

**United City of Yorkville  
City Council Executive Session  
May 8, 2007**

Purpose: For litigation, when an action against, affecting or on behalf of the particular public body has been filed and is pending before a court or administrative tribunal, or when the public body finds that an action is probable or imminent, in which case the basis for the finding shall be recorded and entered into the minutes of the closed meeting.

Present: Mayor Burd, Alderman Leslie, Alderman Werderich, Alderman Golinski, Alderman Plocher, Alderman Munns, Alderman Sutcliff, Alderman Spears, Alderman Besco, City Clerk Milschewski and City Attorney Roth.

Executive Session began at 8:10 P.M.

Mayor Burd said that the purpose is to discuss pending litigation as of Wednesday. Just so you know I went to court this morning. The judge did deny the injunction that would have stopped us from having Joe Plocher sworn in. He said no he wouldn't do that so we went ahead with the swearing in. Now next Wednesday there is a hearing. I'm going to have our new city attorney explain this whole process. But, the Kramers would continue to represent us as special counsel since they started the process if that's okay with you all. So they represented Joe and me today in an emergency situation they were willing to come in and step in.

Alderman Munns: Joe and you or Joe and the city, because I'm still not sure if we're plaintiffs or defendants because I got served like everyone else did.

Alderman Leslie: We're actually both are we not?

Alderman?: We're both.

Mayor Burd : Yes, but the city attorney was there. He said he was neutral so that does me no good so I hired my own person to represent me and to represent Joe. He did an incredible job in an hour. It was amazing. He grabbed all kinds of information and he went.

Alderman Werderich: Is Kramer representing you two personally or the city?

Mayor Burd: Well, right now, he's representing us personally.

Alderman Munns: So the city's case is next Wednesday you're saying.

Mayor Burd: The case is continued til next or the hearing next Wednesday as far as you understand. Dan was going to try to be here. He was running in from someplace else. This is all this was filed last night. At 4:30 it came to the city so it is an emergency type of situation so its not something that.

Alderman Werderich: Who's the plaintiff?

Mayor Burd: Jackie.

City Clerk Milschewski: I am.

Alderman Werderich: Just you personally?

City Clerk Milschewski: No. There's three, four, five of us on it. Ward 2.

Mayor Burd: Did you not get a copy of?

Alderman Werderich: I did. But I just got it when I sat down this evening.

Discussion on where everyone was served. Some people were served at home.

Alderman Besco: No, I'm talking about the whole thing. We have asked the State's Attorney to give us some type of ruling or some type of information as there's apparently no way possible that we are going to get this from the State's Attorney in time. But is there any possibility that the State's Attorney could rule before Wednesday so we, I mean...

Mayor Burd: The State's Attorney has basically I talked to him today. He basically finished his case.

Alderman Werderich: I think that we shouldn't be talking about this with the plaintiff in the room.

Alderman Munns: Wait, we have both. We have someone who filed this case and the person they filed it against. So, legally what do we?

Alderman Werderich: The city is included as a party as a defendant as a co-defendant.

Alderman Leslie: And also as a plaintiff right?

Alderman Werderich: No it's just these people from the city. United City of Yorkville

Alderman?: It's also on the behalf of...

Mayor Burd: Let the attorney...

Attorney Roth: What I would suggest at the outset is to have the city clerk step out and have the deputy city clerk come in and take the minutes of the meeting and then we can talk freely. At that point, that is my suggestion to start.

City Clerk Milschewski: That's fine. Is she still here?

Alderman?: Yes, she's right out there.

Attorney Roth: Yes, it is okay. In fact, you can't legally excuse a member of your council even if there is a conflict of interest or anything else and I'm not saying there is. I think this is an appropriate thing.

Alderman Besco: Technically the Clerk is an elected position too.

Attorney Roth: But the clerk is not by right entitled to be in an executive session. As long as her designee is taking minutes you're fine and I don't think that anyone will object to it legally or otherwise.

City Clerk Milschewski stepped out and Deputy City Clerk Lisa Pickering entered.

Attorney Roth: Well unfortunately, I was just handed this at the beginning of the meeting so I haven't read it and I'm not with the matter other than to say that the judge was here and the judge denied the motion and the motion was for emergency relief in the form of a temporary restraining order and emergency injunction seeking to prohibit the Mayor and members of the City Council and or the County Clerk from certifying the results of the County Clerk's canvass for the position.

Mayor Burd: If I could throw in one thing. They said today that the election has already been certified by the county. The City Council does not certify elections. They have not done so for two years, that's been abolished. Is that correct Lisa?

Deputy Clerk Pickering: Yes, the county is now the local canvassing board.

Mayor Burd: They are the sole certifier of our local elections. We have nothing to do with it. We don't decide who sits on the city council and you don't get to pick and choose who you want to be with you on there. We really don't have any part of this at all. You can't keep anybody from being sworn in and it's not your decision. That's what we were told.

