

EXECUTIVE SESSION OF THE CITY COUNCIL**February 8, 2021**

The meeting began at 6:11 PM

Absent members 1 (Lebron-Martinez) Present Members 12 (Anderson-Burgos, Bartley, Hernandez, Leahy, Lisi, McGee, McGiverin, Murphy, Sullivan, Tallman, Vacon)

President McGee recognized Acting City Solicitor Crystal Barnes.

Atty Barnes presented an outline of the items to be discussed, which included closed cases, federal court litigation, Massachusetts Appeals Court, state court litigation, Massachusetts Commission Against Discrimination (MCAD), Bankruptcy Court, and presentiment letters. She then emphasized that the conversation was confidential, adding that some of it would be follow up on old cases.

- She then stated that the first case was Padras Latinos de las Escuelas de Springfield y Holyoke ("PLESH") v. Massachusetts Department of Elementary & Secondary Education, et al.. She explained that there was a settlement after quite some time or mediation and negotiations. She explained that the final outcome was that the school paid out \$65,000 and the state paid out either \$150,000 or \$165,000. She added that it came out of the school budget. She noted that these items would be a brief overview as their inside house counsel Tasha Marshall on litigation matters was out that evening, so follow up questions could continue to another night.
- She then explained the next case was John J. Smith, Jr. v. City of Holyoke et al. She explained that this was a police misconduct case following a police vehicle pursuit where state police also responded. She stated that the demand was \$275,000. She noted that it had been ongoing for quite some time. She then stated that the city filed a motion for summary judgement and an update had just come, allowing it in part but denying it in part. She further explained that they threw out some of the claims and kept some. She noted that Atty Charles Emma was handling this matter. She then stated that the case would go forward on one of the counts based on the allegations of excessive force. She added that on count 2 against the city, which was based on a failure to train on use of force policies and high pursuit policy. She then stated that Atty Emma felt the judge made some mistakes in his ruling, seemingly allowing the party to come forward and have the case continue rather than throwing out the entire case. She then stated they were working on a cost benefit analysis on whether to continue to file more motions or let the trial continue, noting that the city loses some rights based on when some motions are filed.
- She then stated that the next item was an appeals matter, a case of Shaun Kelley v. City of Holyoke. She stated that the city won this case. She then explained that an officer was put on administrative leave due to bad drug testing. She added that they were now appealing the decision. She then stated that outside counsel, Joe Schneiderman, was handling the matter. She stated that there was an issue with how the judgement got noticed and docketed, which led to them having trouble filing the appeal because the courts were having trouble talking to each other. She noted briefs had not yet been filed.
- She then stated that the next item was the City of Holyoke v. NASDI, which had been ongoing for a while. The presentation explained that this had to do with seeking reimbursement from the contractor following the collapse of the Essex House in December of 2014. She explained that there was a new change in that NASDI had filed bankruptcy. She then stated the city had used Atty Joseph Lange in the past for bankruptcy matters, including with some housing court issues and had great success, and he was being utilized on this one to continue to perfect the claims and make sure the city's claim is protected and doesn't lose money in the bankruptcy. She added that the city could not move forward as long as the bankruptcy was pending.

