

**MAYOR AND COMMISSIONERS MEETING  
CITY OF REHOBOTH BEACH**

**November 8, 2010**

The Workshop Meeting of the Mayor and Commissioners of the City of Rehoboth Beach, was called to order at 9:02 a.m. by Mayor Samuel R. Cooper on Monday, November 8, 2010 in the Commissioners Room in City Hall, 229 Rehoboth Avenue, Rehoboth Beach, DE.

City Solicitor Glenn Mandalas gave the Invocation followed by the Pledge of Allegiance.

**ROLL CALL**

Present:     Commissioner   Bill Sargent  
              Commissioner   Pat Coluzzi  
              Mayor            Samuel R. Cooper  
              Commissioner   Dennis Barbour  
              Commissioner   Stan Mills  
              Commissioner   Lorraine Zellers

Absent:     Commissioner   Kathy McGuiness

Also in attendance was:     City Manager Gregory Ferrese  
                                  City Solicitor Glenn Mandalas

**CORRESPONDENCE**

Correspondence received was related to the regulation of patios associated with restaurants and the control of noise.

**OLD BUSINESS**

Mayor Cooper called to discuss potential changes to Section 270-10(A) of the City Code, which Section relates to the regulation of patios associated with restaurants and Chapter 189 of the City Code, which Chapter relates to the control of noise.

Commissioner Pat Coluzzi noted that of the four meetings, the last two meetings were held, one with residents and one with businesses. Commissioners Sargent, Barbour and Coluzzi were in attendance at those meetings which were arranged by Ms. Jenny Barger of Main Street. Discussion was open-ended and allowed businesses and residents to make their views known of what they believe are the issues surrounding patios and noise. The first meeting was related to the patio ordinance, and the second meeting was related to the noise ordinance. Commissioner Dennis Barbour has prepared a presentation; and one of the things he has discovered is that in 2003 there was a study prepared by a consultant, paid by the City, to look at issues surrounding noise and what the City might do to be able to enforce regulations.

Mayor Cooper presented his prepared statement. It was his desire to describe the events from his vantage point that have led to the current debate on the patio and related ordinances, and to state what he believed is at stake. There are many restaurants located in the City that represent a tremendous asset. While he was unsure of the exact dates, Mayor Cooper referred to the summer of 2009 when numerous complaints were received concerning an establishment located on Baltimore Avenue. The police took action in an attempt to enforce the ordinances related to that establishment's certificate of compliance but had limited success. The complaints continued in the fall and winter of 2009. During this entire time, Mayor Cooper was made aware of advertisements which indicated that this establishment during many of the hours it was open was clearly not operating as a restaurant. The police were required to devote more and more time pertaining to the issues related to this establishment. This finally resulted in the City's police needing requested assistance from three other police agencies to quell an unruly mob one Saturday night outside of this establishment. When Mayor Cooper had learned of this on Monday morning, he was shaken because this is not the type of activity he wants the world to associate with Rehoboth Beach. This situation was not resolved until the owner of the property stepped in and took control. Mayor Cooper is rarely out late in the evening; however on August 14, 2010 at approximately 11:45 p.m., he left home on an errand. He decided to make a loop around Rehoboth Avenue and could scarcely believe what he had heard as he turned east onto Rehoboth Avenue from South First Street. There was music blaring from an establishment approximately mid-block. Proceeding around the circle and heading west, Mayor Cooper encountered from his vehicle what he considered another very loud establishment. Once home, Mayor Cooper was concerned enough that he walked up the Boardwalk to the first establishment,

