

CITY COUNCIL WORK SESSION

Public Performance

March 27, 2006 – 6:30 p.m.

Council Chambers

City Council Present: Mayor Marchand, Councilors Grasso, Dwyer, Raynolds, Pantelakos, Smith and Hynes

City Council Absent: Assistant Mayor Ferrini, Councilor Whitehouse

Officials Present: John P. Bohenko, City Manager; Robert Sullivan, City Attorney; Suzanne Woodland, Assistant City Attorney, Dave Holden, Planning Director, Michael Magnant, Police Chief, Len DiSesa, Deputy Police Chief, Gerald Howe, and John Russo, Police Commissioners, Nancy Carmer, Manager Economic Development and Dianne M. Kirby, Deputy City Clerk

Mayor Marchand opened the meeting at 6:35 p.m. He thanked everyone for coming and turned the meeting over to City Manager Bohenko.

City Manager Bohenko stated that Assistant City Attorney Suzanne M. Woodland, would be discussing the legal issues surrounding public performances, with David Holden, from the Planning Department presenting the planning issues followed by Police Chief Michael Magnant, discussing the enforcement issues. He turned the meeting over to Suzanne Woodland, Assistant City Attorney.

Assistant City Attorney Woodland stated that the City currently does not regulate street performers such as magicians, musicians, dancers and mimes. She stated that street performers are however, subject to the City's noise, sidewalk obstruction, vending and nuisance ordinances in the same manner as all other persons. She further stated that the regulation of street performers raises First Amendment issues. She stated that public sidewalks are public forums where the First Amendment protects freedom of speech, which can include expressive performances. She stated that the City regulation of its public forums is subject to the following limitations. She stated that the City may adopt reasonable time, place and manner regulations provided that the regulation is content neutral, narrowly tailored to serve a significant government interest and leaves open ample alternative channels of communication. Assistant City Attorney Woodland stated that failure to carefully craft and enforce the regulation can create unnecessary and costly litigation. She stated that a number of other communities have ordinances that purport to regulate street performers in some form, but she has not investigated the extent to which the regulations are enforced, nor determined whether there has been any recent litigation. She recommended the City review and amend existing ordinances as a preferable option for dealing with any concerns that the Council may have with regard to street performers rather than trying to regulate street performers separately.

Assistant City Attorney Woodland stated that the City needs to clearly identify their goal and she laid out six specific goals to be considered.

City Manager Bohenko suggested that the Council should at least talk about Assistant City Attorney Woodland's first goal that states: *"Does the City want to encourage or discourage street performers? Some types of regulation could discourage street performers. A number of communities such as Cambridge Massachusetts and Burlington Vermont require street performers to get a license or permit. Although the fee is minimal, it is still an administrative burden for the performer."* City Manager Bohenko stated that this goes to the heart of the whole issue. He stated that the Council probably wants to encourage street performers in a certain way. He suggested that the Council have some discussion relative to what the Council's thoughts are before we move on to the Planning Department's presentation.

Councilor Pantelakos stated that she was curious as to why we are here tonight and asked if there has been a problem.

Councilor Dwyer stated that over a year ago, Art-Speak heard, from some locals, that there was some confusion and requested clarification about what is permitted, where it is permitted, could they ask for money and requested if there are any regulations. She stated that this was before we had the incidents with the fire dancer and the juggler. She stated that Art-Speak and members of the City Council have heard from members of the public who are asking questions about whether we were encouraging or discouraging street performers and was Portsmouth being an unfriendly place. She stated that there are also questions concerning what is dangerous to the public and what should be regulated. She stated that these questions have come from both local and non-local artists and that they need to be addressed.

Councilor Pantelakos stated that if we are going to allow the street performers to collect money for their performances, that is panhandling and we need to be very careful when we say who can and cannot be performers. She stated that the sidewalks are for the pedestrians to walk safely and they should not have to go out into the middle of the street to get around someone who is performing. She stated that she thinks the street performers are great, but the Council needs to set some controls.

Mayor Marchand stated that just from listening to the exchange between Councilors Dwyer and Panatelakos, it seems that there are a couple things that need discussion. He stated that first the Council needs to decide where to allow the performers. He stated that Portsmouth has some very narrow streets that should performers be allowed to perform there could cause some safety issues. He stated that secondly the Council would need to decide what types of props, such as fire, sharp objects, etc we should regulate.

Councilor Smith stated that he would not want to discourage street performing, but supports some type of licensing with a very low dollar amount attached to it. He stated that would give the Police/Fire Departments an idea of what is going on in the City and regulate with rules and procedures.