- She then stated that the next case was the City of Holyoke v. Mountain View, et al, a breach of contract claim where Roberts Field was found to be defective. She explained that they were trying to get a mediation date settled so they could start making demands. She then stated that they were looking to request \$1.5 million, which was a figure provided by experts to explain what it would cost to put in a new field as there was no reviving what was there. She added that they realistically may be able to expect around \$1.2 million. She added that Atty Emma was working on a contingency fee basis, meaning that he would get a cut of it if the city won. She noted that because it was a breach of contract claim, the city could not add in attorneys fees as part of the demand.
- She then moved to the next case, Jayne Billings v. City of Holyoke, a tort claim where they were alleging that they tripped over a tree branch on the street and were requesting damages. She explained this was being handled in house and that Atty Tasha Marshall had filed an answer in the claim, stating that there was some contributory negligence in tripping over a tree branch. She added that there was also some determining if the tree was the city's. She noted that this spoke to the issue of dead trees in the city. She then stated that it appeared this was a city tree but with so many trees around, it was hard to determine for sure. She stated that they filed an answer a while ago so it was possible they may not hear anything.
- She then moved to the next case, Mayer v. MHA, City of Holyoke, et al, a land court case regarding a group home at 11 Yale Street. She then stated that the city filed a motion for summary judgement. She added that the Mental Health Association (MHA) had also filed a motion for summary judgment. She then suggested it would be at least another 60 days, noting that the city was given 30 days to file theirs and the plaintiffs were given another 30 days to oppose that, and then the city would get another 30 days to rebut their opposition. She then suggested that this wasn't major for the city as they were waiting for the court to decide whether they needed to pull the building permits or if they could stay at the property. She explained that this was more MHA's case, and the city was called in because the city held the permit. She expressed hope that this would be resolved soon as it was a huge time burden for their department.
- She then stated that there were not any MCAD claims for the city but there was one for the schools for a wrongful termination. She explained they had outside counsel and it came out of their budget. She noted that these kinds of discrimination claims happen fairly frequently.
- She then stated that there were two presentment letters, something that had to be sent to their office before a claim can be filed. She then explained that one was the Estate of Daniel Allende v City of Holyoke and Atty General Maura Healey. She then stated that it was a wrongful death claim with the Police Department. She explained that Mr. Allende was in police custody, they were doing their checks and thought he was sleeping in his cell, but later found that he had died while in custody. She then stated that it was alleged he had drugs in his rectum, and it was possible that ruptured while he was in custody. She added that the state was involved because he was supposed to be on an ankle tracker, and they believed it failed. She added that other claims were arising from that because the state lost track of their criminal. She reiterated that they had not yet received a filing.
- She then explained that the next case involved Natasha Custodio, a woman who posted bail in a case, and then the bail was revoked, the Commonwealth returned her money. She then stated that the alleged violation was that Holyoke Police went to her home requesting the money be provided to the Police Department because they felt the money was part of the case and should be kept as such. She explained that they were still fact finding at that point to find out what happened in that situation. She explained that Atty Emma was handling the wrongful death case and was also being asked to help handle the Custodio civil rights case. She noted that it was currently just a torts claim, with Ms. Custodio asking for the money back, which came to around \$25,000.

Councilor Sullivan noted that the first case where \$65,000 was coming out of the school budget was while the city was under receivership and the state was in control of all of the programs and administration of the school, but the city was having to pay for their screwup.

Atty Barnes stated that was correct. She noted that it was from 2017, although she was unsure when receivership started.

Greaney stated it was five years ago.

Atty Barnes expressed her understanding that a lot of what was put into policies and procedures that came out of the settlement of the case had been requested from a state mandate. She then explained that the city was put in the position of a guinea pig, where a bar was set as far as what schools across the state should be doing. She noted one bonus was that the city was not trying to meet state mandates because they were already in place. She added that they also had to fulfill requirements of reporting to the plaintiffs once a year, showing whether or not the city was still in compliance. She noted that the city could ask for changes in procedures based on if the city was finding financial difficulties.

Councilor Sullivan asked if it had been paid out from the School Department budget already.

Atty Barnes stated that it had. She then explained that they had requested \$1.3 million in just attorneys fees and it was settled at \$65,000 from the School Department, reiterating that the state put in their own money.

Councilor Sullivan noted that the automatic stay on the NASDI case affected the company that went into bankruptcy, but asked to clarify that the claim was against the insurance company.

Atty Barnes stated that NASDI fled for bankruptcy but because it was a multi-party case, the case was stalled because the city was looking for \$1 million in insurance but the person holding the insurance was also up against it.

Councilor Sullivan expressed his understanding that in clear cut cases like this, there wasn't much for a bankruptcy attorney to do and only needed to file a motion for an automatic stay. He suggested that these usually fly right through because lawsuits supersede anything pre-bankruptcy. He questioned why that would hold this up.

Atty Barnes stated that while she wouldn't think so either but offered a reminder that in a previous code enforcement, the company filed for bankruptcy, the city's motion for relief from stay got denied twice. She added that it was almost a battle between two courts because the other couldn't believe it was denied either. She then expressed concern that if the claim was not perfected by someone well versed in that procedure, the city could lose its claim to the money.

Councilor Sullivan suggested that it should be quick and inexpensive to handle it.

Atty Barnes expressed hope that it would be. She added that Atty Lange had been good about his billing and was not charging the city too much, just for the motions and hearings.

Councilor Sullivan asked what Atty Emma's contingency fee was on number 5, the Mountain View case.

Atty Barnes stated that it was a 30% percentage of the settlement.

Councilor Sullivan expressed surprise at 30% of a \$1.5 million claim. He then asked if the person who filed a claim about tripping on a tree branch was a Holyoke resident.

Atty Barnes stated that they were.

Greaney asked if there were injuries with the tree branch and what damages were being sought.

