would consider quality of life issues, and they could be included in Beaverton's. He said

whatever it would take to qualify and get past the court test, he and the Council would strongly support.

Coun. Brzezinski asked if Kirby wanted directions from Council on several issues.

Kirby said the list was the major issue where he wanted direction.

Mayor Drake said he thought that there were comments such as the ones by Langeluttig regarding the City's liability and responsibility, which needed to be addressed.

Coun. Brzezinski suggested they hear the rest of the presentation to see if their questions are answered.

Consensus was they should proceed with the presentation and then ask questions afterward.

Kirby said there was an obligation for the City to contact or at least make a diligent effort to contact the person in charge of the premises, to inform them that the City believed they had a chronic nuisance on their hands. He clarified that staff wanted the business owner to discuss how they intended to take care of the problem. He explained that, assuming that the person made a reasonable effort to come in and discuss the issues and had a plan, what they hoped for was that compliance would be achieved. He reviewed how the owner would come in and discuss the problems with someone from the Police Department about a plan to correct them. He explained that when there wasn't a solution, either because the plan fell through or no one came in to discuss the problem, then when the third offense occurred within a 30 day period, the matter would go to the City Attorney's Office.

Kirby reviewed the process for citing and penalties (in the record), and said it could probably be up to $600 per day. He noted that if they went beyond that, they would be opening the argument that the City would need to automatically provide for a jury trial. He further noted that at that level of penalty they might also run into the possibility of the argument that it was more of a criminal case than a civil case and then there would be the issue of court-appointed attorneys.

Coun. Stanton said 918-030C stated that "by fine of not more than $250."

Kirby explained that he had drafted it as $250 but it could be higher, and reported that Portland fined a maximum of $100 per day, and the City of Beaverton had a $250 per day penalty for tobacco offenses and for Code Enforcement. He said he used the $600 figure because that was the maximum penalty under State law for a traffic infraction and there was no right to a jury trial in a traffic infraction case. He reported that there were some defenses available, but if the City had attempted to notify the person, the defenses would probably always fail. He explained that if

someone had no actual knowledge that their premises were a chronic nuisance, and they had no ability to control the conduct that was the basis for the chronic nuisance, that would be a defense. He clarified they would receive the notice when two of the offenses had occurred, and informed that they were going to become a chronic nuisance. He said the trial would be in the court, not Council, because this type of case often became very fact-intensive, and could take two or three days in court.

Kirby noted there was an issue of determining if the court had the ability to impose the sanction of closure for 180 days. He said the proof was on the City and amount of proof was written in the ordinance as "Preponderance." He reported that there had been discussion in the Attorney's Office that the better approach would be to use the "Clear and Convincing Evidence." He explained that since it was essentially an ordinance that provided the opportunity to impose an injunction on a business from operating, the safer route was to use "Clear and Convincing Evidence." He noted that he would rather be "safe than sorry" and have the higher standard of proof. He explained that with a weak case that passed the trial court level, it could open itself up to judicial review at the appellate court level and ultimately fail because the City's ordinance had too low of a standard. He said if they got the injunction but could not get the person to comply, then they would be in contempt of court, and there were legal processes that could be used, and ultimately the person could go to jail.

Kirby said he thought he had covered the highlights of the ordinance.

Coun. Stanton read from second to the last sentence in the *Historical Perspective* of the agenda bill, about the circulation of the drafts and asked to whom the ordinance drafts had been circulated.

Kirby said it had been circulated to the attorneys and the police.

Coun. Stanton read the last sentence under *Information for Consideration* in the agenda bill, "The Oregon Constitution does not preclude a government from anticipating the secondary effects of activities that may involve expression." She wondered if the word "government" equaled jurisdiction.

Kirby said it would include state and local governments.

Coun. Stanton referred to 918.020 A, the last sentence, and asked regarding the statement "must be substantially contributed," if that meant it had to be proved by a preponderance of evidence.

Kirby said it would have to be proven in court that the nuisance activities which were occurring off the premises but nearby the premises, were connected to the activities occurring on the premises. He explained that there had to be a nexus between the two.

