

Aiken City Council Minutes

WORK SESSION

September 8, 2015

Present: Mayor Cavanaugh, Councilmembers Dewar, Ebner, Homoki, Merry and Price.

Absent: Councilwoman Diggs

Others Present: John Klimm, Stuart Bedenbaugh, Gary Smith, Sara Ridout, Kim Abney, Al Cothran, Nathan Campbell, John England, Scott Slatton, Jim Meggs, Dan Brown and Tim O'Briant of the Aiken Standard and about 12 citizens.

Mayor Cavanaugh called the work session to order at 4:00 P.M. He stated the purpose of the work session was for Council to hear three presentations and have discussion regarding business licenses and building inspections. He said those presentations were: (1) Inspections 101. The Legal Requirements, Roles and Responsibilities of the Inspections Team. What the Inspector does in Reviewing the Construction of a Home. (2) Business License 101: Requirements, Roles and Responsibilities of the Business License Team. (3) Municipal Liability in the Areas of Inspections and Business Licensing. A Legal Perspective.

Mr. Klimm, City Manager, stated the purpose of the work session was educational in nature, not only to better understand what our legal roles and responsibilities are in the area of inspections and business licensing on what we must do and whether there are optional best practices that other communities have employed for the benefit of our citizens that we should consider. He said we have a panel of experts of both the national and state level who bring an objective perspective in years of experience. Sometimes it is productive to look outside of our city to see if our practices can be improved. He said we appear today not in a defensive role, but in an objective one as we continue to try to improve the services that we provide. We are also here to clarify what it is that we do provide to help clarify some recent statements that have led to confusion.

Mr. Klimm stated the panel includes the following. The first speaker is Mr. John England who has been involved in the construction industry for over 40 years. Mr. England holds over 30 International Code Council certifications and is a Master Code Official of which there are less than 800 worldwide. Mr. England started England Enterprises doing residential and commercial code inspections and plan reviews. Most notable contracts were the code inspections of public schools and state buildings in South Carolina, as well as acting as Building Official for many jurisdictions in South Carolina and Tennessee. England Training, LLC was started in 1996 and now trains over 3,000 contractors, architects, engineers and code officials in the United States and the Caribbean in any given year. Mr. England also acts as an expert witness in local, state and federal courts. Mr. England is also certified to teach Building Inspectors, Fire Marshals, Architects, Engineers, Contractors, and Home Inspectors for the following jurisdictions and organizations and offers continuing education credits for the states of South Carolina, Georgia, Tennessee, Florida, Louisiana, Virginia and Ohio.

Mr. Klimm stated the second speaker is Mr. Scott Slatton. He is a native of Greenville County. He has had a diverse career. He holds both a bachelor's and a master's in Public Administration. He has actually served as a City Manager for a period of time. He then joined the Municipal Association of South Carolina in 2008 as a Field Services Manager. In 2013 he began work for the Association as its Legislation and Public Policy Advocate where he is tasked with exploring, developing and advocating for solutions to the long term chronic issues facing cities and towns across the state. Mr. Slatton holds the credentialed manager designation which is the highest possible designation from the International City and County Management Association, and he is co-chairman of the ICMA's Governmental Affairs and Policy Committee. He is also a member of the South Carolina City and County Management Association. Mr. Slatton is the Municipal Association's staff contact for South Carolina Business Licensing Officials Association.

As such he is well versed in South Carolina Business License and History, legislation affecting business licensing and state-wide business licensing, policies and ordinances. He also helps plan and organize the Annual Business License Officers Association meeting in the fall, and their educational academy each spring.

Mr. Klimm stated the third speaker is Attorney James Meggs. Mr. Meggs has an extensive career practicing municipal law in the public sector, including 17 years as the City Attorney for the City of Columbia. During that time Mr. Meggs represented Columbia and its officials in a wide array of cases including tort liability, eminent domain, construction disputes, intergovernmental relations, land use planning, and zoning. Mr. Meggs was trial counsel in a prominent federal anti-trust case that found its way to the United States Supreme court in 1991 and effectively ended the threat to local governments for money damage liability under federal antitrust law. He prepared and argued more than 25 cases in the appellate courts of South Carolina and in the Fourth Circuit Court of Appeals. He also serves as an adjunct professor at the University of South Carolina School of Law teaching land use regulation and local government. Mr. Meggs was elected to two terms as the President of the South Carolina Municipal Lawyers Association, chaired the Government Law Section of the South Carolina Bar and served for a number of years as the South Carolina State Chair of the International Municipal Lawyers Association. He graduated from the Citadel in 1974 and received his Juris Doctor and Masters of Public Administration from the University of South Carolina. His practice currently concentrates on litigation, zoning and land use planning, local government, and assisting firm clients in navigating through the maze of governments at all levels. He is admitted to practice before the United States Supreme Court, the United States Court of Appeals Fourth District, District Court of South Carolina and other courts in that jurisdiction.

Mr. Klimm stated staff has assembled these three experts in a variety of areas, and we are present to listen to their three presentations. The first one will remind us all of our legal requirements, roles and responsibilities in the area of inspections by John England. Then we will hear from Scott Slatton discussing Business Licenses 101 Requirements, Roles and Responsibilities of the Business License Team. Thirdly, we will hear from Jim Meggs who will discuss municipal liabilities in the areas of Inspections and Business Licensing.

Mr. Klimm stated that two of the three panelists have additional commitments this evening. One needs to be in Florida this evening and one needs to be back in Columbia. He said he had promised them that their role in this meeting will end no later than 6 p.m. He publicly thanked each of the speakers for their commitment to be present at this meeting. He pointed out that any one of the general areas could foster discussions that last hours. He said he wanted to make sure that for the purposes of education that we get through all of the presentations. He said his request to Council is that we allow Mr. England, Mr. Slatton, and Mr. Meggs to make their initial presentation in its entirety. Then we will open up for questions from Council and then questions from the general public.

Mr. Klimm then asked Mr. England to talk about the inspections process.

Mr. England distributed a handout to the Council members. Mr. England stated he had looked over the documentation that Mr. Smith had asked him to review as far as what is done in the City of Aiken and the paper work trail, etc. He said he had been teaching building inspectors in South Carolina for about 18 years. He said he had seen a lot of things done wrong, good, bad, etc. He said building inspectors are kind of like redheaded step children. Everybody loves us until something goes wrong. He said it is kind of like a daunting task sometimes. He said he travels the country and is involved in code changes, etc. When you start looking at building codes, you are looking at something like a set of encyclopedias. You can't memorize it, but you try to know where everything is. He pointed out that on the front of the handout he put a couple of interesting statements. He said they are copies of the current codes that are being enforced in the state. He pointed out the stack of books and stated there are that many reference standards that go with the codes of which they don't have copies half the time and

between that and manufacturers' specs, it gets to be a daunting task. He pointed out on the second page of the handout, he put some note areas. He said the biggest thing is what is the intent of the building code, more than anything. He said the intent of the building code is life safety. He said we all know that as we do inspections, and we go out on our daily duties, that time is money. He said it all relates. He said most building departments are supposed to be self-sufficient and not be a burden on the tax payers. He said all the fees they collect are supposed to run the department. Certain state laws actually say that and in some states they do. The intent is to establish minimum requirements for homes. He said there are jokes with building inspectors and contractors that the contractors want to build the worst house you can build legally. He said it is kind of a funny joke, but it is the minimum code. He said we can always build better houses. When you start looking at the history, going back to hurricane Andrew, he was there after the hurricane; he started seeing four nails in a sheet of plywood that is holding on a roof. We have come a long way. He said not everything we do is perfect these days, but we keep moving forward.