Atty Barnes stated that the complaint was for \$75,000. She noted that there was a max of \$5,000 so was not sure why the complaint was so high. She then expressed her understanding that the woman fell and busted her knee cap pretty bad. She reiterated that they had not heard anything back from them in a while.

Councilor Hernandez, noting that this information was confidential, asked if anyone from the community besides these people knew the claims were ongoing, and what should a councilor say if someone did present a question to them.

Atty Barnes stated that councilors should not discuss any information they receive in these meetings, emphasizing that this was essentially an attorney/client privileged meeting. She noted that even after cases settle, minutes sometimes still cannot be released because strategy and negotiation techniques can be talked about and release could harm the department in negotiating future cases. She noted that while case names are public record, that shouldn't even be discussed because information not yet known to the public could be inadvertently mentioned.

Councilor McGiverin asked what was being asked for in the Officer Kelley case.

Atty Barnes stated that they were appealing the decision because the city won the appeal.

Councilor McGiverin expressed his understanding that Officer Kelley was erroneously put on administrative leave for a false positive and that he had already received back pay.

Atty Barnes stated that he was bypassed for a promotion based on the false positive and was now looking for an appeal to have that appealed.

McGiverin asked for clarification that it wasn't monetary.

Atty Barnes stated that she did not have more information at that time.

Councilor McGiverin suggested settling if it was not monetary.

Atty Barnes stated that she would love to say it's not monetary, but she didn't want to be inaccurate.

Councilor McGiverin noted that Mountain View was not the original contractor. He then asked what happened.

Atty Barnes stated that it was Mountain View and others. She then stated that the field was multilayered, and they had to sue the multiple companies that contributed to the field because they couldn't determine where the defect was, so they were all pointing fingers at each other. She explained that Mountain View was just one of the parties.

Councilor McGiverin asked how many staff attorneys were in the office.

Atty Barnes stated there were three.

Councilor McGiverin asked who the other was in addition to Atty Barnes and Atty Marshall.

Atty Barnes stated the other was Jenny Wellhoff.

Councilor McGiverin asked if there were any openings.

Atty Barnes stated that they had no openings, adding that she gave up a position and they didn't have a Solicitor appointed.

Councilor McGiverin stated that the Solicitor was an opening.

Atty Barnes stated that was correct but not one she could fill.

Councilor McGiverin emphasized that she was doing the job. He then noted that being down any bodies made it difficult to do things in house.

Atty Barnes stated that was correct.

Councilor McGiverin asked her to explain giving up a position.

Atty Barnes stated that if they were fully staffed, they would have a Solicitor, 3 Assistant Solicitors, 2 Associates, a paralegal, and an admin. She then explained that they had 3 Assistants, and a paralegal.

Councilor McGiverin asked if there was labor counsel.

Atty Barnes stated they did who filled a position and charges \$3,000 a month flat fee for anything asked of him. She added that for \$36,000, she got labor counsel rather than continuing to take in people who would be learning it on the job, which was an issue before. She expressed her belief that was the way it should stay, noting it was a necessary evil to have outside counsel for a specialty.

Councilor McGiverin expressed agreement but believed that what the labor counsel was contracted for should be a separate line item in the budget.

Atty Barnes stated that they would fix that for the next budget session.

Councilor McGiverin commended her for her work.

Councilor Tallman asked if a decision could come back in the Yale Street case and say the city could take away their permits.

Atty Barnes stated that they had a building permit that was issued, an appeal was brought to the zoning board of appeals, which failed, and they filed the complaint with the land court based on the denial of their appeal. She added that the city was now just waiting because they currently had a valid building permit and were basically currently building at their own risk. She suggested that the court could say a number

of things, there could be a monetary matter with MHA, there could be a situation where MHA has to convert the building back to what it was before the building permit was issued, but the city was a party in the case just waiting to be told if the building permit would remain valid.

Councilor Tallman asked if there was actual cost to the city.

Atty Barnes stated there was not.

Councilor Tallman asked if there were attorneys working on it.

Atty Barnes stated that it was just in house attorneys.

Councilor Lisi noted there were several orders in committees that were filed in relation to the zoning, as well as something in Public Safety, on the MHA matter. She then asked if they could move forward on those items or were they not able to because of the pending litigation.

Atty Barnes recommended against messing with the zoning ordinances while it was pending because they were making arguments based on the zoning ordinances. She added that it was also a hot issue in other cases, one recently where the land court waited for the final decision to happen during the litigation. She then suggested that with the undetermined legalities around zoning amendment surrounding group homes, more research needed to be done before amending them. She suggested amending them could also be a detriment to the case.

Councilor Lisi asked how to handle the related but non-zoning orders.

