



**OFFICE OF THE CITY COUNCIL
RESEARCH DIVISION**

117 WEST DUVAL STREET, SUITE 425
4TH FLOOR, CITY HALL
JACKSONVILLE, FLORIDA 32202
904-255-5200

**COUNCIL MEMBERS DENNIS AND WILSON NOTICED MEETING MINUTES
GROWTH PLANNING, BUDGETING, QUALITY OF LIFE, JEA ISSUES
City Council Chamber, 1st floor, City Hall**

**September 16, 2019
3:30 p.m.**

Location: City Council Chamber, City Hall – St. James Building; 117 West Duval Street

In attendance: Council Members Garrett Dennis, Scott Wilson, Randy White, LeAnna Cumber, Michael Boylan, Tommy Hazouri, Matt Carlucci, Randy DeFoor, Brenda Priestly Jackson, Ron Salem, Garrett Dennis, Ju’Coby Pittman, Joyce Morgan

Also:
Charter Revision Commission Chairman Lindsay Brock

Melanie Wilkes – Legislative Services Division; Steve Cassada and Will Coffee – Council Staff Services; Jeff Clements – Council Research Division; Kyle Billy and Kim Taylor – Council Auditor’s Office; Sherry Hall – JEA; Jason Gabriel, Lawsikia Hodges and Peggy Sidman – Office of General Counsel; Cheryl Brown – Council Secretary/Director

Meeting Convened: 3:34 p.m.

Council Member Dennis called the meeting to order and explained the reason for the meeting. He met with the Office of General Counsel to request preparation of legislation opposing the privatization of JEA and was cautioned by the OGC regarding “cone of silence” rules because an Invitation to Negotiate had been issued by the JEA that might produce an outcome that would come before the City Council for future action. The City Council requested a binding legal opinion on that subject and expressed interest at a previous meeting about the possibility of the Council obtaining its own legal counsel.

General Counsel Jason Gabriel said that the City Council is unique among City government entities in having a specific authorization in the Ordinance Code to hire a legislative counsel, but only for the purposes of supporting the Council’s legislative work and not for the purpose of opposing or challenging rulings of the General Counsel. He said that outside counsel may very well be retained at some point to assist the City in dealing with complex issues relating to the potential privatization of the JEA.

Council Member DeFoor said she had several concerns:

- 1) Haste of the process – JEA appears to be financially sound, so there’s no reason to rush to a decision.
- 2) Independence of counsel – how does City Council get the representation it needs for its interests?
- 3) Absorption of liabilities when selling the JEA – who will be responsible?
- 4) Selling water – water is the next oil, and the JEA’s water operations should not be divested for any reason. South Florida wants our water and it will become increasingly valuable over time and the City would be foolish to let the water system go.

Ms. DeFoor said the City Council will only have 2 opportunities to touch the JEA issue – the currently pending JEA pension bill, and then at the very end of the process when a sale has been negotiated and finalized, when the pressure will be great on the City Council to approve a “done deal.” The City Council has a fiduciary responsibility to represent the citizens and taxpayers in determining the future of the JEA. She has talked to Jason Gabriel today who told her that the City Council members are subject to the “cone of silence” requirements with regard to two things: 1) the merits of the Invitation to Negotiate and 2) any potential responders to that ITN. She recommends the Council hire independent counsel and that it issue a clear statement of opposition to selling JEA.

Council Member Dennis said that since City Council doesn’t need permission from OGC to hire its own counsel, he hopes OGC will be cooperative in assisting the Council to hire the attorney it needs. Mr. Gabriel said that the Charter says the General Counsel must coordinate and sign off on hiring a legislative counsel, which he’s not opposed to but must be involved in the hiring process. That counsel must work in coordination with the OGC and cannot be used for “opinion shopping” or fighting the General Counsel’s office. In response to a question from Mr. Dennis about why the JEA was authorized to hire independent counsel, Mr. Gabriel said it was allowed because of the specialized legal needs of JEA in considering the complexities of considering a potential sale. Mr. Dennis said that City Council has the same need for that kind of specialized expertise and waiting until later in the JEA process to do so is not in the Council’s best interests. Mr. Gabriel said if he can get a handle on what the Council needs to know he can get the kind of expertise the Council needs, and asked what specific topics the Council is interested in exploring.