Mr. England stated education is a key. He said South Carolina is further ahead of the state of Georgia with its inspectors because we require licensing for inspectors in South Carolina. Georgia does not require inspectors to be licensed or certified. South Carolina requires 24 hours continuing education per inspector per every two years. He said he felt it should be more than that, but that is his opinion. He said he looked at the ordinances that the City of Aiken had adopted. He said the city had adopted Chapter 1, and that is a key thing because that gets the intent of the code for the jurisdiction. He said that is one of the first things he asked the department. He said considering the size of the City of Aiken, there are basically three full-time and another part-time inspector, which is about average for this size town. He said in some other towns you may have part time inspectors. He said he had a class last week and there were three people there from Portland, Oregon. He asked how many people they had in their inspection department, and there were about 300 people. He said you go from one extreme to another. He said the bigger the town, the more problems show up. The smaller the town, the more responsibility one or two people have to take on. It is kind of like being a jack of all trades and master of none.

Mr. England said he looked at the permit fees. He said in the handout he had included some other paper work to back this up. The permit fees in the City of Aiken are around the norm in this part of the state. He said he still thinks they are behind times. He said houses are getting more complicated, and we are needing to spend more time on paperwork and other things that go with this. The only way you can do this is to increase time on the job which increases permit fees to pay for it. He said that is a recommendation.

Mr. England stated he had looked at the permit application the city currently uses. He said he had made a couple of recommendations to change a few things there. He said he had been around so many jurisdictions that he sees some holes that could be filled, etc. As far as plan reviews, the City of Aiken does better on plan reviews than many cities. A lot of towns don't do residential plan reviews, but you do in the City of Aiken. Plan review is a process, and it is an interesting process when you start looking at what all we do want and what all we do get. We would like to have more on plan reviews than we usually get, especially when it comes to residential. He said he was talking about the Building Codes Council earlier. He said the home builders even made a comment that we are not supposed to get truss drawings in the plan review process. We have to wait until we get on the job site and hope that they are right at that point. He said when we push one way, guess who pushes back at us. The home builders push back at us sometimes because they want to get the job done. On the plan reviews we would love to have tons of information that we don't get. He said we get a set of plans that are basic usually at the most. You get a little electrical and HVAC, but you don't get a lot of it. He said he knows that the state is starting to require energy plans. He said energy is a big deal and the big buzz word these days, but he would much rather see a lot of other stuff on the plans. Basically the plan review process is to try to head off potential code violations in the field. He said we don't want to hold up construction projects. If we can head them off before they get there then the contractors can keep moving and they don't come calling Council that the inspectors are holding them up.

Mr. England stated he did note a code section in the handout that says approval of construction documents. He said what is actually adopted in Chapter 1 says Review for Code Compliance. He said that does not mean that everything is approved for code compliance. He said the inspectors review it. He said you would have to have a staff of 10 people to take a residential set of plans and go through them with a fine tooth comb. When you try to do 8 or 10 in one day, we are back to how long do we spend on these plans. He said residential plans seem to be a lot less lackluster than the commercial. Commercial is usually designed by professional architects and engineers.

Mr. England stated as far as inspections, he felt to do a very good thorough inspection, you would have to be on the job 8 hours a day, 5 days a week. Then the permit fees would be very high. He said presently we are doing an average of 5 to 7 inspections per day. When you have inspectors out there doing 8 or 10 houses a day and you figure they are there an hour at the most and consider the drive time, it gets to be that you can only do so much and you look for what first. He said the first thing he looks for is life saving and whether we can get people out of the house and is it safe. He said the public looks at inspectors differently some times. He said he would tell a story. He said he was in Venice, Florida, two weeks ago, in a local pub. He said an elderly gentleman about 70 years old was sitting next to him. The gentleman asked what he did. Mr. England said he asked the gentleman what he thought about building inspectors. The gentleman stated his daughter had just built a new house, and they missed all this stuff. Mr. England asked what they missed. The gentleman stated a 10 inch dinner plate won't fit in the upper cabinets in the kitchen. Mr. England asked the gentleman if he felt that was a big concern of the inspectors. The gentleman said it should be because dinner plates are 10 inches. Mr. England said he would not really care if there were cabinets up there are not because the inspector is trying to get the minimum intent of the code and trying to get the lifesaving portion and trying to make sure everything is safe and secure on the houses. He said the public's thought on what building inspectors do sometime is totally different. He said it is interesting. He said he would challenge the Mayor to ride with an inspector one day on the job site. He said it is kind of like a cat and mouse case. Can they find what the contractor is missing. He said the more knowledge the inspectors have they know where to look. He said he was an electrician by trade, and he remembers inspectors coming to his job site. He knew what they were looking for and made sure they had that. He said everyone out there misses something. Mr. England stated presently we do foundation inspections; slabs are not in there, but according to the types of inspections they are required. We do plumbing, mechanical, electrical, and flood plain management. He said we are getting a lot more federal regulations from FEMA. He pointed out that FEMA is a big deal in inspections. The energy inspection could come down because the State took some money and that was something that was put on the building inspectors' department. He said on commercial there are ADA requirements, and there are a lot of other things there other than just a building. He said they have to go through all the liability issues.

Mr. England stated that right of entry is a big deal for inspectors. He said he has heard more than once that if you get a building permit, the inspector should just stop by. He said there have been lawsuits on that. It is called trespassing. Unless someone calls for an inspection technically the inspector does not have the right to be on the property, which is strange. He said someone needs to call for an inspection. He said some of the verbiage he put down for the application would help some of that. He said Mr. Smith might look at that. He said it is a lot of things. The other thing that inspectors worry about is who is in the house. He said when he goes to the front door and knocks, and a little kid 12 years old comes to the door and he has come to inspect for additions, he said he will not go through that front door if that is the only person in that house. Same thing if there is a single lady in the house, he will not go through the front door. He said the inspector would open themselves up to a can of worms. He said you want to do inspections and people want more inspections, but we have to watch where we go and what we do.

Mr. England stated, in the handout regarding Certificate of Occupancy. every building should have a Certificate of Occupancy. He said he pulled out Section 110.3 what should be on a Certificate of Occupancy. One interesting thing about Chapter 1 for Council's

notice is that Chapter 1 is not adopted by the State. It has to be adopted separately. Anything in Chapter 1 that we want to add, delete, or change we can do. He pointed out that a lot of jurisdictions don't adopt Chapter 1. He said Chapter 1 is the administrative chapter. We can put anything in it or take anything out. He pointed out that the City of Columbia and Charleston have added things and taken things out of Chapter 1. He said that is something that Council has a viable option to do. Council can add or charge things in Chapter 1. He said that was one of the first things he wanted to see was Aiken's ordinance to see if Council had adopted Chapter 1 separately from the code. He said it needs to be adopted separately and it was.

Mr. England stated that owner/builders are another story. He felt that is a big issue sometimes. He gave an example about how owner/builders and contractors treat inspectors. He said someone may come in, and they want to build a deck in their backyard. They pull a permit for a deck and have a set of plans for the deck. They say they are going to build the deck next week. Three years down the road, we look in the permit drawer and guess what permit is still open and we never did an inspection—the deck. He said this happens all the time because people will not call for an inspection. They are not getting power or water turned on so the inspectors don't get any notification. He said that has been an issue for years. He said it is not just in Aiken. He said he was talking with a building official from Mt. Pleasant one time, and he said he was going through the files and cleaning up the old permits and finding permits that should have been inspected. He said there are ways you can check on these permits through a computer system so someone can go out and check the status. He said what will happen one day is that some deck is going to fail and they had a permit but no inspection was ever done. He said to him that is an issue that needs to be dealt with. He said owner/builders are the worst on this matter because there is no license or other checks on the permit.

Mr. England stated a page in the handout is an evaluation of what the City of Aiken charges for building permits. The appendices at the bottom of the page is what ICC recommends be charged for permits. He said contractors don't like this. He said a church came in and wanted to put an addition on the church. How much is the addition. It is only \$5,000. It was a 5,000 square foot addition. He said we are restricted, but we still have to do the inspection work. He said as a check and balance in the handout there are some pages published by the International Code Council which tells us how much they consider housing to be costing. It is usually a low ballpark figure because they are taking a national average. He said he would not try to figure out what housing costs are. He said if he builds a starter home, it will cost less per square foot than a luxury house would. He said the chart is kind of a generalized cost which is something that the inspectors can use as a check and balance on the fees. He pointed out a note on the sheet which says that the ICC thinks that the average house costs about \$112 per square foot now. He said that does not count land value or anything else. He said that all comes with a big grain of salt because if you are building a starter it is one thing, but if you are building a luxury house it could be \$130 or \$200 per square foot. He said the chart is sort of a check and balance that can be used to make sure people are giving us a fair shot at our fees.

