



City of Roswell

38 Hill Street
Roswell, Georgia 30075

Meeting Minutes Mayor and City Council

Mayor Jere Wood
Council Member Nancy Diamond
Council Member Rich Dippolito
Council Member Kent Igleheart
Council Member Jerry Orleans
Council Member Betty Price
Council Member Becky Wynn

Monday, August 8, 2011

7:00 PM

City Hall

WELCOME

Present: 7 - Mayor Jere Wood, Council Member Nancy Diamond, Council Member Rich Dippolito, Council Member Kent Igleheart, Council Member Jerry Orleans, Council Member Betty Price, and Council Member Becky Wynn

Staff Present: City Administrator Kay Love; Deputy City Administrator Michael Fischer; City Attorney David Davidson; Director of Environmental/Public Works Director Stu Moring; Transportation Director Steve Acenbrak; Transportation Land Development Manager Clyde Stricklin; Director of Community Development Alice Wakefield; Recreation and Parks Director Joe Glover; Economic Development Manager Bill Keir; Planning and Zoning Director Brad Townsend; Community Relations Coordinator Kimberly Johnson; Police Chief Dwayne Orrick; Transportation Deputy Director David Low; Deputy City Clerk Betsy Branch.

Pledge of Allegiance

Brandon Burke, Boy Scout Troop 7153 introduced himself and said he was attending the Council meeting to complete his communications merit badge.

CONSENT AGENDA

1. **Approval of July 11, 2011 Council Meeting Minutes (detailed minutes to replace Council Brief minutes adopted on July 25, 2011); Approval of July 25, 2011 Council Meeting Brief.**
Approved
2. **Approval of a request to allow the location of antennas and related equipment on the rooftop of the existing building located at 1110 Sanctuary Parkway.**
Approved

- 3. **Approval of a change order to CMES, Inc. for the Grimes Bridge Road at Norcross and Warsaw Intersection Improvement Project in the amount of \$40,589.40.**

Approved

Approval of the Consent Agenda

A motion was made by Council Member Wynn, seconded by Council Member Diamond, to Approve the Consent Agenda. Item #4 was pulled off the Consent Agenda. The motion carried by the following vote:

In Favor: 6

- 4. **Approval of a change order to JJE Constructors, Inc. for the Crabapple Sidewalk Project in the amount of \$37,377.20.**

Councilmember Price requested that Consent Agenda item #4. be extracted from the Consent Agenda. Mayor Wood agreed to remove item #4 from the Consent Agenda.

Transportation Director Steve Acenbrak presented the item and explained that the bulk of the change order was generated by a concrete retaining wall on the side. The designer did design it adequately. However, after looking at the situation in the field, it was determined that the wall needed to be raised a certain number of feet in the area on top to make the backfill slope safer. This change created an additional amount for labor and materials. There were minor changes to guardrail from the Committee's request, to minimize the impact of the trees in the lower area. The sidewalk was re-aligned to bring it closer to the road and minimize the impact to the trees. Labor and materials were involved, as well as additional guardrail installed behind the area.

Council Comment:

Councilmember Price asked if this money is for beautifying and for the façade. Mr. Acenbrak replied no, it was for the structure. No further discussion.

A motion was made by Council Member Dippolito, seconded by Council Member Wynn, that a change order to JJE Constructors, Inc. for the Crabapple Sidewalk Project in the amount of \$37,377.20 be Approved. The motion carried by the following vote:

In Favor: 6

REGULAR AGENDA

Mayor's Report

1. **Recognition of the City of Roswell Transportation Department for placing first in the Georgia Section of ITE Summer Seminar Technical Paper Competition.**

Councilmember Dippolito recognized the City of Roswell Transportation Department for going above and beyond in providing the City with many great projects and congratulated them for winning a first place award on July 19, 2011 for their technical paper titled "Lessons Learned from Roswell's First Modern Roundabout" in the Georgia Section of the ITE Summer Seminar Technical Paper Competition.

On behalf of the Transportation Department, Director Steve Acenbrak said we all enjoy working here. This is an honor and a privilege as well as a professional challenge. He said we have just designed and completed our first roundabout and while that might look simple, there were many technical challenges throughout the design and construction. He added that the whole concept of a modern roundabout is evolving nationally. Mr. Acenbrak said we took the best ideas we found from across the country, incorporated them into the roundabout, and learned quite a bit especially given that it was a five-legged roundabout with a number of technical challenges. He said staff felt it was appropriate to document those experiences and share the lessons learned with our fellow professionals in the field and therefore, this paper was jointly written and submitted to the Institute of Transportation Engineers Summer Seminar, along with six other papers. The City of Roswell Transportation staff was awarded first place.

Mayor Wood congratulated the department for the well-deserved award on behalf of the City of Roswell.

2. **Presentation to the City of Roswell for the renewal of the Bicycle Friendly Community Award given by The League of American Bicyclists.**

Mayor Wood said Transportation Director Steve Acenbrak played a big part in the City receiving this award and added that he is an avid cyclist and active in Bike Roswell. He asked Mr. Acenbrak to come forward and present the award. Mr. Acenbrak said Bike Roswell represents all cycling recreation as well as road and mountain cyclists. He said it was an honor to be able to take the City's great infrastructure, improve upon it and make it into a multi-modal capacity. In 2005, the City was given an honorable mention by The League of American Bicyclists and since has made great strides in improving the City's bicycle friendliness. There are four levels in the league, Bronze, Silver, Gold and Platinum. In May of this year, the League renewed the City's Bronze Level until May 2015. This is a continuous improvement process for which the City must reapply periodically to maintain its active designation. Roswell was the first city in Georgia to be designated a Bicycle Friendly Community and has received national recognition. Mr. Acenbrak thanked The League of American Bicyclists on behalf of Bike Roswell and RAMBO's Boards of Directors.

Mayor Wood thanked all of the volunteer staff from Bike Roswell and RAMBO for their leadership. The Mayor stated that each year there are more and more cyclists on the roads and the roads are becoming safer and friendlier. A bicycle advisory committee will be created. Mr. Acenbrak confirmed that it would be brought to the Transportation Committee on August 26. Mayor Wood encouraged everyone who wants to be involved in bicycling in Roswell to consider serving on that advisory committee. There is an existing informal bicycle advisory committee and we appreciate all the advice they give but we want to formalize that which will help us win points toward the next level of bicycle friendliness.

