

**CITY OF ALAMOGORDO, NEW MEXICO  
CITY COMMISSION SPECIAL MEETING MINUTES  
2:00 P.M., COMMISSION CHAMBERS  
AUGUST 7, 2007**

**MAYOR DON CARROLL  
MAYOR PRO-TEM RON GRIGGS  
COMMISSIONER INEZ MONCADA  
COMMISSIONER ED COLE  
COMMISSIONER MARION LEDFORD**

**COMMISSIONER CHRIS LUJAN  
COMMISSIONER STEVE BROCKETT  
CITY MANAGER PAT McCOURT  
CITY ATTORNEY WILLIAM BROGAN  
CITY CLERK RENEE CANTIN**

**CALL MEETING TO ORDER AND ROLL CALL**

Mayor Don Carroll called the meeting to order at 2:00 p.m. Roll call was taken, and Commissioner Ed Cole was absent.

Mayor Carroll explained that when Sunbaked Biscuits closed their operation, it became the subject of a number of lawsuits, and what the City is attempting to do is see if its position in the lawsuits can be resolved. In addition, the City has received an application from Marietta Biscuit Company to take over the Project Agreement from Sunbaked Biscuits and to assume the mortgage issued by Sunbaked Biscuits.

1. Approval to transfer project agreement from Sunbaked Biscuits, Inc. to Marietta Biscuit Co., Inc.

*Recommendation:* Approve the agreement

City Manager Pat McCourt explained that this involves approximately \$1.8 million of taxpayers' money that has been aggressively protected through the Court system to this point. It is the City's desire to settle and get this project going, which has been the City's position since the very start of the project.

The City has been offered a settlement, which would involve Marietta Biscuit Company coming in and assuming the position currently held by Sunbaked Biscuits, Inc. The Project Agreement is an agreement between the City and a private company under which the company agrees to produce a number of jobs in the community. In exchange for producing those jobs, the liability owed to the City is written down over time.

The agreement before the City has been negotiated with the desire to tighten up the original Project Agreement. The major change that the Commission and the public need to be aware of is in Section 5 under the job provisions on page seven. City Manager McCourt went on to explain that this section has been changed rather dramatically and what has been incorporated into it is that Marietta Biscuit Co. must produce a minimum number of jobs each year in order to receive the ensuing incentive payment. If they fail to produce the number of jobs, the next incentive payment is reduced. This change is intended to guarantee that the public is paid back the money that has already been put forth in addition to the future payments. Under this proposed structure, if Marietta Biscuit Co. met only the minimum jobs proposed, by year eight the City would be totally paid back. In addition, the City would be paid forward to cover the payments that the City would still owe to the company. The business plan that Marietta Biscuit Co. submitted actually projects a greater number of jobs than what is listed in the agreement, which would mean if that occurred that the City would be paid back at an earlier time at which point the City would release the lien on the building and land. The agreement has also been changed to reflect the name of Marietta Biscuit Co.

City Manager McCourt stated that if the Commission were agreeable to allowing Marietta Biscuit Co. to take the place of Sunbaked Biscuits, the other portions of the agreement would have to be kept in place as well. The City would be subordinated behind the lender, which would mean the City would

maintain its second position on the loan. The City would also be agreeing to release the lawsuits that the City has against various parties in association with the agreement with Sunbaked Biscuits, and they would in turn release the lawsuits against the City. City Manager McCourt pointed out that it is important to keep in mind that the City is only one party in this. The primary objective and goal of the City is to protect the public's money and accomplish the original goal, which was to get an operating facility in Alamogordo that would produce jobs. City Manager McCourt asked that the Commission strongly consider approving this agreement. Extensive background checks have been conducted on the individuals involved, and the business plan has been carefully scrutinized to ensure that there is adequate financial funding to make this plan a reality.

This agreement would be with an operating company that has 34 years of experience with a product that is on store shelves right now that will be produced immediately at the plant. It will not be a matter of going out and securing new contracts. They can show already that they have the capability to ramp up and get the plant running. City Manager McCourt believes this to be a good option for the City to pursue.

