

ROLL CALL

ITEM 1

Present: Kim Anderson, Mayor

John M. Passidomo, Vice Mayor

William E. Barnett
R. Joseph Herms
Alan R. Korest
Paul W. Muenzer
Fred L. Sullivan
Council Members

Also Present:

Dr. Richard L. Woodruff,
City Manager
Norris C. Ijams,
Assistant City Manager
William Harrison,
Finance Director
George Henderson,
Sergeant-At-Arms
Marilyn McCord,
Recording Secretary

See Supplemental Attendance List - Attachment #1

ITEM 2

**DISCUSSION/ACTION IN REGARD TO
RETAINING JOSEPH D. STEWART, ESQUIRE,
TO PURSUE LITIGATION WITH THE CITY'S
AUDITOR.**

City Manager Woodruff told Council that it was necessary to determine, based upon the analysis Attorney Joseph Stewart had done, whether there was merit to proceeding with legal action against former City Auditor Ron Wood. If so, then Council must decide how it should proceed with

legal arrangements in pursuit of this suit. Dr. Woodruff explained that Attorney Stewart had been retained based upon a Council directive in March, 1991.

The City Manager distributed background information pertaining to Attorney Stewart and to his law firm, Hardt & Stewart and said that he was especially well qualified to look into the matter at hand, not only as an attorney but as a C.P.A.

Attorney Stewart addressed Council, and advised that he had substantial experience in filing suit against professionals. In addition, Attorney Stewart noted that he had articles published in C.P.A. journals.

Attorney Stewart told Council that in his opinion the former auditors were indeed negligent in respect to their comments about the bond covenants. He stated that it was his opinion that there was clear liability, there were substantial damages, and a solvent defendant was involved. Attorney Stewart said that his investigation consisted of interviewing a number of witnesses including City staff members and reviewing the bond situation and the final audited statement. He explained that he had not reviewed the auditor's work papers or subpoenaed witnesses, but those avenues could be pursued after suit was filed.

Utilizing visual aides, City Manager Woodruff and Attorney Stewart reviewed the chronology of events leading up to the present situation. Events discussed included the ending date for the 1990 City audit, and the meeting to discuss transfers from the Revenue Fund with Mr. Woods, Mr. McWilliams and City Attorney Rynders; the last day of audit field work and audit report; the special letter from Rogers Wood Hill Starman & Gustason (RWHS & G) that the City was in compliance with the bond covenants; Preliminary Offering Statement prepared with RWHS & G's

initial City audit; discovery of the technical default; and proposed issuance date for bond release.

Attorney Stewart explained that damages which may be available in this potential lawsuit arose out of the negligence in the financial statements addressing the Water and Sewer reserve account. There may be additional damages which the City is entitled to he also noted. Attorney Stewart pointed out that until 1984, comparative negligence was not even allowed in a C.P.A. malpractice case, however, that law has been changed.

There are many unanswered questions in this situation, said Attorney Stewart, and many will remain unanswered until the City is able to obtain the power to force individuals to testify about what they know of the technical default. He said that he was of the firm opinion that malpractice had occurred and urged the Council to make a decision soon, since Florida has a two-year statute of limitation.

City Manager Woodruff told Council that he and Finance Director Harrison had reviewed the matter and clarified some dates. Dr. Woodruff pointed out that an auditor is not hired as staff's financial assistant but as Council's independent auditor, charged to be a check and balance upon the staff. He said that he was of the opinion that the auditor should have informed Council that there were problems at the City Dock. In addition, there are accounting practices which had occurred in the City for numerous years which never should have gone unmentioned to Council. Dr. Woodruff went on to say that the auditor should have made statements to Council that pointed out areas of neglect on the part of staff in matters of cash control, handling of rentals, etc. The auditor was hired as Council's employee, said Dr. Woodruff, and his charge was to be independent. He told Council that his recommendation as City Manager would be to

proceed with a lawsuit.

Council discussed the issue and Council Member Herms asked whether the Members of Council would go before a jury should suit be filed. Attorney Stewart answered that questions of procedure would be worked out between himself and a point of contact appointed by Council, however, the defendant had the right to demand a jury trial.

Discussion followed as to whether or not the City staff had been partly responsible for the situation, and Council Member Herms suggested that on a worst-case basis the City could be required to pay the defendant's fees as well and not receiving a settlement. Attorney Stewart emphasized that, as in any law case, there were no guarantees, however 95% of those cases filed are settled and he predicted that this case would be settled.

Council Member Herms said, "Our weakest defense goes back to negligence of previous staff members and may have some of us involved." He went on to say that according to Ron Wood, he had three or four private meetings with our City Attorney. City Attorney Rynders disagreed, saying that the only meeting he had attended was for the purpose of a telephone conference call with Mr. McWilliams.

Council Member Herms commented, "The only way we'll find out the real truth is through specific depositions. Unfortunately everything we've seen goes back to our staff members and I have a feeling that's what it might be in this situation. We could be sitting in a very precarious situation with regard to comparative negligence." Council Member Barnett asked Mr. Herms if he was inferring that the City should not go forward with a lawsuit. Mr. Herms answered that he was not specifically implying that the City should not go forward, but if it does, it is imperative to determine how weak or strong the case is, through the immediate

depositions of the key players. He added that the question would be "what was the competence of the staff and elected officials at that time, and what was really going on?"

