



COUNCIL SPECIAL SESSION

Monday, May 10, 2021

APPROVED MINUTES

MEMBER PRESENT

Mayor Rick Scholl
Council President Doug Morten
Councilor Patrick Birkle
Councilor Stephen R. Topaz

MEMBERS ABSENT

Councilor Jessica Chilton

STAFF PRESENT

John Walsh, City Administrator
Kathy Payne, City Recorder
Lisa Scholl, Deputy City Recorder
Mouhamad Zaher, Public Works Director
Rachael Barry, Government Affairs &
Project Support Specialist

Jacob Graichen, City Planner
Sue Nelson, City Engineer
Tina Curry, Event Coordinator
Bill Monahan, City Attorney
Peter Hicks, City Attorney
Matthew Kahl, City Attorney

OTHERS

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| KOHI | Casey Jollisaint | Suella Springfield |
| Scott | Al Petersen | Bob Brawand |
| Brady Preheim | Steve P. | Doug Walker |

CALL SPECIAL SESSION TO ORDER – 5:10 p.m.

DISCUSSION TOPICS

1. Discussion regarding the Discipline of Councilor Stephen Topaz

Mayor Scholl expressed the importance in reviewing future accountability measures for the entire Council, as well as the current disciplinary action. He would like to move forward with a resolution. The following is already in place:

- Resolution No. 1509 Code of Ethics
- Resolution No. 1837 Operating Rules and Procedures
- Resolution No. 1838 Governing Policies

Attorney Bill Monahan reported that they are looking for direction from Council on how to proceed. They have taken the findings from the investigation and drafted a resolution and memo with their recommendations, both of which was distributed to Council and available in the archive packet for this meeting.

- Resolution of reprimand or censure for engaging in behavior that was a violation of the City's Code of Ethics and Policies. Monahan read the draft resolution. The earliest it could be adopted is May 19.

Mayor Scholl talked about the sustained allegations resulting from the investigation. Councilor Topaz asked when he would be able to see the findings from the report, which the rest of the Council has seen. He has only seen the redacted summary. He referred to this as a "shoot Topaz in the head and foot and don't give him a gun to shoot back." Mayor Scholl argued that he was given at least three opportunities to provide an explanation for the actions. Councilor Topaz restated that he wants to see the report about him. He talked about his constitutional rights to know who is charging him and what the charges are.

Mayor Scholl reminded him that they had a meeting to review it and Councilor Topaz said he would be there but did not show up. Topaz argued that he was in the hospital. Mayor Scholl said it has been one thing after the other; his attorney has not been available, and he evaded the investigator the entire time. Topaz said his attorney was in the hospital and he cannot be interrogated without his attorney present. Scholl responded that it was not an interrogation. Topaz could not answer her calls without his attorney. COVID and distance is reality. No one ever came to his house.

Attorney Peter Hicks clarified that the investigator reached out Councilor Topaz eight times over a three-month period. Topaz either did not respond or said he needed his attorney present. The first time they received any indication that Topaz actually had an attorney was in April this year. The attorney appeared at a recent Council meeting to review the executive summary. Topaz was given the opportunity to respond to the allegations at that meeting and declined. At that meeting, they discovered that Topaz's attorney was from the same law firm as the previous attorney. That firm has three attorneys. Any of those other attorneys could have attended. The investigation has been going on since September last year. Topaz was first contacted in November and never made himself available. Topaz has had at least three opportunities to discuss and respond to the allegations. In two of those meetings, the executive summary findings were shared with Topaz. At the meeting Topaz failed to attend, which was scheduled at a meeting he attended, the investigation in full was shared with all the Council members. At this point, they have decided not to turn over the investigation report, in part because of attorney client privilege and more importantly, over concerns related to retaliation as many of the investigation participants were concerned about retaliation that did in fact occur. There were 11 opportunities for him to respond.

Councilor Topaz expressed that he is not required to put the noose around his own neck. The fact that he did not show up is not a sign of guilt. It was an inconvenience. The fact that he is being charged by people who are unidentified is against the law. There are a bunch of people saying he is going to retaliate. If he mentions that someone did not their job, that is probably called harassment. If they feel bent out of shape or that boss feels bent out of shape, that is tough. He reports to the citizens of St. Helens, not to the staff and not to the Council.