Council Member Hazouri said the City has lots of important issues pending before it, but the JEA is probably the most important public policy issue of all. Council needs to be in front of the issue, not trailing along behind. He said most of the independent authorities have wanted independent counsel over the years and asked why the Office of General Counsel doesn’t hire the specialized counsel it needs to deal with issues as they arise. He believes the Council can’t afford to get boxed into a situation of being asked to act on a done deal at the end of a long process. Mr. Gabriel said that sometimes specialized niche expertise is needed (i.e. bond counsel), and sometimes it’s a matter of staff workload and time. JEA has a legitimate need for high level assistance with regard to considering a monumental issue, and that counsel works cooperatively with the OGC. He again asked what information the Council is seeking and said he’s willing to appoint an OGC attorney, apart from the current legislative staff, to be an advisor and liaison to get any information the Council may need, which might at some point involve hiring outside counsel. City Council has the power to change the JEA charter right now and set any rules it wants with a 2/3 vote. Mr. Hazouri reiterated that City Council is behind on considering the JEA privatization issue and doesn’t have a way to impact the process until the very end.

Council Member Carlucci agreed with Council Member DeFoor’s desire to put a pause on the JEA privatization process and asked how Ms. DeFoor sees outside counsel’s role in helping the City Council. She said that there is sometimes an inherent conflict of interest between the City Council and other agencies and City Council can’t be muzzled by the OGC to the detriment of the citizens. In response to a question from Council Member DeFoor to Mr. Gabriel about how to define the JEA “cone of silence” and how it impacts Council, Mr. Gabriel said the council members can’t talk about issues relating to the substance and merits of the JEA’s Invitation to Negotiate or talk with potential proposers to the ITN in a

way that might impact the fairness of the procurement process. He likened it to the restrictions on *ex parte* communications that apply to zoning and land use issues.

Mr. Gabriel said that he rejects the argument that the OGC has an inherent conflict of interest by serving multiple clients; the whole City government, including the independent authorities, is a single entity established by the Legislature and served by the OGC so there's no conflict among multiple clients.

Council Member Cumber said that forum shopping (trying to choose a court to get the most favorable opinion) is a dangerous practice. Sometimes outside counsel is necessary to deal with arcane areas of law. She disagrees with the conflict of interest argument and cautions against hiring lawyers to fight the OGC – that's a slippery slope leading to trouble in the future. If an argument is made to hire outside counsel whenever someone doesn't like the OGC's opinion, then that's a problem. The "cone of silence" was well-explained at a previous council meeting – council members just can't talk to potential proposers in a way that would give someone an unfair advantage. She believes that an adversarial relationship with the OGC will be detrimental to everyone.

Council Member Dennis quoted from the Ordinance Code section regarding the ability of the City Council to hire legislative counsel. He advocated for the hiring of counsel that can be laser-focused on the needs of the City Council and can support the workload of 19 members. He believes that the process should get underway to develop the scope of services cited in the Code as a preliminary to hiring legislative counsel. Council Member Carlucci said that if Council wants to hire an attorney, it needs to do a proper procurement process.

Council Member Salem asked for an overview and timeline of the JEA Invitation to Negotiate process. Mr. Gabriel said the ITN was published in August and responses are due by October 7. Responses will be reviewed by JEA staff and negotiated with potential purchasers for presentation to the JEA Board. Ultimately it will come to City Council and then be subject to the referendum previously called for by City Council.

