

OFFICIAL PROCEEDINGS OF THE CITY COUNCIL
Rapid City, South Dakota

June 30, 2004

Pursuant to due call and notice thereof, a special meeting of the City Council of the City of Rapid City was held at the City/School Administration Center in Rapid City, South Dakota on Wednesday, June 30, 2004 at 1:15 P.M.

The following members were present: Mayor Jim Shaw and the following Alderpersons: Tom Murphy, Martha Rodriguez, Bill Waugh, Ray Hadley, Ron Kroeger (by telephone conference) and Jeff Partridge. The following Alderpersons arrived during the course of the meeting: None; and the following were absent: Alan Hanks, Jean French, Sam Kooiker and Rick Kriebel.

Staff members present included City Finance Officer Jim Preston, City Attorney Jason Green and Administrative Assistant Jackie Gerry.

Motion was made by Rodriguez, seconded by Waugh to go into Executive Session to discuss litigation. Upon a roll call vote, the following voted AYE: Murphy, Rodriguez, Waugh, Hadley, Kroeger and Partridge; NO: None. Motion carried.

The Council came out of executive session at 1:54 P.M.

Motion was made by Rodriguez, seconded by Hadley to reconvene the proceedings of the Special Council. Upon a roll call vote, the following voted AYE: Murphy, Rodriguez, Waugh, Hadley, Kroeger and Partridge; NO: None. Motion carried.

Alcoholic Beverage License Applications Hearings

Mayor Shaw opened the public hearing on the following license applications:

On-Off Sale Malt Beverage License Renewals – No Video Lottery

1. Northcott Company dba Perkins Restaurant, 1715 N. LaCrosse Street, for an On-Off Sale Malt Beverage License Renewal; and
2. Northcott Company dba Perkins Restaurant, 2305 Mt. Rushmore Road, for an On-Off Sale Malt Beverage License Renewal

City Attorney Green recommended the Council make a formal motion that recognizes the action taken to reconsider these two items at the previous Council meeting was without lawful effect and direct the City staff to endorse the Council's approval based on the first vote on these items; whereupon a **motion was made by Waugh, seconded by Rodriguez** to move approval as stated by City Attorney Green.

At this time, Mayor Shaw recognized Lisa Sissenstein who questioned the State statute that permitted a re-vote on this issue. City Attorney Green indicated that this was not a re-vote on any item. This was an acknowledgment that certain action taken was without lawful effect, and directing City staff to comply with the requirements of State law; which are to endorse the approval of the Council on these licenses and send them to the Secretary of Revenue. He explained the Council took two separate actions on these items. One of them was lawfully effective, one of them was not. The Council is directing staff to follow the action that was lawfully effective.

In response to a question raised by Lisa Sissenstein on Item No. 127 listed on the June 21, 2004 Council agenda, which was reconsidered because Bill Waugh needed to abstain from voting; Green explained the law on reconsideration for alcoholic beverage licenses was different than it was for other items. He cited the South Dakota Supreme Court Case Cooper v Hauschild

(527 N.W. 2d 908) as the authority that reconsideration based on an alcoholic beverage license application is not permitted. He continued by explaining the Supreme Court in that case, specifically said that local governing bodies retain the ability to reconsider other items based on their rules of procedure. He also explained that the reconsideration on the Item No. 127 did not change the Council's action. The action was exactly the same. The reconsideration on that particular item was so that the record would reflect that a certain alderman had abstained on that particular vote.

Sissenstein responded stating that for reconsideration to be done, no vote of the Council should be reconsidered or rescinded at a special meeting unless at such special meeting there is present at-large a number of aldermen as where present when such vote was taken. She indicated that being the Council asked for reconsideration that night, which was asked for by Alderman Hanks after visiting with City Attorney Green, believed he could decline and thus asked for a reconsideration, which was passed.

Sissenstein asked for a continuance of this item to allow her an opportunity to research and gather more information on the stated Supreme Court case. She indicated she had no problem with Perkins Restaurant having a malt beverage license; but had a problem with an applicant using it without notifying their patrons by not listing the beverages on their menu, in the restaurant, or using table tents. She indicated she knew the law says an applicant is not required to display their malt beverage list; and suggested they were using it to try to circumvent the law to work for their benefit. She pointed out Sioux Falls had the same problem and adopted an ordinance requiring that no application for a malt beverage retailer license or an on-sale dealer and wine license would be considered by the City unless the applicant certifies or attests during the application process that it will offer the sale of alcoholic beverages on its menu and have alcoholic beverages on the premises readily available for sale.