Councilor Dwyer stated that a permit is an opportunity to inform a person what is permitted in our City so there is no misunderstanding. She stated that it gives clarification.

City Manager Bohenko stated that requiring a permit is two fold. There is the legal issue as well as the fact that you would need to issue the permit in a timely fashion. If someone comes into town at 5:00 p.m. on a Friday night and wants to be on the sidewalk or whatever, what do we do if they do not have a permit.

Assistant City Attorney Woodland stated that it becomes a challenge to know who are the street performers and who are just singing an anti war song. If you do not have someone here on the weekends, you run into administrative issues that could turn into legal issues if there is undue delay. You have to decide if you want to encourage or discourage street performing. She stated that one option is the public sidewalks are public forums, if you are looking at encouraging a particular use such as the Vaughan Mall stage that may be an area where you may want someone to come in and file an application, so you will be regulating that particular area. She stated street performers could still be free to take their guitar and walk down the street singing whatever song or political message they want.

Councilor Pantelakos requested to know what the City's liability is for street performers. City Manager Bohenko stated that that is a good question because then you get to the issue of what is allowed expression and what is endangering the public. He stated that is where the Chief will talk a lot about because that is where they have a difficult time. It is difficult to enforce a gray area. He stated that two things need to be done here. First, we need to figure out a way to regulate specialized performers. He stated that the single singers or musicians walking the sidewalk, we might not be able to regulate.

Councilor Grasso stated she likes the idea of the permits for specialized performers. She stated the Council would need to specify if the permit was a one time permit or a permit for a specific block of time such as all summer. She stated that the City could assume the liability in these designated areas. She stated that the Council should not allow panhandling.

City Manager Bohenko suggested the Council go out of order and hear from Police Chief Magnant now.

Chief Magnant stated that there are a number of issues that the beat officer has to deal with. He stated that Market Square has become recognized as a venue to exercise individual opinion on any number of issues. Individuals and or groups use the area in front of the North Church as a bully pulpit forum. Sometimes the speech or opinions being exercised are in conflict with each other. He went on to state that occasionally, street vendors' conflict with each other over space or over the right to sell their goods in close proximity to one another. At other times, they are engaged in the sale of inappropriate items, i.e. puppies. He went on to state that street entertainers occasionally come into conflict with the police because of public safety issues, obstruction of streets and sidewalks, interrupting the free flow of pedestrian traffic, or because the entertainment entails the use of items that pose a threat to public safety, such as fire, hatchets, or knives. He stated that typically, the use of animals in street performances results in complaints of animal abuse. He stated because of the lack of enforceable ordinances, police officers have had to become street-level policy makers in an effort to mediate the particular situation. Chief Magnant stated that calls for service are minimal. There were seven calls in 2005 and twelve in 2004 and they mostly consisted of

noise complaints, drums, bongo, rap music, bagpipes, occasionally amplified music, or the use of dangerous items being used in the performance, such as fire and hatchets.

Chief Magnant stated that the Police Department has had the opportunity to review the Art-Speak key point for discussion and they endorse the section entitled, 'Restrictions', with the addition of 'no amplification'. He stated that the Police Department does not believe the City is at a level yet where we need to consider requiring a permit. He closed his presentation stating that the Police Department is concerned about potentially complicated issues arising from Portsmouth's growing notoriety as a street entertainment venue.

City Manager Bohenko suggested that the Council move on the Planning and the zoning issues.

David Holden, Planning Director stated that the zoning ordinance is complementary to what Chief Magnant is saying in that it refers to requiring public events to go through the Council for a permit. He stated that the zoning ordinance covers what uses are allowed on a City block. He further stated that the ordinance is very poor and does not address use in the public right of way. He stated that it does address live performances and does provide some regulation on them.

Councilor Grasso asked Assistant City Attorney Woodland if the City has a no panhandling ordinance and if we did would it be enforceable. Assistant City Attorney Woodland stated that it would be problematic. City Attorney Sullivan stated that panhandling is entitled to some level of First Amendment protection. He stated that is not saying the City Council can not do it, but they would have to spend more time on it.

Assistant City Attorney Woodland stated that vending is prohibited unless you have approval.

Mayor Marchand stated that when someone says panhandling, it sounds like it should be an easy thing to regulate, but you are saying this is not the case.

City Attorney Sullivan stated that the First Amendment is the most complicated area of law because, the Court views the First Amendment as being the foundation of the republic. My general advice about First Amendment law suits is that cities lose First Amendment law suits – the smartest rule there is, is to try and stay out of them and he suggested the City Council proceed with great caution.