Mr. England stated the next pages in the handout are basically some information he put in. He said one of the things that we find, especially when settling law suits he has been involved in, is the application is the most important piece of paper that we have, more so than anything else. He said if people tell us the wrong story on the application, the rest of it goes by the wayside pretty much. He said a lot of jurisdictions are getting applications notarized. He said if the clerk in the office gets the application notarized and the owner signs it as well as the contractor and it has two signatures on it everybody knows what is going on. Either that or get the contractor to have a copy of the contract with them. He said he knows that people sell property, and by the time the application gets to the building department, the owner of the property has changed, and it is hard to track this sometimes.

Mr. England stated the next page of the handout is something that he drew up for one of the classes he did. He mentioned building departments; if you go to the Building Officials Association and mention the word owner/builder, that is always an issue for

them. He said people think they can build houses through a computer program, but there is another whole story out there. He said he had had people come to him and say that a contractor took them for a ride. He said to them that he thought they were the contractor. He said what they did was go to an unlicensed contractor that is not licensed by the state and build a house. He said maybe they can and maybe they can't. He said the form that was devised and shown in the handout is a recommendation that we make the homeowners sign to at least let them know their rights and their obligations.

Mr. England stated there is a poster in the building department which says Building Official quotes. He said it is a big poster which they have framed and hung up. The posters were given away at the Building Officials conference. "So you don't have a code book Mr. Builder." He said he had heard that more than once. "Well we have been doing it this way for 40 years." He said the quotes are interesting.

Mr. England stated he had talked with the building official earlier about the information on the next page of the handout. He said it is something that was done in the City of Beaufort for several years. He said there were a couple of old inspectors down there. He said the City Administrator said they had complaints against the Building Department. He said it was a 35 page report. Mr. England said he read through the report and out of 35 pages he could not find one code violation. It was the color of the carpet or a stain on something. He said some home inspector was looking at this building and basically doing a punch list for the building. He said as a building inspector he did not care if the counter top is chipped. Will it kill anybody, no. Does it look bad, yes. Should the contractor make it right, yes. He said he could not write that up as a code violation. He said remember the inspectors are trying to make the building life safety. He said they came up with a form which tells the owner if they have problems against contractors, please go to the contractors or LLR and put in a complaint against the contractor. He said that is the first thing to do. The second thing is we ask them to fill out the form, front and back. We did not want to call it a complaint form, but call it an Investigation Request. One of the things on the back of the page, which is real important to him, is that basically he wanted to know what code section they are talking about. He said his time is valuable as he has thousands of jobs out there to do. He said he does not want to be sent on a wild goose chase. He asks the person to give him the code section to look at. He asked if inspectors make mistakes, and responded yes they do. He said he found some code violations when he walked in this building today. He said it is an old building. He asked if they thought he could go behind any one of Aiken's inspectors and find something, and he said yes he could. He said they could go behind him and probably find something he missed. He said we all have a different perspective in how we look at things. He said sometimes we are in a hurry and some things do get missed. He said building inspectors do the best they can do. He said unless you want someone to sit on a job 8 hours a day and watch every nail being pounded in every piece of roof, siding, trim, and paint, things get missed. He said things get covered up before the inspectors get there. He said the biggest fight the building departments have some time is somebody pours a concrete slab and we get asked why we have not inspected it. What can the inspector do now. He said find an engineer. Hopefully they will find an engineer who will know what they are talking about in this state. According to LLR an engineer can practice in any field he feels comfortable with. There is not an electrical engineer or mechanical engineer. They are just engineers. He said sometimes he just says they do everything but blow the whistle on the train. He said he had gotten electrical plans from licensed engineers, and they are wrong. He said it is kind of like the traffic cops. They sit on the street corner and direct traffic all the time, and they spot the one with a tail light out and stop that one. He asked if others went by and they missed a tail light. He said probably. He said if a jalopy comes on the road and is about to fall apart, we will stop it and make sure it gets off the road because it is a life safety issue for everybody else on the road. He said if you think about that, it makes a lot of sense.

Mr. England stated the last page of the hand out is about lawsuits. He said he had been in a lot of lawsuits. He said he had his own private company for several years that contracted with many jurisdictions. He said at many times he had 20 to 30 lawsuits because, as a private company, he could get sued a lot easier than the jurisdiction can. He said he had the City of Atlantic Beach at one time. He said he remembers when the Police Chief locked up the preacher for an unsafe building. He sued us for

discrimination. He said the cases he put on the sheet were near and dear. They were Barnwell and Augusta. He pointed out Augusta is in a different state and the laws in Georgia are a little bit different. He said he followed the case from the beginning and this is what happens sometimes when building departments get out of their sandbox and go into territory they should not go. He said he did not want to write the whole story so he wrote a summary. Georgia Power Company at the time requested from Augusta before they would turn power back on for buildings that have been off for six months that they get a letter from the Building Department. Lewis Vann who worked for the City of Augusta, went out to inspect a mobile home pole that he had been out to inspect many times. Number one is that the Building Department has no testers. They are lucky to have a screwdriver sometimes. Mr. Vann, is going out to take a visual look at this mobile home. He said we don't know what is behind the walls as it is a 1960's mobile home. He looked at the trailer pole and connections; he took the covers off and everything looked fine. It looked like it did the last time he was out there two years ago. Nothing had changed so he thought he would write a letter to turn the power back on. Newlyweds moved in and the trailer burned down and killed both of them. Reading between the lines, we came to find out that it was some lighting that somebody had put together with some tape instead of a wire nut in the ceiling somewhere over the last 40 years. The Fire Marshal came out and said it was an electrical fire so of course the parents of the kids decided to sue, not the County, but the building inspector. He said we have a level of protection if we do our job to the best of our ability by our standards, and we should have some kind of protection against lawsuits. The case went all the way to the Georgia Supreme Court. Reading some of the judge's decisions along the way, they did not want to say yes or no. They didn't say the building inspector was wrong, but they did not he was right either. At the end Columbia County and the City of Augusta decided they would go ahead and pay for the lawsuit and be done with it. They did not want to go to a jury trial. Mr. England said he asked the Building Department why they were writing the letters. The answer was that Georgia Power wants the letter to get them off the hook for the liability. Mr. England asked why they were doing that. The answer was it was a contractual relation between Georgia Power and the homeowner. It was not in the city ordinance. He said they were not going to inspect those things any more. They were not getting paid for it. It was a service done by the city to keep Georgia Power happy. While a lot of other jurisdictions take the stand that they will still write the letters, they want a licensed electrician to go out and look at the projects way before hand and certify before they will put their name on the letter. The electricians have the tools and other things the inspectors do not have to check this out.

Mr. England said the other case was Green vs Felder and England Enterprises, City of Barnwell, Ron Powell and others. He said basically we ran the City of Barnwell for many years. Mr. Felder built a building for Mr. Green. Mr. Green hired Mr. Felder, a contractor, to build the building. Barnwell hired England Enterprises and Ron Powell an employee who acted as the building official. They contracted this out. Felder fired Green and finished the work himself. We never issued a CO on the building because the building never got finished by the contractor. Felder found some issues with the property. There were code issues and all kinds of other little things. Were they major code issues. No, they were minor things. It was more that he did not like some of the work. He did not like the cabinets and other things. Felder sued Green and others. He said they asked for a summary judgment and things to be dismissed out of the case. Mr. England stated he sent this to Mr. Smith last week when he got it back. On the back it talks about the summary, the proposed order was filed. He said they got the order from the Court of Common Pleas, and it basically says toward the end that the purpose of the building code is to protect the public at large and not create legal duties flowing from the building official to each and every resident who can establish a building code violation or violations went undetected. He said to him that is a big deal. He said he was a third party in this case. He was not a city employee. He said his liability opens up a whole bunch more. For a judge in this state to give this, makes him want to get back in the inspection business which he sold several years ago, but he is not going to do it.