In response to a question raised by Sissenstein on the compliance check; Green indicated there was no direction, in the form of a motion, from the Council.

Alderman Partridge expressed his concern on whether Council action was in concert with the law; and whether the City Attorney's opinion was also in concert with the Attorney General's opinion.

Substitute motion was made by Partridge to continue the license renewals to the July 6, 2004 Council meeting, at which time the Council can take action to ensure that the Attorney General is in concert with the City Attorney's opinion; and we have not missed anything in terms of what was done with item no. 127. The Chair declared the motion died for lack of a second.

Alderman Hadley explained the purpose of the Special Council meeting was to make the public aware that the Council's previous action was not lawful.

Green read an excerpt from Supreme Court Case Cooper v Hauschild (527 N.W. 2d 908); "According to the statutory scheme of SDCL Ch. 35-2, the only action a local governing board is authorized to take after approving an application is: a) endorse the approval of the application and forward it to the Department of Revenue; and, b) make a recommendation to the Secretary of Revenue that a license be suspended or revoked."

Alderman Hadley suggested in a perfect world he owned Perkins and there was no smoking; and indicated this was a smoking issue. He indicated there were only two reasons to deny a license - character of the applicant and suitability of the location. He reiterated there was nothing in State law that says they have to notify their customers that they serve alcohol; nothing requiring them to list it on the menu or display table tents. He reminded all in attendance that Rapid City does not currently have an ordinance that requires an applicant to serve the alcohol beverages or advertise the availability. He suggested the applicant was not circumventing the law, in contrary, they were complying with the law. He indicated the law says if you want to have

smoking, you have to have a malt beverage license or you have to have a video lottery license. The Council does not have the right to deny the application once approved. When it comes before the Council every year, is an opportunity for the Police Department to check to see if there are any compliance check problems - to see if the location is unsuitable or the character of the applicant is questionable. If the compliance check is favorable, it is brought forth as a recommendation to send back to the State as the applicant has fulfilled the two requirements to keep the license. Hadley suggested he believed the Council made an error on June 21, 2004, because the actions taken were imposing personal feelings rather than legal decisions.

Mayor Shaw recognized Stacey Waldman, who thank the Council for the opportunity to speak and asked if the City was being threaten with a law suit; and which City Attorney Green answered in the affirmative. When asked what constituted State law, Green advised that Supreme Court opinions were considered to be law until changed by the Supreme Court or legislatively over-ruled, or the United States Supreme Court over ruled the decision.

Alderman Partridge asked for the ramification if continued; at which City Attorney Green advised that the malt beverage license expires on this date.

Upon a roll call vote being taken on the motion, the following voted AYE: Murphy, Rodriguez, Waugh, Hadley, and Kroeger; NO: Partridge. Motion carried on a 5 to 1 vote.

Motion was made by Rodriguez, second by Partridge to Set for Hearing on July 6, 2004 a Special Malt Beverage & Wine License for the Rapid City Area Chamber of Commerce to be used on July 13, 2004 at the Rapid City Swim Center, 235 Waterloo Street.

City Attorney Green advised the hearing date of July 6, 2004 was not appropriate as State law requires a seven day publication period. He suggested the hearing be set at a Special Council meeting on July 12, 2004. At this time, with the consent of the members present, Rodriguez withdrew her motion.

Motion was made by Rodriguez, second by Murphy to Set for Hearing on July 12, 2004 a Special Malt Beverage & Wine License for the Rapid City Area Chamber of Commerce to be used on July 13, 2004 at the Rapid City Swim Center, 235 Waterloo Street.

Alderman Hadley offered a friendly amendment to Set for Hearing on July 13, 2004, before the Public Works Committee meeting. Motion maker accepted the friendly amendment.

Upon a roll call vote being taken on the motion as amended, the following voted AYE: Murphy, Rodriguez, Waugh, Hadley, Kroeger and Partridge; NO: None. Motion carried.

As there was no further business to come before the Council at this time, the meeting adjourned at 2:40 P.M.

CITY OF RAPID CITY

ATTEST:

Mayor

Finance Officer

(SEAL)