Councilor Grasso asked if someone is playing music on the street and has a basket out and people want to donate, even if he doesn't ask for donations is that alright.

City Attorney Sullivan said that it is fine. He stated that the rule is content neutral, reasonable time, place and manner restricted and narrowly tailored to achieve a legitimate governmental purpose. One legitimate governmental purpose is that people are suppose to be able to walk on the sidewalk so you can clearly adopt regulations calculated to preserve the ability of people to walk on the sidewalks so long as they are content neutral and narrowly tailored.

Councilor Dwyer stated that location is one of the clear ways to regulate where we allow specific performances. She stated that you also need fairness – having people treated reasonably the same. She states that Chief Magnant stated that he does not think permits are required at this time. She stated that the only way to be fair to everyone is to require permits to all. She requested that Chief Magnant explain to the Council why he does not feel a need to permits.

Chief Magnant stated that the level of complains is low. He suggested that if the City tightens up one or two existing ordinances so the police can deal with the noise issues and public safety issues he feels this will go a long way with the fairness issue.

Councilor Smith stated that there are two types of performances out there. The first being those who are performing for money and the other who are performing or speaking for protest. He stated that those performing for protest are more problematic and we should not require a permit from them. He stated that those performing for money should require a permit. He stated that we need to regulate with some sort of permit process, with a low fee so we will not discourage performers, but we can issue the rules and regulations with the permit. He stated that the next step would be where to have them perform. He suggested an area in front of the North Church and requested if the City has complete say over that entire area of the North Church. He also would like to encourage the blocking of the streets from Porter to Market Square on Friday and Saturday evenings to allow performers to perform.

City Manager Bohenko stated that they always contact the church whenever the City has a major event. He stated that the City has a good relationship with the church. He stated that with regards to allowing permitting performers to perform at the church might not work. He suggested the City work with Pro Portsmouth to utilize the area between Porter Street and Market Square and encourage that area or the Vaughan Mall for specialized acts. He further suggested that the City allow the street singers and magicians to continue as they are now. He stated that the police presently do not have any real issues with them.

Councilor Smith stated that if it is the church's property do we have any say if someone sets up and starts banging on drums, etc. Assistant City Attorney Sullivan stated that although they hold the deed, the City does maintain the sidewalks as public property, so we may have some authority.

Councilor Pantelakos asked if, under the First Amendment we could treat panhandling as we do vendors and require them to pay a fee if they want to panhandle on our City streets. City Attorney Sullivan stated he suspects the answer would be no. He stated that there is freedom of expression issues involved in panhandling.

Councilor Pantelakos stated that she does not feel it is fair that business' and vendors have to pay money for permits and licenses to operate yet these people can come in and collect money and not have to pay taxes or purchase a permit. Mayor Marchand agreed with Councilor Pantelakos.

Assistant City Attorney Woodland stated that she reaffirms City Attorney Sullivan's instincts. She stated it is her understanding that they usually look at case law relating to street performers and the passing of the hat and it is quite problematic.

Councilor Pantelakos asked if the Council has any regulations on Freedom of Speech and what it entails. City Attorney Sullivan stated it all goes back to contact neutral, reasonable time, place and manner restricted. Councilor Hynes stated that licensing freedom of speech will never work. Freedom of expression and freedom of speech are controlled by the Police Department and by licensing when necessary by the Code of Common Decency when it offends more people than it entertains. He stated that entertainment would have to be controlled by the amount of noise created. He stated that if it exceeds the noise limits dictated by the City we have the controls for the Police Department to work with. He stated that he is not in favor of licensing. He said Portsmouth is attractive because it gives a feeling of freedom.

Councilor Dwyer stated that goal #5 on the Assistant City Attorney's handout, which states, "Should *"preferred performance areas" within the City be identified to encourage street performers to perform at those locations as opposed to other areas (keeping in mind that the public sidewalks would still be available)? Perhaps amplification or drums could be permitted at those areas within certain time limits to encourage performers to use those venue*", would be well received by a number of the local performers. She stated that if we don't go the permit route, the key then is whether the police feel that they will have enough guidance to be able to walk the line. She stated that she doesn't feel there is enough clarity on both sides regarding what is expected and right. Chief Magnant stated that absent that clarity, the beat officer has to make the decision and establish that policy.