taking with him an inexpensive sound meter. He had no training but would say that the noise from this establishment exceeded 100 decibels measured from the middle of the sidewalk. When the four-piece band was playing, Mayor Cooper could have literally shaken hands with each member while he stood on the public sidewalk. He could hear the music from this establishment almost until he got to the Boardwalk approximately 300 feet to 400 feet away on the same side of the street as the establishment. On the way home at approximately 12:30 a.m., Mayor Cooper witnessed people seated and standing on a restaurant patio. The minutes of the Commissioners' meeting held on January 20, 2009 at which this establishment received its certificate of compliance in part reflect that "the applicant needs to understand the strict limitations of the patio provision of the Code and somehow people will need to be restricted from going on to the patio at 11:00 p.m." This was attributed to Commissioner Mills' statement made during that meeting. On the evening of August 28, 2010, Mayor Cooper and his wife were to meet others for dinner at a restaurant on Wilmington Avenue. This establishment received its certificate of compliance on February 19, 2010. The first half of the paragraph of the minutes from the Commissioners' meeting at which this was approved, is "Ms. Jane Patchell, Esq. of Tunnell & Raysor, P.A. represented the owners of the restaurant. In addition to the restaurant being in compliance with Section 215-1 through 215-15, the patios will be in compliance with Sections 270-19(A)(1)(a) since they will be below the 750 square foot maximum allowed. The applicants are willing to abide by all the use restrictions in Section 270-19 including that food and beverages will only be served to seated patrons. No live entertainment will be on the patios. No external speakers or amplifiers will be on the patios. No internal speakers from the premises will be directed towards the patios. No bar will be on the patios. Food service will be only served from 7:00 a.m. to 10:00 p.m. Alcoholic liquor service will be allowed from 11:00 a.m. to 10:00 p.m., and the patrons must leave the patio by 11:00 p.m." As Mayor Cooper made his way on to the premises, he was confronted with music coming from an amplifier and speakers located on the patio area. Mayor Cooper was so offended by what he saw that he immediately left. Commissioner Mills had contacted Mayor Cooper on September 7, 2010 to ask if he could meet with the City Manager and the Mayor; and at 3:00 p.m. they met. Commissioner Mills had stated that he had walked the commercial area after 11:00 p.m. the previous Friday and Saturday nights. During his walks, he noticed a number of establishments where persons were on patios after the prescribed time. Commissioner Mills had no list but spoke from notes he had taken. Commissioner Mills identified many establishments that he thought were in compliance as well as those he thought were not. Mayor Cooper was not surprised of Commissioner Mills' findings given his experience in part. The City Manager took the lead and stated that he would call a meeting with the Chief of Police, Building Inspector and City Solicitor the next morning. Commissioners Mills and Mayor Cooper were also requested to attend. At the meeting on September 9, 2010, the City Manager requested the input of those assembled and decided that there needed to be a more comprehensive enforcement of the patio rules. Those establishments that Commissioner Mills had observed people on the patios after hours were to be notified that they may have violated the patio rules; and in the future, this was going to be more closely monitored. Mayor Cooper now recognized that the City was wrong in not giving more and better notice. As Mayor, he accepted the responsibility to the insensitive way these restaurants were treated. The City, through its Commissioners, made a conscious decision 19 years ago that it did not want to become a bar town such as Dewey Beach. Mayor Cooper apologized to Dewey Beach in that he did not intend to deride it but the contact to Rehoboth Beach is profound. Mayor Cooper did not feel that the vast majority of restaurants are a problem. In fact, they are a tremendous asset to the City. However, an increasing number of establishments are taking more and more liberties in not following the law and creating public nuisances. The Commissioners are again faced with the decision of whether the City wants to become a bar town. There are already signs in Mayor Cooper's view that the City has been slipping in that direction. He has seen establishment signs indicating that no one less than 21 years of age are permitted after 10:00 p.m. Couples with a 19 year old son or daughter wishing to have a late meal are not welcome. One recently opened establishment was written about. "People have been calling us Starboard North, referring to the classic Dewey Beach bar. Since its springtime opening, the bar/restaurant has become party central in Rehoboth Beach with its three full bars, a small stage for bands, and a dance floor as crowded as any Dewey dive on a Saturday night. On Sunday afternoon, the party spills out onto the Avenue with more live music and an all day happy hour." Another establishment was written about. "If you have a hard time finding this establishment, just listen. You can hear it a block away." Noise is the primary concern with these establishments, bars if you will, but it is certainly not the only concern. Mayor Cooper did not accept if there is no one to complain then there should be no enforcement. The general public should not have to endure bombardment by music and other noises they may not appreciate. Some of the establishments in this City do not take the common sense step of closing windows and doors when providing entertainment. It seems clear that they want to project maximum noise. Mayor Cooper did not also accept that some must surrender the peacefulness on their property to those not willing to control their noise. It disturbed Mayor Cooper that a Commissioner would suggest that someone should move to escape the noise. The City's current noise ordinance, ineffective and nearly impossible to enforce even if it could train enough employees in the proper use of a sound meter, is unlikely that the courts

are capable of adjudicating cases involving such evidence. Unless the Commissioners are willing to adopt a standard that does not rely on the use of sound meters, there will be no effective control. Outside patios associated with restaurants is what precipitated this discussion. Mayor Cooper's research indicates that the City's patio hours are consistent with those of other municipalities similar to the City's. Mayor Cooper understood that there may be a market for patrons to dine later into the night than is currently permitted; but he also felt that there is an equal chance some patios will turn into rowdy bars. Without the necessary controls including a revamp and tightened noise ordinance and a zero tolerance police, Mayor Cooper cannot support later hours on patios. He is not in favor of moving Rehoboth Beach in the direction of becoming a bar town. He rejects the argument made by some that the City will die without the bars; however, if the Commissioners do not take positive action to deal with the noise and other issues at this point, that is where the City is headed. If the Commissioners can agree on this, then creating the necessary ordinance in designing an enforcement program should be doable. The Commissioners should encourage and support the many fine restaurants in the City, but not to allow the rowdy bars even if associated with a restaurant.

Commissioner Mills shared his thoughts. Legislators have a responsibility of enacting laws that benefit and serve the community. Businesses like any individual have a responsibility to comply with established laws and to follow the rules. City management has a responsibility to promulgate laws including a fair and standardized application, and enforcement of the laws on the books at the time when necessary. These three distinct responsibilities merge in part to ensure a level playing field among businesses and to protect the safe, health and welfare of those reside, visit or conduct business within the City. While many have their opinion about how the recent patio code enforcement actions came about and what they mean, is respect for and compliance with the City's established law. Commissioner Mills has been an advocate of enforcement for and compliance for the City's laws. In reporting any complaints, all he has asked for is simply for compliance with the City's laws and enforcement action as warranted. His advocacy for compliance and enforcement has been strengthened by residents, restaurants and businesses making similar complaints to him. As an elected official, Commissioner Mills is in a position of legislator and have the greater expectation of compliance by businesses and enforcement by the City. For restaurants that desire to serve alcohol, Commissioner Mills can sit in judgment of their application in part on the merits of: 1. The restaurant is not having an adverse impact on neighboring properties or on the City. 2. Considering the impact on traffic, parking and noise. 3. The restaurant would not be a detriment to the peace, order and quiet of the neighborhood and City. Integral with granting of the certificate of compliance are conditions for maintaining their certificate of compliance such as complying with patio codes, etc. It is important to be mindful that obtaining and maintaining a City issued permit of compliance is mandatory in obtaining and maintaining a State liquor license. In Commissioner Mills' term of office so far, he has participated in 13 permit of compliance hearings of which seven included patio licenses. He has voted in favor of every applicant. During their individual permit of compliance hearing, each restaurant with patio acknowledged to understanding the patio code regulations. One even pledged to their attorney that they would abide by the Code. When Commissioner Mills voted favorably to grant each restaurant a permit of compliance including the right to use a patio under specified conditions, he was fully satisfied that the restaurants intended to comply with the City's laws. Furthermore at the time of voting favorably, Commissioner Mills believed that the expectation of full compliance was shared by other Commissioners who voted favorably as well as by the citizens and other restaurants. This issue for Commissioner Mills is and will always be 100% about respect for and compliance for the City's laws. This past summer was no exception to receiving complaints from residents and other restaurants except for the escalation and number of complaints including from Mayor Cooper and another Commissioner. At recent past Commissioner meetings, it is interesting how many restaurants have now publicly offered that they willfully violated the City laws, and some have apologized. If the scale had not been tipped to non-compliance by the sheer number of violators, then perhaps no large scale enforcement action would have been initiated by the City Manager. Instead, all the restaurants that appeared to violate the laws were the group catalysts for receiving warning letters and then enforcement monitoring directed by the City Manager, along with every other restaurant. Commissioner Mills was sorry this happened and was sorry that the City has to enforce the laws, but it was enflamed by the more vigorous apparent violators. Commissioner Mills responded to two comments made in some letters by Commissioners McGuinness and Barbour. They both mentioned that this has stemmed from a noise problem. Commissioner Mills, Mayor Cooper and Mr. Ferrese have stated that there were reports from multiple sources – residents, restaurants, other Commissioners. All these complaints were about lack of compliance of the patio code, not about noise levels. In Commissioner Barbour's letter, he has stated that he has concerns about the impact constant diversion of police may have on public safety within the City in regards to noise complaints. If the police are consistently diverted from other more potentially dangerous matters because of complaints, something must be done. Commissioner Mills has talked with the Chief of Police and being intimate with the police through Neighborhood Watch and through a personal noise complaint, he has found that the police are professional and that their response sequence fits into

