

# REGULAR MEETING - MARCH 6, 2007

The Common Council of the City of Michigan City, Indiana, met in regular session on Tuesday Evening, March 6, 2007, at the hour of 7:30 p.m., local time, in the Common Council Chambers, located in the lower level of the City Hall Building, 100 East Michigan Boulevard, Michigan City, Indiana.

The meeting was called to order at 7:30 p.m. by Council President Willie Milsap, who presided.

The Pledge of Allegiance to the Flag and a short period of silent prayer were observed.

Roll call was authorized and the following were noted present and/or absent:

**PRESENT:** COUNCIL MEMBERS Evelyn D. Baker; Patricia Boy; Joseph Doyle; Phillip Jankowski; Virginia Martin; Ronald Meer; Willie Milsap; and Paul Przybylinski (8).

**ABSENT:** COUNCIL MEMBER Charles Lungren (excused) (1).

## A QUORUM WAS NOTED PRESENT.

### APPROVAL of MINUTES

President Milsap inquired whether there were any corrections, deletions, or additions to the minutes of the Regular Meeting of February 20, 2007, and, hearing none, the minutes were approved as printed.

### REPORTS of STANDING COMMITTEES

There were no reports.

### REPORTS OF SPECIAL OR SELECT COMMITTEES

Councilwoman Martin reported on the meeting with the Sanitary District regarding the Tryon & Meer Road Sanitary Sewer Project.

Councilwoman Martin also reported on the workshop with the Fire Department, Union, and City Council in regards to testing and applications.

Councilwoman Boy submitted the following formal report for the benefit of the public, media, and the written public record concerning the controversial hiring of a out of town Attorney as the Council's representative.

The committee to find an attorney for the Council (Chairperson Mrs. Martin, Mrs. Baker, and Mrs. Boy) met on Saturday, January 13, from 10:30 until 3:00. We interviewed all eight candidates for the position, asking all eight the same five predetermined questions, which were designed to help us find an attorney who would best fit the needs of the Council. Council members Milsap and Meer were also in attendance, and monitored the process, although they did not participate or interfere with the questioning or scoring process.

Based on the responses to the questions, we each independently scored each question, for each candidate. When the last candidate had been interviewed, we tallied the score sheets and compared our lists in ranked order.

All eight candidates met the qualifications, would be available as needed, and any one of them would have been an excellent choice, but in comparing our results, we each had the same three candidates as our top three scorers, and Mr. Meyer had the highest scores. He was thus our first recommendation, based on his interview score, individual qualifications, and experience. As an added benefit, he has no conflicts of interest in the city, a significant point when considering the city and the council recently had to hire an Indianapolis law firm to represent them, due to conflicts of interest or appearances of conflict for nearly every other attorney or law firm in the area, including the City Attorneys, Espar and Evans, and our Council attorney, Alevizos.

There were only a few points difference among the remaining candidates' scores. As a result, we gave a list of three recommendations to the Council, and discussed all eight candidates in an Executive Session. We had predetermined that the only names that would be made public would be those that were nominated in the Council meeting. As Mr. Meyer was the first nominated, and he was duly elected, no other names were or will be released. We sincerely appreciate the interest and spirit of public service shown by all the candidates in considering this position.

Councilman Meer also commented on the hiring of the Council Attorney.

Councilman Przybylinski reported on the Solid Waste District meeting.

## REPORTS of OTHER CITY OFFICERS and DEPARTMENTS

City Planner John Pugh submitted the following correspondence to the Council in response to Council President Milsap's request to report (verbal/written) on the status of the Well's Chair Building, 200 E. U.S. Hwy. 20, Michigan City, Indiana:

Dear Councilman Milsap:

Per your request for the status on the above-reference building, please be advised that this building is owned by Construction Services Co., Mike Krachinski. The building is used for storage of construction materials by the owner. The building is secure, stable and does not present a hazard to the public. It is listed for sale.

This department will continue to monitor the condition of the building.

There were various comments made by City Planner Pugh, Council President Milsap, and Sharon Carnes (414 E. Coolspring Avenue) regarding the Well's Chair Building.

## PETITIONS

There were no petitions.

