

**XENIA CITY COUNCIL
SPECIAL SESSION MEETING MINUTES
APRIL 1, 2019
7:00 P.M.**

1. CALL TO ORDER: President Engle called the April 1, 2019, Special Session to order at 7:15 p.m. in the City Council Chambers, City Administration Building.

2. ROLL CALL: Councilman Will Urschel, Councilman Dale Louderback, Councilman Wesley Smith, Councilman Levi Dean, Mayor Sarah Mays, and President Michael Engle were present. Vice President Wallace was absent.

3. ORDINANCE 2019-07 ENACTING CHAPTER 269, TITLED “GENERAL PROVISIONS” OF CITY BOARDS, COMMISSIONS, AND COMMITTEES CODE: Ms. Fisher said Title 8 of the City’s Codified Ordinances contains the City’s Boards, Commissions and Committees Code. This Title addresses the three Boards and Commissions created by the City’s Charter – Planning and Zoning Commission, Board of Zoning Appeals and Civil Service Commission. In addition, this Title addresses several other Commissions, Boards and Committees created by Council over the years, as authorized by the City’s Charter, such as BRACA, the Economic Development Advisory Board, and the Traffic Commission. For the three named Charter-created bodies, the Charter states that these bodies shall consist of five voting members and one Chairperson, who shall not vote except in the case of a tie. This restriction on the Charter-created bodies was carried over into the legislation for the Council-created bodies mentioned above. Further, for all of these bodies, both the Charter-created ones and the Council-created ones, the language of the Charter and the legislation that controls them states that “a majority of the total membership, excluding the Chairperson, is required to approve or disapprove any matter coming before the board or commission.” By requiring a majority of the total membership, rather than the standard majority of the members present, our Charter and the legislation based on it has created situations where a City Board or Commission may not be able to take any action when there are abstentions.

Ms. Fisher said an abstention is a decision to not vote. If a Board or Commission member abstains, it is usually because he or she has a conflict of interest and needs to remove himself or herself from the voting; thus, an abstention cannot be counted as a cast vote – either “aye” or “nay.” This is particularly true when the majority needed to pass a measure is “of those present” or “of those voting.” In such cases, an abstention would not count at all. So, if you had a board of 5 members (all with voting rights) and 4 were present at a meeting, and 2 voted yes and 1 voted no and 1 abstained, there would be 3 counted votes cast. The majority of 3 is 2, so the measure would pass 2-1 (This would be expressed as 2-1-1 abstain). If 2 voted yes and 2 abstained, there would be 2 counted votes cast. The majority of 2 is 2, so the measure would pass 2-0 (expressed as 2-0-2 abstain). In a nutshell, when the majority needed is of those members present and/or of those voting, you would only count the ayes and nays, and then take the majority of the counted votes to determine if a measure passed. You would not consider the abstention at all and would not count it for or against the measure because the member did not vote. She said there is one exception to this rule, however, and that is when a majority is defined as a set number of the total membership. This is often expressed as “a majority of the total membership” or “a majority of all members.” This language fixes the majority at a set number – for a five-member board, the majority would be 3. In these cases, even though an abstention is still not counted as a cast vote, it has the effect of

acting as a “no” vote because the majority is defined as a fixed number. In other words, because a set number of votes is needed and an abstention cannot count as one of those votes, it counts “against” the number needed. So, while an abstention is never counted with the majority, it can have the effect of a minority vote when the majority needed to pass a measure is a defined, fixed number.

Ms. Fisher said all the City Board and Commissions mentioned above consist of five members and the City Charter and ordinances that follow the Charter state that a “majority of the total membership” is needed for these Boards and Commissions to take any action. This means a vote of three is necessary in every case in order for the Board or Commission to take action, either for or against. Thus, there could be a situation where a Board or Commission may be unable to act due to abstentions. For example, in a situation where three of the five members have to abstain on a matter, no action could be taken by the Board or Commission as that would only leave two voting members. In a situation where two of the five members have to abstain, if the remaining members vote 2-1, the Board or Commission would again be unable to take any action. This can have the biggest and most detrimental impact in zoning matters, where the Planning & Zoning Commission or the Board of Zoning Appeals finds itself unable to act. This situation will need to be reviewed and addressed by the Charter Review Commission. However, as any changes to the Charter must be presented to voters for their approval, this matter cannot be addressed quickly through the Charter review process. In the interim, she has prepared legislation and is recommending that Council enact new legislation to address these potential situations. The new Chapter 269, to be titled “General Provisions,” would be added to Title 8. Section 269.05 of this Chapter states that in any case where a Board, Commission or Committee finds it is unable to act on a matter before it because a majority vote cannot be reached, either for or against, due to abstentions, it shall refer that matter to Council who shall act *in loco* (in place of) for such Board, Commission or Committee.