a hierarchy of priorities. Emergency and high level crimes will get first response. A noise complaint is low on the totem pole. If the police are on a noise complaint and got another more important call, they would drop the noise complaint and respond to the more important call. Commissioner Barbour had mentioned that business is commerce; and Commissioner Mills agreed that it is, but also are the accommodations businesses within and abutting the commercial district which feed patrons into the businesses and restaurant establishments in the City. What gave Commissioner Mills the most pause in this entire situation and highlighted by Commissioner Barbour's statement that he says "It is well past time that we adopt a more vibrant vision for how a beach community should function". Commissioner Mills was curious to know what is contemplated. It seems that the discussions on the music levels and patio use are now taking the Commissioners to the brink of making a decision on the type of town they want it to be, defining the character they desire for Rehoboth Beach. Commissioner Mills shared some of the scenarios he encountered over the summer. Greene Turtle: Open and serving food and drinks after hours, required to be closed in contravention of the patio code. Persons with drinks not seated and walking around in contravention of the patio code. Speakers mounted on the exterior patio and music audible on the Boardwalk in contravention of the patio code. Patrons overhanging the balcony with drinks in hand and shouting down to girls. Purple Parrot: Open after hours in contravention of the patio code. Music on the patio audible up to the Stoney Lonen in contravention of the patio code. Wandering patrons instead of being seated in contravention of the patio code. Aqua Grill: Open after hours. Wandering patrons. Crowds likely in excess of the permit. Approved seating is for 130; and at the first October meeting, the owner conveyed that at one time he had more than 230 patrons in his establishment. For Commissioner Mills, this is not about whether he likes or does not like music or about non-seated patrons, it is about compliance with the City laws. Taverns and bars are not allowed by law in the City. All of the scenarios above effectively presented an outdoor bar scene. Seeing the above and hearing music and DJ's blaring up and down the streets from various restaurants competing with each other gave Commissioner Mills pause of the scenes more reminiscent to Dewey Beach, Key West, Bourbon Street in New Orleans, etc. It is fine for those locations because it reflects those towns' attitudes, but it is not fine for Rehoboth Beach. Commissioner Mills wants to retain the City atmosphere of several years ago when patio codes and permits of compliance were largely complied with. He is not interested in it becoming a party town. The City's laws help define the character of the City, and this is how in part Commissioner Mills is approaching review of these codes. Commissioner Mills wants businesses to be successful, but he also wants to protect the interests of all residents, tourists and other businesses. He has stressed compliance continually and enforcement; but without enforcement on the City's part, having laws is irrelevant. The City needs to do better as well. This all came about from lack of compliance with the laws on the City's part and the consequences on the Commissioners' part of heavy handed enforcement. These are lessons learned; and there is a need to review both the codes and enforcement methodologies. It is Commissioner Mills' hope that there will be more positive strides in moving forward with the review of the three elements that he thinks are important: 1. Patio code. 2. Noise code. 3. Restaurant code. Commissioner Mills would like to take the lead in addressing the restaurant code. Commissioner Lorraine Zellers has offered to help Commissioner Mills.

Commissioner Barbour presented what the residents and businesses are requesting. Main Street put together meetings with the residents and business community. Commissioners Barbour and Coluzzi also participated in those meetings. The information provided in the presentation was based upon the police reports from October 2007 through October 2010. Commissioner Barbour had gone through the police reports relative to noise issues, and he tried to break the summary of noise complaints down according to street and actual establishment. A date range was also provided. There is a clustering related to noise which has brought a lot of this to a head. On October 26, 2010, a meeting was held with the residents, and on October 27, 2010, a meeting was held with the business community. The meetings were moderated by Ms. Jenny Barger of Rehoboth Beach Main Street with Commissioners Coluzzi and Barbour participating. The consensus items from the residents and business community were: 1. Both the noise and patio ordinances should be decriminalized. 2. The same hours should apply to all restaurants, where grandfathered or not. The hours should correspond with the serving hours. 3. There should be stiff penalties, including fines and closing of offending establishments for a period of time. 4. Enforcement should be consistent. 5. The City should consider a "community policing" approach to standard setting and enforcement. 6. The City should hire a Noise Officer who would be responsible for enforcement. In addition, the residents suggested that the noise and patio ordinances should be addressed separately. First the revisions should be adopted to the patio ordinance and decriminalize violations of both ordinances, and then address any other problems with the noise ordinance. In addition, the business community suggested that suggested fines after a warning should be \$250.00, \$500.00 and \$1,000.00 with possible revocation of the certificate of compliance after the fifth violation. The City should undertake a study of noise levels within each commercial area of the City in summer of 2011 to determine a baseline standard for what are acceptable noise levels. Noise should be measured at a reasonable location. Better noise monitoring devices