## COMMUNICATIONS

The following communication was submitted by Mayor Oberlie at the night of the Council meeting:

**TO: Mayor Chuck Oberlie**

**FROM: BAKER & DANIELS**

-- Richard L. Hill, Esq.  
-- Randolph R. Rompola, Esq.  
-- Allison M. Sell, Esq.

**DATE: March 6, 2007**

**RE: Common Council Resolutions Regarding Herman Kittle Development**

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We have reviewed the two (2) resolutions which you had forwarded to us, which we understand are to go before the Common Council (the "Common Council") at its meeting this evening, which relate to the proposed multi-family housing project on Pals Road.

With respect to the one paragraph resolution requesting that the Mayor take action to prevent the developer from proceeding with the project including, if necessary, filing a law suit, the resolution appears not to take into account the application of I.C. 36-7-4-1109. Section 1109, as you know, provides that when a completed application for a permit is filed, the statutes, ordinances, rules, development standards and regulations in place at the time of the filing apply to the permit. In our view, we do not believe a credible argument can be made that the BZA overruled the Common Council's zoning ordinance adopted in October because the BZA, applying Section 1109, determined that at the time of the filing of the building permit, the property was zoned R-3. The evidence presented at the BZA hearing indicated that the building permit filed was complete, consistent with the standards of the Building Department, subject to departmental reviews which are a common occurrence upon the filing of a building permit.

As we have indicated previously, our research does not lead us to the conclusion that the City would have a particularly strong case as a plaintiff challenging the annexation and zoning actions taken previously with respect to the property. It would appear to us that the better action for the City to possibly pursue would be a challenge to Section 1109 itself, based upon the information available to us, with respect to the timing of the filing of the building permit and the completeness of the permit as determined by the Building Department.

We are not aware of any challenges to Section 1109 since its adoption in 2006. We have not researched what legal challenges may be possibly raised by the City if it were to consider challenging Section 1109. However, it should be noted that should the City determine to pursue that course of action, it is almost certain that the developer would pursue an action against the City for damages to the extent it believes it is harmed by such an action. The City would want to carefully consider the possible causes of action to ensure that it has a meritorious claim. We have no information to know what the amount of damages claimed could be, but given what we know about the scope of the project, we presume alleged damages would be considerable.

We briefly reviewed the additional resolution you provided to us. The resolution appears to recite many of the arguments raised at the BZA hearing challenging the developer's appeal of the denial of the building permit. It is not clear to us that any of these claims would support a reversal of the BZA ruling.

If the City determines to pursue an action challenging the determination of the BZA or the application of Section 1109, we believe that the City should also have a firm understanding of the potential liability the City would be exposed to in the event that it were determined that its claims are without merit. We, at this point, are unable to ascertain the potential for damages. As we have indicated above, we do not believe the City is in the best position to challenge the old annexation and zoning. We also at this point have not researched what possible challenges may exist to the legality of Section 1109, but we believe that, to the extent the City desires to pursue litigation, challenge to Section 1109 may be the City's most viable option.

Should you have any questions, please do not hesitate to call.

## RESOLUTIONS

The being no objection, the Clerk read by title only "**A RESOLUTION OF THE MICHIGAN CITY COMMON COUNCIL REQUESTING THE MAYOR TO PURSUE LITIGATION TO VERIFY THE LEGALITY OF THE DEVELOPMENT AND CONSTRUCTION OF THE HERMAN & KITTLE PROPERTIES, INC. HOUSING PROJECT ON PAHS ROAD**", as Introduced by Paul A. Przybylinski and Co-Sponsored by Patricia Boy.

Councilman Przybylinski moved for the adoption of the Resolution, seconded by Councilwoman Boy.

Councilwoman Boy submitted and explained the following author's amendments **A RESOLUTION OF THE MICHIGAN CITY COMMON COUNCIL REQUESTING THE MAYOR TO PURSUE LITIGATION TO VERIFY THE LEGALITY OF THE DEVELOPMENT AND CONSTRUCTION OF THE HERMAN & KITTLE PROPERTIES, INC. HOUSING PROJECT ON PAHS ROAD**:

Whereas statement 1: line 6, after "Coolspring Township, LaPorte County, Indiana" add a comma after "Indiana" and delete "and is"

Amendment 1:

Page 2, line 6: after "erroneous and unlawful" add "and the BZA has in effect nullified a properly and legally enacted Zoning Ordinance of the City Council, in violation of **IC 36-7-4-612 (a) ADVISORY. Zoning ordinance; effect of prior ordinances**, which states, 'Each zoning ordinance and each amendment to it adopted under any prior statute are validated and continued in effect until amended or repealed by action of the legislative body taken under authority of the advisory planning law.'"