Alderman Munns: Is this a moot point? It's all done.

Mayor Burd: Well, no.

Attorney Roth: Let me just say this. Again, the relief that we sought was emergency relief and in order to get a temporary restraining order. What they sought was not just to stop the canvassing of the votes but also to prevent the alderman from being seated in this position tonight. The court took a look at what the standards are for granting emergency relief. They found that 3 of the 4 standards were satisfied. But the 4<sup>th</sup> element that there was a likelihood of success on the merits was not satisfied. And that's a very strong statement for the judge. In my experience in litigating these kinds of cases when you don't if you don't get a ruling that there is a likelihood of success on the merits and you are appearing in front of that same judge each time you really have an upward battle. So, I would say to you, the upshot of the courts ruling is that the complaint for emergency relief has been denied that the normal process should take place as it has and that it should continue that way until a court were to rule otherwise. Based upon the judge's written opinion, that's a fairly strong statement in my view that when he says that the likelihood of succeeding on the merits of the case which is where you would go on the

next step is not likely. So, at this point I would proceed as if the suit had not been filed and we'll keep you apprised from here.

Alderman Besco: Well basically that's what we've done. He's been sworn in.

Attorney Roth: That's right.

Alderman Besco: So we're going to the next step and that's basically we've got to wait for the judges ruling.

Attorney Roth: That's right. But, I think the purpose of bringing this as an emergency motion was to stop you from seating him and the judge said no I'm not going to stop you from seating him. Seat him, just follow your process. You've done that. At this point its wait until you get a direction from the judge to the contrary. Otherwise proceed.

Mayor Burd: What the executive session is for tonight is to hire the Kramers as special counsel to handle this for the city council.

Alderman Besco: Again, I'm going to speak up on this one. First of all I know that Kramers have probably represented half of us in the room. I know they do work for us, the business, I know they have done work for Valerie in the past. I just feel that they're so intertwined I'll be much more comfortable with the City Attorney handling this.

Attorney Roth: I know Dan Kramer. Dan Kramer is a fine attorney.

Alderman Besco: Oh, I agree. It's just that he's worked for about everybody in this room. He's still working for us this moment as far as our business.

Attorney Roth: If it would appear that there would be a conflict or even an appearance of a conflict then.....

Alderman Besco: Oh, on top of it the other issue is that he's bringing these developments in front of us more than any other attorney in the city or for that matter in the county.

Mayor Burd: Philipchuck's right up there with him. This is only for this one issue. It concludes the representation that he began. That's the only reason I'm bringing it forward because he was there for us this morning.

Alderman Munns: What is he charging us compared to the city attorney?

Attorney Roth: He's charging less than I am.

Mayor Burd: Way less.

Alderman Leslie: Are you cited in terms of you getting representation, just as the Mayor elect?

Mayor Burd: No as alderman I was cited, everyone was cited separately. My confusion is....The question I am confused about. It says United City of Yorkville et al. Basically on behalf of. Not the United City of Yorkville, it's the citizens of. We're not suing ourselves. She's not suing us as City Clerk, she's suing us as a resident of Ward 2.

Alderman Werderich: That's correct.

Alderman Besco: There's no financial relief, so the type of representation that we need as a city would be minimal.

Alderman Werderich: Do we have the motion? I haven't seen any copies of the file. I want to see the relief.

Mayor Burd: The next thing they're asking for Wednesday is that he would be removed from office.

Alderman Werderich: Reads all the things they're asking for.

Order to enjoin the Mayor, members of the city council and or the city clerk from certifying the results of the city clerks canvass of votes for the election. Enjoining the Mayor and or members of the city council from seating Plocher as Alderman of Ward 2 for the city. Enjoining the Mayor and or members of the city council from determining that Plocher is qualified to hold the office of alderman for the second ward until the matter is resolved before the court. Enjoining the Mayor and or members of the city council from determining that the vacancy exists in the office of the alderman for the second ward until this matter is resolved before the court. Enjoining the Mayor and or members of the city council from appointing a person to hold the office of the alderman for the second ward until this matter is resolved before the court. Enjoining Plocher from taking office of alderman for the second ward until this matter is resolved before the court.

Mayor Burd: What the judge ruled, he said that this was an election issue and these problems had to have been brought forward before the election. It's too late now to seek remedies that they're asking for. After the election that's not the response that he could give us.

Alderman Spears: Did you say earlier that the Kramers are representing you and Joe?

Mayor Burd: They were in court. Our city attorney (Wyeth) showed up in court and said that he took a neutral position he wasn't defending the city. He just stood there. He took no position. He was also biased. He recommended the opponent. He went on record.