Councilman Louderback said he has served as the City’s representative on MVRPC; therefore, he has never chaired one of the City’s lay boards. He asked if the Chair had an opportunity to vote. Ms. Fisher said the Chair votes only to break a tie. She described a situation that happened recently where there were 2 aye votes, 2 nay votes, and one abstention. Therefore, the Chair had to vote to break the tie.

Mr. Merriman said this request is based on a potential urgent situation and explained there could be a potential voting issue with the Planning and Zoning Commission members. He said two members have expressed a need to recuse themselves from the vote due to conflicts of interest, which leaves only three voting members. If only one of the members votes the opposite way, then a decision cannot be made. In that circumstance and with passage of the proposed legislation, the issue would proceed to City Council for consideration and a decision.

Councilman Urschel said if a requested action does not pass, he asked where and how applicants to Boards and Commissions could file an appeal. Ms. Fisher said BZA decisions are appealed through the Greene County Common Pleas Court. For the other Boards and Commissions, applications could file a Mandamus action to force the City to take action as required or they could file an ORC Chapter 2506 appeal through the Greene County Common Pleas Court. With the latter, she did not know if a 2506 appeal was even possible, because without any action, there was nothing for them to appeal. Mr. Merriman noted they could add a provision to the Land Development Code with regard to Planning and Zoning Commission decisions that items could

proceed to City Council if that commission was unable to take action, but this issue affects other lay boards as well. He noted this request was also about a lack of volunteers on City lay boards. He said the City Clerk has put out numerous appeals for volunteers but there continues to be a problem filling vacancies and some lay boards have had ongoing vacancies for some time. Therefore, if a lay board is not fully populated, that already puts them at a disadvantage.

Ms. Fisher said she took this opportunity to also address a few other issues as follows:

- The Charter states that all Boards and Commissions are to follow Council's Rules of Order. She added 269.04 that states the same, but says that in the absence of such Council established rules, the Boards and Commissions are to follow Robert's Rules of Order.
- Likewise, the Charter states that Boards and Commissions are to meet at times established by Council. She added 269.03 by which Council authorizes the Chair of the Boards and Commissions to set the meeting dates and times.
- She also added 269.02, which reminds all Board and Commission members they are required to take an oath of office. This Section also prohibits elected officials and City employees from serving on Board or Commission, unless otherwise authorized (such as a Councilmember serving as Chair of a Commission). Our Charter and ordinances are silent on this, but it makes the most sense to prohibit City employees and officials from serving on City Boards and Commissions at this time as allowing such service could create more of the abstention issues they need to avoid.

Councilman Urschel asked exactly what was being requested. Ms. Fisher said if Ordinance 2019-07 was adopted to enact Chapter 269, then Council would act upon items if a Board, Commission, or Committee cannot do so. Mr. Merriman noted the language of the new chapter does not exist anywhere else in the City's Codified Ordinances or the City Charter.

Councilman Urschel asked if the current rules could be modified to include language about the "majority of members present" could make a decision so that matters did not need to come to City Council for a decision. President Engle said they cannot do that because it was in conflict with the current Charter. Ms. Fisher said that change could be made for the lay boards that are not established by the Charter, which are Economic Development Advisory Board, Board for Recreation, Arts, and Cultural Activities, and the Traffic Commission. However, the Charter establishes the Planning and Zoning Commission, the Board of Zoning Appeals, the Civil Service Commission, and the Charter Review Commission, which cannot be changed without a ballot measure and endorsement by voters. When she added the Charter Review Commission, she was very careful how she worded that language, which already includes the provision of "a majority vote of those present." The request to enact Chapter 269 was to address potential situations until the Charter Review Commission could address the issue and hopefully put it on the ballot. Mr. Merriman agreed the best long-term fix was an amendment to the Charter.