Discussion ensued, and City Manager Woodruff told Council that procedurally it needed to decide whether or not to sue. If Council decides to sue, then it needs to obtain counsel. Once retained, the attorney's responsibility will be to file the necessary paperwork and then take depositions. At that time, he should make a determination whether the suit should be settled or withdrawn.

Attorney Stewart told Council that should he be retained, his contract would include methods of obtaining privileged information, after which he would be able to provide an accurate opinion. He stated that he did not believe it was appropriate to discuss factual issues in a public quorum.

City Manager Woodruff said that he did not view the situation as a matter of finance, but as a matter of principle, and that his recommendation to proceed had nothing to do with whether the City could gain damages. The point is, he stressed, governmental ethics. Council owes its citizenry an end to the matter. Dr. Woodruff said that a lawsuit would settle this, through a final ruling that would bring to the public's attention the actual facts. The City Manager said further, "It doesn't matter to me whether we have one penny come our way. The key issue here is ethics, to settle in the taxpayers' minds who was at fault. If the end result says the City was at fault, I will accept that gladly also. That will have closed this chapter in a factual way as set forth by our constitutional system. I want each of you to understand that potentially, we have the expenditure of much public funds to try this suit and potentially lose it or recover damages and win. But, the question is settling the matter of who was at fault."

BREAK: 7:20 p.m. - 7:30 p.m.

Council Member Muenzer expressed concern with regard to the cost of attorney's fees, and asked if it would be possible to obtain a second opinion.

City Manager Woodruff emphasized that there was no commitment to hire Attorney Stewart; he was hired solely for the purpose of advising whether or not the City should file suit. With respect to a second opinion, the City Manager suggested that after depositions are taken, a review attorney could be brought in to review those depositions. Dr. Woodruff verified that there were no funds in the budget for this suit but it could be paid for in several ways, including paring out of additional areas of expenditure.

Attorney Stewart explained that the Statute of Limitations in this matter begins from the time the client knew or should have known of the alleged negligent act. He said that his concern was not so much for the 1990 Audit Statement but for events previous to that, and it may be revealed that the City suffered other damages in prior audits. Attorney Stewart urged Council to take immediate action in order to stop the Statute of Limitations.

In answer to Council Member Barnett's question, Attorney Stewart said that there was an opportunity to win the award of attorney's fees, and that he would discuss that with his identified City point of contact.

Council Member Sullivan stated that this situation was indeed something that must be pursued on the part of the City. He agreed that an error of ethical conduct had occurred by a professional hired by the City. The responsibilities of an independent auditor were not properly discharged, said Mr. Sullivan, and Council would be negligent in its duties to the

citizens if this case was not pursued.

MOTION: To pursue the lawsuit
against the former City
Auditor.

Mr. John Anson Smith, 15 11th Avenue South, urged Council to go forward and follow through with this issue, with a reminder that the "Statute of Limitations clock was running."

Mrs. Sue B. Smith of 15 11th Avenue South also encouraged Council to pursue this matter and suggested that perhaps there might be more than one lawsuit to pursue. Mrs. Smith said that Council's decisions gravely affected the citizenry of Naples, and pleaded that when a citizen comes to Council with news or information, Council should listen.

Council Member Sullivan clarified, in response to Council Member Herms' question, that his motion merely stated a decision to proceed with legal action. The determination of depositions and other matters would be determined by the attorney who is hired. Mr. Sullivan also emphasized that the more public discussion Council holds on the case, the more "ammunition" is provided for those against whom it would be proceeding.

City Manager Woodruff told Council that an Engagement Letter would specify what Council expects of the attorney, including the date by which depositions must be taken. The letter would then be given to another attorney to analyze whether the case is strong or weak.

MOTION: To retain the firm of Hardt
& Stewart, Attorneys at Law,
to represent the City in an
auditor's malpractice action
against the former City
Auditor.

It was the consensus of Council that added to Attorney Stewart's contract would be a schedule

of specific activities, schedule of depositions and projected time period for those depositions, agreement to a second opinion, and language dealing with obligations on both sides should the City sever this contract.

When asked about potential conflict of interest, Attorney Stewart told Council that his partner was representing a client who is suing the City, and that both parties had been contacted and had consented to the possibility of the law firm representing the City in this case.

Council Member Herms suggested considering other law firms in the community, noting that in the past, problems had arisen when only one person was considered. Council Member Korest said that he was familiar with the firm of Hardt & Stewart and that in his opinion Council would be selecting a firm that could handle this very complex case to the City's best advantage.

Mayor Anderson reminded Council that Attorney Stewart was a CPA as well as an attorney and came very well qualified to handle the case. Vice Mayor Passidomo added that there was not another lawyer in southwest Florida with the credentials possessed by Attorney Stewart.

Council agreed that City Manager Woodruff, with the City Attorney's assistance, would be the City's point of contact with Attorney Stewart.

Attorney Stewart addressed Council with regard to confidentiality. He explained that his contract would include the provision that there be a privileged file maintained by his point of contact. All Members of Council had the responsibility of monitoring the case, he noted.

No copies would be made of the documents within that privileged file. Mayor Anderson added that the file would be maintained by City Manager Woodruff and kept in his office.

ADJOURN: 8:55 p.m.

KIM ANDERSON, MAYOR

JANET CASON
City Clerk

Marilyn McCord
Recording Secretary

These minutes of the Naples City Council were
approved on _____.