Coun. Stanton gave the example of a shopping center where some of the stores were closed, but activity was going on in the parking lot.

Kirby said the activities of the business when it was closed, did not have a connection to activities off the premises.

Mayor Drake asked if the operator knew it was going on and did not do anything about it, was it up to the store to provide security.

Discussion ensued and others said they did not think so.

Kirby gave the example of a convenience store where people were congregating after it was closed and said they would argue that there was no connection, and it would be a very fact-intensive case.

Coun. Soth said in relation to this being criminal vs. civil procedure, for the Code Enforcement, the ultimate adjudicating authority was the Council who could order an abatement, but in these cases it would be the Court. He agreed there were some things that should be included but did not want to get into a big laundry list that would make it harder to determine violations. He asked about the example of a tavern business being liable for the acts of someone who had been drinking in that tavern after they had closed or they were off of the premises.

Kirby said under certain circumstances they could connect the actions such as "littering" if you have your facts right.

Coun. Soth said that in the list Kirby had given, he also listed an Oregon Revised Statutes (ORS) reference. He asked if it would be appropriate to include anything in the ORS as covered.

Kirby said that was too much and explained that there were weird laws that did not have an implication in this. He reported that in Portland they put in ORS chapter 471 and 472 which related to liquor licensing and regulation, that if you are in violation of any action in those chapters three times in 30 days, then it would be a chronic nuisance activity. He said he would even be cautious of adding those sections.

Coun. Doyle referred to 918-020 A, and asked if the number three was a common practice, had it been court tested, and why was it three and not another number.

Kirby said three was the common number used since they would be trying to establish the chronic nature of the nuisance, rather than it being just an intermittent problem.

Coun. Doyle said he had seen somewhere that two had been thrown out by some definition from higher up that two was not a chronic problem, and could see three being a good number, given the size of the City.

Coun. Stanton stated that she thought she knew why not two, because when it happened, it would give the police a heads-up. She explained that on the second time, they would call the person in and have the discussion, and the third time they would act on it.

Coun. Doyle said in B of the same section, he would consider additional offenses, look at 471 and 472, and also look at the things they discussed earlier. He stated that he thought it should be expanded, and noted they had brought this up because they were feeling powerless to take care of some things that were their goals.

Coun. Soth asked if one of the reasons they wanted to use Beaverton Code (Code) instead of ORS, was that if it was a Code violation then it would be heard in Municipal Court, but if it was ORS it would go to District Court.

Kirby said it was not necessarily that way. He explained that Nos. 1-5 had both Code and ORS, No. 6 had only Code, and Nos. 7 and 8 had only the ORS. He noted that Nos. 7 and 8 were felony crimes and Code did not cover felonies. He clarified that on some of the other ones, basically the Code and ORS overlapped and prohibited essentially the same conduct. He further explained that when that conduct occurred in the City and a Beaverton police officer was called, he would charge the criminal violation under the Code and it would be processed through the Municipal Court. He said the procedural difference wasn't a defense between Code and ORS, and noted that if the person committed a felony and a misdemeanor together in Beaverton the entire case would go out to the County.

Coun. Soth said then if it was a felony they would go to the County District Court.

Kirby said if it was distributing drugs it would be a felony and prosecuted in Circuit Court in Washington County. He said they could have an acquittal on a criminal charge, but it could still be proven for the chronic nuisance.

Coun. Doyle stated that, regarding the list Kirby gave from Portland, he did not have a problem with any of those, and asked for input from others.

Coun. Yuen asked for clarification since he understood Kirby's comments this only applied to criminal nuisance.

Kirby said criminal conduct would be the basis for finding that there was nuisance activity.

Coun. Yuen asked if in 9.18.020B.6, it would only be related to the criminal portion, because that was a civil ordinance.

Kirby said that was correct. He clarified that would be considered under disorderly conduct and would almost make it unnecessary to include that in the ordinance. He noted that Coun. Yuen had made a good point, which

he had not noticed previously.

Coun. Yuen asked, because of the potential for confusion regarding the Chronic Nuisance Ordinance, would they be better off to change the short title to reflect that it was chronic nuisance related to criminal activity. He suggested that people could look at "Chronic Nuisance Ordinance" and think it covered, instead of criminal activity, such things as barking dogs and cars parked on the lawn for six months.