3. **Approval of a Planning Commission appointment - Joe Piontek.**

A motion was made by Council Member Orlans, seconded by Council Member Wynn, that a Planning Commission appointment – Joe Piontek be Approved. The motion carried by the following vote:

In Favor: 6

4. **Approval of a Planning Commission appointment - Lisa DeCarbo.**

A motion was made by Council Member Dippolito, seconded by Council Member Orlans, that a Planning Commission appointment – Lisa DeCarbo be Approved. The motion carried by the following vote:

In Favor: 6

Administration and Finance Department - Councilmember Jerry Orlans

5. **Approval of an Amendment to Chapter 3, Alcoholic Beverages, of the City of Roswell Code of Ordinances to allow for the sale of alcoholic beverages by the package on Sundays and to add the Referendum to the November 8, 2011 General Election Ballot. (Second Reading)**
Presented by David Davidson, City Attorney

Councilmember Orlans introduced the item. City Attorney David Davidson conducted the second reading of an ORDINANCE OF THE CITY OF ROSWELL, GEORGIA TO AMEND CHAPTER 3 OF THE ROSWELL CODE OF ORDINANCES TO ALLOW FOR THE SALE OF ALCOHOLIC BEVERAGES BY THE PACKAGE ON SUNDAYS IF APPROVED BY A CITY-WIDE REFERENDUM TO BE HELD IN CONJUNCTION WITH THE 2011 GENERAL ELECTION; TO REPEAL CONFLICTING ORDINANCES; TO CALL FOR A REFERENDUM ON THE QUESTION AND FOR OTHER PURPOSES, stating it is hereby ordained, that subject to passage by Roswell voters of a public referendum, Chapter 3, Alcoholic Beverages is hereby amended as follows:

1.

Article 3.5 Business Regulations, Section 3.5.5 Days When Sales Unlawful of the Roswell Code of Ordinances is amended by deleting subsection (b) in its entirety and replacing said subsection with a new subsection (b) to read as follows:

(b) No person shall permit the sale of alcoholic beverages on Sunday unless such person is a licensee for a bona fide eating establishment, retail package licensee, caterer, private club or special events facility as defined by this chapter and the requisite fee for Sunday sales is paid.

2.

Article 3.5 is further amended by deleting subsection (a) of Section 3.5.6 Hours of Operation in its entirety and replacing said subsection (a) with a new subsection (a) to read as follows:

(a) A package licensee shall not engage in the sale of alcoholic beverages except between the hours of 8:00 A.M. and 11:30 P.M. Monday through Saturday, provided that if such package licensee is authorized for Sunday sales such package licensee may also engage in the sale of alcoholic beverages on Sunday between the hours of 12:30 P.M. and 11:30 P.M. Package licensees shall not permit their places of business to be open when sales of alcoholic beverages are not permitted except that where the primary business of the package licensee is other than the sale of alcoholic beverages, such restrictive hours shall apply only with respect to the sale of alcoholic beverages.

3.

BE IT FURTHER ORDAINED by the Mayor and Council that the City of Roswell hereby calls for a special election as provided by law for the purpose of submitting this question to the electors of the City of Roswell for approval or rejection.

The ballot shall have written or printed thereon the words:

() YES Shall the governing authority of the City of Roswell be authorized to permit and regulate package sales by retailers of malt beverages, wine
() NO and distilled spirits on Sundays between the hours of 12:30 P.M. and 11:30 P.M.?

4.

The Mayor and Council hereby authorize the City of Roswell authorized to contract with the Fulton County Department of Registration and Elections to conduct this election and the referendum on the question of Sunday sale of alcoholic beverages. Let the call for these elections issue according to law.

5.

The Ordinance amendment shall become effective on the date after the results are certified. All other portions of the Ordinance to be effective on the date of its adoption.

Mayor Wood stated for clarification, if approved by the majority of the voters of the City of Roswell on November 8, 2011, we will allow sale of alcoholic beverages by the package on Sundays from 12:30 pm to 11:30 pm.

Council Comment:

Councilmember Price noted that Council had previously requested the specific wording of the referendum and asked for that language clarification. Mr. Davidson replied that it is item #3 of the ordinance and that state law establishes it. Ms. Price asked if it is the same in every city. Mr. Davidson replied yes.

There was no public comment.

A motion was made by Council Member Orlans, seconded by Council Member Wynn, that an Amendment to Chapter 3, Alcoholic Beverages, of the City of Roswell Code of Ordinances to allow for the sale of alcoholic beverages by the package on Sundays and to add the Referendum to the November 8, 2011 General Election Ballot be Approved on Second Reading. The motion carried by the following vote:

In Favor: 6

Enactment No: ORD 2011-08-10

Community Development - Councilmember Betty Price

6. **Approval of the initiation of a text amendment to Section 10 of the Zoning Ordinance to include regulations for donation bins in the City of Roswell.**

Presented by Bradford D. Townsend, Planning and Zoning Director

Planning and Zoning Director Bradford D. Townsend stated this is a proposed text amendment initiation to control the permit requirements, application information, location and placement controls, and fees as well as a definition for donation bins. Mr. Townsend said staff recommends approval of the initiation as recommended by Committee.

Council Comment:

Councilmember Diamond referring to the August 9, 2011 Committee Agenda, said, "We have consideration for putting a certain company's bins, but if we are limiting them to one bin per location, I guess I don't want to get ahead of ourselves. We haven't considered that yet, but I would think any entity that wants to come to us, we would have a hard time picking one over the rest of them. I don't recall the discussion about how we ended up with one per location." Mayor Wood asked if it is one per company per location or only one bin per location. Mr. Townsend replied it was recommended at Committee to be "A person or entity would be allowed to place no more than one (1) donation bin per parcel or location." Ms. Diamond said then you could have more than one bin. Mayor Wood asked if there could be multiple bins on one parcel, but only one per applicant. Mr. Townsend replied "One person or entity, correct." Mayor Wood noted that this is only an initiation and there will be opportunity for additional discussion and amendment.

Councilmember Price suggested that a distinction be made as to location because while working through this, the assumption was that this would be for private property because with public properties, we already have arrangements or contracts with some entities. She asked if this would supersede that or would this be an addition. Mr. Townsend replied the ordinance is drafted and would be applied only to private property, but if it is Council's intent that it be applied to both public and private property, the ordinance should be redrafted. Mayor Wood replied that perhaps the clarification should be that it does not apply to City property, if it is to be given to more than one person. Ms. Price said there is nothing in the ordinance that says private property, "it says the City of Roswell, which would include public property," so we may need to find a way to make it clear that this is for private property. Mr. Townsend asked if the clarification should be it is for private property only. Ms. Price replied that was correct.