President Engle asked if staff wished for this Ordinance to be passed as an emergency or be introduced. Mr. Merriman explained the timeline relative to an emergency ordinance becoming effective immediately upon passage versus an introduction, a second reading, plus 30-day waiting period following the second reading for the ordinance to become effective. If the latter, it could prolong a decision for almost two months. He suggested Council consider the information presented this evening and take action at the April 11 Regular Session. He noted Planning and Zoning doesn't meet until April 4, and if they cannot take action, this would only delay the decision by one week. President Engle said regardless of the immediate situation with the Planning and Zoning meeting, they need a remedy to address this issue. Mr. Merriman agreed.

Councilman Urschel expressed concern about operating at a deficit because he was not as familiar with the particular nuances of each Board, Commission, and Committee. Mr. Merriman said if an item proceeded to City Council for a decision, staff would prepare comprehensive information in the staff report and provide all necessary information so Council could make an informed decision.

After further discussion, Mr. Merriman suggested that Ordinance 2019-07 would be included in the agenda packet for the April 11 Council meeting for their consideration as an emergency. All present agreed.

4. VARIOUS PROJECT UPDATES. Mr. Merriman discussed the following:

- **Greene County Building Inspection:** He shared that he received a call last week from Pete Landrum, Beaver Creek City Manager, and at the urging of Beaver Creek Mayor Bob Stone, he was reaching out about the growing political consensus within their Council and staff that the dissatisfaction they are experiencing is reaching a point where they need to do something. Mayor Mays agreed they are getting some significant push back from some fairly significant business owners. Mr. Merriman said there has been some push back from smaller individual projects in the past, but larger projects are now beginning to express their discontent. He explained they could go in several different directions with regard to building inspection services, and the best possible scenario would be a consortium of Xenia, Beaver Creek, and Fairborn, which was unlikely in the near term. He noted he recently received a formal proposal from the City of Fairborn. Staff has been actively working on this issue and anticipates presenting some alternatives to Council in the very near future. All present agreed to schedule this topic for a Special Session on April 25.
- **Artwork on W. Second Street Water Tower:** In the pursuit of opportunities to bring value, reduce costs, and bring new revenue resources, staff has engaged a potential partner on a unique approach to finishing the aesthetic wrap on the W. Second Street Water Tower. Kettering Health Network has expressed an interest in partnering with the City of Xenia to co-brand the water tower such that the City would not have to pay for the cost of installation and the City would get additional revenue from a lease agreement. A mutually-acceptable design would incorporate both the City's brand as well as Kettering Health Network's brand. If the City decides to finish the design on its own, the estimated cost is \$60,000 to \$70,000. He said although the City has not done anything like this in the past, it was not unprecedented for municipalities to allow these types of sponsorships on public buildings and other appurtenances, schools allow advertising on their scoreboards, etc. He said the City of Xenia has a long relationship with Kettering Health Network, who is a significant contributor in this community by way of services as well as contributions the foundation makes to numerous community events in Xenia. Councilman Urschel asked if there would be an issue contracting directly with Kettering Health Network and not offering the opportunity to other entities. Ms. Fisher cited Section 9.16 of the City Charter, which states "The purchase, sale, lease or transfer of real property, including fixtures thereon, are exempt from this provision, and the purchase, sale, lease or transfer of real property, including fixtures thereon, may be accomplished by negotiation or informal competition or by formal bidding upon the approval of Council by the adoption of an ordinance or resolution," which means they do not have to formally seek proposals or bids. Those present expressed their support of the endeavor. Councilman Smith asked if the lease revenue could be used for Shawnee Park playground equipment instead of being deposited into the Water Fund. Ms. Fisher said it has to go into the Water Fund because it is related to the water tower. Mr. Duke agreed, but Kettering Health Network could always make a donation for park equipment but it needed to be a different transaction.
- **Parks Maintenance Worker:** Mr. Merriman said they are struggling to fill the Parks Maintenance Worker position, which he felt was partly due to the schedule of Mondays and Tuesdays off and