should be used. In 2003, the City commissioned a study about noise. It was conducted by the Institute of Noise Control Engineers; and the contractor basically walked through the current Code and compared it to other cities, and came up with some specific recommendations as to how the Code should be changed. This is not only informative, but a very useful guideline for moving forward. The contractor compared the City with the State of Delaware, Sea-Isles City, NJ, Cape May, NJ, Ocean City, MD, and Annapolis, MD specifically in terms of the decibels that are measured by noise meters during the day and evening. Based upon their findings, recommendations were made. The importance is not the decibels, but where the decibels are measured from. Commissioner Barbour tried to do a comparison of what the consensus with the community was and what the report actually said should be done. In the 2010 community consensus, the business community suggested that the City should undertake a study of noise levels within each commercial area of the City in summer of 2011 to determine a baseline standard for what acceptable noise levels are. NCE had recommended that a sound monitoring study be performed during the summer of 2004 throughout the business and residential areas of the City. Information learned from sound monitoring would include a determination of commercial area sound levels, determination of residential area sound levels using both A and C weighting, change in sound levels at distances within 25 feet of the buildings. Such information would be necessary to finalize a new commercial nighttime noise limit, new entertainment dB(C) noise limit and new minimum distance location. In the 2010 community consensus, the businesses and residents suggested that the City should re-examine the location from which noise is measured. NCE had recommended that one of the most significant differences between the City noise ordinance and the others was the location of sound measurements. The State of Delaware, Sea-Isle City and Cape May call for sound measurements at the property line of the "receiving property". Only Ocean City, MD requires sound measurements at the property line of the "source property". In the 2010 community consensus, it was agreed that the City should re-examine the location from which noise is measured. NCE had recommended that taken together, the above modifications should be fair to all parties. The most significant modification is changing the location of noise measurement from the source property line to the point of the complaint origination. This will typically be within a receiver's property line, but it does not necessarily require someone to complain. In the 2010 community consensus, it was suggested that the City should consider a "community policing" approach to the noise ordinance standard setting. A noise enforcement officer should also be hired so that enforcement is not solely complaint driven. The NCE report had not addressed the issue of community policing, but NCE had recommended that the Police Department should consider appointing a "Noise Control Officer". This should be one officer who has extra training in the area of noise ordinance enforcement, noise measurement methodology and instrumentation. This person would then be responsible for training other officers, maintaining equipment and procedures and then conducting the important measurements that would be used for expert testimony. In the 2010 community consensus, it was agreed that the City should employ better noise measuring equipment. NCE had recommended to not replace the Police Department's current sound level meter (SLM); but it recommended that when budget permits, another SLM should be purchased which would have C-weighting and octave band capability. The use of both the octave band and C-weighted noise limits would be appropriate for situations where a resident is bothered by low frequency bass. City Manager Gregory Ferrese noted that this instrument had been purchased. Commissioner Barbour noted that NCE had recommended that the commercial night noise limit be increased from 55 dB(A) to 60-65 dB(A) to be consistent with the area and State regulation. No recommendations were made to change the residential night noise limit of 55 dB(A). No recommendation was made to change the nighttime definition from 11:00 p.m. to 8:00 a.m. NCE had recommended that measurement location be changed from the source property line to the complaint location but not closer than 10 feet which is consistent with the State of Delaware. NCE had recommended that the existing practice which cannot be plainly audible from 1:30 a.m. to 8:00 a.m. at the source property line for entertainment noise limit should be modified to include that it cannot exceed 67 to 73 dB(C) from 11:00 p.m. to 8:00 a.m. within the receiver property. NCE also recommended that the location for assessing the noise level limits be changed to the point of complaint origination, but no closer than 10 feet from the noise source. The State of Delaware uses the location of "complaint origination" and the above modification would then be consistent with the State regulation and the noise ordinance of two of four of the reviewed municipalities. It was suggested that a minimum distance be added in order to prevent excessive high noise readings which occur when measurements are taken very close to noise sources. NCE also recommended an addition to the "Entertainment Limit" to the existing requirement for "no audible sound to penetrate the building, structure or vehicle from 1:30 a.m. until 8:00 a.m. During the nighttime periods (11:00 pm. To 8:00 a.m.), no sound from entertainment establishments shall create audible sound that exceeds a C-weighted level in dB(C). Commissioner Barbour thought that the recommendations of the 2003 noise ordinance report should be adopted. Both the patio and noise ordinances should be decriminalized. Proposed changes should be approved to the patio ordinance. Stiff progressive penalties for noise ordinance violations should be imposed, up to and including revocation of the certificate of compliance. Commissioner Barbour recommended the following interim changes to the current noise ordinance regarding decriminalization: 1. First offense – no assessment;

warning only. 2. Second offense - \$250.00. 3. Third offense - \$500.00. 4. Fourth Offense - \$1,000.00. 5. In the event of a fifth offense within a period of time to be determined, the Commissioners shall have the authority to revoke a business's certificate of compliance. What Commissioner Barbour proposed, does not include the issue of coming up with a baseline next summer. He suggested that a community-wide assessment be done next summer of what an acceptable noise level would be. In Commissioner Barbour's presentation, he also had included three photographs referencing commercial establishments that have patios.