Kirby said they would be expanding the scope of this ordinance if they moved into the chronic civil-type nuisance. He said he wanted to make a comment that was just his instinct, but it seemed to him that if they had a chronic nuisance relating to civil infractions, he thought they would probably want a different sanction than closing the business for 180 days. He explained that they would typically be dealing with homeowners, and would not want to move them out of their house for six months. He suggested they would want some other sanction, such as a substantial financial penalty. He said it could be enough to cause people to want to comply, and an enhanced penalty if they did not comply. He explained that the reason he had not included the wording or reference to chronic criminal nuisance ordinance was he wanted to make it clear that procedures used to adjudicate violations of this ordinance were civil, not criminal out of an abundance of caution.

Mayor Drake suggested that Kirby think on that, and look into any other legal cases or ordinances that might apply to what Coun. Yuen's concern was.

Coun. Yuen noted that the ordinance referred to businesses, but it did not seem to pertain exclusively to businesses. He suggested that if there was a particular type of activity or place of activity that Kirby had in mind, that should be clarified. He explained that as it was, it did not appear to be restricted to businesses.

Kirby clarified that it did apply to real property that was privately or publicly owned.

Coun. Yuen said that in reading through, he could see that, but the way that Kirby had been describing it, sounded like he was referring to businesses.

Kirby said he would try to be clearer about how he was expressing himself.

Coun. Brzezinski said, regarding 918-020 A, she had a problem with the idea that they had to have a violation three times in 30 days or they would be home free. She explained that she was concerned with the establishment that had two violations each month. She suggested they might want to take a look at the proposed franchise agreement with TCI that MACC had just put together, for some ideas. She noted that there

were some issues in it related to customer service, such as if TCI fell below certain standards then MACC could impose penalties. She explained that if TCI were "bad" one quarter, then "good" the next quarter, then "bad" the next quarter, they would not go back to zero in terms of a fine each time they did better. She stated that she did not think they should get to start at zero at the beginning of each 30-day period.

Kirby asked what the maximum window they would be looking at would be, for three events to occur.

Coun. Brzezinski said she heard the rest of the Council saying per 30-day period, not calendar month. She wanted him to think through that.

Coun. Doyle suggested that maybe they should use three violations in 30 days, four in a quarter and six in a year.

Coun. Brzezinski asked, regarding 918.020 B, if they needed to actually list everything.

Kirby replied that he thought it was necessary, since they needed to give fair notice of what the violation was, and the sanction was pretty substantial.

Coun. Brzezinski said she thought rather than trying to come up with a list that night, she would like to see Portland, Bend and Ashland's lists, and the Councilors could make notations on those.

Mayor Drake said they could provide them with a list of the sections of the other cities' ordinances and then Council could submit things they liked and Kirby could incorporate them.

Pilliod noted that it was unfortunate that the police were not present, because he would be interested in knowing how often an establishment has three offenses happen in a 30 day period. He said he got the impression, based on the limited number of elements that they've inserted, that they had few examples.

Coun. Brzezinski said she assumed that after a work session they would go back and talk to those who should have input into it.

Mayor Drake responded that they would be doing that.

Pilliod said even though it was impossible to predict what additional crime precursor elements they might want to insert, they could amend it later if they found they had a problem in an area of violations.

Coun. Yuen asked for an explanation of page two, section F.2, "The *character* of the area nearby the Chronic Nuisance."

Kirby said a better word for *character* would be something referring to

zoning, i.e., residential, commercial, school, park, hospital, etc.

Coun. Yuen noted that he did not fully understand why the character of the nearby area would somehow regulate the fine. He explained that when he read it, he wondered if that meant the fine would be less in a lower-class neighborhood than in an upper-class neighborhood, and if so, he felt uncomfortable with that.

Kirby asked if the concept of the zones made sense, and that they would be looking at that in terms of how much harm had occurred. He noted that staff would be directing the court to consider certain factors in order to make a fair assessment of what type of fine was to be imposed. He asked if the nature of the zone was something important.