working full-time hours from Wednesday through Sunday. The position is an entry-level position that starts at \$16.93 per hour¹. Councilman Urschel asked the requirements of the position. Mr. Merriman said it is a classified, competitive position that requires Civil Service testing, and none of the candidates on the current eligibility list are interested in this position. Staff has discussed changing the classification for this position to increase the pay, which did not require Council action, but he did not know if that would make the position more desirable. Councilman Urschel asked if this was year-round position. Mr. Merriman said it is a year-round position that works an alternate schedule in the parks during the fair weather months, and this position should already be filled as they are upon the spring season. Associated with this position, he informed Council that in the near future he would be presenting some changes to how Shawnee Park Pavilion and Xenia Station Shelter reservations are made and the associated fees. He explained that under the existing Fee Schedule, reservations are made in back-to-back, four-hour increments and staff has no time between morning and afternoon events for clean up, etc. Further, the City does not recoup anywhere near actual costs due to very low rental rates, especially with the evening rentals that automatically create an overtime situation. He noted last year's Parks Maintenance Worker capped out his comp time balance halfway through the summer due to working overtime, which is an indication of how many times he had to stay late on Saturday and Sunday evenings. Mr. Duke said the position was always a Maintenance Worker position and paid at a higher rate. It was transitioned to a Laborer position after a long-time employee in that position passed away only a few years ago, which was done in an attempt to save some money. Mr. Merriman said the position needs to be plus-rated during the winter months when the employee is utilized for snow removal. He said this position has more contact with the public than any other Laborer or Maintenance Worker position, so this employee needs to have good public relations skills also. Further, this employee has to deal with downright disgusting situations in the bathrooms as well as acts of vandalism.

- **Economic Impact Analysis:** Mr. Merriman distributed an updated Economic Impact Analysis relative to the Central State University Annexation. He reported they do not yet have the outcome of the litigation that Ms. Fisher has pursued regarding the annexation of the City-owned bike trail (to be considered in conjunction with the annexation of Central State University). However, he felt an updated analysis was needed due to new federal and state dollars going to CSU that has positively affected their employment numbers. Mr. Duke reviewed the updated numbers per the report, most notably the projected income tax of \$517,500, which has significantly increased since the initial analysis was completed based on 2016 data. Councilman Urschel said as a new member of Council, he was not privy to the particulars of this annexation. Mr. Merriman explained the boundaries of the proposed annexation and the County's denial of the City's petition to annex the City-owned bike trail, which prompted Ms. Fisher's filing of the Mandamus action. Councilman Louderback asked when a decision would be made. Ms. Fisher said she did not know; she never thought it would take this long. Mr. Merriman said Central State representatives have been in regular contact with him inquiring about the status; they want this to happen one way or another.
- **Council Training Event:** Mr. Merriman asked Council to consider a training opportunity in the next few months to cover several topics including ethics training and Council's role in the City's operation of an Emergency Operations Center (EOC). He would be contacting Council with some proposed dates and times. He noted it may occur off-site where they set up the EOC.

5. EXECUTIVE SESSION: Motion by Councilman Louderback, seconded by Mayor Mays, to go into Executive Session at 8:48 p.m. to discuss the Purchase or Sale of Property per XCO §206.04(a)(2) and ORC §121.22(G)(2); Pending Litigation per XCO §206.04(a)(3) and ORC

¹ The wage for the 2019 calendar year is \$17.40 per hour.

§121.22(G)(3); and Confidential Information Related to Economic Development Projects per XCO §206.04(a)(7) and ORC §121.22(G)(8). No discussion followed. The Roll on this was the following:

Ayes: Urschel, Louderback, Smith, Dean, Mays, and Engle

Nays: None motion carried.

6. RECONVENE IN SPECIAL SESSION / ADJOURNMENT: The Council reconvened in Special Session at 9:22 p.m. with the same members present.

Motion by Councilman Louderback, seconded by Councilman Smith, to adjourn the Special Session at 9:23 p.m. No discussion followed. The Roll on this was the following:

Ayes: Urschel, Louderback, Smith, Dean, Mays, and Engle

Nays: None motion carried.

Michelle D. Johnson
City Clerk

Michael D. Engle
Vice President, Xenia City Council