Mayor Don Carroll stated that for this sale to be consummated, the various secured creditors and parties associated with the lawsuits have to be satisfied. City Manager McCourt agreed and explained that this is a particularly crafted agreement that deals with Marietta Biscuit Inc. They are recommending that if this agreement is acceptable to the Commission it be made contingent upon the successful closing of the escrow. City Manager McCourt said he does believe that means the other secured parties will have to be satisfied in the process.

Mayor Carroll also clarified that the moneys in the agreement are not given up front but are collected after the job creation has occurred. City Manager McCourt explained that each year a job audit occurs, and if Marietta Biscuit Company does not meet the minimum number of jobs, the next projected payment would be reduced. It could, in fact, be reduced to zero though it wouldn't be reduced to a negative number. Under that scenario, if additional jobs were not being produced, no additional payments would be made. Any jobs that they do produce go to write down the existing mortgage payment that is owed to the people of Alamogordo. The \$1 million additional incentive that was built in is \$100,000 for each year over the next ten years based on job production.

Commissioner Brockett asked if they would receive \$100,000 this year or if that would begin in 2008. City Manager McCourt stated that they would receive it. A job audit has been conducted, and there are sufficient jobs within that audit to make them eligible for the payment.

Commissioner Brockett pointed out that even if the Commission is in agreement, there may be secured creditors out there that have not been satisfied yet. City Manager McCourt explained that if the amended Project Agreement and subordination is acceptable to the City Commission, they would be approved and the City would then withdraw its interest in the lawsuits. That is contingent upon what the other creditors do, which happens through the closing process. City Manager McCourt said his understanding is that there is one secured creditor that has not yet agreed to a settlement.

City Attorney Bill Brogan said that they do have information that all of the secured creditors have settled except one. City Manager McCourt reiterated that it is their recommendation that it be contingent upon all secured creditors agreeing. Commissioner Brockett said that he would not want the City to withdraw legal action and then be bound by that only later to find out that the other creditors did not. Mayor Carroll explained that if the closing takes place, all of those things will take place at the same time, as they are all interdependent. The parties who have stated their agreement with settling have made it dependent upon all interested parties going along with it. Otherwise, they will withdraw their approvals.

Mike Hobson, general manager for Marietta Biscuit Company in Alamogordo, stated that if the agreement goes through, all secured creditors would be taken care of before escrow closes. He went on to explain that he and Lou Mysterly have been involved in different companies for over 35 years. He actually made the Marietta brand for Mr. Mysterly for many years in the bakery in Marietta,

Oklahoma. It was Mr. Misterly's brand; he built it and kept it going after they were purchased by Keebler and they no longer wanted to participate with the brand. The brand was released. Lou took it and has kept it alive with co-packers over the last few years. Mike Luke is at the helm of sales, and the Marietta brand is in many of the stores in Alamogordo. Mr. Hobson said that he has been in the cookie business for 38 years. He worked with Kellogg Keebler for a number of years and President Baking, which made the Famous Amos brand. Mr. Hobson said that the facility would enable them to start producing cookies immediately. They are very optimistic and know that they can produce cookies. They fired the bakery up a few months ago and he produced cookies for a couple of days. They know it can be done, and they know how to do it. They know how to take the equipment that is available and put it into operation. They would like the opportunity to show the Commission that they can do it.

City Attorney Bill Brogan said that he needed to correct his previous statement in that there are two secured creditors that have not yet settled. One of them is being worked out in an outside deal with Marietta Cookies, and the other one is still a part of the escrow-closing problem. It is his understanding, however, that the first secured creditor does business with Marietta Cookies on a day-to-day basis. It is fully expected that they will get paid and that will be taken care of. City Attorney Brogan did not have information regarding the second creditor, but they are hoping that will get resolved in the next day or so. Money has been set aside in escrow for both of these creditors. For the first creditor, half of what they are owed is going to be held in escrow, and all of what the second creditor is owed is being held in escrow. It is a matter of time in terms of when they get the check and when they will sign the release. It is Attorney Brogan's understanding that they have agreed to the amount; there are just some logistics issues.