Coun. Yuen stated that if it was an illegal activity it was an illegal activity; no matter where or when it was occurring; the activity and legality of the activity would remain the same. He said his guess was that rather than the fine changing, it would be the immediacy of whether or not it was a chronic nuisance. He said he was not comfortable at all with the current wording and noted that it was also in section G.2.

Mayor Drake asked if that wording was taken from another ordinance and if so what was the intent.

Kirby said he thought it was possibly from both Bend and Portland.

Coun. Soth asked if it couldn't also be covered under number one, as the two were very similar.

Pilliod explained that the purpose behind that was for the court to determine what the appropriate sanction was. He noted that this was a list that the judge had to consider, and if you eliminate it you would make it discretionary rather than mandatory.

Coun. Doyle stated that he agreed with Coun. Yuen, and had already lined number two out in both places. He said, regarding 918-030C, he would suggest that the $250 fine was much too low as a maximum and he would not be uncomfortable with $500, as long as it did not mandate a trial with jury, etc. He said in this case, $500 - $600 would be more meaningful.

Coun. Soth suggested that if $600 was the trigger point for a jury, they should use $599.

Kirby clarified that they could go up to and including $600 with no problem, and he would amend it to that.

Coun. Stanton asked if Kirby had run this by the Landlord Association.

Kirby said Sam Wade and Steve Silvas had been working with him on this, but he did not know if it had gone to the Landlord Association.

Coun. Stanton suggested that the Landlord Association should have a chance to review it.

Coun. Stanton asked if, regarding 9.18.030 C, the fine was per violation, not per day.

Kirby said it was written per violation, but asked if they would be in favor of per day.

Coun. Brzezinski noted that if it went on day after day, the business would be closed. She said she could see the civil violations continuing on a daily basis, but with these kinds of things, she thought it should be per violation, rather than per day.

Kirby suggested that when they reached three nuisance activities, then each further violation would be $600.

Coun. Stanton asked, regarding 9.19.030 F number 4, on whom the effect would be, the City at Large, the people within 300 feet, or the police who had to respond.

Kirby said all of the above.

Coun. Stanton said she thought it had to be on those affected, the neighborhood, the City at large, etc., and said the effect on whom should be clarified.

Kirby said it would be the effect on members of the community.

Coun. Stanton asked if the claim of violation could be brought by someone other than the City.

Kirby said Henry Kane suggested that they could empower members of the community to bring a case.

Coun. Brzezinski noted that she thought what Kane was saying was that it should not always have to be the City Attorney who had to do it.

Coun. Stanton said it could be such that it would be brought up on behalf of the City by a citizen.

Kirby explained that the bigger a policy issue was if you empowered an individual in the community to bring a lawsuit to enforce an ordinance on behalf of the City, it would implicate City resources.

Coun. Stanton noted that it would be unwise to let just anybody come forward with a complaint against their neighbor, and the City would have to prosecute it or bring it forward.

Kirby reported that the past week he had spent a great deal of time involved in an eviction between a group of people who the landlord claimed were gang members and who the former tenants claimed were victims of discrimination. He clarified that what they were asking for in the litigation did not involve the City of Beaverton or any government entity directly, but did involve the gang-related files maintained by the police department. He noted that it had been a lot of work and there were documents which had to be provided and some which cannot be released because of ongoing criminal investigation. He explained that if someone got aggressive about it, it might mean they would be in front of a Federal Court Judge, the City arguing that these files had to be kept privileged, and asking for the State of Oregon to intervene, because some of the documents had come from the Oregon State Police.

Coun. Doyle stated that he was going to think long and hard about all of that, since the remedy was already there for any private party.

Kirby said that was distinct from what Kane was talking about: empowering individuals to act as Attorney Generals.

Coun. Doyle reiterated that the remedy on the individuals or a group's behalf was already there.

Coun. Soth noted that as far as he read it, the Council would give the City Attorney discretion. He said if the attorney desired to have outside counsel delegate, then as usual, they would come to the Council for approval to do so.