Amendment 2:

Page 2, delete last sentence "The Council requests...March 14, 2007." and replace it with "The Council now formally appeals the February 13, 2007 action of the BZA as incorrect, and requests immediate remedy, including reversal of their decision, denial of any and all permits until the annexation issue has been determined by a court and all environmental concerns have been addressed, and injunctive relief against all activities by the developers until such time; and instructs our attorney to file this appeal in court if the Mayor does not do so by March 14, 2007."

Councilwoman Boy assured the Council with the author's amendments it would narrow this down to one Resolution, withdrawing the second Resolution on the agenda.

Councilman Meer asked Council Attorney Meyer in doing this would that be sufficient in what the Council is after. Council Attorney Meyer assured him that it would and explained in detail the author's amendments.

There was discussion among Councilwoman Martin and Council Attorney Meyer regarding filing litigation.

Councilwoman Boy then went on to read amendment number 2 and wondered if voting on both as the same time would be sufficient with the Council and was assured that it would.

Council President Milsap asked if there were any questions or comments by the Council. Councilman Przybylinski moved to amend the Resolution the original Resolution with the author's amendments, Whereas Statement 1, Amendment 1, Amendment 2, and the motion was seconded by Councilwoman Boy.

The motion carried and the author's amendments were approved by the following vote: **AYES: COUNCIL MEMBERS Jankowski, Meer, Milsap, Przybylinski, Baker, Boy, and Doyle (7). NAYS: COUNCIL MEMBER Martin (1).**

Council President Milsap asked if there were any comments or questions by the public and a member in the audience called attention to Clerk Fedder's count of the vote, stating that the vote was not 8-1 and for the record it should be 7-1.

Councilman Przybylinski thanked Council Attorney Meyer and Councilwoman Boy for working on this Resolution and addressed the original Resolution.

Council Attorney Meyer responded to Councilwoman Baker's request regarding clarification of the proposed amendments.

City Planner John Pugh responded to questions by Council Members Meer and Przybylinski concerning permits that have been issued.

Councilman Meer made various comments regarding the annexation of the property and bringing in subsidized housing.

Council President Milsap asked if there were any comments or questions by the public and the following individuals spoke on the proposed Resolution: John Bougeareal (107 Martin Street), Chuck Barnhouse (4852 Clover Lane), Tom Banzi (5271 N. Johnson Road), and Dawn Banzi (5271 N. Johnson Road).

Council President Milsap asked if there were any other comments or questions by the public and hearing none, directed the Clerk to call for the vote on the proposed Resolution as mended, entitled "**A RESOLUTION OF THE MICHIGAN CITY COMMON COUNCIL REQUESTING THE MAYOR TO PURSUE LITIGATION TO VERIFY THE LEGALITY OF THE DEVELOPMENT AND CONSTRUCTION OF THE HERMAN & KITTLE PROPERTIES, INC. HOUSING PROJECT ON PAHS ROAD**".

Council Attorney Meyer responded to Councilwoman Martin's question regarding how much money the litigation would cost and property owners in that area filing a law suit.

LaPorte County Prosecuting Attorney Robert Beckman responded to Councilwoman Martin's questions.

After discussion among Attorney Beckman, Councilwoman Martin, and Council Attorney Meyer, the Clerk directed the Clerk to call for the vote on the proposed Resolution as **amended: AYES: COUNCIL MEMBERS Martin, Meer, Milsap, Przybylinski, Baker, Boy, Doyle, and Jankowski (8). NAYS: None (0).**

RESOLUTION NO. **4356**

**A RESOLUTION OF THE MICHIGAN CITY COMMON COUNCIL REQUESTING THE MAYOR TO PURSUE LITIGATION TO VERIFY THE LEGALITY OF THE DEVELOPMENT AND CONSTRUCTION OF THE HERMAN & KITTLE PROPERTIES, INC.'S HOUSING PROJECT ON PAHS ROAD**