Mayor Cooper was troubled with this process. He asked when the meetings with Main Street were held and when notice was given that those meetings would occur. The input received was not broad enough based to convince him that the meetings represented the entire community. The notice was so short and the venue was such that some people may not have been comfortable with; and it was a very limited sampling of people in in this City. Ms. Jenny Barger of Main Street sent out emails to all Main Street business members and anyone who had submitted comments. She thought the meetings were noticed three days before the dates of October 26 & 27, 2010 when they were held. She acknowledged that there was not a lot of time for people to put these meetings on their calendars, but there was a request for things to move forward. Notices were also sent out from Save Our City and Rehoboth Beach Homeowners' Association to their contact lists for residents to join in. The Chamber of Commerce also sent out notices. The same invitation was also sent to the Commissioners and Mayor Cooper. Commissioner Coluzzi accepted that it was not a representative group. There were some ideas which were brought up, and there may have been different or more ideas with a different group of people. Because these are reasonable ideas, they are worth discussing. She did not want the people who have attended those meetings to think that the Commissioners reject their ideas. The responsibility of the Commissioners is to discuss these ideas, and it is not up to the Commissioners to solely rely on the people sitting in the audience to give them information. The input provided is good and is worth discussing.

Commissioner Barbour commented that the original decision to enforce the patio ordinance did not have business or resident participation in fact the Commissioners were not largely involved. In terms of official action of the City, he did not think that represented the views of the Commissioners. Mayor Cooper had asked Commissioner Barbour some time ago in an email that for part of his presentation he asked when Commissioner Barbour was first made aware that the patio ordinance was not to be enforced. In Mayor Cooper's view, it was to always be enforced. In regard to the patio ordinance that was approved as part for Ms. Jane Patchell's client on February 19, 2010, a woman in attendance at that meeting had asked the Commissioners to not approve it because there was concern about the noise. Mayor Cooper in part voted for that certificate of compliance because he thought the Commissioners had the protections of the patio ordinance, etc. in place. If the Commissioners were not to enforce that, then Commissioner Barbour should have stood up and said that they are not really enforcing it. Commissioner Barbour said that he never stated publicly that he did not think the City should not enforce the patio ordinance. What he stated publicly was that the patio ordinance has been on the books for 19 years and there has never been a citation. The point he was making was why was it enforced all of a sudden after 19 years and giving the businesses two days notice from Building & Licensing, Commissioner Barbour never said that the patio ordinance should not be enforced.

Commissioner Coluzzi suggested moving forward with the consensus items suggested by the residents and business community at those meetings. Commissioner Lorraine Zellers thought there were some good suggestions, and it would be place to start from.

Mayor Cooper said that he will not agree to an ordinance driven only by complaints from the citizens. Commissioner Coluzzi suggested that there should be a noise control official along with a few police officers to be tasked with the responsibility of enforcement. Mayor Cooper said the noise control officer should not only be tasked with that, and the police officers can act on their own when they are witnesses. The noise meters do not work in the situation which is being discussed. Measuring noise or music coming from an establishment is not conducive to measuring noise with the sound meters, and the vast majority of resort municipalities similar to the City are using a plainly audible standard.

Commissioner Bill Sargent noted that Chief Banks had said that the current ordinance cannot be enforced because the noise meters do not produce the kind of evidence that can be used for convictions in Delaware courts. Another serious problem is that the noise meters take a sample over time. The most offending part of noise is the beat of the music, and that beat is instantaneous. When adding the instantaneous noise to an average, it does not show up on the meter. Commissioner Sargent had spoken with Mr. David Mellen who has been a noise engineer with DuPont for 40 years. When there are many sources of noise, it is extremely hard to isolate one. To determine the contribution of any one source on a meter, it needs to be turned off and then turned back on. To get a good reading, cooperation is needed. Chief Banks cannot get a good reading from the most offending places. The plainly audible standard is used in the State of Delaware, and has been used

effectively in Newark for 20 years. The police virtually never lose a case because Newark's Alderman is extremely familiar with the law which is a simple standard that works.

Commissioner Barbour has been searching for a standard that is reasonable and can be enforced. One of the key issues is that no matter what standard is used it should be taken from the complaining property not from right outside the establishment. It is important to be fair to the source of the complaint. The core of the problem that has been reported to the Police Department emanates from mechanical noise such as speakers, music, etc. Discussion ensued as to a reasonable standard to be used regarding noise.

Mayor Cooper said that there are methods to control noise such as sound baffle panels which will muffle the sound that comes out of an establishment. The establishments should be willing to spend some money to control their noise. Commissioner Coluzzi did not see any reason for a restaurant to have their windows and doors open with music pouring out. She likes the idea of being outside. If an establishment has a loud group, it should be required to contain the sound. The Commissioners should work with the restaurant regarding requirements to control noise. The Commissioners may need to look at changing the permit of compliance to add these types of requirements such as when there is music some things may need to be done to the property in order to have music.

Commissioner Barbour said that it would be far more effective for the City to go to the establishment if there is a problem. The first line of defense should be communication and conversation.

Commissioner Sargent said that something is needed which is enforceable as a standard.

Commissioner Coluzzi referred to the 2003 Noise Ordinance Review done by Michael Bahtiarian, full member of Institute of Noise Control Engineers; and in the review, there is instrument and measurement methodology and recommendations. She has to believe there is some ability use equipment for this purpose because he has made a recommendation. If the Commissioners are unsure of the recommendations, then perhaps someone else should do a review of the instrument and measurement methodology. Commissioner Coluzzi wanted the measurement standards to be objective. Her concern with plainly audible is its subjectivity.