Atty Barnes stated that she did not know what the non-zoning issues would be.

Councilor Lisi stated that something was in Public Safety, including a letter that was received. She deferred to Councilor Murphy as chair of that committee. She did not recall what kind of action the letter was asking for.

Councilor Murphy stated that Public Safety didn't have anything.

Councilor Bartley stated that Councilor Lisi was referring to an order he filed that had been sitting in committee for a long time. He then asked Atty Barnes to explain a little more what she meant when she recommended against addressing the zoning order because it would taint the argument. He stated that he did not support that argument and did not support the city's position. He asked how it would impact the city's position. He added that he was getting calls from constituents asking when that order was going to be taken up, adding that Councilor Lisi, as Ordinance chair, was getting the same emails. He asked how they should respond.

Atty Barnes stated that she could do more research on the issue around regulating group homes and the zoning amendments to that effect and put something together. She then explained that as they had just filed a motion stating that the city's ordinances allow group homes as of right, she did not want there to be any appeals to the case if the zoning was changed while the case was pending, adding that they would then have to change their argument. She then suggested that it may not impact their argument because it depended on what was in place at the time their permit was issued, but still did not believe it was a good idea to change zoning ordinance when there was pending litigation about zoning ordinance surrounding group homes. She added that the court could say that the city can't regulate them, and she would rather

see an outcome first because group homes were currently supposed to be treated like a residential home and were allowed as of right.

Councilor Bartley recalled during the introductory comments, the comment at the time was that either they would continue their construction, or the city could pull the building permit. He then stated that it was not clear on the city's position being impacted by a zoning discussion. He suggested that another discussion could take place later in the year and it could be made more clear what the impact on the city's position would be. He also noted that as the order had not been taken up in a timely fashion, it may have to be refiled anyway.

Atty Barnes stated that it would be because they would be getting treated separately. She added that the impact of this case on the city was the building permit. She added that was because the zoning ordinance was in compliance with other litigation that took place before, which stated that group homes were allowed as of right. She then suggested that if the city started changing that, there was other litigation stating that they should be allowed as of right. She emphasized that the case was one issue and changing the zoning ordinance was a different issue. She then stated that while the case was about the building permit, the case as a whole looked at the zoning ordinance and group homes being allowed as of right, if they served an educational purpose, if they fell under the Dover Amendment, and other issues at play that didn't currently bear on the city because it was currently in compliance with other litigation. She then reiterated that changing that could have an impact.

Councilor Bartley asked if they were two separate issues within the same case, or two separate cases.

Atty Barnes stated that the litigation was not with the city, but there were other cases coming out of the SJC (Supreme Judicial Court) out of other municipalities that were changing regulations on zoning ordinances that relate to group homes.

Councilor Bartley emphasized that the earlier point made was to recommend against taking up the order because it could impact the city's case. He then suggested that it appeared she was changing it because there were other cases involved.

Atty Barnes suggested that he wasn't paying attention. She then explained that there was other pending litigation that had come out saying that the city shouldn't change zoning amendments.

Councilor Bartley expressed frustration at being told he wasn't paying attention.

President McGee asked for cordiality to get the information.

Councilor Bartley stated that he was asking for information.

President McGee asked Atty Barnes for a clear answer for what Councilor Bartley was getting at. He then asked if her point was that there was no litigation against the city but there was other litigation.

Atty Barnes stated that there were other cases about regulating group homes through zoning amendments. She then emphasized that the city's argument in this case was that they were allowed as of right. She suggested that if the city changed it while basing its arguments on a specific part of the zoning ordinance would be a little odd. She reiterated that it would not affect the case because they looked to what they were when the case was filed. She also reiterated that with so many other cases being litigated relative to zoning and group homes, it would be touchy to start charging it when they were in compliance with laws and the statuses of other cases coming out of the courts.

Councilor Bartley suggested that when another litigation review takes place, a presentation on those other cases could be provided.

Atty Barnes stated that she could do that.

Councilor McGiverin recalled that the city had a special permit process as part of the ordinance in the 1980's, and the city was challenged that the language controlling any group home was unconstitutional. He recalled that the while gist of it was that they were educational facilities and not residential. He added that the codes would not allow them to exist as residential because they had multiple parties paying for the expenses of the home.

Councilor McGiverin made a motion to adjourn the executive session. He noted that the body has to convene in public session to adjourn the meeting. Councilor Tallman seconded the motion. Motion passed on a call of the roll of the yeas and nays--Yeas 12--Nays 0--Absent 1 (Lebron-Martinez).

Adjourned at 6:59 PM.