Mr. Klimm stated Mr. Slatton will talk about the issue of business licenses.

Mr. Slatton stated he wanted to preface his remarks by saying that he is not going to make any particular judgements or evaluations on the City of Aiken business licensing

process as he is not familiar with it to the extent the staff is. He said he would say the City has a professional staff that has a very, very good reputation among the other municipalities across the state. The staff consists of a former president of the South Carolina Business Licensing Officials Association, and also a staff member who is extremely active in the Association. He said he would say that staff regularly participates in the training that the MASC holds twice a year through the Business Licensing Officials Association. They also participate in quarterly training sessions that are held in the region. He said what he would be talking about is based on the Municipal Association of SC Model Business License Ordinance, its application across the state for those cities and towns that have chosen to adopt it in part or in whole, and he would talk about some of the best practices he is aware of with regard to business licensing in the state. He said he does know that the City of Aiken's business license ordinance for the most part is reflective of the Model Business License Ordinance that the Municipal Association has created and maintained for many years.

Mr. Slatton stated he wanted to make sure first that Council understands what a business license tax is. It is an excise tax on the activity of doing business inside municipalities. The business license tax is calculated on a business' gross income. It is not calculated on a business' net income because that would make it an income tax which is not permissible for municipalities under state law. The fee is calculated on gross income in an effort to insure that the tax is applied equally no matter how successful a business is or is not. How one manages a business is irrelevant to the business license tax. The business license tax is also a method for businesses to help support a municipal government's provision of services to businesses. People may say they pay property taxes. He said not all businesses necessarily pay property taxes. They may through rent and direct ownership, but often times many businesses require service provisions that are above and beyond what their property taxes provide to the city. The business license tax is one of the three largest revenue sources for most every municipality across the state of South Carolina. He said he was sure the Finance Director could affirm that is true for the City of Aiken. The business license tax has become much more important to cities and towns across the state since particularly 2006 when the cities' hands were tied by the General Assembly with the passage of Act 388 which severely restricts the cities' ability to raise property tax revenues sufficient to provide services that the citizens request. The business license tax is the only General Fund revenue source that is completely controlled by City Council for now. He said as all will probably remember this past session there was a bill that was introduced that would severely restrict the city's ability to raise revenue through the locally adopted business license tax. Currently City Council members have direct and total control over the rates and the application of the business license ordinance around the city. He said the business license tax is authorized by SC Code of Laws Section 5-7-30.

Mr. Slatton stated he would talk about what a business license tax is NOT. He said a business license tax is NOT a warranty on a business' work. It is not a vetting of a business' credentials except in the case of contractors. Even then there is very specific language in the model business license ordinance which is also contained in Aiken's ordinance he assumed where a contractor is only required to show evidence of his or her qualifications or his or her trade licenses. Those are credentials that are issued by the Department of Labor Licensing regulations. He said he was sure Mr. England in making inspections would like to see the credentials for contractors. He said some cities and towns across the state may use their business license ordinance to require additional vetting or additional production of credentials from a particular business, but that is not commonplace. A city's ability to require more credentials or evidence of qualifications from a contractor or any business is certainly limited by the resources that are available to them, particularly through staffing, and it is also limited by policy decisions that City Councils make across the state as to how business friendly or not you want to be. That is an important part of what the business license tax is NOT. Generally a business license tax is not a consumer protection measure. It is a revenue generator for the city. It is not meant, and historically has not been, meant to provide the consumer with certain protection. He said in the course of issuing business licenses they are certainly, and for most every city and town across the state, tied to the issuance of building permits, tied to the approval of zoning requests or checked off to make sure the zoning is proper, but they don't have to be. The issuance of a business license is not necessarily dependent on those

things in the business license ordinance, except unless the local jurisdiction has chosen to do it that way. He said the business license tax is not a tax on profits since it is calculated on gross income. There are discrepancies across the state, unfortunately, as to what gross income is. That is something that the Municipal Association is working with the legislators and internally to try to come up so that we have standardization across the state.

Mr. Slatton stated the basis for the business license tax was established in 1872 by the General Assembly. It was specifically mentioned as being authorized in the State Constitution that South Carolina is still operating under that was adopted in 1895. He pointed out that on the MASC website there is a great law review article that was written by William Quirk, who was a law professor at the University of South Carolina. It is entitled "The Nature of the Business License Tax." He said it is a great history and chronology of the business license tax in South Carolina. When businesses come in and are asked to pay their business license tax, they are classified based upon their profitability according to the Internal Revenue Service. Every business in the country is assigned a NAICS (North American Industrial Classification System) code. Everybody has a NAICS code based on their grouping and likeness to other similar businesses in the United States. As the economy ebbs and flows, as businesses become more profitable or not, their NAICS code classification changes. Then as they move around with the NAICS codes they also move up and down within the model business license ordinance grade index. A business is assigned a NAICS code and then, based on the profitability of the business, they are classified into a rate classification within the city's ordinance. Businesses move in and out of more or less profitable grade classes, depending on the change of profitability according to IRS. The business license tax in South Carolina is largely based upon the Municipal Association's model business license ordinance. It is a part of a comprehensive handbook that the MASC writes and maintains. It is in the business license handbook which can be found on the MASC website.

Mr. Slatton stated he wanted to go back to the classification of businesses on profitability index. It is imperative that City Councils be fairly current with the IRS profitability indices across the state. A City Council that does not adjust businesses based on the updated IRS classifications can leave themselves open to some liability. He said Mr. Meggs may talk about that in his presentation. If a doctor is still classified in a rate class from 20 years ago, when he or she was probably a more profitable business than he or she is today, then that creates a problem for City Council. He said Council needs to be sure they maintain those rate classifications and keep them up to date. He said that is something that the MASC does to insure that the model ordinance is updated periodically. He pointed out the fax machine manufacturer. The fax machine manufacturer probably is not as profitable today as it was 20 years ago. He should not be kept in the same rate class that he was when he was more profitable. Throughout the history of the business license tax in South Carolina, it has been attacked on numerous occasions, and in each case it has prevailed. There are certainly challenges to the business license tax and business license ordinance that will come to us again in the future, but ensuring that it is applied fairly and based on the profitability indices we hope we can prevail going forward.

Mr. Slatton stated he would talk about the roles and responsibilities of a city and its different factors with regard to the business license tax. He said just like with any policy, Council knows that it is their responsibility to adopt the business license ordinance and the policies that Council sees fit for its enforcement. Those can be as varied as the cities and towns that exist across the state. Depending on how rigorously Council wants to enforce the business license ordinance will determine how much Council puts for staff resources in the business license program. Council sets the rates and Council periodically updates those as the IRS profitability index changes. He said the MASC has taken the responsibility on themselves to maintain the IRS profitability index on the cities' behalf so when it comes for the rate classes to be updated or the NAICS code changes to be made, then the city can do that very easily with an amendment to the city's business license ordinance. Mr. Slatton stated the staff responsibility, just like any other policy Council sets forth or ordinance adopted by Council, is to enforce the ordinance and execute those policies. Again that is limited by the resources available. Staff is responsible for informing Council of how well the ordinance is going, how well the

policies are working. Staff is responsible for recommending changes to Council based on the information they gather. He said another responsibility is the public's responsibility. He said that is one of the reasons the panel is present today. The public's responsibility is to let Council know how it thinks things are going or not, and Council makes decisions based on that.

Mr. Slatton stated he had mentioned the model business license ordinance. It was last updated in 2012-2013. He also pointed out the Business License Handbook which was updated in 2013. He said the handbook is the "go to" guide for business license officials across the State of South Carolina whether or not they have adopted in part or in whole the model business license ordinance. He said they constantly pour over the document and change it and massage it as needed whether it is prompted by changes of the IRS or changes by the General Assembly. He said there is the standardized business license application. He said the City of Aiken is one of 72 cities and towns across the state that have agreed to accept the standardized business application which was developed by the Business Licensing Officials Association several years ago. It is a form that transient businesses can fill out their business information, make multiple copies of it, and then submit it to those cities and towns across the state who have agreed to accept it rather than the business having to fill out a different business application for all 270 cities and towns across the state.