Commissioner Moncada asked once they have signed when Marietta Biscuit Co. plans to open the plant, and Mr. Hobson said he hopes to start interviewing people on Thursday. A lot of the infrastructure needs to be brought back into operations. Some cleaning up needs to be done, and they have to get their inspections done and be kosher certified. Mr. Hobson stated that probably by the third to fourth week of September they would be baking cookies. Commissioner Moncada followed up by asking about the pay scale for the jobs that they will be creating. Mr. Hobson said that it will vary with the job, but the entry-level jobs will be \$7.25. Commissioner Moncada asked if they would be bringing in people from California, and Mr. Hobson stated that most of the people would be a team that he has put together in Alamogordo. He will likely bring in two or three people from outside as individuals he has worked with for 20 to 30 years. One gentleman will come in on a consulting basis and be in Alamogordo for three to four months to help with the machinery and getting things going. That said, 90% of the employees if not all of them would be local people because it is utilizing local people that makes things successful.

Commissioner Brockett asked what kinds of inspections they need to have done, and Mr. Hobson said they would get their kosher certification. They also have the American Institute of Baking, which is usually a third party that comes in and makes sure that all of their plans and sanitation practices are in order. It is just part of doing good business to have a third-party come in and audit what is being done.

Mayor Carroll asked City Attorney Brogan if the Commission agrees to approve the project transfer whether there is specific language that he might suggest for a motion. City Attorney Brogan suggested that the motion be for the City Commission to approve the amended Project Agreement to Marietta Biscuit Company, Inc., and the assignment of the mortgage that secures that Project Agreement to Marietta Biscuit Company, Inc. Mayor Carroll asked if that motion encompasses the Subordination Agreement, but it does not.

Mayor Pro-Tem Ron Griggs asked if there is a way to look at all three of the related items prior to a motion being made in relation to any of them. He suggested that might be important.

City Attorney Brogan said that they certainly could discuss the items in whatever order they wished to, but he suggested that they adopt a separate motion for each of the three items. They could vote at one time, but it could be on three different motions.

2. Approval of subordination agreement between City of Alamogordo and CommerceWest Bank.

*Recommendation:* Approve the agreement.

City Manager McCourt explained that the Subordination Agreement is very similar to what they did last October when they moved into second place behind Alamo Fed. In this case, the City would be moving into second place behind CommerceWest Bank. The term of the agreement is a maximum of 15 years, but if the Project Agreement is paid off earlier, everything ends. The amount of the Subordination Agreement is \$5,085,000.

City Manager McCourt went on to explain that paragraph five was in the previous agreement, but Commerce West Bank is not willing to accept that as a portion of the Subordination Agreement. It was the paragraph stipulating that if in fact the agreement ended in foreclosure and a third party buys it, the City would then have the right to buy it at the third party's price within six months. Of course, if it goes into foreclosure the City has the right to buy it at the courthouse steps. Whether that paragraph is necessary is a debatable point, but CommerceWest has indicated that it is not acceptable to them. Commissioner Brockett asked City Attorney Brogan how comfortable he is with removing the paragraph. City Attorney Brogan said that he is somewhat uncomfortable, and he explained that the objection that CommerceWest has is that it would delay their assumption of ownership of the property by six months. The purpose of the paragraph had been to allow the City a first right of refusal with Alamo Federal Savings and Loan when the City had the understanding that there would be \$2 million ahead of the City. With CommerceWest, there will be a little over \$5 million ahead of the City, and so there is obviously an increased risk. The balance to that is that Marietta Biscuit Company appears to be a far more solvent organization and a better-run organization. If the City wanted to, it could certainly participate in a foreclosure auction should it come to that.

