

**CITY OF COLUMBIA CITY COUNCIL
SPECIAL CALLED MEETING MINUTES
WEDNESDAY, FEBRUARY 26, 2014 – 11:00 A.M.
CITY HALL – 1737 MAIN STREET
COUNCIL CONFERENCE ROOM – 2ND FLOOR**



The Columbia City Council held a Special Called Meeting on Wednesday, February 26, 2014 at City Hall, 1737 Main Street. The Honorable Mayor Stephen K. Benjamin called the meeting to order at 11:11 a.m. and the following members of Council were present: The Honorable Sam Davis, The Honorable Leona K. Plough, The Honorable Brian DeQuincey Newman, The Honorable Cameron A. Runyan and The Honorable Moe Baddourah. Ms. Devine was absent. Also present were Ms. Teresa B. Wilson, City Manager and Ms. Erika D. Moore, City Clerk. This meeting was advertised in accordance with the Freedom of Information Act.

Upon a motion made by Mr. Newman and seconded by Ms. Plough, Council voted unanimously to refer an update from the Columbia Police Department, the Police Benevolent Association and Municipal Court to the Public Safety Committee.

A motion was made by Mr. Newman to enter into Executive Session for the discussion of **Items 1** and **2**. Mr. Davis seconded the motion.

Councilor Plough urged the Council to only talk about those items that are not already in the public domain.

Mayor Benjamin said the discussion is limited to the items articulated on the agenda.

Mr. Kenneth E. Gaines, Esq., City Attorney said his legal advice will relate to some of those items; he has to give Council a chronology as part of that legal advice.

Mayor Benjamin asked Mr. Gaines how they should handle this discussion.

Mr. Kenneth E. Gaines, Esq., City Attorney said they should go into Executive Session and if there's something they need to discuss in public, they will. He said there has been some discussion about releasing his memo and they need to discuss that.

Councilor Plough said a legal opinion is appropriate to be in executive session.

Mayor Benjamin said he is perfectly fine with having the entire discussion in public, including the receipt of legal advice.

Councilor Plough disagreed.

Mr. Kenneth E. Gaines, Esq., City Attorney said he is not and he advised Council that some of his legal advice cannot be discussed publicly. He noted that he will need to give Council some background information as part of his legal advice.

EXECUTIVE SESSION

Upon a motion made by Mr. Newman and seconded by Mr. Davis, Council voted unanimously to enter into Executive Session at 11:18 a.m. for the discussion of **Item 1**.

1. Receipt of legal advice, which relates to a pending, threatened or potential claim – *This item was discussed in Executive Session. No action was taken.*

▪ **Council reconvened the meeting at 11:50 a.m.**

Upon a motion made by Mayor Benjamin and seconded by Mr. Baddourah, Council voted unanimously to waive attorney-client privilege.

Mr. Kenneth E. Gaines, Esq., City Attorney explained that this matter involves the following: A loan was made by the city's Commercial Revolving Loan Fund (CRLF) to a corporation called Carolina Procurement Institute Inc. and Gary and Michelle Washington. On September 9, 2004, the Loan Committee approved a loan to Carolina Procurement Institute, Inc. and the Washington's in the principal amount of \$200,000. The documents in the file indicate that there was a first mortgage in the amount of \$453,000. There was to be a second mortgage, security agreement, a personal guarantee of the Washington's, a promissory note and a UCC financing statement filed at the court house. The Washington's owned the commercial property that was being secured by the loan. The Washington's executed the first mortgage to the bank; there was title insurance issued to the bank; and the security agreement was signed by the corporate entity only; the personal guarantee was signed by the Washington's; the corporate entity signed the UCC financing statement. In looking at the file, we have found that the loan closed on December 22, 2004 by Councilmember Devine as the private attorney representing the borrowers. The commitment letter clearly required delivery of a second mortgage on the property at 1815 Gervais Street. The checklist, loan closing instructions and the security agreement that was signed by the corporation also contemplated collateral of the second mortgage of the property owned by the Washington's. It is unclear from the file as to why the commitment letter or the closing instructions were not adhered to; there's no documentation in the file. Angelo McBride who works for that area of the city recalled that Josephus Howard discovered this and attempted to get the Washington's to execute a second mortgage in conjunction with the promissory note that they signed. The indication is and I don't know this to be a fact; this is what I am receiving from Angelo's recall; they refused to do so. This morning Ms. Herbert advised me that she looked on the electronic file and there was a mortgage that is not executed dated June 5, 2008, four years after the loan, which is consistent with Mr. McBride's recall. We don't have any timeframes in the file that I could find. The loan became delinquent in June 2010; the city retained Stan McGuffin, Esq. with Haynsworth, Sinkler, Boyd, P.A. to bring a foreclosure action.