Mayor Marchand stated that one of the concerns is the lack of definition. He stated that looking at the small number of complaints, our main focus would be the noise ordinance. He asked what would be our next step, should we sharpen the ordinances or look into specific areas for the performers?

Councilor Pantelakos stated that she would not be in favor of changing the ordinance to allow amplification due to the amount of people who live downtown. She stated she would like to tighten the ordinances to assist the police.

Councilor Smith stated that he agrees with Councilor Pantelakos on the ordinances and specific areas. He stated that one aspect that is still missing is how do you let the performers know the rules and regulations. He stated that is the reason he suggested a permit with a small fee so the performers know what the rules are and everyone is on the same playing field.

City Manager Bohenko stated that he would like to talk to Pro Portsmouth about partnering with them on Vaughan Mall and the area from Porter Street to Market Square and try to work with them on those areas as venues for people to do performances. He stated we might also discuss possible low level amplification with defined times. He stated that if we are successful in Vaughan Mall & Market Square, maybe we could find a third area to try. Basically we would tighten up the ordinance and work with Pro Portsmouth to try to come with some kind of

partnership. He stated that instead of developing an elaborate program here in City Hall, he would like to work with Pro Portsmouth, who has been extremely successful in working with local performers.

Councilor Reynolds stated that he feels that public street performances should be allowed to express themselves. He stated we should remember that in December, the Council passed support for the Bill of Rights.

Councilor Grasso stated that she agrees with Councilor Smith. She stated that when the rules and regulations are in black and white we need to give them to Art-Speak and have them pass them on to the local performers.

Mayor Marchand stated that there are two basic areas we want to move forward with. First we need to tighten the ordinances to provide the police with guidance and remove some of the gray areas. Secondly, we need to work with Pro Portsmouth in defining areas and guidelines for performers and disseminate these guidelines through Pro Portsmouth.

Councilor Pantelakos requested if we would have something in place that can be enforced this summer. City Manager Bohenko stated he will begin working with the legal staff on tightening the Ordinances tomorrow and will try to have them ready for the last meeting in April or first meeting in May.

Councilor Grasso thanked City Attorney Sullivan and Assistant City Attorney Woodland for all their work on this issue.

City Manager Bohenko stated that he is in the process of putting together the budget for FY07. He handed out an information sheet and stated that this sheet contains information to review so that when the Council receives the detailed document on April 20, 2006, they will have some understanding as to the complexity of the process that his staff goes through. He stated that the handout is a one-page summary of the total gross budget. He stated the gross budget for 2006 is \$73,000,000.00. The department's request presently is \$77,997,000.00 or about 6.7%. He stated that this is approximately 4.9 million dollars over last year. He stated that of that 4.9 million dollars, 1.7 million dollars is health insurance and energy cost increases. He stated that if you took the health insurance and energy costs out of this figure, you would be looking at about a 4.4% increase for all departments. He stated that this figure is both operating and non-operating figures. He stated that the department request as of April 20, 2006, which will be submitted to you with details, would require a tax rate of \$1.41 or 8% increase over the previous year. He stated that the property tax levy is going up 9.23%, due to \$50,000,000.00 in new growth. He stated that if the budget were to be accepted by the Council as is, the City would have approximately an 8% increase in the tax rate or \$1.41. City Manager Bohenko provided information on what the figures would be if the budget were increased by 4%, 5%, 6%, 7%, 8% and 9%.

Mayor Marchand stated that on April 20, 2006, the Council would be given the proposed budget. He stated that the Council needs to ask now how much money can the people afford to spend over last years taxes.

City Manager Bohenko stated that he strives to keep property taxes proportionate. Mayor Marchand stated that it is very important to not focus too closely on property value. He stated that at the end of the day, the tax bill is a result of spending and not a result of property value. City Manager Bohenko stated that we do have \$50,000,000.00 in new value and will now be paying taxes.

City Manager Bohenko stated that there are a couple major areas under the budget, such as education, police and fire that he is going to allow to go through and be presented to the Council. He stated the reason for this is that there are such significant decisions that need to be made that he doesn't think he should make. He stated that he would guide the Council to protect the services of the City.

Councilor Pantelakos requested if the local Government Center is assisting or funding lower medical and health care. City Manager Bohenko stated that they are doing a number of things.

City Manager Bohenko stated that the Chair of the Legislative Delegation has requested when the City Council can meet with them. After some discussion as to dates and time, City Manager Bohenko stated that he would contact the delegation and set a date.

At 8:05 p.m., Mayor Marchand closed the meeting.

Respectfully submitted by:

Dianne M. Kirby, Deputy City Clerk