Commissioner Zellers has researched the plainly audible standard. She found that municipalities are moving away from the decibel readings and going to the plainly audible standard within a reasonable distance. Noise meters are also used in conjunction with the plainly audible standard. The standard seems to be that if someone's voice can be heard 50 feet away, then it is plainly audible. Mayor Cooper said that this would also take into account the ambient noise in the background.

Commissioner Barbour said that the standard needs to be reasonable, and he did not think that the Commissioners are in a position to determine that standard. Experts are needed.

Ms. Betty Prettyman, 41 Delaware Avenue, voiced concern with, not only the loudness but the rhythm of the music emanating from an establishment located across the street from her, and she noted that a noise meter cannot handle that.

Commissioner Barbour did not think that businesses could survive in this City if noise was measured out front on the curb at 100 feet away. He did not think that this would be reasonable, and an objective standard needs to be determined.

Commissioner Zellers said that the Commissioners need to create an ordinance which everybody understands and can be enforced across the board equally. She thought it would be a good idea that in the summer a group should go to the establishments and take readings, and match them to a plainly audible standard. Information is needed from City Solicitor Glenn Mandalas and Police Chief Keith Banks regarding decriminalization and civil penalties.

Commissioner Coluzzi suggested that the Commissioners of Building & Licensing meet with the businesses to make suggestions about installing baffles, etc. to make their establishment quieter. Then see how that works over time. Mayor Cooper said that any establishment is one change of ownership or management away from being a huge problem for this City. The tools to deal with it are needed by the Commissioners.

Commissioner Mills noted that the restaurant code contains provisions for permit of compliance. There is a certain process that takes time for the City Manager to write to the owners to tell them that they allegedly have a violation. The owners have a timeframe in which to respond back upon which time the City Manager may respond again. If appealed by the owners, a stay occurs for one year. City Solicitor Mandalas commented that it is a lengthy process.

Commissioner Sargent said that if sound is plainly audible at some point, it is too loud. He was not sure if the plainly audible standard is used that the Commissioners will come up with the right numbers. He suggested that until 9:00 p.m., 100 feet would be used for the standard; from 9:00 p.m. to 11:00 p.m., 50 feet would be used; and after 11:00 p.m., no sound should emanate beyond the property line. No expert can tell the Commissioners what is right for the residents. The Commissioners need to decide on reasonable standards.

Commissioner Barbour disagreed. He thought that the Board of Commissioners are headed in a direction of being business unfriendly. The Commissioners need to balance the businesses with the residents. The businesses need to be better represented at least in this dialogue.

Commissioner Zellers said that she would be willing to work with the businesses. She provided an example of which she agreed with that in New York, the plainly audible standard was not used for the entertainment industry; but in lieu of the first offense fee, it is willing to let the businesses use that money towards coming up with a solution such as installing an extra set of doors, install baffles, etc. Perhaps the residential/commercial area could have a different set of rules than the commercial area such as Rehoboth Avenue. Business input is needed as well as resident input.

Commissioner Barbour suggested as a starting point that the Commissioners start with the 2003 report in moving forward. Mayor Cooper said that some of the recommendations of the report had been rejected, and he suggested hiring somebody new if that is the consensus of the Commissioners to move in that direction.

Ms. Jenny Barger of Main Street asked if the Commissioners would consider having a City sponsored meeting with the residents and the businesses. The businesses and residents enjoyed the opportunity to come together at the Main Street sponsored meetings with some representation from the City to be open and discuss this issue. She would help in getting the word out through Main Street.

Commissioner Sargent said that he would like a draft ordinance distributed to everybody so they can tell the Commissioners what problems they are having with it. Commissioner Coluzzi disagreed. The Commissioners need to come to consensus on some specific principles in order to move forward. A list of people who have caused issues has been provided to the Commissioners, and she suggested working with them right now to resolve the issues.

Commissioner Mills said that he would like to see Commissioner Sargent's revamping of the Newark, DE noise ordinance be put on the table and made to the public for comments and discussion. Commissioner Barbour thought that if the Commissioners are going to look at the entire noise ordinance, they should focus on the core problem which is how offenses are enforced and what the standards are for noise. Commissioner Mills said that there are deficiencies in the Code. There is no enforcement or monitoring of base levels. There is a deficiency in using a meter. Currently, the noise ordinance is complaint driven; and it needs to be proactive. Commissioner Barbour's presentation has not addressed what Commissioner Mills thought were additional deficiencies.

Commissioner Coluzzi has requested in the past and to date has not received this information: 1. From Chief Banks - why the noise ordinance cannot be enforced. 2. From City Solicitor Mandalas - whether or not progressive fines can be done. City Solicitor Mandalas commented that it is not legally sustainable to have progressive fines in connection with a civil offense. In regard to a civil offense, a criminal penalty or criminal fine cannot be imposed. There are criminal acts and civil offenses; and in between,, are violations. In most municipalities, a violation of an ordinance is typically a violation rather than a misdemeanor, criminal matter or civil offense. He believed that in a violation context which is generally quasi-criminal and quasi-civil, the fines can be progressive. There is a low level of due process required. If the noise or patio violations are purely decriminalized and are made civil, it would not be appropriate to have progressive fines or penalties. Commissioner Barbour requested that a memo be forwarded to him from City Solicitor Mandalas on this issue.

Commissioner Zellers commented that in her research, she found that St. Michaels, MD, in their noise ordinance, talks about a municipal infraction. Certain ordinances and Code violations can be declared as infractions. There is due process to a certain extent, and there are different set penalties for those specific violations. She asked if this would be something that could be done in Delaware. City Solicitor Mandalas thought that this could be done. Most of the violations of the City's ordinances are quasi-criminal or quasi-civil. Discussion ensued regarding decriminalization.

Commissioner Coluzzi suggested that City Solicitor Mandalas propose what should be in the violation category and how the Commissioners might construct the penalty phase. Mayor Cooper said that if the Commissioners are going to do something like this where it is progressive, the current ordinance says that the person in charge will be held responsible. He asked why the establishment is not held responsible and what



changes would need to be made to incorporate that.