There was no public comment.

A motion was made by Council Member Price, seconded by Council Member Diamond, that the initiation of a text amendment to Section 10 of the Zoning Ordinance to include regulations for donation bins in the City of Roswell be Approved. The motion carried by the following vote:

In Favor: 6

- 7. **Approval of a Resolution to accept a Community Development Block Grant (CDBG) for the Adult Recreation Center Expansion Project in the amount of \$417,587 and approval of Budget Amendment 6122G1-08-08-11 in the amount of \$417,587.**

Presented by Alice Wakefield, Director of Community Development

Director of Community Development Alice Wakefield stated this is a request for approval of a resolution for the acceptance of the 2011 CDBG funds from Fulton County for the Adult Recreation Center addition project. This resolution allows the Mayor and or City Administrator to execute the grant agreement with the County. Staff recommends approval. There was no Council discussion or public comment.

A motion was made by Council Member Price, seconded by Council Member Orleans, that a Resolution to accept a Community Development Block Grant (CDBG) for the Adult Recreation Center Expansion Project in the amount of \$417,587 and Budget Amendment 6122G1-08-08-11 in the amount of \$417,587 be Approved. The motion carried by the following vote:

In Favor: 6

Enactment No: RES 2011-08-32

Recreation and Parks Department - Councilmember Kent Igleheart

- 8. **Approval for the Mayor and/or City Administrator to sign a contract with Wright Mitchell & Associates for Phase 1 design services for the Adult Recreation Center expansion project in an amount not to exceed \$65,000.**

Presented by Joe Glover, Director of Recreation and Parks and Historic and Cultural Affairs

Director of Recreation and Parks and Historic and Cultural Affairs Joe Glover stated this project is an addition to the Adult Recreation Center, Phase 1, a fitness aspect. The City received fifteen responses from architects for design services. A six-member committee, three members from the Recreation Commission and three from the Adult Recreation Center, reviewed all the applications and interviewed three firms. The Committee selected Wright Mitchell & Associates to complete the Phase 1 portion of the project.

Mayor Wood asked Mr. Glover to describe Phase 1 and the total amount of the expected expenditure. Mr. Glover said Phase 1 is an addition of approximately 3,000 sq. ft. to the fitness center that includes restrooms and showers. The approximate cost of this phase is \$800,000. Mayor Wood asked where the remainder of the

money would come from. Mr. Glover replied they hoped it would come from the 2012 CDBG funds.

There was no public comment.

A motion was made by Council Member Igleheart, seconded by Council Member Dippolito, for the Mayor and/or City Administrator to sign a contract with Wright Mitchell & Associates for Phase 1 design services for the Adult Recreation Center expansion project in an amount not to exceed \$65,000 be Approved. The motion carried by the following vote:

In Favor: 6

City Attorney's Report

9. **Public Hearing for an Appeal of the Issuance of an Alcohol License (retail package/ liquor, beer & wine) to R&B Wines and Spirits and Boniface Outta, 1425 Market Boulevard #300, Roswell, Georgia. (This item was deferred from the July 25, 2011 Mayor and City Council meeting.)**

City Attorney David Davidson explained that the appeal of the grant of an alcohol license to R&B Wines and Spirits and Boniface Outta was heard at the last Council Meeting. Council deferred this item for clarification of the interpretation of the City ordinance and for direction from Council. Mr. Davidson stated he had sent a letter with that direction to the attorneys for the applicant and the appellant. Mr. Davidson stated that he understood that both parties have prepared new surveys and are ready to present them.

Mayor Wood asked Mr. Davidson to read his letter and to provide his interpretation of what direction the parties were to follow.

Mr. Davidson read the following content from his letter dated July 27, 2011: The Mayor and Council therefore will allow both parties the opportunity to provide new surveys under the following guidelines and interpretation of the City Ordinance. Surveys shall show the most direct route of travel on the ground as would be traversed by a reasonable man while showing or noting any immovable impediments that require the route to be altered. "Immovable impediments" for purposes of this matter shall include but not be limited to trees, bushes, walls (not curbs), fences, buildings, ditches unless a man made permanent bridge is available, raised concrete medians over twelve inches in height, rivers, lakes, ponds, signs, monuments over twelve inches in height, and utility cabinets over twelve inches in height, etc., but shall not include normal street curbs, cars or other automobiles, grassed street medians or pedestrian islands or other objects that may be reasonably moved or traversed. The distance shall be measured in a straight line from the front door of the structure from which the beverage alcohol is sold or offered for sale to the front door of the building of, for these purposes, the nearest retail package distilled spirits store (accounting for the most direct route around immovable objects or impediments).

Mayor Wood asked for Council questions about the definition or guidelines. Council had no questions.

Appellant Presentation:

Louis Levenson, Levenson & Associates, attorney for the appellant came forward and stated they were in agreement with the City Attorney's definition of the statute.

Council is now faced with an interesting factual determination. Since the last time they were before Council, the applicant has built a fence that would impede the direct line. Mr. Levenson noted that the evidence will be presented by our surveyor. Mr. Levenson said he did not think there was any dispute that the applicant built a fence to impede the direct line that previously would have been unimpeded and would not have required any circuitous route around an immovable impediment. He said that when the applicant's efforts to build the fence were detected by the surveyor engaged by Mr. Whatley and Mr. O'Daro, they took the fence down and installed bushes. Mr. Levenson displayed a visual and said the bushes reflected on their survey are considered by the applicant to be within the definition of the City Attorney's understanding of an immovable impediment. Mr. Levenson said, "In fairness to the City Attorney, he did say that immovable impediments would include but not be limited to trees, bushes, walls (not curbs). The factual decision Council is faced with is whether you will allow an applicant during the pending application to construct a fence to subvert the intention of the legislation and/or install bushes."

Mayor Wood said the ruling is going to be on this hearing of an appeal, not a new application. The Mayor stated that although we have asked to the facts, as they were when this appeal was made, it would not be appropriate to change the facts during the appeal. Mayor noted that City Attorney David Davidson had reminded him that the City has no statute about preventing a re-application for a liquor license. Mayor Wood said if an obstruction arises and it is a legal obstruction, the applicant may reapply under a new set of facts and be granted the application, if under the new set of facts things have changed. That it is following the law.