Mayor Benjamin asked when that occurred.

Mr. Kenneth E. Gaines, Esq., City Attorney replied around June 2010.

Mayor Benjamin asked what happened in June 2008.

Mr. Kenneth E. Gaines, Esq., City Attorney explained that Angelo McBride recalled that Mr. Howard attempted to get a second mortgage executed. The indication is that the Washington's did not agree to do that. This mortgage is unexecuted.

Councilor Plaugh asked what the terms of the original loan were.

Mr. Kenneth E. Gaines, Esq., City Attorney said \$200,000; 4.75% interest rate; a commitment fee of \$2,000 was to be repaid; 25 year amortization. It's all on the commitment letter.

Councilor Plaugh asked when the first payment was to be made. She said the payment was to commence on February 1, 2005. She asked why wasn't it found delinquent until 2010.

Ms. Tina Herbert, Executive Director of the Office of Business Opportunities said she would have to print the payment history; it's not in the file.

Mr. Kenneth E. Gaines, Esq., City Attorney continued to explain that the principal and interest were to be paid in three hundred (300) equal monthly installments in the amount of \$1,140.23 with rate adjustments every five (5) years; commencing on the eighth day of February, 2005 based on a twenty five (25) year amortization period. The loan was closed on December 22, 2004. He noted that there are two (2) letters from Mr. McGuffin dated February 2, 2011 and April 19, 2012 and they are included in the packet. Based on the suit against Carolina Procurement only, because the Washington's were in a Chapter 11 proceeding, the Washington's went into default from the suit; Mr. McGuffin obtained judgment in favor of the city in the amount of \$184,345.49 plus costs, fees and interest. In the bankruptcy action the loan was listed by the debtor's attorney as unsecured; the bankruptcy plan is attached to this memo; and the city's judgment was reduced to an unsecured amount of \$26,420.00. Had the second mortgage been filed, it would have been included as a secured loan and there probably would not have been any reduction. The Washington's filed two (2) bankruptcies: a Chapter 11 and a Chapter 9. Recently, they filed a motion to reopen the bankruptcy to amend the plan; the city through the Community Development Department retained Lindsay Crawford, Esq. to resist that motion, but the Bankruptcy Court did not grant the motion to reopen the bankruptcy. My understanding from Mr. Runyan this morning is that the Washington's are delinquent in their payments under the bankruptcy plan and indications are that it will be written off by the loan committee.

Mayor Benjamin asked Mr. Gaines to explain the difference between secured and unsecured creditors.

Mr. Kenneth E. Gaines, Esq., City Attorney said on a mortgage loan, secured creditors get the property back and should get their money back when the property is resold.

Mayor Benjamin asked if we have ever been in the first position.

Mr. Kenneth E. Gaines, Esq., City Attorney said no.

Mayor Benjamin said as we try to assess what the damages might be, it's vitally important to understand how secured creditors are treated. I wish we had our arms around the numbers; a real assessment of the best case scenario.

Mr. Kenneth E. Gaines, Esq., City Attorney said that the Commercial Revolving Loan Fund has written off \$157,911.29 on this loan.

Mayor Benjamin asked how much it would be if it was here and if it were a bankruptcy.

Mr. Kenneth E. Gaines, Esq., City Attorney agreed to find out.

Councilor Newman said it is clear that a mistake was made, but we probably would not have gotten that original amount of money back anyway.

Mayor Benjamin reiterated that it is vitally important that we get our numbers lined up.

Councilor Runyan asked Mr. Gaines to explain the award for \$184,345.49.

Mr. Kenneth E. Gaines, Esq., City Attorney said that was not in the bankruptcy; that was the default judgment based on the promissory note, attorney fees, costs, interest, etc. They were in default and it was a judgment against the corporation.