Kevin Hyde of Foley and Lardner, special counsel to JEA, explained that after Oct 7, JEA procurement employees will evaluate the proposals through late October for minimum pass/fail requirements, then the passing proposals will be further evaluated by JEA's procurement team for whom to negotiate with. Negotiations ensue with JEA's negotiating committee, then the selected proposers will give their best and final offer. The best offer(s) will be taken to the JEA board for a final decision by sometime next spring. If they make a decision to accept an offer, then it comes to City Council for approval and the scheduling of a referendum. Council Member Salem thinks the City Council should get all the expertise of OGC to answer their questions, but if there's any question then there may be need for outside assistance, which could be legal or could be financial (i.e. mergers and acquisitions experts). He doesn't see the need for a rush to hire outside expertise yet – let the process play out.

Council Member Priestly Jackson said this issue has been pending for months and Council is already behind the curve and needs to catch up. She's concerned with the over-broad language in the August memo on the JEA procurement "cone of silence" – some of it seems to have gone far beyond what was necessary by mentioning communications with constituents, use of social media, etc. That had a chilling effect on some people. Non-attorneys may not have understood the nuances of the wording and may feel like they are restricted when in fact they are not. Jason Gabriel said that the memo was intended to do 2 things: 1) protect the integrity of the JEA's ITN procurement process, and 2) foster fair competition among the proposers. The prohibited discussion topics for council members are 1) the merits of the ITN requirement and 2) discussions with the ITN potential proposers. Everything else is permissible, including general statements of position on the JEA and its future, discussion with constituents about their concerns

and opinions, media appearances, etc. Ms. Priestly Jackson said that this is a complex and monumental decision affecting the City's future, so the Council needs all the expert advice it can get.

In response to a question from Council Member Priestly Jackson about the limitations on Council's ability to hire its own counsel, Mr. Gabriel said that funding would be needed and the General Counsel must be involved in coordinating and assisting with the hiring process. He indicated his willingness to meet with Council leadership and work out the finances and understand what end the Council is trying to achieve. Ultimately the OGC will very likely need outside expertise to deal with an issue as important as a potential privatization of JEA, so urged all parties to work together to get what everyone needs. He wants the Council to be comfortable with the process and happy with the outcome and said he will do anything he can to help the policy body do its job. In response to a question from Ms. Priestly Jackson about how the Council should best convey its needs to OGC to decide what's needed, Mr. Gabriel asked the Council to submit any questions to him and he'll decide what can be handled in-house and what needs to be farmed out to outside expertise.

Council President Wilson expressed the feeling that the JEA potential sale process is moving too fast, including the JEA pension bill that is in committee for action tomorrow. What if that bill doesn't pass Council? Does that impact how the ITN proceeds? Kevin Hyde said that in his capacity as counsel to JEA he is under the "cone of silence" with regard to the ITN and has to be careful what he says. He said the JEA board's resolution said that certain factors, including pension protection, are vitally important to whether a deal goes forward or not. Mr. Wilson said that questions about the loyalties of the General Counsel have persisted over the years. He likes the suggestion of hiring outside counsel to do what the OGC can't and the idea of posing questions to Mr. Gabriel for responses.

Council Member Boylan suggested that the City Council is being put in the same position as it was in the School Board tax debate – forced to make a "take it or leave it" decision at the end of another body's process. Jason Gabriel noted that the City Charter was amended recently to require referendum approval of a sale of more than 10% of JEA's assets. If Council doesn't approve, then there's no referendum. Mr. Boylan said that gets back to the recent situation with the School Board, with Council negotiating terms that it doesn't like with perhaps multiple parties. Mr. Gabriel said that some principle components of the ITN are non-negotiable because that wouldn't be fair to proposers whose proposals didn't get to the final stage of the selection process. City Council has a limited ability to negotiate, but ultimately has the power to vote the proposal up or down. Mr. Boylan said that the Council may need several kinds of outside expertise, including water law, environmental law, etc. The JEA pension bill seems to be putting Council in the position of tentatively indicating approval for a sale of the utility.