Mayor Scholl argued that this was not a case of people not doing their job. This is about Councilor Topaz being a whistleblower and saying that people are not doing their job. That is absolutely not the truth. The investigation was thorough. Scholl said that Topaz admitted to the entire Council that he tried to direct funds to his project. Topaz argued that he did not. Scholl agreed that Topaz did say that 20 other neighbors would also benefit from it. That is a violation of ethics. Topaz argued that it is not when he is representing his entire neighborhood. He took Walsh to that home and showed him the water coming in. That home is four homes away from his. That is not his personal business. It is his job as a Councilor to try to get things fixed for his entire community. Scholl stated that he is not comfortable with him bringing Walsh in. Topaz argued that Walsh is a witness and is on staff. Scholl reminded him that he could have presented all of this to the investigator. Now he is wasting their time. There is video evidence multiple times of Topaz bringing these things up.

Councilor Topaz said he showed Walsh the problem. Walsh is supposed to be the communicator between Council and staff if there is a problem. The water problem could have been solved before he was even a Councilor. His six sump pumps are pumping the water out of the low end. The City put the sewer system into that area in 1912 to get rid of the water on that end, and they stopped that. That is on paper.

Mayor Scholl stated that Councilor Topaz filed a lawsuit in 2009. Topaz said it was for the City's ability to be responsible for that. It was not whether the City did it wrong. The fact that it did not follow EPA regulations is another point. The trial was whether the City was responsible, and the people said no. Scholl summarized that Topaz filed a lawsuit against the City in 2009, he lost, he appealed, and he filed again. Topaz argued that he did not appeal. He went to the State Licensing Board about the Engineering of...

Monahan reminded the Council that they are beyond the opportunity to discuss the investigation. This is about discipline and potential changes.

Councilor Birkle pointed out that speaking for the neighbors is limited according to the Code of Ethics. He personally had issues when the I&I was done at his house. Now he has to get a pump for the crawl space. However, if his neighbors contacted him about a similar problem, he would refer them to City staff and then to Council. They are not trying to re-argue a particular incident.

Councilor Birkle pointed out the need for a comma after the word "members" in the title of the draft resolution. The document is well-crafted. He reviewed documents last night to determine if Councilor Topaz was aware of the particular resolutions and policies. Resolution No. 1881, which was passed on April 15, 2020 by unanimous vote, includes individual Council member agreements. This does not mean they cannot question or raise our concerns, but they have all agreed to ways of doing that. Resolution No. 1983 Personnel Policies and Procedures, which was passed unanimously on July 1, 2020, includes a no harassment policy that does include elected officials. Birkle was not on the Council when the investigation began but read articles and attended meetings. He often scratched his head about statements Topaz made and the manner they were made. There are ways to address concerns. They need to respect the work of people and staff. The public statements in newspapers and in meetings brings discredit to the City and undermines the competence of City employees. Because Topaz has signed these documents, the draft resolution is justified. This is sufficient to move ahead with a censure.

Councilor Topaz said normal procedure when there is something you do not like or concerns from citizens is for the Councilor to talk to Walsh about it. If there is no reaction, is it the Councilor's position to not do anything because it will get people upset or is it to try to remedy the problem that is hurting our citizens, even though it is going to be done in a mean and loud way? There are a number of things said in the investigation that are wrong. The person is calling harassment is the person getting asked. He could ask anything, and it could be considered harassment. If you are doing something wrong or it could be done a better way, a question is a nice way to point it out. Since he does not have the authority to tell staff what to do, his biggest tool is a question. What happens if the question is verified that it is a problem, and the City is trying to cover it up? Is that harassment or the Councilor's job?

Council President Morten told Councilor Topaz that he does not try to solve problems on his own. When he sees them, he brings them to the Council. Explain the problem and discuss it at a work session. With his lawsuit, that had not been done. In many senses, he was not part of Council and circumvented the Council by not coming to them to deal with it. Do not circumvent the Council and go to the City Administrator. Topaz responded that he did go to Council before the lawsuit and before they were digging dirt. He has been doing it according to his way for a long time. He has been asking for a long time to have that stormwater removed. The official word was that "the City was not negligent in doing it."

Mayor Scholl called for order. Council takes these allegations seriously. They are not here to discuss the investigation. They are not here to say the City is covering stuff up. He already had a chance. Councilor Topaz argued that he was never given that chance. Scholl stated that is a lie. He is tired of the half-truths and miscommunication happening in these meetings. It makes Council and staff look incompetent. They are making hundreds of thousands of dollars, specifically the City Administrator, Public Works Director, and Finance Director, that Topaz called out recently during a meeting.