**WHEREAS**, Lee W. Terryberry of Herman & Kittle Properties, Inc., Indianapolis, Indiana (Developer) filed an Application for Building Permit form (Application) with the Michigan City's (City) Building Department on August 15, 2006 for the purpose of constructing a 140 unit multi-family apartment complex called Canterbury House Apartments-Michigan City (Project) on approximately 30 acres of property located in Coolspring Township, LaPorte County, Indiana and is bounded on the North by U.S. Highway 20 and on the South by Pahs Road (Property), which Property is located across the street from the Michigan City High School; and,

**WHEREAS**, after hearing and reviewing substantial evidence regarding the status of the zoning of said Property, on October 23, 2006 the Michigan City Common Council (Council) determined and declared in duly adopted Ordinance No. 3991 that a prior purported rezoning of said property in 1972 from Agricultural to R-3 Residential Classification was void ab initio due to various failures to follow legal requirements; and,

**WHEREAS**, in Ordinance No. 3991, based on all of the evidence before it, the Council determined and declared that, in order to fulfill the requirements of all applicable laws and City Ordinances and to best protect the health, safety and welfare of the citizens of the City, the Property be rezoned from the Agricultural classification which it had at the time of and since the annexation in 1971 to the R-1 Residential classification; and,

**WHEREAS**, the Mayor Charles E. Oberlie (Mayor) approved said Ordinance No. 3991 on October 24, 2006; and no one has contested the validity of any part of Ordinance No. 3991 since its enactment; and,

**WHEREAS**, a multi-family apartment complex, including Developer's Project, is not allowed in an R-1 Residential zone or, in the previously existing Agricultural zone, pursuant to the City's Zoning Ordinances; and,

**WHEREAS**, the City's Planning Director (Director) denied the Developer's Application based, in whole or in part, on the Property being in an R-1 Residential zone; and,

**WHEREAS**, the Developer appealed the Director's denial to the Michigan City Board of Zoning Appeals (BZA); and,

**WHEREAS**, despite the unchallenged provisions of Ordinance No. 3991 and despite having no legal authority to overrule or modify any zoning ordinance affecting the Property, including Ordinance No. 3991 the BZA granted Developer's appeal and overruled the Director's denial of a building permit for Developer's Project; and,

**WHEREAS**, the action of the BZA in overruling the Director's denial of Developer's Application effectively ignored and violated the provisions of Ordinance No. 3991 which action is beyond the jurisdiction and authority of the BZA.

**NOW, THEREFORE, BE IT RESOLVED BY THE COMMON COUNCIL OF THE CITY OF MICHIGAN CITY, INDIANA** THAT since, based on all of the above stated facts, all of the existing circumstances, the laws of the State of Indiana and the City's Ordinances, it is clearly in the best interest of the City and all of its citizens, and, therefore, the Council does hereby respectfully request, that the Mayor take all available appropriate steps to prevent Developer from proceeding with the construction of the Project on the Property, including, but not limited to, directing City officials to not issue any of the necessary City building or other permits for the Project and taking the necessary steps to immediately file a lawsuit requesting an appropriate court to order Developer not to begin or, if it has already begun, to cease and desist from continuing, any construction activity on the Property related to construction of the Project; declaring the BZA's decision to over rule the City Plan Director's denial of Developer's building permit for the Project to be erroneous and unlawful; and immediately staying the BZA's order until such time as the court issues a final decision. The Council requests that the Mayor advise the Council as to whether the Mayor intends to honor the Council's above requests as soon as possible but in no event later than March 14, 2007.

INTRODUCED BY: */s/ Paul Przybylinski*  
Paul Przybylinski, Member

Councilwoman Boy moved to withdraw the second Resolution on the agenda, entitled "**A RESOLUTION OF THE MICHIGAN CITY COMMON COUNCIL APPEALING AN ACTION OF THE BOARD OF ZONING APPEALS**", as introduced by Pat Boy. (Councilwoman Boy explained the first resolution covered the points that were in the second resolution, after the Council made the amendments.)

At 9: 02, the Council President Milsap requested a five (5) minute recess, which was approved by the Council.