Councilor Runyan asked if the property was in the Washington's name.

Mr. Kenneth E. Gaines, Esq., City Attorney said yes sir; they were in bankruptcy at that time, but the corporate entity had not filed bankruptcy; and I don't know if the corporate entity ever filed bankruptcy. He said indications are that the Commercial Revolving Loan Fund Committee will be writing off the amounts being paid pursuant to the bankruptcy plan. He asked Ms. Herbert if she knew about the payments the Washington's are making. He said that Mr. Runyan indicated that there was some discussion about the Commercial Revolving Loan Fund writing off that amount.

Ms. Tina Herbert, Executive Director of the Office of Business Opportunities said we have already written off the difference between the balance and what the Bankruptcy Court said we could get. Today there was also a motion to investigate whether or not we have the option of having the bankruptcy order dismissed and going back after them. She noted that any payments they are making will be applied to the balance.

Mr. S. Allison Baker, Senior Assistant City Manager added that the decision that has to be made on that is whether or not we lose more money by going after him versus staying where we are now.

Councilor Plough asked about the original appraisal. She wants to make sure we had an asset to begin with. She asked about the personal guarantee.

Mr. Kenneth E. Gaines, Esq., City Attorney said they are personally in bankruptcy. The appraisal as of July 22, 2010 valued the property in an as-is condition at \$320,000. He said there is indication that there were supposed to be renovations to the property.

Councilor Plough asked if there is staff that is intimately familiar with the file.

Ms. Tina Herbert, Executive Director of the Office of Business Opportunities said no more than she is. She said one of the issues they've had is that loan officers have come and gone. She said that Josephus was here through 2010; we didn't have a loan officer for six (6) months; then we got Scott Blackmon; we haven't had the consistency.

Councilor Baddourah asked if the money was given to them to buy the property.

Mr. Kenneth E. Gaines, Esq., City Attorney said they owned the property; I think it was a restructuring. He noted that at closing South Carolina Community Bank paid an appraisal fee, but he doesn't have access to that appraisal.

Councilor Plough asked that the request for the appraisal be put on the list.

Mr. Kenneth E. Gaines, Esq., City Attorney agreed to get the numbers tied down and to get with Mr. McGuffin.

Councilor Plough asked that staff review the Commercial Revolving Loan Fund plan and the conflict of interest provision.

Mayor Benjamin said it is also important to note that staff has done a good job cleaning up these old loans. He asked that we make sure we report to the respective agencies and comply with those regulations.

Councilor Runyan asked in 2008 or 2010, when the city became aware that there was a deficiency that rendered us an unsecured creditor what would be the typical action or response in that situation.

Mr. Kenneth E. Gaines, Esq., City Attorney replied that as the attorney for the city he would contact the closing attorney and ask for the execution and recording of the mortgage and if that didn't happen, if you had title insurance, make a title insurance claim against the policy; if no title insurance, you would have to go against the attorney who closed the loan and possibly their errors and omissions policy; I would ask that the deficiency be corrected to protect the client.

Councilor Runyan asked if Mr. Gaines knew why that wasn't done in this case to remedy this deficiency.

Mr. Kenneth E. Gaines, Esq., City Attorney said according to Mr. McBride, Mr. Howard tried to make contact in 2008; there's a blank mortgage in the computer file.

Councilor Runyan asked when the statute of limitations started running.

Mr. Kenneth E. Gaines, Esq., City Attorney stated that legal malpractice is three (3) years from the date of discovery.

Councilor Runyan said in 2010 when a flagged was raised by a memo we were still within the statute of limitations.

Mr. Kenneth E. Gaines, Esq., City Attorney said yes and the statute of limitations is an affirmative defense as you and I discussed and this is for any type of legal malpractice.

Councilor Runyan said because it was not raised in 2010, are we now clearly outside of the statute of limitations.

Mr. Kenneth E. Gaines, Esq., City Attorney said I would believe we are and we have consulted with outside counsel who does legal malpractice work.

Councilor Baddourah asked how come no one realized there was a mistake. He said between staff, attorneys, court hearings and court records nobody ever saw the red flag.