Commissioner Coluzzi said that Chief Banks needs to give the Commissioners a report on how he has been able to enforce or not enforce this and what it entails. Currently, there is not enough information about the plainly audible standard, who has used it, how it is being enforced, distance for enforcement, and commercial vs. residential. Commissioner Zellers said that some municipalities that are using the plainly audible standard, have different classes of noise so they have different definitions for those types of classes and different types of enforcement. Commissioner Mills thought it would be beneficial if Chief Banks contacts other municipalities about their standards and what works and what does not work with their codes. Mayor Cooper suggested that a presentation could be made by a representative from the City of Newark, DE.

Public Comment:

1. Mr. Gene Lawson, 12 Hickman Street, suggested that since the noise ordinance is not enforceable, it could be repealed and if necessary, the State statute could be used because it is very similar. In its place, a plainly audible standard could be adopted that would be sunset after 24 months. This would give the Commissioners time to gather the data and would provide a change to try out the standard to see if it works. As part of making the patio hours consistent with the rest of the operation, the Commissioner could consider streamlining the process for suspension or revocation of a certificate of compliance. Mayor Cooper agreed, and he thought the Commissioners should think about bifurcating the patio from the restaurant so a patio certificate could be pulled without pulling the entire restaurant's certificate.
2. Mr. Jim Park, address unknown, asked what the City Manager's role is in gathering information. Mr. Ferrese stated that he has been taking all the input in.
3. Ms. Bitsy Cochran, 27 Baltimore Avenue, said that a new study is needed because there are new restaurants in the City since the study has been done. She voiced concern that this topic cannot wait until next summer, and something needs to be done when a restaurant becomes obnoxious. The off-season should have a different standard regarding this matter.
4. Mr. Joe Maggio, co-owner of Aqua Grill, commented that his establishment is located in a grandfathered building without much insulation, and he asked what can be done with the patio to quell the noise. He requested that the police reports be shown to him that list lewd behavior on Baltimore Avenue. Mr. Maggio agreed with Commissioner Sargent's suggestion about looking at some of things that can be done and setting a baseline strategy.
5. Mr. Mark Betchkal, 98 Sussex Street, suggested that the Commissioners should not just close down the restaurants inappropriately.
6. Ms. Susan Wood, owner of Culture Pearl, said that somehow throughout development Rehoboth has kept commercial in the downtown area. Unfortunately, this entire discussion and everything that is going on revolves around a very small percentage of people who live where they are backup to the commercial district. If a person borders a commercial district, then that person has to be able to tolerate a lot of differences in the time of the year, etc. The livelier the downtown year-round, the better off it is for the entire community who live and vacation here. The Commissioners should consider that if noise control is done, to allow some type of outside music even if it is some type of acoustic thing. No microphone or amplified music should be allowed. If everyone can come to an agreement where the music is not blasted, then the line between commercial and residential will become a lot less offensive.

Mayor Cooper believed that there are some businesses that have someone across the street from them which they wish would go away because they are affecting their business. Some establishments could take very minimal measures to solve the problem. This past summer he saw more people disregarding the patio ordinance, and there was a blatant disregard for the rules.

Commissioner Sargent said that the Commissioners want to find a reasonable way to balance the needs of the residents, restaurants, etc. Commissioner Coluzzi suggested that this topic be kept on the agenda until the issue has been solved. Information is needed from Chief Banks. Information is needed from City Solicitor Mandalas regarding the idea of a violation which is quasi-criminal/quasi-civil and how that might work for the City. If this information can be obtained, then the Commissioners may be able to move forward at the regular meeting. She also would like for meetings to be arranged through the City Manager with the particular restaurants that have caused issues and talk with them about the potential for doing some other things to help the Commissioners solve this problem. Attendance at those meetings should involve Mayor Cooper, Mr. Ferrese and two Commissioners.

Mayor Cooper called for the meeting to be recessed at 11:27 a.m. The meeting was reconvened at 11:39 a.m.

## **NEW BUSINESS**

Mayor Cooper called to discuss the request of Kelly Rodgers, Trustee of the Blanche Rodgers Trust, for the City to consider a new draft proposed lease for Lot 22 Rehoboth Avenue which is owned by the City and leased to the Blanche Rodgers Trust.

Mayor Cooper had distributed the proposed lease, the existing lease and history regarding the rent which has been paid to the Commissioners prior to the meeting. The City owns Lot 22 Rehoboth Avenue, and in the 1930's the lot was leased to Mr. Forrest Snyder for a nominal amount per year. Mayor Cooper's grandfather had moved the building which sits on the property from Bethany Beach. The building was then sold to Mr. Bill Snyder; and in 1968, it was sold to Mr. Kelly Rodgers' mother and father. They have been the owners since then. The last lease was signed in 1995 for five years with (2) five-year renewal options for a total of 15 years. The new lease is written on the same terms. The current lease calls for adjustments based on the Consumer Price Index (CPI), and Mr. Kelly Rodgers would like to know more in moving forward what the rent would be. The proposed lease has been rewritten to say that the City owns the land, and the Rodgers own the building and are responsible for it, to insure it, etc. The rent in the last lease started at \$45,000.00; and this year, they will pay \$63,591.00 based on the adjustments. Mr. Rodgers has requested and it was put in the lease to start the new lease at \$60,000.00.

Mr. Kelly Rodgers provided a brief history regarding the lease and what he hopes to do with the building. A lot of improvements have been made to the building over the years. Rents have consistently gone up, but the CPI is overtaking what he actually charges his tenants. Mr. Rodgers said that he would like the Commissioners to consider a freeze or start the new lease at \$60,000.00 until the economy turns around. It would not be responsible for him to ask his tenants for increased rent. Mr. Rodgers asked that the City to take a look at his situation because he would like to make improvements to the building. Mayor Cooper read the previous rental rates.