Monahan suggested Council hold a retreat to discuss how to bring forward issues and how to address mistruths stated in meetings. However, that is not what they are talking about tonight. The allegations have been substantiated. His memo includes reference to a Council communication agreement. It reviews the role of all members, such as reference to respect and supporting a decision once the vote is taken publicly, even if you voted in opposition. It should not continue to be brought up when it is not on an agenda. He suggests when disagreements are brought up to add it to a parking lot for discussion later during the meeting or at a future meeting.

Councilor Birkle talked about an example of when they were looking at the St. Helens Industrial Park Phase I RFQ. Councilor Topaz raised concerns about another part of that. It is valid to have concerns, but it did not apply to that phase. It could be added to the parking lot to discuss at a later time. It needs to be set aside to be accountable and efficient during meetings. Topaz responded, "as an Engineer," that he sees a real problem that will cascade through the whole thing. Can we bring it up if it will have an impact on future phases? Mayor Scholl reminded him they are not here to discuss that.

Councilor Topaz explained that he went to Courts, City, and the State Engineering Licensing Board, who said they had no authority. Administrative Court said he was right. The Appeals Court said he is not allowed to talk about this publicly. The Supreme Court said he is not allowed to talk about it, even the storm system is affecting a number of properties in that area. Did the investigator check out the problem?

Monahan responded that Councilor Topaz had multiple times to raise that issue and the investigator could have looked into it. Topaz interjected that it has been brought up at Council meetings. Monahan reminded Topaz that direct communication was needed. He does not know whether the investigator saw that. Hicks added that Topaz does not have to participate in the investigation. The cases Topaz is talking about is public record and anyone can look them up. However, the purpose now is to deal with the investigation findings and move on. This meeting is to discuss the resolution in relation to Topaz's conduct, as well how the Council will move forward for all Council members.

Councilor Birkle would like to move forward with procedures to protect staff. He did not call for Councilor Topaz's resignation at last week's meeting. He did not know the Mayor or Council President Morten were going to call for resignation. Mayor Scholl added that he did not know it was going to be brought up either. Council President Morten explained that he brought it up after researching the Charter and seeing that resignation was an option, which is why he suggested for Topaz to consider it. Birkle does not question that, but it was brought up later that evening that they were not unanimous. From the beginning, they have been unanimous that the issue needs to be addressed through a resolution. He has always believed and tried to protect staff. The proposal does not restrict Topaz's first amendment rights. There are things that can be done to allow Topaz to fulfil his responsibility as a Councilor, but also provide buffers and protection for City staff.

Councilor Topaz said City staff are doing something wrong. If you say, "you are doing it wrong," it is a hard indictment. It is difficult to get correction with a Union Shop. How do you address a problem when you have been informed by a citizen? Right now, it is automatically called harassment. Council President Morten responded that they need to bring it to the Council. Monahan added that there is a process in place for citizens to bring concerns to the Council. The Council makes decisions as a group. No Council member acts individually. Topaz asked what happens if the Council votes 3-2 and it is federally illegal. They have all taken an oath to follow the laws of the United States, State of Oregon, and City laws. Are you bound... Monahan responded that they are not ready to give legal advice. Any issues of legal nature should be raised through the City Administrator and he can bring it to their attention.

Monahan reviewed the attorney's recommendations:

- Public statement
- Draft resolution to approve next Wednesday as it is written or modified
- Staff is waiting on clear direction from Council and protection

- Access restrictions. This is not an effort to impede on Councilor Topaz's first amendment rights as a citizen or his duties as a Councilor. The restrictions have to be made in a way to not impede his ability to perform his duties.
 - Certain employees feel uncomfortable when they are interrupted, asked to perform tasks, and he stays for an extended period of time.
 - Voters have a right for him to perform his duties.
 - Take part in group settings and take City action.
 - There are times they may need to come to City Hall for other purposes. Given the nature of the complaints filed and substantiated, he thinks it is important to place access restrictions. He suggests restrictions be added for one point of contact. The key point of contact could be Walsh and he has the ability to delegate.
 - Consider saying that Topaz shall not be permitted to meet with any City employee or personnel with the exception of the City Administrator and City Recorder without pre-authorization of the City Administrator.
 - Consider requiring that Topaz notify the City Administrator in advance of attending an in-person meeting.
 - Consider limiting his engagements to only the individuals he is scheduled to meet with.
 - Consider directing requests for information of materials through a designated individual.
 - Consider requiring a third employee always be in attendance when he is meeting with one employee.