Mr. Kenneth E. Gaines, Esq., City Attorney stated that Mr. McGuffin wrote a letter in 2010 and it was discovered then that there was no mortgage; I don't know what action was taken by anybody; then they filed a bankruptcy and got the unsecured creditor status; they were asked to submit a plan; and that plan was approved by the court; they made payments under the plan.

Councilor Davis asked at what point anybody communicated to Ms. Devine that the document was not in compliance, even when the bankruptcy gets filed.

Mr. Kenneth E. Gaines, Esq., City Attorney said he can't speak for Mr. McGuffin, but he believes there was communication, but he is not sure.

Mayor Benjamin insisted that it is so important that we are talking facts here. I don't want any guessing or any assumptions; either we know or we don't; if Mr. McGuffin needs to be in the room, then he needs to be in the room.

Mr. Kenneth E. Gaines, Esq., City Attorney said he asked Mr. McGuffin to be here, but he had court hearings in Charleston today.

Mayor Benjamin said that is a question for Mr. McGuffin and he can answer that with a certain degree of clarity without having to be here. He said the reason we are having this meeting and Ms. Devine is out of town and I am sure if she were in town, she would recuse herself from these conversations because there is a conflict of interest. It's because everyone

around this table believes in accountability. It is a rare situation we find ourselves in, but nonetheless it is an important one that we try to make sure we execute the people's business; that we try to do it well; cross our t's and dot our i's; that we make sure our obligations and our responsibilities to the citizens are sacrosanct; it's precious; we take it very seriously and sometimes that means we have discussions that might not be comfortable discussions, but perhaps still need to be had. This meeting is about accountability; it's about transparency; we want to get to the bottom of this; and we want to get to the facts and figure out the most appropriate way to move forward. He said we went straight into a deep dive and he wants to make sure we are all on the same page. Let's make sure we stay close to the facts as we know them.

Councilor Plough requested the whole file.

Mr. Kenneth E. Gaines, Esq., City Attorney said there is some stuff in the file that cannot be released pursuant to the Freedom of Information Act (FOIA). He told Mr. Baddourah that the plan of reorganization on behalf of the Washington's was filed on September 13, 2010 and the order confirming was filed by the court on December 22, 2011.

Councilor Baddourah said from December 2011 until today there were no red flags for anybody to see that the payments were not being made; there was no way to collect the money. He asked how we could have a two (2) year gap.

Mr. Kenneth E. Gaines, Esq., City Attorney said in bankruptcy court there is an automatic stay when you file and your creditors can't come after you; you have to have the stay lifted.

Councilor Baddourah said on the policy part of it, as we try to look out for taxpayer's money, are there any more cases similar to that that we haven't looked into.

Ms. Tina Herbert, Executive Director of the Office of Business Opportunities said when she got here it was in bankruptcy and the file was inactive; however, after the letter that was written to Scott in 2011, I called Stan to say that we didn't have a mortgage file, what we can do to correct it. I asked him is there any way we can go back and record the mortgage. There should be a letter in the file from 2012. She said he provided the same response we got today; if Mr. Washington will not comply with the bankruptcy, we could possibly go back and get the bankruptcy dismissed, which would then allow us time to go back in and fix what we need to get fixed.

Councilor Baddourah asked if we need to go back and investigate any other loans.

Ms. Tina Herbert, Executive Director of the Office of Business Opportunities said when that issue arose two (2) years ago, she had staff go back and pull every file to make sure the mortgages had been filed and recorded. She said that Ken also asked her to check the closing attorneys and so they also pulled the names of all the closing attorneys on active loans, not inactive loans. She said her staff has gone through every file and verified that if there is supposed to be a mortgage, it's in there, it has been signed and it's actually filed.

- **Mr. Newman left the meeting at 12:24 p.m.**

Councilor Runyan asked for a consolidated list of who has closed every commercial loan.

Ms. Tina Herbert, Executive Director of the Office of Business Opportunities said she just did that yesterday.

Councilor Plaugh asked what happened when the first payment was not made; months passed; and then two (2) years passed. She wants to know under our underwriting standards when this loan technically became delinquent and what actions should have been taken to correct this. She said had that been done at that point and time there would've been other remedies available to us that are not available today. She said she asked Dana Turner to be here; she has moved on to serve us in our courts, but I don't know if she has any recall from 2004, but I want to hear what she might be able to share.