Mr. Slatton stated he had mentioned earlier the SC Business Licensing Officials Association has a rigorous training institute and advanced academy that are held with one in the spring and one in the fall. Then there are two credentials that are issued by the Business Licensing Officials Association—a Master in Business Licensing (MBL) and the Accreditation in Business Licensing (ABL). The ABL is a credential that is issued to a business licensing official who has completed the Business Licensing Officials Association's Training Institute which is a three year training institute. Then they are required to take a comprehensive exam that they must pass before they are able to earn the ABL. The Master in Business Licensing (MBL) is an advanced accreditation that shows and demonstrates a business licensing official's dedication to ongoing training and advancement. He said those are the best practices that the MASC promulgate across the state. He said they encourage eight regional groups, called COG groups, that meet quarterly to discuss common issues and best practices in their particular area. They usually have a lunch time meeting. Their training is valid toward earning the Master Business Licensing.

Mr. Slatton pointed out some resources that the cities can use regarding the business license. Those include the S.C. Code of Laws Title 5, Chapter 7, scstatehouse.gov/code, Municipal Association of South Carolina, www.masc.sc, keyword: business licensing, SC Business Licensing Officials Association, www.masc.sc/bloa.

Mr. Klimm stated lastly Mr. Jim Meggs will address the issue of municipal liability in the areas of inspections and business licensing.

Mr. Meggs stated he had enjoyed the prior comments and concurs with some of the statements made by them. He said he would try to identify those as he goes through the exercise. He said he was embarrassed to admit that his municipal service had been so extensively long. He said he was a municipal attorney when we had sovereign immunity in the state with two exceptions. We had motor vehicle accident liability only to the extent of the statutory minimums for property damage and personal injury that being \$5,000 property damage, \$15,000 personal injury and \$30,000 in the event of a death. There was another limited area of liability for street defects which had a number of trips and traps, but very low limits of liability. He said all that changed in 1986, but before that time two things are significant in our discussion this evening. Before that time employees could be personally liable in certain circumstances. There was also a rule that has been alluded to this evening, that being the public duty rule. The public duty rule is what this discussion will largely turn on this evening. He said the public duty rule existed prior to the abrogation of sovereign immunity by the Court and by the Legislature. It is still the law in South Carolina, having been embraced in recent cases as a survivor to the Supreme Court's invitation to the Legislature to reform the liability blue

print in South Carolina for state and local government in 1986. He said he felt the important factors are that the public duty rule pre-existed the abrogation of sovereign immunity. It survived the enactment of the South Carolina Tort Claims Act, and is the law in South Carolina today. He felt that is very important and significant in analyzing the city's exposure to liability in business licensing and building inspections process.

Mr. Meggs stated in 1986 the Legislature passed the SC Tort Claims Act because basically the Court told them the year prior that if they did not act the whole thing was going out the window. There would be no sovereign immunity. There would be no caps on liability. The Legislature accepted the invitation and adopted the comprehensive rewrite of the liability blueprint. In the Act the Legislature declared it to be the public policy of the State to recognize immunity to construe the Act in favor of the immunity of the government with certain exceptions. There are now over 45 enumerated exceptions to the waiver of liability in the Act. He said that is real confusing, as on one end you say liability is the rule and immunity is the exception, but the Legislature has set it both ways in the statute. In the Act the Legislature carved out the continued immunity for certain governmental functions, including inspections, licensing, and this type activity. What they did not touch was the public duty rule. An important comment to note is that the Legislature immunizes employees, generally speaking. After the adoption of the Tort Claims Act the building officials and business license inspectors don't need to fear personal liability, except with two exceptions under state law. That is, if they go out with the intent to harm someone and cause injury so the inspector gets into a fisticuff with a contractor, and he started it. He probably has a personal problem. The city is not responsible for that and not liable for that bad act by an employee. The employee singly is responsible for that. If the employee acts outside the proper scope of his or her duties, then that can give rise to personal liability for the employee. He said under the Tort Claims Act in South Carolina employees generally are in otherwise in Tort, and they need not fear for their personal pocketbook.

Mr. Meggs stated back to the public duty rule. Mr. England brought right to the front the intent statement in the building code. He said this is real important because it clearly states a broad public duty statement rather than providing language that could give rise to lawsuits by folks whose houses turn up with defects or commercial buildings, etc. He said this is totally important. He said the purpose of this code is to establish minimum requirements to safeguard the public safety, health and general welfare. He said that is a quintessential statement of purpose that will dovetail into the public duty rule. If the duty is a public duty, it is not something that is actionable by someone who claims injury. The whole case fails for lack of duty. There can be no negligence or no claim of negligence from a lawsuit based on a negligence theory if there is no duty, because negligence presumes there is a duty owed by the defendant to the plaintiff in some respect. There has been a breach of that duty and damages have proximately resulted from the breach. If there is no duty, you don't even get to first base.

Mr. Meggs stated he would try to highlight why this statement is so important in the context of Tort Liability. He said he had mentioned the Tort Claims Act, and it is carved out of various reservations of sovereign immunity against the general waiver. Several of those sections might pertain to building inspections and maybe even business licensing. However, if that public duty factor is in the analysis, then even under the Tort Claims Act you don't get to pursue a claim against the city or its employees. There is a case that people talk about a lot in this context. It is a case called Steinke. He said Steinke gave the tort lawyers a little ray of hope for a while and continues to cause some consternation about these reservations of immunity in the Tort Claims Act. In one of those reservations there is an exception for gross negligence. The Court said you have to read gross negligence into some or all of the rest of them. However, you don't get there. You don't get to that gross negligence analysis if there is a public duty factor in the equation. Only if you get beyond the public duty do you get there. Here is Steinke. We have folks who suffer injury or their decedents suffered injury as a result of the Department of Labor, Licensing Regulations to inspect cable and cage that was being used as a bungee jumpy amusement ride at the beach. Folks died as a consequence of the failure of this equipment, and Steinke sued LLR. What was the first play that LLR might have made. The duty to inspect this apparatus is a public duty, and we don't have to go any further.

Here is the contrast. He read the statute that provides the purpose for the regulation for the statute that was to be complied with by the South Carolina LLR.

The statute reads: "The purpose of this chapter is to guard against personal injuries in the use of amusement devices to persons employed at or attending the amusement parks and in the event of a personal injury to insure that the injured party has the possibility of financial recovery. It is the intent of this chapter that amusement devices must be designed, constructed, assembled or disassembled, maintained and operated so as to prevent injuries."

Mr. Meggs stated to contrast that statement purpose against the public duty statement in the building code. It is quite stark, and the courts relied on that very strong statement purpose to find that the Legislature intended that this statute do something more than impose other duty on the inspectors at LLR. Consequently, Steinke was able to pursue his claim against South Carolina LLR. He said he could not remember what the outcome was. He said he did recall that it was a \$12 million award against the operators of the bungee jumping apparatus. He said the important analysis is that these duties are imposed by the building code and by the Legislature in mandating that building codes be adopted and enforced. He said we don't even adopt these codes any more, they are pronounced upon us by the Codes Council in Columbia. He said he used to call them the Codes Czar because they like to change things. He said when he was City Attorney in Columbia he got a little frustrated because they would change things and call us and say you have to adopt this version of the discrete changes they made in Columbia. He said he used to call his lawyer friend at LLR, and he would ask him what the Code Czar had to say about the particular matter. He said with respect to the building codes and business licensing, it's a public duty. Mr. England gave us a taste of a recent court order out of this bundle in the Circuit Court where one of our Circuit Judges has ruled that this is a public duty area so no duty arises to the plaintiff, to the individual. Consequently the case goes away for lack of that underlying duty.

Mr. Meggs stated he comes from a municipal background, but Mr. Smith can tell you, I am not a dyed in the wool municipalian. He feels there is misbehaving in municipalians sometimes, and we need to deal with them. The City is not an insurer of the purchasers of homes or structures. This isn't a program that is designed to afford folks some protection. Folks need to get their own inspection done and have somebody there if necessary 24/7 to observe the conduct of the contractors and subcontractors. The building code is not about aesthetics or workmanship; it is about life safety as stated in the code and as Mr. England has informed us.