Mike Sard, Sard & Leff, attorney representing the applicant replied to Mayor Wood that his ruling was made without hearing his response. Mayor Wood said he would hear Mr. Sard's response but it would be hard to change his mind. Mr. Sard said, "We have case law on point that shows that when it comes to liquor licensing it is the standards in place on the day of the hearing." Mayor Wood replied "You can change the facts after you have appealed the case? We are not hearing this as an original application; we are hearing this as an appeal." Mr. Sard replied "You have asked for new evidence to be presented." Mayor Wood stated he would be glad to look at the case law and hear the City Attorney's advice, but to say that we are creating new evidence after an appeal is filed and the hearing is heard, it is going to have to be on point. Mr. Sard asked that the Mayor consider the case law before making a ruling. Mayor Wood said "We will consider it. I can't imagine a case in which you had a hearing and then you are appealing it, and then you go back and change the facts and add new evidence. We weren't asking for creating new evidence, we were asking for a review of the existing evidence." Mr. Sard said that at the appropriate time, he would be ready to make that case and asked that the Mayor withhold judgment until the appropriate time. Mayor Wood said "Given the twists and turns of this case whether by obstacles physical or legal, I think it is appropriate to again take it under advisement after we hear from all of the parties." Mr. Sard said we are just asking for an opportunity to make that case. Mayor Wood said he would allow the evidence to be presented.

Mr. Levenson said "The only issue I thought we reconvened for today was for you to ascertain the accuracy of the surveys because there was some question when we were here on 25 July, as to whether the surveys were accurate and we now have the surveyor and I believe the applicant has its surveyor." Mayor Wood said this was not a question of the accuracy of the surveyor but we did not have clear guidelines before. The Mayor noted that City Attorney David Davidson has given the guidelines that need to be followed. Council will have to determine whether or not the surveyor followed those guidelines in making a determination. The Mayor said "We were not questioning the accuracy of the surveyor. We were questioning the guidelines that

were followed in making that survey.” Mr. Levenson replied “Mr. Griffin is here if there is a question from Council or from the Mayor on the method by which he applied the guidelines of the City Attorney, and we represent to the Council that he did, except for the intervening fence, now bushes, that would according to the applicant’s interpretation of the City Attorney’s interpretation of the legislation, now require a circuit around the bushes, which you could see that any small dog could walk through and is clearly not the intention of the statute to create an impediment because under that from a public policy point of view, bushes, think about it, bushes could be moved, placed and replaced and make a mockery of the intention of the straight line interpretation of the statute.” Mayor Wood said he thinks we have already done that to ourselves. Mr. Levenson said, “No, Mr. Mayor, you have not done that, the applicant has done that, and I think that therefore, the burden is on the applicant to change. Well, the legislation is clear, the facts have morphed since July 25th and we ask you to sustain our appeal and deny the application, but that is our argument, and again, the surveyor is here.”

Mayor Wood asked the surveyor come forward and describe the video of the survey being done.

Mr. Levenson said, “This is both legally interesting and fun to do this, but in response to the Mayor’s question about whether there could be a re-application, I don’t deny that would be the case, but under the present facts I believe even those bushes would not constitute an impediment by the City Attorney’s definition of an impediment. Of course I know Mr. Sard takes a different point of view.”

Jim Griffin, Georgia Land Surveying Company, said he has been doing liquor surveys for 35 years. Mr. Griffin stated this was measured four times in a straight line and did not run into any fences or buildings but went around them. Mr. Griffin stated the measurement was not 1500 feet. He stated the measurement process was correctly done. Mayor Wood asked him to show the line that he took on the video.

Council Comment:

Councilmember Price inquired about the measurement difference with and without the bushes. Mr. Levenson replied that he did not know what the measurement is but according to the applicant’s total lineage, he thought it was 1500 and some odd feet, perhaps 50-60 feet beyond the 500 yards. Ms. Price asked if one measurement shows it under and one shows it over. Mr. Levenson referred to an overhead slide and indicated a line drawn up to Holcomb Bridge Road that is almost identical with the line drawn by Mr. Griffin. Mr. Griffin concurred. Mr. Levenson said after that, there is a difference of opinion as to how the line is to be drawn, it zigzags around essentially avoiding what you see as described on the applicant’s survey as a “bush impediment” which are the bushes that that previously had been shown in the photographs.

A video of the survey from the appellant was displayed on the overhead.

Mr. Griffin described the survey video shown to the public. Mr. Griffin identified his son, a registered surveyor, as the surveyor conducting the measurement and that he would not do it wrong. The video clearly showed the wheel started at zero. Mr. Griffin pointed out where the surveyor went over a curb and noted they are allowed to go over curbs. There were no fences. He indicated where the surveyor was going along the edge of the parking lot, across another curb, and straight across the street. He said his son told him it was almost a straight line except for going around one auto business building. Mr. Griffin there were no bushes when this survey was done. Mr. Levenson asked if the bushes on the left were the bushes he had shown in the photograph. Mr. Griffin replied they might be but it was not an impediment to rolling

the wheel. Mr. Griffin stated that fence, stone wall or something like that you would have to go around but with bushes three feet apart, it is possible to go through them. Mr. Griffin stated that the only obstacle in the way between there and the store was one curb. The wheel showed the distance to be 1478 feet. Mr. Griffin said the measurement was rolled four times. One of those times the distance was 1482 feet, but it was never 1500 feet on any of the four times it was rolled.

Councilmember Wynn asked to view again the a segment in the video after crossing over Holcomb Bridge Road and through the drive-thru, down into the juniper bushes and stepping off the curb into the parking lot of the Marketplace.

Mayor Wood asked if the appellee would like to cross-examine the witness.