Ms. Dana D. Turner, Chief Administrative Judge said at that time the loan committee operated out of the Office of Business Opportunities (OBO) and not so much out of Community Development. She remembered the name Gary Washington, but she doesn't remember anything at all about this particular loan. She said she spoke with Ken a little bit this morning and he refreshed her a little bit about the loan itself. There should have been regular commercial loan committee meetings to discuss what was in default and what was current.

Councilor Plaugh asked if there should be minutes of those meetings.

Ms. Dana D. Turner, Chief Administrative Judge said yes. She noted that there weren't always regular around the table kind of meetings for the Commercial Revolving Loan Fund; I don't know how much of that is on file. I would think that Angelo should be able to find information. An important thing to remember too is that the purpose of the Commercial Revolving Loan Fund was to make loans that were maybe of more risk and another entity would not have made that loan; there were often loans that weren't recovered or they were written off. The purpose of the Revolving Loan Fund was to make loans to encourage businesses to develop.

Mayor Benjamin asked do you mean by nature these are more risky loans.

Ms. Dana D. Turner, Chief Administrative Judge said yes, by nature, they were more risky.

Councilor Plaugh said it was a constant thing when this program got started that you never, ever wanted to finance someone into bankruptcy. While there would be some inherent risks, the whole purpose of underwriting was to make sure you didn't put them in the realm of failure.

Ms. Dana D. Turner, Chief Administrative Judge said exactly and as you know there were formulas that the loan committee used and those that signed off on this would have looked very carefully at those to make sure the loan should be made.

Councilor Plaugh asked wouldn't you find it a little unusual that we didn't know that they weren't paying their mortgage; nobody was doing anything for four (4) or five (5) years. She asked the City Manager to pull the minutes of the Commercial Revolving Loan Fund during that period of time when the loan was made and the reports.

Ms. Teresa Wilson, City Manager asked if Ms. Livingston had anything to offer. She said many of us around this room have gotten involved on the tail end of lots of things that have transpired and Mr. Baker is here; we've all at some point or another have tried to right the ship.

Ms. Deborah Livingston, Director of the Community Development Department said in 2004 the loan officer was working out of OBO; then back to Community Development; and now it is back in OBO.

Councilor Plaugh asked who was in charge of OBO.

Ms. Dana D. Turner, Chief Administrative Judge said she thought it was Mr. Lawton.

Ms. Deborah Livingston, Director of the Community Development Department said either Tony Lawton or Marshall Johnson.

Councilor Plaugh asked who would have been the assistant city manager over it.

Ms. Dana D. Turner, Chief Administrative Judge said she probably was.

Ms. Tina Herbert, Executive Director of the Office of Business Opportunities said that all EDA loans are serviced by First Citizens; when I first got here we had a high number of delinquencies and that's why the EDA fund was suspended. I called First Citizens and asked about how we were intending to collect. I was personally told that they had stopped making calls and collecting, because that was their directive. We quickly corrected them in 2011 and asked them to call on delinquent loans just like any other loan and since then we have been working well. She noted that we pay someone to service these loans now.

Councilor Plaugh asked to see the minutes of the Commercial Revolving Loan Fund Committee; the quarterly reports filed with the EDA; the original appraisal; the servicing reports from First Citizens along with the directive not to collect.

Ms. Teresa Wilson, City Manager asked if she wants the information from back then.

Councilor Plaugh said yes.

Ms. Tina Herbert, Executive Director of the Office of Business Opportunities said they did a monthly report.

Councilor Plaugh said she is sure First Citizens didn't decide not to collect without having something signed.

Ms. Dana D. Turner, Chief Administrative Judge said it was probably a loan committee determination.

Ms. Tina Herbert, Executive Director of the Office of Business Opportunities asked if Ms. Plaugh wants the minutes from when it was approved.

Councilor Plaugh said when it came to the loan committee under the delinquency criteria. She requested a conflict of interest plan.

Ms. Tina Herbert, Executive Director of the Office of Business Opportunities said the EDA has its own specific contract in addition to what we have.

Mayor Benjamin asked what EDA funding is.

Ms. Tina Herbert, Executive Director of the Office of Business Opportunities said EDA is funded with EDA and CDBG. She said for this we go by EDA guidelines; CDBG money was used as a match.