Kirby explained that it was meant to provide for those cases where, on due consideration and review of the facts of the law, it was just best not to proceed. He said they were empowering the City Attorney's office to use discretion whether to bring a case or not and hold them accountable, but also to provide for the discretion to say that this was not a case that should be taken to court.

RECESS: Mayor Drake called for a brief recess at 8:10 p.m.

RECONVENED:

The regular meeting reconvened at 8:18 p.m.

Mayor Drake noted that they were on page three.

Coun. Stanton said she could go over her questions with Kirby separately. She went on to ask, on page 3, section C, what the difference was in "bringing action" and "commencing action."

Kirby said there was no difference; commence was more of a legal term.

Coun. Doyle said the difference was that one was on behalf of the City

and the other was on behalf of themselves

Coun. Stanton asked, regarding section D, who would retain jurisdiction.

Kirby said no one would. He explained that once the court released its jurisdiction, it did not have it and no one else would get it. He said the concept was for the court to recognize that the City had the authority to enforce the ordinance.

Coun. Stanton asked what "unless sooner released" meant in section F.

Kirby explained that meant it could be less than 180 days, and it would be up to the judge's discretion.

Coun. Stanton asked if it was always occurring in a parking lot, how would they close the parking lot.

Kirby said the premises would include the building on the property.

Coun. Stanton asked what the potential impact on the Municipal Court could be.

Kirby said every jurisdiction they spoke with said that the real beauty of an ordinance like this was it forced people to take action to comply, and hopefully there would not be an impact on Municipal Court.

Coun. Soth commented that on page 3, in regard to what Coun. Stanton was asking, it said to him that the judge could impose 180 days, but he could modify it.

Coun. Yuen noted that, regarding page 2, 9.18.030 C, there was no minimum fine, but there was a maximum fine, and wondered if this was the kind of thing where the City would want a minimum fine.

Kirby reminded the Council that there also was the sanction to have an injunction and shut the building down, but if they wanted to have a minimum fine he thought they could.

Mayor Drake noted that some people thought that, at times, judges exercise too much discretion, and he would like to see a minimum fine.

Coun. Doyle agreed and suggested $250.

Coun. Soth said up to $600, the judge could do as he pleased, and would have all the discretion in the world, but a mandatory minimum would not allow the judge to have any discretion.

Coun. Doyle suggested the judge could have discretion between $250 and $600.

Coun. Brzezinski stated that she would be willing to say that if the premises were closed there would be no fine. She explained that a fine between $250 and $600 if the premises were allowed to continue to operate, still allowed the judge discretion.

Kirby said they could say that the business had to close for a few hours each night.

Coun. Brzezinski asked if number 3 on page 6, meant the fine.

Kirby said that was correct.

Coun. Brzezinski said she did not understand how an individual could be liable for a business or corporation.

Kirby said it should be a corporation, a business *or* an individual.

Coun. Yuen commented that the discussion of the minimum fine was a good one. He noted that the Council set up the policy they wanted to follow, and they wanted to take control as much as they could. He said he understood that the Councilors thought there should be a fine, and a minimum fine rather than leave it up to the judge.

Pilliod suggested they give it some thought, and maybe they could tie the minimum amount to something that was close to the cost of prosecution, including investigation. He explained that it was not a dollar figure per se, but allowed an assessment, and something that could be established by affidavit. He said these would be deemed "court costs" that would be imposed as a forfeiture on the defendant.

Coun. Doyle agreed that it made sense to tie it to recovery costs. He noted that it could be tied to some language that if 9.18.040 F was used, it could allow the judge to mitigate any dollar amount of court costs.

Coun. Brzezinski commented that her feeling was that if it fell below the trigger point of $600, fine, but it seemed like the costs would always be higher than that.

Pilliod said the judge could decide how much time it should have taken for the case.

Coun. Brzezinski suggested they discuss it further and do more research.

Coun. Stanton said, regarding 9.18.050 A-4, she wondered who or what determined "unsatisfactory."

Kirby said that was a good point, and one approach was they simply try to get to a meaningful conversation about the problem and sincere effort, but it was very subjective. He noted that it was easy to judge someone who did not show up, but more difficult to judge someone who did not

participate. He said that should be analyzed.