Mr. Meggs stated regarding Mr. Slatton's comments relative to licensing, it is a revenue source. It is one of the few that the Legislature continues to authorize to cities. It is used, at least in Columbia and virtually everywhere else, as a check off device. When a new business shows up at the business license office, they are given a clearance sheet, and they have to go around and be sure that the physical location at which they locate at is properly zoned. He said in Columbia it would trigger a fire inspection. All of those things are designed to assure compliance with other municipal codes and lifesaving kinds of considerations, but have nothing to do with consumer protection. All of those things are matters entirely outside the purview of a business license program. He said where you can get into trouble is in failing to license legal and lawful businesses. Lawful businesses are entitled to be licensed as long as they get the right check offs and make their application properly. He said you can get in trouble in his experience in meddling with that license once it is issued by virtue of trying to suspend it or revoke it. He said unless you go through a due process type of hearing procedure and make sure you have the I's dotted and T's crossed, you need to be very careful about revoking or otherwise meddling with lawfully permitted businesses. He said he knows there is a temptation when there is a nuisance going on to just summarily revoke or suspend the operation of a license. He said he would caution against that. He said Aiken has a good City Attorney, and he was sure he was protecting the city from those kinds of inclinations.

Mr. Meggs stated his comments had been a lot of legalese, but he tries not to get too bogged down in the legalities. He said he would be happy to answer any general questions Council might have about municipal liability.

Mr. Klimm stated that concludes the initial presentation, and the floor is now open for questions from Councilmembers.

Mayor Cavanaugh asked what time the speakers have to leave. Mr. Klimm responded they have to leave at 6 p.m.

Councilman Dewar stated the Council was very concerned about the obligation of the Building Inspector for a new house and indemnification or liability that fell to the city by virtue of the Building Inspectors' performance. He said what he thought he heard Mr. Meggs say was that does not warrantee any of the workmanship on the house. That is an issue between the owner/occupant or the builder and the trades people that built the house. Mr. Meggs stated that is correct.

Councilman Dewar stated with regard to the licensing, we license a developer. He asked what do we do for the subcontractors. Do we have any responsibility for validating licensing of subcontractors of a house. Mr. Slatton responded that in the model ordinance and also in the city ordinance that the city ask for and require that they show evidence of their qualifications. Typically that will be assurances that they are licensed by LLR, and that they carry the proper credentials. That is for contractors, subcontractors, and anybody, particularly somebody who is going to require an inspection of their work. The model ordinance and the city ordinance require that they show their credentials.

Councilman Dewar asked then if it would be fair to assume that a standard building permit will have 10 to 12 certifications of the subcontractors. Mr. England stated the problem you have there is, like a special residential. The builders have a license with LLR. The mechanical, plumbing, and electrical have licenses with LLR. Then they have a specialty license, which in his opinion is a joke, because you can get one for \$50. One does not have to have qualifications or anything else. Even though you might have one for concrete work or something like that, that has been something the Municipal Association has fought for years. Besides the four licenses, there is really no other licensing in the state.

Councilman Merry asked Councilman Dewar if he was asking whether the subcontractors should have a business license. Councilman Dewar stated that was correct. Mr. Slatton stated they need to be sure they understand the distinction between a city issued business license and the license that Mr. England is talking about which is a license to be an electrician anywhere in the state. The City business license requires a contractor to show the city evidence that they are a licensed electrician who can do business as an electrician in the state.

Councilman Dewar stated then if an electrician, as an example, is a subcontractor for a builder, the builder has a business license. He asked if the electrician had to have a business license or would he operate under the authority of the builder. Mr. Slatton stated the determination of whether or not the subcontractors should also have a city issued business license is a policy decision for City Council. It was pointed out that the City of Aiken does require them to also have a city license. Mr. Slatton stated some cities do not require a city business license of subcontractors. Councilman Merry pointed out that the City of Aiken has a person on patrol of construction sites every day checking on that.

Councilwoman Price stated she wanted to thank the Mayor and City Manager for bringing John England, Scott Slatton, and James Meggs here. She said they come highly credentialed not only with their background, but also with their level of experience to bring clarity to a great deal of discussion that has been taking place in this city whether it deals with inspection of homes and other things as well. She said she would like for this to be continued when we have these discussions taking place that we bring these kinds of experts to the table. She said we have been all over the map with speculation and what

we think should happen and no one really knows until you hear from these people who have been in the business for a while. She said there are several things she would like to ask. She said Mr. Slatton had made the comment that the only General Fund revenue source that is locally controlled by the City is the business license tax for now. She asked about the comment "for now." Mr. Slatton stated there have been many attacks on business licensing in the General Assembly over the years. It is an unpopular tax that is levied and like most taxes, people don't want to pay any. House Bill 3490 was filed earlier in the year by the House Representative Rick Quinn that would do several things. First, it would cap the maximum amount of a business license tax that could be imposed at \$100. He pointed out that 80% of business licenses that are paid across the state are less than \$100, but with the proposed bill, the city could not collect more than \$100 from any business. That includes the mom and pop shop on Main Street or Walmart. It would require the South Carolina Department of Revenue to collect the city's business license tax on the city's behalf and then they would submit it to the city. He said we know how that has worked out with other state collected revenues. He said those are probably two of the most egregious bills. The MASC has been working with Representative Quinn on his bill for a number of months with a group of the Home Builders Association, the State Chamber of Commerce, and other stakeholders in this issue. He said whether Representative Quinn's bill moves forward or not, some other proposal will come along. He said that is why anyone at the Municipal Association will tell you, particularly when it comes to business license tax and the attacks that it faces yearly, it is the only one that Council controls completely for now.

Councilwoman Price stated the other comment that Mr. Slatton made was vetting. Some want to use the tax for additional vetting. She said her question is if they use the business license for additional vetting, what does that do on business itself. Does it limit the number of businesses that can enter competition. Mr. Slatton stated to the extent that it puts additional burdens on the businesses to meet whatever requirements the city chooses to put on. Right now the city ordinance requires that they show evidence that they are credentialed, and they have those credentials from LLR. Mr. Slatton stated he did not think the city's ordinance, but he knew the model ordinance, did not require a business to produce any other evidence of something that it should or should not be. Mr. Slatton stated the more hoops you ask the businesses to go through, it costs them more money, and takes them more time to get up and running again. In the private business world the last thing they need is more obstacles.

Councilman Merry stated Mr. Meggs had mentioned that the building code is designed to meet public duty and not create an individual duty and through that there is essentially some immunity. He said from Mr. Meggs bio he noticed that he had done a lot of work in the arena of zoning. He asked Mr. Meggs if he felt the zoning ordinance would meet that same type of immunity or standard that they established for public duty or public good, and would not lend themselves to individual liabilities from individuals towards the city or an employee. Mr. Meggs stated that was his belief, yes. Councilman Merry stated then other than the building code and the zoning ordinance, did Mr. Meggs know of any others that might fall in the same category. Mr. Meggs stated that is an odd question. He said virtually anything in the code, standard codes, with some exceptions. He said he was involved in a case as an expert witness in the City of Orangeburg several years ago. The plaintiff in that case had a building that was, in the eyes of the building inspector, substandard to the point that it needed to be demolished. In fact the City came in and demolished it. He said the case went up to the Court of Appeals. He said the case was called Chakparti. The Court found liability in the case. He felt it did so on two bases that are not totally apparent in the opinion, and you needed to know a little bit more about the history of the Chakparties and their relationship with the city officials. He said this is a wonderful way into a war story that will give you a little more insight. He said he was curious to see if Mr. England has a comment about this. He said in his experience, and he was with the City of Columbia for 25 years, and dealt with building and fire officials regularly. The folks tend to want to work with property owners and just have the desire to try to get along and work people through a problem they are having with a building. That is what went on in Orangeburg. He said he observed that in 25 years with Columbia. You don't want to tear people's houses down. That is not the purpose of the exercise. What you want to do is have them properly renovated and brought back to standard and occupied and get them back on the tax rolls. Unfortunately, in the course of

trying to work with the property owners, the building official would issue a building permit, and it might have an expiration of a year or six months, but something would happen in the meantime to get things stirred back up. Maybe there would be a fire, there would be an inspection, and they would find that the work was ongoing. He said he felt there was enough evidence there of working with and others would say jerking around. He said between those kind of bad facts, even though viewed from a different perspective, they were not bad facts, the jury did not like those facts. The Court found that in the International Property Maintenance Code, which is what Orangeburg was operating under, there were some specific notices and some specific steps that had to be given to the property owners before enforcement action could be taken. As a consequence of those specific steps, just like the statute we read about the purpose of an inspection of the bungie jump, there are some parallels he felt that could be drawn between the requirements in the IPMC code for notice and steps that have been taken to a discrete property owner, not to the public generally and not for the purpose of assuring life safety or health and welfare of first responders which the building code is about. Councilman Merry stated there are individual duties maybe within the context of the entire system. Mr. Meggs stated there was no public duty. It got deeper than public duty. It went down to the individual level.