Mr. Sard asked Mr. Griffin if he walked this distance himself. Mr. Griffin said "No, others walked it. I had people working for me." Mr. Sard asked Mr. Griffin if he could have walked it himself. Mr. Griffin said, "No I could not have walked it, that is right." Mr. Sard referred to the initial part of the video and asked Mr. Griffin if he could have walked between the pole and the wall and down that hill. Mr. Griffin replied "I know what you are getting at but I am handicapped. But, I could have walked it. I guarantee you, if you don't, I will get my walker and I can go right down through there. I mean I can, I can go right down through there." Mr. Sard asked if he could walk through the junipers. Mr. Griffin replied, "Through those junipers and those weeds. I would have a little trouble but I could do it." Mr. Sard asked if he could make it through the grass swells. Mr. Griffin replied, "Right, if I was having to go 3000 feet otherwise or go straight through there. I can go straight through there." Mr. Sard asked if he was familiar with the topography. Mr. Griffin replied, "I am real familiar with it. I mean I rode my car along while they were measuring and watched them every step of the way. I am real familiar with the topography and let me just tell you something, I could put a stand or chair there and I can walk it and stop at that chair and walk the whole line." Mr. Sard referred to the video and asked why Mr. Whatley directed Mr. Griffin's son to go in a certain direction or why Mr. Griffin's son needed direction from Mr. Whatley. Mr. Griffin replied "My son didn't need any directions. Mr. Whatley's paying for it and he's trying to get the shortest line. In other words when I come over here I wanted Mr. Whatley to show me what he thought was the closest line and I measured it." Mr. Sard asked if that is for the surveyor to decide. Mr. Griffin replied, "And what he had was the closest line, that's the reason I decided it. I went over there before Mr. Whatley showed me where to measure and I measured it one time and one back. Then he showed me and the way he says is the closest and it was the closest." Mr. Sard asked if it was him or his son that rolled the wheel over the junipers. Mr. Griffin replied, "It was my son that did that and that was my son that came out with me the first day." Mr. Sard asked what the depth is of the junipers. Mr. Griffin replied, "I would say about twelve or fifteen inches." Mr. Sard asked Mr. Griffin if he thought it was intended for anyone to use the method that was used, travel through the junipers and grass, likewise. Mr. Griffin replied "The way you used to travel is a pedestrian walk, and that's the way we've always measured it, but the state changed it to a straight line besides obstacles and you don't even have to be able to walk the line. You could measure it with a distance meter the way they are saying it and I got that from the state guy. That's on liquor store to liquor store." Mr. Sard asked if he thought the people who designed the buildings and parking lots intended for those medians to be traveled by people, or vehicles, or anybody. Mr. Griffin replied "No, the way we travel, no I don't think they intended that to be traveled. We are surveyors, we are supposed to measure it the way they want it to be measured." Mr. Griffin had no further questions.

Mayor Wood asked if the appellant had any questions for the witness. Mr. Levenson had no questions. Mayor Wood the appellee could make his presentation.

Appellee:

Mr. Sard said "That was their interpretation of the way a reasonable man would walk. I think it was very unreasonable." Mayor Wood said at this time we want to get the evidence in and then make an argument. Mr. Sard replied that he had objection for the record that he wanted to make clear. Mayor Wood said that was fine, but he first wanted Mr. Sard to get the evidence in and then make his arguments. Mr. Sard agreed and referred to the issue regarding the fence and shrubs. It appeared there was some attempt to think it was humorous that we were creating obstacles or impediments. Mr. Sard said it was not humorous, but it does show the unreasonableness of the ordinance. There was a fence installed after the last hearing. He said his client received permission from the property owner to install the fence. It was intended to be an impediment. Mr. Sard said they were not trying to fool anyone. During installation of the fence, they discovered a permit was needed from the City. When they realized there would not be enough time to obtain the permit, the fence was removed. Mr. Sard stated they learned that bushes were allowed to be planted without a permit so they received permission from the property owner to plant the bushes. Mr. Sard offered a copy of the letter from the property owner granting that permission. Mr. Sard asked if he should save the law for later and just get in the evidence. Mayor Wood stated he first wanted to get the evidence in because he did not want to mix argument with the evidence. The Mayor wanted Council to understand what the evidence is and before arguments are made.

Mr. Sard stated he would like to display videos of the survey showing two routes of travel back and forth. One video would show the same route as the appellant's survey, for consistency with the same point of view, leaving their store, Liquor Depot and coming to our client's store, R&B.

Councilmember Price asked if Mr. Davidson could read the definition again.

Mr. Davidson read the following content from his letter dated July 27, 2011: Surveys shall show the most direct route of travel on the ground as would be traversed by a reasonable man while showing or noting any immovable impediments that require the route to be altered. "Immovable impediments" for purposes of this matter shall include but not be limited to trees, bushes, walls (not curbs), fences, buildings, ditches unless a man made permanent bridge is available, raised concrete medians over twelve inches in height, rivers, lakes, ponds, signs, monuments over twelve inches in height, and utility cabinets over twelve inches in height, etc., but shall not include normal street curbs, cars or other automobiles, grassed street medians or pedestrian islands or other objects that may be reasonably moved or traversed.

Mr. Sard introduced Michael Barger, the surveyor who provided the survey with the application. Mr. Sard asked if it was necessary to review Mr. Barger's qualifications since they had previously been reviewed at the last meeting. Mayor Wood confirmed that it was not necessary unless the other side had a challenge.

Mr. Barger described the survey video and said the route he chose was a little different from Mr. Whatley's surveyor. He explained that he did not go down the steep embankment because he felt that was not a route a "reasonable" man would traverse. He indicated during the video when he was probably back on the same line as Mr. Griffin and then also where his route was different from Mr. Griffin. He stated that he did not traverse through the juniper bushes. He indicated another point on the video where the route in that area goes around the newly planted bushes, and an existing planted island that he had to traverse around. He stated he measured the