Hicks talked about the balance of the City being an employer and Topaz being a Councilor. As an employer, the City is required to protect employees. The recommendations would still give Topaz access to the information and people he needs. Council cannot disregard their obligation as an employer. Topaz pointed out the problem he has with that. Someone could say they are the boss and direct them not to talk to Topaz. Monahan responded that is an assumption.

Monahan used to perform trainings for the League of Oregon Cities. There is an adherent assumption that everyone is on the same team and they all believe in the quality and abilities of the other individuals. He suggests the Council obtain a facilitator and hold a retreat to help them understand the needs. It is imperative that they believe in the people who are working for them and the processes. If there are concerns from one Councilor, then it could be brought to the others. Ideally, it would be raised in a private setting to bring the facts forward without damage to anyone's integrity or reputation. Mayor Scholl confirmed they did that, which is where the Council Mantra came from. Monahan said the best efforts need tweaking. Unfortunately, not everyone has to cooperate. As a result, they may not be as productive as they want to be. He knows they have tried to make it work. Discussion ensued about the efforts made and holding another retreat, especially with new Council members on board.

Discussion of how to proceed. A resolution is the strongest way to proceed. That could be followed up with actions. It was the consensus of the Council for the resolution to address item numbers 1, 4, and 5 on the memo.

Councilor Birkle is concerned that they will not be able to act on this until a week from Wednesday. He wants to see Councilor Topaz have the decency to stop taking staff's time and harassing them. Topaz argued that he is a Councilor, and they are supposed to help them. He has not been harassing anyone. Hicks reminded him that Council does not supervise employees. The City Administrator can set conditions on how employees interact with Council members.

Monahan proceeded to review suggested amendments to existing documentation to avoid future reoccurrences and hold all Council members accountable.

- Governing policy. Change the language that assigns a Council member to a department, making it dependent on if they have not been censured or publicly reprimanded.

Councilor Topaz asked what happens if an employee makes a statement about a Councilor bothering them and the investigation shows that was not true? Right now, everything is that the employee has more power than the Councilor. Hicks repeated that hypothetical situations are extremely difficult. His duty as an employer is always to the employee first. The employee has certain things that are protected conduct, including making complaints. What matters is how the City reacts to the complaint. If the City finds that that the complaint was completely illegitimate and completely made up, the City can then determine whether to discipline the individual. It is the City's first duty to make sure that harassment, discrimination, or inappropriate conduct is stopping while the investigation is happening. Topaz responded that everything has only been in one direction so far. Mayor Scholl argued that is wrong. The employees have zero power over any of the Council. The Council can fire anyone with a 3-5 vote. Topaz does not think that applies the same to union members. Scholl apologized to the employees. They are wonderful.

- Code of Ethics, Resolution No. 1509. Can add more specific reference to potential violations of sanctions. He has seen some communities that have a very elaborate censure policy.
- Operating Rules and Procedures, Resolution No. 1837. Can add a new section for conduct outside of meetings.

Councilor Topaz asked if a Councilor could go look at a job site. Monahan said yes, any member of the public can do that. The Councilor can bring back their observations to the rest of the Council. One member of the Council may not think anything was done but the rest of the Council may think it has been addressed and are ready to move on. Council needs to discuss at a retreat how to handle that.

- Council Commitment or Communications Agreement. This would be a new agreement reviewed annually and signed by all Council members.
- Oath of Office. Create a document defining the role and expectations of Council members.

Based on discussion, the attorney will modify the resolution to include item numbers 1, 4, and 5 from the memo.

Walsh reported that his role is to serve everyone, including Council and staff. It is also developing relationships outside the City and moving the City forward. Monahan mentioned the option for Council to direct the City Administrator to channel all staff communications until the investigation is complete. Is it the Council's desire to do that? Mayor Scholl concurred. Hicks expressed that it should happen if there are any concerns about conduct still occurring. It is within the scope of the City Administrator's authority.

ADJOURN – 7:03 p.m.

Respectfully submitted by Lisa Scholl, Deputy City Recorder.

ATTEST:

/s/ Kathy Payne
Kathy Payne, City Recorder

/s/ Rick Scholl
Rick Scholl, Mayor