Councilor Plaugh asked Ms. Herbert to verify that.

Mayor Benjamin said there are a lot of questions that have to be answered by people not in this room; there are documents you guys asked to see; policies outside of our scope, but at some point with Ken or someone he retains from outside, someone has to interface with Ms. Devine and if there are questions or inconsistencies then those need to be reported and followed up on.

Mr. Kenneth E. Gaines, Esq., City Attorney said he will follow up with the Mr. McGuffin.

Mayor Benjamin said we need to crystalize the questions that need to be answered and decide how we are going to most appropriately represent the interest of the citizens and then decide how we are going to move forward. Make sure that Ms. Devine has the chance to address each of those comments and then figure out how we are going to move forward.

Councilor Davis concurred. He said as we have learned through this discussion, some of the fringes of deep diving also suggest that there are some things that need to go back to the Economic and Community Development Committee. He said there is a gap that he can't follow from 2004 to 2010 and some of that has been corrected, but I don't have a full understanding as to how we got to this point and why. I'm not positioned to say that I totally agree with Mr. Gaines.

Mayor Benjamin said we've done a comprehensive review of the loan portfolio and we also need to look at what kind of safeguards are in place that feed up the pipeline. He said that is certainly something the committee can provide policy on as to how we deal with those things going forward. He said the difference between then and where we are now are like night and day.

Councilor Plaugh acknowledged that we did extensive work with Tina and her staff to look at all of the underwriting and delinquency. I really think we are cleaning up old work.

Councilor Davis said there is a question with the conflict of interest policy; let's look at it and see where we are.

Councilor Runyan said it might be helpful for Council, if you all create a linear timeline with the starting point being when the loan was first made and then include all pertinent information on it with the corresponding documents.

Councilor Baddourah asked if the closing attorneys are still liable for three (3) more years because of the omissions insurance. He asked when their responsibility ends; after the loan closes or it keeps on going.

Mayor Benjamin said usually it ends at closing; however, there are obligations that remain. He said there are a couple of different questions here: execution of duties; insurance, no insurance; and the statute of limitations. The obligation does not end at closing and some of these questions are not for the closing attorney; it's for the borrower and the ability to repay the loan.

Ms. Tina Herbert, Executive Director of the Office of Business Opportunities explained that the loan officer drafts these documents and sends them to the closing attorney. She said there is nothing showing that we actually drafted a mortgage and sent it to the closing attorney. She said we send a letter to the closing attorney outlining what is being sent and what is expected back. She said there should have been some checks and balances on our end.

Ms. Dana D. Turner, Chief Administrative Judge said there were checklists back then.

Councilor Davis said he is more comfortable now with the checks and balances that are in place. He expressed concerns about the period of time these folks went without paying. He said it is a question of what the procedures were.

Councilor Plaugh said she is comfortable that the procedures have always been in place.

Ms. Tina Herbert, Executive Director of the Office of Business Opportunities said they need to make sure that any correspondence received is also shared with the appropriate staff.

Councilor Baddourah said it is a good idea for us to review the process. He said the program we voted on two (2) months ago when it comes to the CRFL program and we need to redefine the steps we need to watch out for and make it clear so when a new person comes in they can follow the steps.

Mayor Benjamin asked the City Attorney to make sure the document is public and that he edits the memo.

Mr. Kenneth E. Gaines, Esq., City Attorney said whatever was attached to his memo is subject to FOI.

Councilor Plaugh thinks that whatever is the right process that the staff feels like they need to follow, they need to do that. She said I don't want us holding you up from doing something that you feel obligated to do.

Ms. Teresa Wilson, City Manager asked if Ms. Plaugh's comments are regarding this matter.

Upon a motion made by Mr. Baddourah and seconded by Mr. Davis, Council voted unanimously to enter into Executive Session at 12:53 p.m.

2. Receipt of legal advice, which relates to a matter covered by attorney-client privilege
– *This item was discussed in Executive Session. No action was taken.*

Upon a motion made by Mayor Benjamin and seconded by Ms. Plaugh, Council voted unanimously to adjourn the meeting at 1:43 p.m.

Respectfully submitted by:

Erika D. Moore
City Clerk