distance from one store to another and then again coming back. The difference in measurement was within two feet. Mr. Barger stated the measurement going back the other way was two feet shorter which is the one that on the survey. Mr. Sard referring to the initial part of the video asked when he first walked out of the Liquor Depot why he did not go down the slope. Mr. Barger replied it was relatively steep and tight to get in between the pole and the existing wall. Mr. Sard presented photograph marked Exhibit #1 to Mr. Barger and asked him to explain to Council what it depicted. Mr. Barger stated "This is a picture that was taken beside the Waffle House looking back toward that first impediment of the wall and the juniper bushes." Mr. Sard provided a copy of the photograph to City Administrator Kay Love. Mr. Barger pointed out specific items on the photograph and stated, explained that the picture was taken beside the Waffle House looking back toward the Liquor Depot. He noted the retainer wall and the area where Mr. Whatley's surveyor came down the little slope. Mr. Sard asked "It's the part where he smashed his shoulder into?" Mr. Barger replied yes. Mr. Sard stated "And almost fell down the hill?" Mr. Barger replied yes. Mayor Wood interjected and said the witness should testify rather than the lawyer putting words into his mouth. Mr. Sard replied that he was trying to help him remember. Mr. Sard asked Mr. Barger to explain the slope on the median. Mr. Barger said he did not measure the slope but that it is probably about 4-5 feet in an elevation change in that area. Mr. Sard asked if the area is covered with juniper. Mr. Barger replied "Yes, there is just a small little sliver of dirt between the wall and where all the junipers are. I don't know if that's just a beaten out path by pedestrians or where stormwater is coming through there. It's just a small area." Mr. Sard displayed photograph Exhibit #2 and asked Mr. Barger to explain this photograph. Mr. Barger said, "These are the junipers that are on the other side of the wall. The junipers run right up in the little curbed island area all the way up to that pole and then there was a small gap between the pole and the wall." Mr. Sard displayed photograph Exhibit #3. Mr. Barger explained that Exhibit #3 showed that was where he took a measurement inside the junipers to get a "rough" idea of how deep they were. Mr. Barger said he agreed with Mr. Griffin that the junipers are about a foot deep. Mr. Sard asked if he measured them. Mr. Barger replied yes. Mr. Sard asked if some were greater than a foot. Mr. Barger replied, "Yes, you get that with juniper bushes, you can't get an accurate measurement all the way around, they are too sporadic in growth." Mr. Sard displayed photograph Exhibit #4. Mr. Barger stated, "This is the area of the gate that was shown in the video where I crossed the gate. This is looking from the opposite direction but it is the same gate. I came down the hill in the video and crossed this way rather than the way the photograph was taken." Mr. Sard asked if he measured under the gate. Mr. Barger replied "Correct." Mr. Sard asked if the gate was an impediment. Mr. Barger replied no. Mr. Sard asked if he could explain why. Mr. Barger replied that he could climb over it. Mr. Sard asked if he knew whether that gate was open during the week. Mr. Barger replied, "No, I've only seen it early in the morning so I don't know at what time the gate is open." Mr. Sard displayed photograph Exhibit #5. Mr. Barger stated, "This is the area in Mr. Griffin's video where their surveyor traversed underneath the drive-thru and came through in this general area through those juniper bushes." Mr. Sard asked if he knew what the slope was. Mr. Barger said, "No, again I didn't measure the slope." Mr. Sard asked about the drop between the top of the junipers and the bottom. Mr. Barger replied, "Again, it is probably roughly five feet." Mr. Sard asked if he measured the depth of those junipers. Mr. Barger replied yes. Mr. Sard displayed photograph Exhibit #6. Mr. Barger said "The junipers in this area were a little bit deeper than the ones across the road. I am going to say these were probably a little better than a foot, maybe 14-15 inches on average." Mr. Sard asked if that was the route that Mr. Griffin took. Mr. Barger replied, "Yes, this is the same area that I showed you on the last photograph." Mr. Sard asked if Mr. Barger tried to run his wheel up on the junipers. Mr. Barger replied no. Mr. Sard asked if he tried to test the wheel out on the junipers on either side. Mr. Barger replied, "No, I preferred to

keep the wheel on a real solid surface.” Mr. Sard asked if outside the purposes of his measurement, he tried to run the wheel on the junipers. Mr. Barger replied no. Mr. Sard noted he was displaying photograph Exhibit #6 [actually #7]. Mr. Barger said, “This is the area of where the new bushes were planted and I think Mr. Griffin’s measurement came right in this area along in here somewhere, I’m not exactly sure, but for my measurement, I went around the bushes. This island right here on this side of the picture connects to another set of new bushes and it goes all around the little landscape island all the way to the little secondary entrance of the parking lot.” Mr. Sard asked if there were two banks of new bushes. Mr. Barger stated that was correct. Mr. Sard said he was displaying photograph Exhibit #7 [actually #8]. Mr. Barger said he thought this was the same bank of bushes just from a different angle. Mr. Sard noted he was displaying photograph Exhibit #8 [actually #9]. Mr. Barger said, “This bank of bushes is the one that is the farthest row from the center landscape island.” He pointed to an area on the photograph and said, “Those are the ones to the west and there’s another row of bushes to the east of that.” Mr. Sard asked if he felt the bushes were an impediment. Mr. Barger replied yes. Mr. Sard had no further questions.

Mayor Wood asked if the appellant had any questions for Mr. Barger.

Mr. Levenson addressed Mr. Barger and said it appeared his testimony varied from Mr. Griffin’s in three areas. He said, “You directed your wheel around the juniper bushes. You directed your wheel around the newly planted bushes and you went around an island in the parking lot.” He asked Mr. Barger if that was correct. Mr. Barger replied, “That is correct.” Mr. Levenson asked if it was correct that “Those were three judgment calls that you made as distinguished from the route that Mr. Griffin took.” Mr. Barger replied, “This is the route that I chose based on the City Attorney’s criteria for going around the bushes.” Mr. Levenson said the only differences between the route that was demonstrated by Mr. Griffin to Council and the route demonstrated to Council by Mr. Barger were the three areas that were just highlighted, the bushes that were planted with the landlord’s permission on the landlord’s property by the applicant and asked if that was correct. Mr. Barger replied, “That is one, yes.” Mr. Levenson said, “Then an island in the parking lot which you decided to go around.” Mr. Barger asked if he was referring to the auto dealership parking lot. Mr. Levenson replied, “All I remember you saying in your video and audio was that you went around an island in a parking lot that Mr. Griffin did not go around.” Mr. Barger replied, “That is the one up here closer to the Liquor Depot.” Mr. Levenson said, “And the juniper bushes, the issue about the twelve inch or six inch juniper bushes.” Mr. Barger replied, “And the juniper bushes is the one, correct.” Mr. Levenson said, “As a result, there is a difference of 87 feet between Mr. Griffin and yourself.” He asked Mr. Barger if he agreed that those three detours that he took, which he believed were consistent with the City Attorney’s interpretation of the statute, accounted for the 87 feet. Mr. Barger replied, “Yes.” Mr. Levenson had no further questions.

Mr. Sard asked if he could introduce the documents at this time. Mayor Wood replied he could. The Mayor also asked for any case law that Mr. Sard might have. Mayor Wood asked Mr. Sard’s presentation was complete. Mr. Sard replied it was except for arguments. Mayor Wood said arguments would be heard after hearing Council questions.