Coun. Stanton asked if they were still talking to the “officer of greater rank,” as referred to at the end of the second sentence.

Kirby said that was correct.

Coun. Stanton noted that 9.18.070, regarding “threatened” nuisance, was too subjective and vague.

Kirby explained that tied into the point where the City would have to go directly to court, and the concept of a threatened harm, which was the type of thing that triggered a temporary restraining order. He said he would get some case law and explain it to her, and would also look at “threatened” in terms of this ordinance.

Pilliod said in sections A & B, “preponderance” could be changed to “clear and convincing.” He noted that in section C, under affirmative defense, he took that to mean that the establishment of that defense is as written, by preponderance of the evidence.

Kirby explained that the concept was what burden of proof the defendant would be held to, to prove their affirmative defense. He said it would be better to allow the defendant to use the lesser burden of preponderance of evidence.

Coun. Brzezinski noted some typos on page 6, which were noted by Kirby.

Coun. Brzezinski said she did not understand how an apartment complex could be closed.

Kirby said she was correct that it would be difficult, and the court could say it did not make sense to close it.

Coun. Brzezinski said her other comment was related to number 4 and said the Central Beaverton NAC letter raised some good points about potential costs. She commented that she did not understand number 4 because it sounded like people who had moved into the premises after the notice, so they would not have anything to do with the violation.

Kirby said number 4 came from Ashland, which was the only ordinance with that provision. He explained that he kept it because they were talking about an ORS 90.100 - residential tenant, not a commercial tenant. He noted he was concerned about relocation and said they did not think they would be in that situation, so they might be able to get rid of that section.

Mayor Drake said they had been required by certain property purchases to relocate tenants, which had cost $12,000 - $15,000 each. He stated that the City wanted to be fair to innocent third parties, but at what point should

it start and stop and how could they control what those costs were. He said condemning a building to purchase it was different.

Coun. Brzezinski suggested they get rid of the section.

Coun. Yuen asked if a tenant could sue the landlord for those same costs.

Kirby said the tenant could use breach of contract.

Coun. Stanton noted that would be putting the burden on the innocent bystander to recoup the costs. She said if they were looking at trying to get their costs out without number 4, any tenant who found themselves evicted by the City because of something that happened in a different apartment, had no recourse but to sue to owner of the building.

Mayor Drake gave the example of a methamphetamine lab, and wondered what that would do to the other units.

Kirby said it would have to be assessed by DEQ. He explained that would be a very fact-specific situation, and they would have to assess where the harm was and how many units were affected by what the harm. He noted that it was entirely possible the activity affected only one apartment. He said they might not enjoin the apartment building from doing business, but instead impose the penalty. He said they could impose a screening process to select their tenants, and a court would have to decide what was most appropriate.

Coun. Stanton noted that the Central Beaverton NAC letter was looking at other types of neighborhood issues, such as Code Enforcement issues, but that was not what they were looking at that night.

Kirby asked if they found they could combine the two, would they be interested.

Consensus was they did not want to do that.

Pilliod asked if they wanted another work session on the ordinance.

Mayor Drake said they could have a limited work session, but should get their comments back to Kirby ahead of time.

Coun. Doyle said he would hate to have this come up as an ordinance and then get it torn apart again, and a work session would be best.

OTHER BUSINESS:

Mayor Drake called their attention to his memo regarding a fee waiver request he received from Tualatin Hills Park and Recreation District (THPRD).

Coun. Doyle MOVED, SECONDED by Coun. Soth, to approve the Fee Waiver Request from THPRD, to waive the fees for the application by THPRD for the location of two flagpoles in Griffith Park next to the Jack Rosenburg stage, as outlined in Mayor Drake's April 6, 1998 memo (in the record).

Question called on the motion. Couns. Yuen, Brzezinski, Doyle, Soth, and Stanton voting AYE, the motion CARRIED unanimously. (5:0)

ADJOURNMENT:

There being no further business to come before the Council at this time, the meeting was adjourned at 8:59 p.m.

Darleen Cogburn, City Recorder

APPROVAL:

Approved this 29th day of June, 1998

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Rob Drake, Mayor