Mayor Cooper had consented to put three options at the end of 15 years in the draft lease. Option 1 is that the City may elect to sell the land to the tenant. Option 2 is that the landlord may elect to purchase the improvement. Option 3 is that the landlord may give written notice to the tenant that the landlord elects not to sell the land to the tenant and not to purchase the building from the tenant. Following the receipt of a written notice, the tenant shall have 120 days in which to remove the improvements from the land. Mr. Rodgers has insisted on a right of first refusal to be placed in the proposed lease. An entity such as the State of Delaware would not be subject to the right of first refusal.

Commissioner Zellers thought that this is a reasonable contract, and she would consider the \$60,000.00 with a fixed yearly increase of \$1,200.00. Commissioners Mills, Coluzzi and Barbour agreed.

Commissioner Sargent said that 2% for the next five years is fine for now, but he was concerned about moving away from the CPI. He thought the \$1,200.00 increase for 15 years is risky on the City's part. Mayor Cooper said that one of the problems with the CPI is that it may not be reflective of the conditions in Rehoboth or even in retail marketing.

This item will be placed on the agenda for the Regular Meeting to be held on November 19, 2010.

Mayor Cooper called for the presentation on yard waste disposal and single-stream recycling state-wide mandates for both the residential and commercial sectors and impact on City services.

Commissioner Mills gave his presentation based on what the recent State legislation has done in terms of banning yard waste and source separated recycling. Current City services include refuse collection for all residential, refuse collection for commercial provided that the business contracts with the City, source separated recycling provided for residential customers, and yard waste collection. Current yard waste pick up methods are typically bundling of sections under four feet, bags, trash cans, loose and also loose leaf collection through vacuuming. The intent of the yard waste ban is to divert the organic waste from the Delaware Solid Waste Authority (DSWA) landfills in order to extend the life of the landfill. A similar intent is with recycling. Yard waste is defined as material resulting from lawn maintenance and other horticultural gardening, and landscaping activities. Beginning January 1, 2011, the DSWA landfills will no longer accept yard waste comingled with refuse. DSWA landfills will still accept yard waste and it will go to a different section of the landfills. There will be a six month grace period for violations beginning January 1, 2011. Loads will be monitored of the solid waste being dumped, and DSWA's objective is to reduce the amount of yard waste comingled with solid waste to below 10%. A maximum of 10% comingling will be allowed before issuing a fine, and warning notices will

be issued during the six month grace period. This means for Rehoboth that refuse and yard waste cannot be comingled; dictates separate pickups of refuse and yard waste and may dictate a separate day for collection of yard waste; and separate transport of the yard waste to a disposal site. There may also be possible dictates by the City on the methods of collecting yard waste, possible extension of dates for collection, type of containers for yard waste and use or not of bags for yard waste. The City Manager will need to development an information plan including education of the City workers and the public. Commissioner Mills also provide an overview of new legislation passed by the State in reference to universal recycling. The recycling fee will begin December 1, 2010. An implementation timeline was also provided. The intent of the legislation is for all to actively participate in this universal recycling program. Providing the recycling services is mandatory, but use by the customer is elective. The law dictates that a single fee needs to be charged for combined collections of refuse/solid waste and recycling. Public notice must be given to all of pending recycling programs. The law also establishes a grant and low interest loan program. Commissioner Mills also noted the impacts to the residential community, certain commercial businesses and the City.

#### **CITY MANAGER'S REPORT**

City Manager Gregory Ferrese reported that a Pre-Application was submitted to the State Division of Parks and Recreation in regard to renovating the exterior and interior of the Baltimore Avenue restroom facility located at Baltimore Avenue and the Boardwalk. This facility was constructed in 1986 and is outdated. The renovations will enable the City to make the facility not only a green facility but also make it more ADA compliant with modern amenities. It is estimated that the total cost including all engineering and architect fees not to exceed \$200,000.00. One hundred thousand dollars has been requested from the State. The City should know by late January 2011 if funding is approved. The next project will be the Delaware Avenue restroom facility. In regard to the State Energy Competitive Grant in the amount of \$500,000.00, the City's Activity List must be approved by the State. (Copy attached.) To date, no approval has been received to proceed. The transfer tax for October 2010 was \$144,374.00. The City budgeted \$900,000.00, and \$915,733.00 has been collected to date. The Building & Licensing Department has collected \$67,900.00 in permit fees during October 2010. Mr. Ferrese anticipated exceeding the budget of \$320,000.00. Veterans' Day ceremonies will begin at 11:00 a.m. on November 11, 2010 at the Bandstand.

#### **COMMITTEE REPORTS**

There was nothing to report.

#### **CITY SOLICITOR'S REPORT**

There was nothing to report.

#### **COMMISSIONER ANNOUNCEMENTS/COMMENTS**

Commissioner Mills commented that he has been attending the Indian River Inlet Bridge meetings and has gone on the deck. The cracks have been fixed, but the project is approximately five months behind which means that the project will not be finished until January 2012. The time for realignment will start approximately at the beginning of next summer, and there will be one lane of traffic going south and one lane going north.

Ms. Carol Everhart of Rehoboth Beach/Dewey Beach Chamber of Commerce said that the last information she had received was that as the bridge comes together, it will look like it will not come together; but that is normal.

#### **DISCUSS ITEMS TO INCLUDE ON FUTURE AGENDAS.**

There were none.

The Mayor and Commissioners Regular Meeting will be held on Friday, November 19, 2010 at 7:00 p.m.

There being no further business, Mayor Cooper adjourned the meeting at 12:28 p.m.

Respectfully submitted,

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(Ann M. Womack, Assistant Secretary)