### **ORDINANCES**

Following the recess, the Council reconvened and the Clerk read on second reading by title only, **AN ORDINANCE OF THE MICHIGAN CITY COMMON COUNCIL TO EXPAND THE MAP SETTING FORTH THE HISTORIC DISTRICT OF THE CITY OF MICHIGAN CITY TO INCLUDE 'THE WORKS' BUILDING**, as introduced by Paul Przybylinski. (Note: At the February 20<sup>th</sup> meeting motion was made to table this Ordinance on second reading.)

Councilwoman Boy said when this Ordinance was discussed on first reading she asked if anyone had a list of the properties that were determined to be historical value before they created the historic districts and she didn't direct that request specifically to anyone. She is now requesting and would like to receive that information for the next meeting. Plan Director John Pugh informed Councilwoman Boy that information is in the hands of the Historic Review Board. He said he believes there was a survey conducted and those buildings were included, but then later the districts were created.

Councilwoman Boy officially requested a copy of the list for all the Council Members.

Councilman Przybylinski commented on who can provide or fund a state survey on this property.

Councilman Przybylinski moved to table this Ordinance until the next meeting so this survey can be done. After comments made by Councilman Meer Councilman Przybylinski withdrew his motion.

After discussion among Council Members Boy, Martin, Przybylinski, Mayor Oberlie and Council Attorney Meyer regarding a survey and the proposed Ordinance, Councilman Przybylinski again moved to **table** this Ordinance indefinitely until this survey can be completed. The motion was seconded by Councilwoman Boy and carried by the following vote: **AYES: COUNCIL MEMBERS Meer, Przybylinski, Boy, and Jankowski (4). NAYS: COUNCIL MEMBERS Milsap, Baker, Doyle, and Martin (4).**

Councilwoman Boy asked the Clerk to direct the Historic Review Board to give the Council a list of the properties that were determined to be historical value before they created the historic districts and was assured by Council President it had already been taken care of.

Attorney Todd A. Leeth, Hoepfner Wagner & Evans, Valparaiso, Indiana, spoke on behalf of the property owner of the property in question, the owners and operators of Lighthouse Place, Premium Outlet Mall, and; also the owner of the Works Building.

The following individual spoke in great detail on the proposed Ordinance: David Landdow, 627 Pine Street, Michigan City, Indiana.

Ordinance then laid over for third reading.

## **UNFINISHED BUSINESS**

There was no Unfinished Business.

## **NEW BUSINESS**

The term of Thomas Alevizos to the Commission on the Social Status of African-American Males expired March 1, 2007.

Council President Milsap stated he has spoken with the Prosecuting Attorney's Office and they will be submitting a name for his replacement.

For **informational** purposes: The following individuals appointed to the Historic Review Board terms will expire March 15, 2007: Thomas Przybylinski, Werner Graf, and John Pugh.

**(Note: The advice and consent of the City Council is needed when the appoints are made.)**

## **COMMENTS FROM THE COUNCIL**

Councilman Przybylinski spoke on preserving the identify of Michigan City and its educational process. He also made a formal request to have additional funding for the program that is run through Barker Woods for tutoring for students in the Michigan City public school system. Councilman Przybylinski said "**A Mind Is A Terrible Thing To Waste.**"

Councilman Meer thanked the committee (Council Members Boy, Baker, and Martin) that hired Council Attorney Meyer, he thought they did a professional and excellent job. Councilman Meer said he thinks Council Attorney Meyer is going to represent this Council very well.

Councilman Przybylinski has various questions directed to City Planner Pugh regarding permits issued regarding the housing project on Pahs Road.

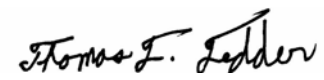
## **COMMENTS FROM THE PUBLIC**

Sharon Carnes (414 E. Coolspring Avenue) commented on a lack of vision in Michigan City. She stated she thinks Michigan City lacks respect. Ms. Carnes gave a list of reasons why she felt this way.

City Planner John Pugh made various comments regarding Lighthouse Place and the Works Building (its original boundaries). Mr. Pugh stated there was a survey done and it might be in his office. He stated the review board does have a copy of the survey.

#### **ADJOURNMENT**

On motion by Councilman Meer, supported by the majority of the Council, and there being no further business to transact, President Milsap declared the meeting **ADJOURNED** (approximately 9:45 p.m.)



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Thomas F. Fedder, City Clerk