Councilman Merry stated the city can set certain traffic laws and codes. He said people are involved every day in accidents where they run a red light or stop sign or speeding, etc. and we did not catch them first. Then the city is not held liable because we were not necessarily enforcing our speed limit or stop sign. He said if we had certain standards or laws or ordinances that are fairly good, using traffic laws as an example, and we had an area where previously we looked at a road where we wanted to put a bike path on it and that would create a situation where, if parking were allowed, it would be in the bicycle path and there would be a case where there would be interference between cars parked in the bicycle lane. We were basically told that we couldn't do that because allowing cars to park in a bicycle lane would violate our own ordinance and open the city up to liability if someone were hurt. He said he was trying to ask if the basic ordinances themselves were established for the public good, but they were not necessarily enforced in every case whether it be running a stop sign or a car parked in a bicycle lane, would any of those open the city to individual liability because we didn't enforce our standards 100% of the time in 100% of the cases.

Mr. Meggs stated he had two thoughts. He said when he said individual liability, did he mean liability to the injured party, not individual liability for any city official. Councilman Merry asked if the city itself would be liable to the injured party. Mr. Meggs stated he always likes to think that we apply and enforce standards uniformly across the board. He felt because of the way the Legislature has carved out various reservations of immunity in the Tort Claims Act, it would be very difficult to make a generalized statement about all being protected. He said he was unable to do that. He said that kind of begs the question. First, you have to answer what is the nature of the duty. He said the public duty rule is not immunity. It is a negative. If there is no duty, there could be no negligence claim. He said regarding the public duty question, he felt you would have to analyze each situation against the purpose of the exercise--is the purpose life safety and public health. Councilman Merry stated you would determine whether it is a public duty or if it had a more individual scope. Mr. Meggs stated if the codes on one hand say that you can't put parking in a bike lane or whatever the regulation is that we have violated, he could not say you would be in good shape doing that. Councilman Merry stated that is kind of what they had been told before. He just wanted to dig into it a little bit.

Councilman Dewar stated the city has a specification on how a driveway should be built, or a sidewalk, or a road, or a house or any part of a house and the specifications are in the city ordinance. He asked who is ultimately responsible for making sure that the specifications are complied with and what role does the building inspector have in that process.

Mr. Meggs stated the responsibility for compliance is with the person who constructs the facility. That could be ultimately the general contractor and no one else. The city's role is to basically do sampling since the inspectors are not out there 24/7 or even every day.

The city's role is to do the best it can do to assure compliance with the minimum life safety requirements in the code because that is the foundation and the jest of why the code exists—life safety and protection of fire fighters and other first responders. He said he did not know that a driveway is subject to inspection.

Councilman Dewar stated the other issue is there is licensing for plumbers, electricians, etc. Is there a license for people building roads. Is that a skill that is licensed or is it just generally assumed that if you know how to build a house, you know how to build a road. Mr. England responded that is more of a DOT matter. He said for example, one of the jurisdictions had a bridge going in. He said that is out of his train of thought, but it was on private property. He said there is nothing in the building codes about bridges and this has nothing to do with the building inspectors. He said that is when you call DOT and other people who have expertise on that. Like in the bridge incident, the building official has the authority to say you are building a bridge on your property, but I don't know what it is going to do so you have to find an outside source that knows more about bridges. He said about six years ago LLR came up and not only licenses the inspectors for Chapter 1 of the code, but they also started licensing the soil, concrete testing people, etc. who are specialty in their trades. He said the building officials just monitor what they do. He said he tells building inspectors they have to know enough about that business to be dangerous. He said he does not have to know how to do the testing, but he has to know what questions to ask. He said you have to understand that residential is one thing, but when you start getting into commercial you get into another ballgame. He said it is interesting as he works with a lot of states. He said you would think there are building inspectors everywhere, but there are not. He said the State of Alabama passed a state-wide energy code. He pointed out there are no inspectors for the energy code. He said there are about 300 inspectors in the whole state of Alabama in the cities. There are no county inspectors. Half the counties in Georgia do not have building inspectors. He pointed out that the City Manager mentioned his Master Code Professional. He said there are only 800 of them nation-wide and South Carolina has 80 of them. He said South Carolina has 10% of the country. He said Florida has 80, but they have five times the inspectors that South Carolina has. He felt South Carolina is above other jurisdictions. He said California does not license building inspectors. He said the building inspectors rely on others many times. He said the building inspectors always have the ability to ask for other expertise. He said the more education the building officials get the better they are such as attending the building official conferences, etc. He said it is not just about sitting in a classroom sometimes, but about getting to know another building official. He said he knows the building official in the City of Columbia, and he can call him and ask what he does for things in the City of Columbia. He said building officials is a tightly knit group. There are 800 in South Carolina, and they all talk.

Councilman Ebner stated he did not hear much about consumer protection other than life saving. He said all he hears is the court system. He said in 1986 the LLC Limited Liability Contractor came about, and it is used greatly in all trades now days in industry as well. The other thing he thought came about in the early 1980's was the Tort Liability for builders. He asked if there was a minimum amount you can sue for such as \$13,600. He said he thought there was a certain threshold where a contractor is protected. He said he went through that on his particular house, and that is what was thrown up to him by a local attorney here who does that. He said the other part that he wants to be sure to understand, is when they were talking about business licenses being issued. He asked if the city has to be sure that the contractors are registered with LLR.

Mr. Slatton stated that is true if the city ordinance requires it. He said the model ordinance requires, as he said earlier, that the contractor show evidence of qualifications. Typically those qualifications include licensing from LLR. It does not require evidence that the business is allowed to do anything else or has been registered with any other state agency. The model ordinances requirement is strictly for evidence for qualifications from LLR. If a City Council wants to add a definition of what those qualifications are and what that should also include, then Council can do so. He said the model ordinance does not do that. For instances, there is no requirement in the model ordinance that the license being issued is dependent on whether or not a business is registered as a business in the state or any other state. It only requires that they show that they have licensure

from LLR. Mr. England stated he thought the person is licensed with LLR, not the company. He said it is the person. He said he owns four different companies. If he wanted to start four different contracting companies and his license was under each one of the companies, he could do that. He said if someone brings charges against him and LLR you would bring it against his license personally, not against the company. He said he thought that is where confusion comes up sometimes. Mr. Slatton stated John England, the individual who is the contractor doing the work is the one who is licensed, not John England, LLC.

Councilman Ebner stated then it is the individual that carries the license and not the shell company so to speak. He said we are in the age of shell companies. He said part of our problem in this particular neighborhood is that several companies is the same name signing on the companies.

Mr. Meggs stated he thought the requirement showing credentialing originated in the technical trades—gas, plumbing, electrical—so the building official ultimately knows that this is not a jackleg electrician, but someone who has the knowledge, skill and credentials from the state. He said all of that serves the purpose of the code, which is lifesaving. He said jacklegs may wire it wrong and you have a house fire which will endanger endless folks, including fire fighters, ambulance people, residents of the property, etc. He felt the credentialing requirement was originally intended to enhance and advance the purpose of the building code.