Council Comments:

Councilmember Diamond asked Mr. Sard what was the purpose of planting the bushes. She said, “Clearly you had a presentation before that and if you didn’t believe you were short why would you plant the bushes.” Mr. Sard replied, “As we said earlier, our initial survey, we think is the correct way to measure. We object to

this particular interpretation that we are being asked to do. Notwithstanding that objection and subject to that objection we are still following the instructions of the Council, the instructions received by Mr. Davidson to take this other route.

Unquestionably, the purpose of the bushes was to create an impediment. We are not disguising that. We did get permission from the landlord as you see and we put it there so one could not traverse that area. It was our preference to put a fence but we didn't have a permit for the fence."

Councilmember Igleheart said he had walked the area and stated the gate going into the parking lot of the car dealer is usually open so it could be traversed. He asked Mr. Barger why he could climb over the gate but not walk through the bushes that are a foot and a half tall. Mr. Barger said he did not want to run his wheel through the bushes. He had always been taught that when running the wheels to make sure they are on a solid surface otherwise the reading may not be accurate.

Appellee Closing Argument:

Mr. Sard stated, "As I mentioned to Councilmember Diamond, this survey that we present today is subject to our objection that the first survey was the correct one. The law in Georgia is that you apply the standards that are in effect on the date of the hearing of an application. It is not the standards that were in place the day of the application. The law is very clear on that. It distinguishes liquor license cases versus zoning cases." Mr. Sard provided Mr. Davidson and Mr. Levenson copies of two cases. Mr. Sard stated that the first case is a State Supreme Court case, Jackson v. Five Aces Company, Inc. that interprets a City of Atlanta ordinance in 1982. The other case is from the State Supreme Court in 2007, City of Homerville v. Touchton, upholding the Jackson ruling. Mr. Sard stated that at the last hearing, you instructed that the new evidence be admitted. Mr. Sard stated "If we were stuck looking at the record of the first case, you wouldn't have a survey from these folks. The record in the first case; they didn't even appear at the first case. We had our hearing, the license review board approved our client's application and a license was issued. After the hearing was over, the opposition appeared well after we had already left the hearing. There was no evidence proffered by them in that particular case. If evidence was closed out, they would have no survey to present." Mr. Sard said that what is being looked at here, in accordance with the case he just distributed, are "standards that are in effect today" at today's hearing. Mr. Sard said, "Mayor Wood was saying we can't bring in any new evidence. We have already past that gauntlet. They did not appear at our first hearing. There was no evidence to contradict the survey that we provided and no evidence in the record at the license review board that showed the distance was anything but the distance we put forward. Now we are considering new evidence, both their survey and the survey you have instructed us to put into evidence. This follows along with Jackson v. Five Aces. It is the same as Homerville v. Touchton. You are following the law that the State Supreme Court has set in liquor license cases. You are hearing evidence up to the time of the hearing and this is proper. If Mr. Outta had passed away before today, you wouldn't be hearing this because there would be no applicant, no licensee alive. If his lease had been terminated and he didn't have access to the space, he wouldn't be qualified and those facts would have changed and we still wouldn't be here today. If his building were destroyed, we wouldn't be here today; again, the facts would have changed. God forbid had he been convicted of a felony in the last week, he would no longer be qualified and we wouldn't be here. The brick building where the auto store is could have been demolished this week and you can be sure Mr. Griffin would have walked through that old building and would have held us to walking through that space as opposed to the building that is there now. We are looking at the facts as they are today at the time of the hearing and that is the evidence that we have presented from Mr. Barger that these are the bushes that are there; they create an impediment but following the case law you are allowed to consider that. Today is the hearing day.

And with those impediments, we meet the 1500-foot requirement as much as we disagree with the methodology.” Mr. Sard stated he wanted to talk about the reasonable standard. He noted that Council had seen the videos. Mr. Sard said he did not think it was the route a reasonable person would take. The video showed Mr. Griffin’s son jar his elbow into a light pole and almost fall down a hill of junipers, risked his life crossing Holcomb Bridge Road; and walked down steep grades that were never intended for travel. Mr. Sard said, “This isn’t a reasonable man, this is a ‘crazy man.’ We did put the impediments there because we could put the impediments there. Our landlord gave us the right to do so and we did, and that shows you even more how unreasonable this standard is. One person figures out one way to go and the next person figures out how to put the impediment there. If the landlord let us, I suppose we could put a maze that filters people in through the front of the building. It’s an absurdity. I realize that what you have done is you’ve inherited an ordinance that you have selected and basically adopted a state regulation that the state changed a few years ago. I question the legality of the state’s changing that regulation because it is a regulation not a law that changed. But that’s not for you to decide, you have adopted an ordinance that is very specific so we’ve got to focus on your ordinance. You could look at things differently than the state. The measurement shouldn’t depend on the athletic ability of a person making the measurement. If I walked through the junipers, you would never see me again, I’m just not that tall but certainly, a taller person can traverse it. You heard Mr. Barger say that he didn’t run his wheel on the junipers because it gets stuck. We couldn’t really see in the video but I suspect that the over one foot tall junipers jammed up that wheel.” [An inaudible statement in the background from Mayor Wood.] Mr. Sard responded “The video was there for us to see.” Mayor Wood stated, “Let’s hear the case based upon the evidence, not based upon speculation.” Mr. Sard replied, “I think that evidence is circumstantial. You heard Mr. Barger say why he wouldn’t do that and you saw the video of someone pushing the wheel through the juniper. I think you could draw the conclusion that potentially the wheel got stuck and that he was pushing it and it wasn’t registering and wasn’t calculating distance. By the way, according to Mr. Davidson’s letter, we are trying to avoid things that are more than a foot tall and you heard the evidence that those junipers were more than a foot tall. That’s why we don’t go over the junipers because you can’t measure it and that is why their survey is not in compliance with your instructions and it is not in compliance with the law. We think the evidence presented both at our license review board hearing and our hearing two weeks ago with the survey that we put forward, but then again today with the survey you have asked us to prepare, all comply with your ordinance with the bushes.” Mr. Sard expressed his appreciation to Mayor and Council.