Council Member Morgan suggested the need for the Council to reinstate its previous committee on the potential JEA sale to delve into the issues that are being raised. Council Member DeFoor said that this will be a highly sophisticated transaction and the City will need to hire the best possible merger and acquisitions attorney to represent its interests because the purchaser will certainly have done so. She sees a need to start now on developing specifications for the needed attorney so as to be ready to act in the spring of 2020 so that the issue can go on the November 2020 ballot if that's how the process plays out.

In response to a question from Council Member Hazouri about whether the JEA pension bill is the only thing that Council has to act on now, Mr. Hyde said it is because potential respondents need to know what the cost will be before they can develop a bid. The respondents and the JEA employees all need the assurance to know what's going to happen to them. Mr. Hazouri questioned whether there is anything else for the Council to deal with, aside from the pension, until it knows what the proposal is going to be. It doesn't seem like Council has any role to play in shaping the deal until the JEA brings a proposal. Mr. Gabriel said the Council can talk about its general feelings on the privatization issue and can pose any questions it has about the ITN to gain clarity. Council Member Pittman said it's hard to know what to ask

if you don't understand the intricacies and ramifications of the deal. Council stands to be put in a position of being blamed if the process goes wrong.

Council Member Carlucci advocated for the JEA pension bill to be referred to multiple committees, including Rules, so that more council members can review the bill. In response to a question from Council Member Dennis about who assigns bills to committees, Deputy General Counsel Peggy Sidman said the Council President has the ultimate authority to assign bills, but in practice it's done by the Rules Committee and Legislative Services staff. Rules Chair Morgan indicated her willingness to have this bill referred to Rules.

Mr. Carlucci said that this is the first time in his City Council experience that he doesn't feel well advised by the OGC and thought that more personal, individual communication would be helpful. Jason Gabriel said that attorney/client privilege means that it's not the role of OGC attorneys to carry the business of one agency to another before they're ready to publicize it. In response to a question from Mr. Carlucci about who chose the spring 2020 deadline for the deal to be decided, Mr. Gabriel said it is the JEA's timeline for their procurement process, which is not set in stone; it will take as long as it takes. President Wilson said he has told JEA representatives that there needs to be more public conversation and information about the potential sale process.

Council Auditor Kyle Billy urged that if council members have specific financial questions, they please pose them to him as soon as possible so his office can get answers prepared or, if it's beyond their ability, to get specialized expertise to get answers. He can send out the Auditor's Office's recent report on the JEA and the final report of the City Council's Special Committee on the Future of JEA.

Council Member Dennis asked Gabriel to present, by next Tuesday, a proposal for what and how City Council would hire a legislative counsel – qualifications, cost, scope of services, etc. He also wants the binding legal opinion on the “cone of silence” previously requested. Mr. Gabriel said the memo was self-explanatory and there's not really a conflict to rule on, which is usually the purpose of a binding legal opinion. After some discussion he agreed to provide a simplified explanation of the “cone of silence” memo similar to what he gave earlier in the meeting, under his signature.

Public Comment

Randy Hilton – believes that City Council needs its own legal representation to advocate for its interests. He cautioned that pension issues are very complicated and Council should take care to clearly understand what it's voting on.

Luis Cano – feels that the JEA privatization process is not being done transparently and agrees that City Council needs legal representation to protect its interests. It's hard to tell what's true and what isn't from the way very little information is being released. The citizens of Jacksonville will not benefit from this proposed privatization and the union membership is very concerned about what's potentially happening.

Chap Gray – the discussions of the potential privatization seem endless and surveys show that 70-75% of Jacksonville citizens are not in favor of privatization. JEA is facing challenges like every electric utility in the world, but is better equipped to meet those challenges by being municipal utility dedicated to the good of the customers and not having to make a profit for shareholders.

Meeting adjourned: 6:15 p.m.

Minutes: Jeff Clements, Council Research Division

jeffc@coj.net 904-255-5137

9.18.19 Posted 2:00 p.m.