Councilman Ebner stated the other matter Mr. Meggs mentioned was about revoking a business license. He said his question is how would you keep these same contractors that you know are doing shoddy work out of town, and we have evidence of that. He asked if they can come back to town under the same name, and you can't keep them out. He asked what do you do in that situation. He said that is real life.

Mr. Slatton stated that as Mr. Meggs mentioned earlier if that business has a legitimate right and has the qualifications to be issued a business license, then the city cannot deny him that business license. It is the consumer's responsibility, be it the last client or the next client to do his or her due diligence to determine how well that contractor, or any other business for that matter, does. A business on main street will not stay in business long if they don't treat the customers right and give them a good product. The city is obligated to issue that retail business a business license whether they do a good job or not. The issuing of a business license is not the city's endorsement of that particular company. It is simply a revenue generated mechanism.

Councilman Ebner stated they had talked about duty owed and breach of duty. In his particular profession, he is a Registered Professional Engineer. One of the rules of the road and the quickest way to get your license pulled is when you know there is a mistake and you don't correct it. He said he makes mistakes in what he is doing, and there are people he has hired through the company he works for who look over his shoulder so to speak. He said in his professional opinion we have some issues with infrastructure and with other issues in the city that people in charge of that knew it was wrong. He said he could get into the detail of infrastructure, etc. He said it gets into SCDOT and ASME, ASTM and civil engineering standards. He said once you know something is wrong, and you perpetuate that, to him that is a breach of duty. He said that is where he is headed with some of the things with the city now. He said part of it is on his road. He said it had been mentioned about the wooden bridges in the city. He said he was part of that. He said the timeframe mentioned is about where he tangled with SCDOT on three roads. He said he thinks the three bridges are illegally built in the city. He said his question is where does that come up in the issue of duty owed and breach of duty in the city when somebody knows it is wrong, and they are professional engineers, but they continue to do it. Where does that fall in line. He said they represent the city and represent 30,000 people in Aiken. He said his question is at what point is that considered breach of duty. Is it one year, five years, or ten years.

Mr. Meggs asked if the engineer was a city official or employee. He said he would suspect that if Councilman Ebner's theory is correct he or she will be ending their career

with the City of Aiken. Councilman Ebner asked how do we fix it. Over the years this has caused a problem. He said the same neighborhood with the houses has the same problem with the roads. Mr. Meggs stated he assumed the City Code requires neighborhoods and subdivisions be developed with either roads that will be built to certain standards and dedicated to the city, or perhaps the city allows private roads to be constructed to certain specifications and maintained in perpetuity by the property owners associations. Councilman Ebner stated the standards are the SCDOT standards that we use in the city and the county. He said he uses them in the industry he is working with. He said they are well adopted standards. Mr. Meggs stated those standards just like the building code standards are designed to advance life safety and protection of the general public welfare, not the individual property owner. From the City of Aiken's liability perspective he does not see that the city could be on the hook. He said he did not want to get too specific. He said he would expect that if that kind of misbehavior does in fact exist, it would be met with a termination.

Councilman Ebner stated if it went on for a number of years, then you would suspect there would be some breach of duty to the public. Mr. Meggs said public duty, sure. Councilman Ebner stated he was asking those questions for a reason because he is on that side of the fence. He said he had been to LLR and talked to them, not only on the city issues, but also has had to deal with them through Cherokee County, Spartanburg County, and Greenville County. He said he had found them to be very upright and straightforward on that. He said one of the things they told him, and that was an older employee who had been up and down the road, that quality never goes away in a particular public inspection type thing. For instance, if a house problem shows up three or four years later, the consumer still has the right to go back to the contractor that did the poor quality, and that would be true on the houses that we are talking about here now, he would assume.

Councilwoman Price stated she would like to say there is a bit more to this whole issue such as who owns the roads, whether the city owns the roads, how much involvement the city had in the very beginning, how much involvement we have now in order to come to a solid analysis. She said she noticed Mr. Meggs is hedging a bit, and he is hedging in the correct way not knowing the full story of what's required here. She said that is his legal background to do that, but certainly this is something that the City Council has been quite concerned about because of the residents and we know a lot of people who live in that area. She said the city took some personal ownership given the fact that they were living in an area that is a new developed area with patched roads, and there are a lot of disgruntled people out there based on the climate right now. She said if Mr. Meggs is going to comment she would ask him to investigate that a bit more before making comments.

Mr. Meggs stated he thought his assignment was to give general discussion. After dealing with clients and folks for more years than he cares to count now, he realizes that when you get into specific situations generally you get the facts one fact at the time. As you accumulate the facts your views can change.

Councilman Ebner stated there is a chain of custody here in his opinion and also in the breach of duty as well as duty to the public. There is a chain of custody that goes down this. He said as he mentioned when you know there is a problem, you are supposed to work to fix it and not let it go on for years and years. He said that is the position he is taking. He said he has discussed it with LLR and also the Attorney General, and it is a timeframe period that also works into this as you well know.

Mayor Cavanaugh stated we have talked a lot about public duty rule. He asked what is a good definition of that. He said he would like to get a better feel for what the definition would be for public duty.

Mr. Meggs stated he would see if he could find a cite out of a case while Council asks other questions.

Councilman Merry stated he felt what Mr. Meggs is telling Council is that no part of this precludes anybody from having a grievance or even trying to file a suit. What he is telling Council though there is a standard by which that suit might ultimately be heard or judged. He said this meeting is not a court room, and he is not here to judge the right or wrong about a particular case and so there is no need to get into the specifics of it. However, if and when a case might be made and the city does find itself in a court, it would be the question of public duty that might determine whether the city has any liability with respect to the roads, houses, or anything else about which there is a question. He felt that is what Mr. Meggs is telling us in general terms. He said he felt today is not the place to adjudicate it. Mr. Meggs is saying that is the standard. Mr. Meggs stated that is correct.

Councilman Ebner asked if we were going to see if there were public questions as there are a few minutes left.

Mayor Cavanaugh stated it is getting very close to 6 p.m. He asked if anyone would like to speak. He said if anyone would like to speak they should come up to the podium.


Mr. Meggs stated he would give a reading from the Steinke case. "Many statutes impose a duty on public officials to perform certain acts. Generally however, such officials enjoy immunity from a private cause of action under the public duty rule. This rule holds that public officials are generally not liable to individuals for their negligence in discharging public duties as the duty is owed to the public at large rather than any one individually. The public duty rule is distinguishable from a defense of immunity which is an affirmative defense that must be pled and can be waived. In contrast the public duty rule is a defense that denies an element of a plaintiff's cause of action, the existence of a duty of care to the individual plaintiff." He said the court goes on to say you have to analyze the statutory bases and other things that can give rise to a way around the public duty rule, including something called the special relationship which is a six factor test. One of the most recent treatments of this rule and the special relations test comes out of a case out of Aiken County. It was a case involving the Sheriff's Department. He said it is a published case, and he would be happy to provide Mr. Smith the citation if Council wants to take a look at it. In response to a question as to the name of the case, Mr. Meggs stated it was Arthurs versus Aiken County. The cite is a 2001 Supreme Court of South Carolina Case. He said the cite is 346 SC 97 551 S.E. 2d 579. He said it is a very unfortunate case about the Sheriff's duty to control some injuries regarding criminal domestic violence.

Mayor Cavanaugh stated it is now almost 6 p.m. He thanked Mr. England, Mr. Slatton and Mr. Meggs for being with Council. He said it has been a good experience, and he felt Council had learned a lot. He said he appreciated their effort to do this for Council. He felt the information would be helpful to Council as we move forward on some of the issues that we have.

Councilman Merry stated he would like to thank Mayor Cavanaugh and John Klimm. He said the meeting was an example of one of a lot of different areas where Council can learn a lot. He said this kind of thing can be tremendously helpful. He said all of us are experts at something, but none of us experts at everything. He thanked them for setting this up and taking the time. He thanked the panel members for coming.

ADJOURNMENT

There being no further business, the meeting adjourned at 6:00 P.M.


Sara B. Ridout
City Clerk