Alderman Spears: Why are they representing you - is there a separate order against you?

Mayor Burd: Because they had to.

Alderman Leslie: I guess what Rose is trying to get to and we were wondering you're not going to have Kramer and then a separate attorney. We either all have Kramer or we all have the same attorney.

Mayor Burd: I just grabbed him. I called him in an emergency situation after John told me that he was going to stand there and not defend the city.

Alderman Leslie: So you were there as Mayor elect?

Mayor Burd. Absolutely, I asked him if he would step in and if he had not stepped in and stepped up to the plate and made a defense for us they would have run right over us. There was our city attorney standing there going whatever.

Alderman Sutcliff: When you say that he is representing you and Joe, he was really representing everyone. We thought he was representing the two of you when you said that.

Mayor Burd: He was personally representing me because I had no authority to hire him as the city attorney. We had the city attorney who was standing there. So, the only way that we could have someone representing me who would actually make a case.

Alderman Munns: But you were listed too, so anyone could have done this.

Mayor Burd: He asked where you all were and what you thought.

Alderman?: John Wyeth told us not to show up.

Alderman Munns: He told us he would be taking care of it.

Alderman Leslie: I had a phone message last night.

Mayor Burd: So what's the consensus?

Alderman Munns: I just want us represented by qualified legal counsel. Who it is I don't really care.

Alderman Werderich: I would like to make a motion that we hire Kramer's office to represent the city.

Mayor Burd: We can't do that here. We would need to do that out there.

Alderman Werderich: That would be my recommendation then.

Alderman Plocher: I'm personally keeping Kramer. So if you guys want to pay another attorney?

Alderman Spears: I don't want that to appear to be a conflict of interest if you are personally retaining Kramer.

Alderman Werderich: Kramer can't do that ethically.

Alderman Spears: I would suggest that we go with our newly appointed city attorney.

Attorney Roth: Here's what we'll do to keep the peace at a minimum. Let me work with Dan Kramer. He's already done the research, he's made the arguments, he's established the rapport with the judge and he won. Let him take the lead. Let us file an appearance on behalf of the city and let him take the lead. If there's something that we see that he's not saying, we'll say it. But other than that rather than spend money on us to do the work that repetitive of what he's doing anyway. Plus he's a good lawyer. I think it would keep that separation that I think you ought to have yet at the same time keep your fees to a minimum.

Alderman Besco: We definitely have to have separation otherwise it doesn't look right.

Alderman Golinski: What's your opinion of this thing even going forward on Wednesday. When the judge already said that it probably wouldn't succeed on its merits. I mean in my mind it sounds like the plaintiff would probably drop it before Wednesday if it's not going to succeed on its merits.

Attorney Roth: I think that its likely not to succeed at the next step. The thing is in these injunction actions you have three steps. Emergency temporary restraining order, that's what this is. The next step is if you don't get that emergency relief to maintain the status quo for even a short period of time until you can have a hearing on the preliminary injunction. Then things can happen and it has. He still has his legal right to proceed on injunctive relief but the standards are going to be pretty much the same. I think that its likely that the judge felt that way on the last hearing he's going to feel that way on this hearing. If he wants to be persistent and he wants to continue on with that complaint seeking permanent relief. He can try and we can't stop him legally from doing that but frankly when you lose both times you kind of cut your losses.

Alderman Golinski: Well, I'm in favor of doing what Mike said retain Kramer as lead with Mike as backup and lets get past this and move on.

Alderman Leslie: One quick point. The plaintiff attorney in this is John as well right because we were acting as both plaintiff and defendant?

Mayor Burd: No.

Alderman Leslie: Who's the attorney?

The attorney is Laura Liu from the firm of Hogan Merrill.

Mayor Burd: That was the problem because John showed up and said that he was on both sides of this issue, which he wasn't. He said I'm neutral. Everybody said that is totally impossible. This is an adversarial situation you have to be defending.

Alderman Munns: We were paying him at that point right.

Mayor Burd: Yes, to stand there. What are we doing when we leave here? Are we going out there and doing anything with the Kramers?

Attorney Roth: Well, I think that no.

Alderman Sutcliff: If the Kramers are going to represent Joe we can't have them represent us at all, we don't have a choice.

Attorney Roth: Let me defend the city but I'll do it in a way that I just said. You don't have to take any action tonight.

Mayor Burd: Is that the normal way if an alderman is challenged that they would have to defend themselves? Or does the city defend them? So that's what I'm saying.

Alderman Besco: But, he wasn't seated at the time.

Mayor Burd: Now he is. The hearing is next Wednesday.

Alderman Besco: But this case was filed before he was sworn in?

Mayor Burd: Well, we could have defended it before though if our city attorney had been so inclined. Because the election had already been certified. It was certified on May 1.