Appellant Closing Argument:

Mr. Levenson stated, “The standard articulated by the City Attorney is a definition or interpretation of what an immovable impediment is. You are now asked to decide whether or not the three circuits taken by Mr. Barger with respect to the juniper, with respect to the newly planted bushes, around the newly planted bushes and around the juniper bushes and around the island in the parking lot are reasonable under the standard. Now that we know what the interpretation of the statute is, you must decide whether the actions taken by the applicant are reasonable under the interpretation of the immovable impediment rule set down by the City Attorney. I think it may be a difference of 18 feet but the additional 65 feet was incurred intentionally to create the buffer to get beyond the 500 yards. The question by Councilmember Diamond points to the effort by the applicant to subvert both the letter and the spirit of the legislation and we ask you to affirm the appeal.” Mr. Levenson thanked Mayor and Council.

Mayor Wood stated, “At this time we will take it under advisement and will have a

discussion in Closure following the Work Session. We hope to render a decision after that." The Mayor called for Council questions.

Council Questions:

Councilmember Price asked if both parties agreed that our definition of #2, as in the letter, was a reasonable way to be interpreting the law or the ordinance. Mr. Sard replied, "We do not. That is an objection that we have made." Mayor Wood asked Mr. Sard, "Just for clarification, what is your interpretation of the way the ordinance should be read." The Mayor asked that he state for the Council how it would be written. Mr. Sard replied, "Frankly, the way it should be written would be the way it was written, that was a very clear." Mayor Wood said, "Tell the Council in your recollection of how it was written." Mr. Sard replied, "It was very clearly said, a pedestrian route of travel on the ground." Mayor Wood said, "Your interpretation, a pedestrian route of travel on the ground." Mr. Sard replied, "That was a better method. We are not suggesting that we measure it by pedestrian route of travel on the ground today." Mayor Wood said, "I know how he traveled it, but as far as a definition of that, what would be a fair definition of how he traveled it. A person would walk it?" Mr. Sard replied, "Either walking or driving, the way that one would travel, the way that a reasonable person would travel." Mayor Wood said, "Thank you, that was what I was looking for. I appreciate that."

Mayor Wood permitted Mr. Levenson to respond to Councilmember Price's question. Mr. Levenson stated, "That is specifically what the legislation changed effective April 1, 2007. It previously was to follow the walkways and now it is measured in a straight line unrelated to the walkways and the streets. In other words, as you saw, both surveyors traversed Holcomb Bridge Road at an angle. Of course, it is illegal to jay walk in the middle of the street. Nonetheless, both surveyors agreed that is the correct interpretation of the statute and I believe the City Attorney's interpretation is consistent with the interpretation of the new law after April 1, 2007 by both the state and adopted by Council to how you measure the distance. I am agreeing with the measurement. I am agreeing with the City's interpretation and I believe the appellee's interpretation is the old rule. You will have to decide that question, but that is my opinion."

Mr. Sard responded, "What we are saying is it could be pedestrian, it could be vehicular. It's the most direct route of travel on the ground and is not limited to pedestrian. If you can get in a car or on a motorcycle and do it shorter than a pedestrian would, certainly that would be a way to approach it. But we have been left here with a way that is neither pedestrian nor vehicular; it is super human."

Councilmember Price state she had one more question and said, "The appellant agrees that our attorney's interpretation is adequate or correct." Mr. Levenson replied, "Yes ma'am." She asked, "Is a juniper a bush?" Mr. Levenson replied, "I would have to say, the word that I am accustomed to hearing is 'juniper bush' so I would have to say, and not being an expert in that field, that juniper would be a bush, yes ma'am."

Councilmember Wynn asked for clarification from Mr. Levenson. She asked, "Mr. Griffin, your surveyor, ran the route four times?" Mr. Levenson asked Mr. Griffin how many times he ran the route back and forth. Mr. Griffin replied, "Four times with the wheel." Ms. Wynn asked for the four measurements. Mr. Griffin replied, "One time we got 1478, 1482 we got two times, and one time we went up and down the steps and got 1428 because we rolled the wheel down the steps. Then I decided that wouldn't be fair going down the steps so I disregarded that time." Ms. Wynn asked Mr. Sard how many times his surveyor ran the route and what the measurements were. Mr. Sard replied, "Twice." Mr. Barger said, "It was 1565 and 1563." Ms. Wynn

asked if he changed his route in any way as Mr. Griffin said he changed his on the 1428. Mr. Barger replied, "No, both those measurements came from the same route, one going from one establishment to the other and then coming back." Ms. Wynn said you did it both ways. Ms. Wynn asked Mr. Griffin if he did the same. Mr. Griffin said, "Yes we measured it both ways and we got 1478 over, and 1482 back and when he went out and did the video tape." Ms. Wynn said, "On the video tape it was 1478, I think." She asked if he actually went up the hills then instead of down so he actually measured going up the hill so he actually climbed the hills. Mr. Griffin said, "You saw how the video was." Ms. Wynn asked if when he went back he climbed up those hills going back, so that he used the same route going south and going north. Mr. Griffin said, "He only walked the video one time; do you understand? We didn't do the video twice." Ms. Wynn said she was not talking about the video. She asked if the three times that he ran it, not talking about the stairs, if the three times that he ran this it was done both ways going from Liquor Depot to R&B and from R&B to Liquor Depot. Mr. Griffin said "I didn't do it both ways. I just did it one way and I tried various ways to see how to get the shortest distance." Ms. Wynn thanked Mr. Griffin.

Councilmember Price asked a question of the appellee, "When you hopped over the fence or gate which normally would be open or could be open, if you had actually gone around the gate, you would have increased the distance." Mr. Barger replied, "Yes, ma'am." Councilmember Price said, "In hopping the fence, was your judgment that it would normally be open and you were giving your opponent an advantage." Mr. Barger replied, "That just represented a straighter line and I didn't feel like it was an impediment that I couldn't navigate so I went over the gate." Councilmember Price said, "Had you gone around the gate you actually would have increased the distance." Mr. Barger replied, "Yes, ma'am."

Mayor Wood asked for further Council questions. There was no further questioning.

Due to further discussion needed, this has been taken under advisement.

10.

Recommendation for closure to discuss personnel, real estate and litigation.

A motion was made by Council Member Wynn, seconded by Council Member Orleans, for closure to discuss personnel, real estate and litigation. The motion carried by the following vote:

In Favor: 6

Adjournment

After no further business, the Mayor and Council meeting adjourned at 8:41 p.m. Mayor and Council reconvened for a Work Session on the Holcomb Bridge Road Corridor Study.