Attorney Roth: Was there a challenge before your election board?

Mayor Burd: No. They're asking for relief we can't grant because it was already certified.

Attorney Roth: I don't know why he chose not to actively defend.

Mayor Burd: Because he was behind the other candidate.

Alderman Sutcliff: Now that Joe is a council member he doesn't need his own representation. If that's true we could use Dan Kramer.

Mayor Burd: That was the point I was trying to make first.

Alderman Sutcliff: Did he require his own individual attorney?

Attorney Roth: He doesn't require it no.

Alderman Sutcliff: What do you recommend?

Alderman Leslie: Why don't we allow the newly appointed interim city attorney to review the case and come back with a recommendation and we'll go with that recommendation.

Mayor Burd: When were you planning on voting on this?

Alderman?: We have until a week from Wednesday.

Alderman Spears: If this happened the filing and everything before he was seated and official appointed then now we're going to use city funds to defend him in the case. He's already retained Kramer on his own. Can you clarify that?

Attorney Roth: The city is a defendant before he was seated and the city is still a defendant. I think its incumbent upon the city to defend itself.

Alderman Spears: Is yours a separate case?

No, It's all together

Alderman Spears: You don't really need Kramer on your own.

Attorney Roth: No you don't need him but you've got it. He's choosing to have representation and I think its not imprudent.

Mayor Burd: The city would have lost if we hadn't hired Dan Kramer.

Alderman Werderich: They would have lost just on the temporary issue. Not necessarily on the issue overall.

Alderman Leslie: She hired Dan Kramer on an individual capacity in terms of representation.

Mayor Burd: Because the city attorney.

Alderman Leslie: Actually, she didn't hire him, Joe hired him.

Mayor Burd: No, I hired him. We both hired him.

Alderman Leslie: But outside of your responsibilities as acting Mayor or to be seated Mayor, right?

Mayor Burd: I hired him because I was one day away from being Mayor and the city attorney was not doing his job.

Alderman Leslie: I understand that.

Alderman Werderich: Here's the question did Kramer enter his appearance on your behalf or on behalf of the city?

Mayor Burd: He couldn't do it on the city.

Alderman Werderich: You can have more than one attorney.

Mayor Burd: No we couldn't. We would have to as a council appoint him. I cannot go out there and hire the city attorney. You have to vote on it as the council.

Alderman Leslie: In a pinch she hired him personally.

Alderman Werderich: What it comes down to as far as Kramer got to look at is who he's entered his appearance on behalf of professionally himself. If he's entered his appearance in the court case on behalf of somebody personally. Then there might be a conflict of interest for him representing someone personally and the city both as co-defendants. If he's entered his appearance on behalf of the city then that's a whole different ballgame.

Mayor Burd: He's not on the city he could not be.

Attorney Roth: Why would John Wyeth have done that? He obviously filed an appearance on behalf of the city.

Alderman Werderich: That would make sense.

Mayor Burd: But Dan Kramer suggested that he could go forward with this on behalf of the city.

Alderman Werderich: At the same time if, correct me if I'm wrong, Kramer can represent co-defendants as long as the co-defendants are okay with it.

Mayor Burd: Now that he's an alderman I don't see how why that would be a problem.

Alderman Werderich: It's not a problem for him, it's a problem for Kramer.

Attorney Roth: He can. I'm not familiar enough with the situation here I would have to say it would seem to me to be a fairly clear conflict of interest on his part if he's

representing developers before the city and he's also representing the city. I think that he's got a problem and I would not want to put him in that position. I wouldn't do that.

Alderman Werderich: So that's where you come in.

Attorney Roth: That's right we will both defend. I'll substitute in for the attorney for the city. Probably for John Wyeth.

Alderman Werderich: They're making the same arguments for both of the codefendants. The city and each individual will be making the same argument through him.

Some additional discussion took place as too the fact that there was no monetary request involved.

Mayor Burd: We're not going to do anything.

Alderman: We all agree to do nothing.

Attorney Roth: I will sit in.

Mayor Burd: But we are going to appoint John Wyeth as special council to handle bonds for Kendall Marketplace.

He's been assigned to the bonds for Kendall Marketplace.

Alderman Leslie: Is that his last official act?

Mayor Burd: Kendall Marketplace requested this because it would take a lot of time to bring someone else up to speed.

There was no further discussion.

A motion was made by Alderman Besco to close the Executive Session; seconded by Alderman Werderich.

Motion approved. Ayes-8 Nays-0  
Leslie-aye, Spears-aye, Munns-aye, Golinski-aye, Besco-aye Werderich-aye,  
Plocher-aye, Sutcliff-aye

The Executive Session was adjourned at 8:45 P.M.

Minutes respectfully submitted by:  
Lisa Pickering  
Deputy City Clerk, United City of Yorkville