Commissioner Ledford asked the representatives of Marietta Biscuit Company to elaborate on the market value of the operation and the property particularly if an appraisal has been done. Mr. Mike Hobson from Marietta Biscuit Company said that the appraisal on the equipment was around \$6 million. That would be the cost to replace it and get equal equipment back in place. He said that Doug Nelson had told him that the machinery looks like a bucket of rusty bolts, but Mr. Hobson said it is a very viable piece of machinery. If someone is not in the industry, they may not understand what a certain piece of machinery can do or what it's able to produce. Mr. Hobson went on to say the ovens will likely last as long as the routine maintenance is done. It's good equipment, and much of the equipment is new equipment including the baggers, the scales, the metal detectors, the weighers and the conveyors. The high-speed cartoner is very new, and in fact it has never been used. The amount of new equipment was one of the things that had impressed him when he walked into the plant, as he is used to being in the business and dealing with used equipment. It is viable equipment and a viable asset.

Commissioner Ledford asked if the second position is related to the real estate, and City Attorney Brogan said that it is. In addition, there is a "fuzzy" equipment lien behind OCEDC. Primarily, the City's security is the real estate. Mr. Hobson said that the value of the real estate is the infrastructure that is there. They will use it to produce cookies. They're not going to move the equipment to a different location. They're going to use the real estate and the people to make it a viable operation. Commissioner Ledford asked if he could comment on the appraisal of the real estate. Mr. Hobson said he did not have the appraisal in front of him, but he believed it was \$12 million in total. Commissioner Ledford made the point that it represents an ongoing business, which is very important. He thought perhaps the first time around the City was a bit relaxed in terms of the business continuing to operate. Commissioner Ledford said he has looked at quite a bit of information with regard to Marietta Biscuit Company including their business plan, existing contracts and significant potential new contracts. Commissioner Ledford said that when he looks at the

Subordination Agreement, he looks at the fact that it is based on the ability to perform and not so much just what the building is worth. He also looks at their ability to pay to make this happen. He asked Mr. Hobson to comment on their formulation of the business plan for this operation as they have looked at the cost and operations and whether they feel good about their ability to create the jobs, which is what is important for the City, become a viable company, and be there for years to come.

Mr. Hobson stated that he has formulated a very conservative business plan taking into consideration the historical data that he had with regard to the cost of raw materials, the cost of production, and the cost of packaging materials. They know what is tied into those things. He is also definitely negotiating some new contracts that he should know about by the end of the week. One of the largest companies is going to put a lot of business into the plant. The success will not be because the plant is located in Alamogordo necessarily, but it will be because of the team they will assemble and the past history they have dealing with him and the other members of the team. Mr. Hobson went on to say that the business plan did not take all of that into consideration so it will be completely an up side to the business plan. He's not going to say that every number in the business plan will be doubled, but he is very confident that it will come to pass because they have done their homework. He said he spent another four and a half hours going over the plan on Saturday morning to make sure everything that is needful is in place. He secured all of the necessary insurance in the last couple of days, and worker's comp came in around \$1,000 less than what was projected in the plan, which made him feel pretty good that they are on track in terms of their projections.

Commissioner Ledford said that he appreciates the patience of Marietta Biscuit Company's representatives, but it is obviously the concern of the Commission as well as the citizens that the business be viable and it does happen. If this were approved, he would like to think that Marietta Biscuit Company would still be in Alamogordo in another twenty years.

Commissioner Ledford also stated that in the past they had felt there was a mismatch in terms of what the owners were putting into the operation with Sunbaked Biscuits. Commissioner Ledford asked Mr. Hobson if he could tell the Commission what the owner was planning to do in terms of personal assets. Mr. Hobson said that he could tell them that the owner has mortgaged his home, his farm, and basically everything he has. They were all free and clear; the owner has put them into the business, \$2 to \$3 million. Commissioner Ledford said that one of the things that is important is that Marietta Biscuit Company have enough money to not only make the necessary acquisitions but to have enough working capital. Mr. Hobson said that right now they have close to \$3 million set aside just for working capital, and part of the contract that he is working on right now with a large company is that they would front Marietta Biscuit part of the money to get a new project started. It will go towards the installation and purchase of equipment.

Commissioner Ledford asked how much money the owner will be putting toward acquisition costs. Mr. Hobson said he could not tell them the exact number, but it is part of the \$3 million. Commissioner Ledford asked if the \$3 million that is being put in will not only get the building purchased but also allow them to buy the inventory they need, pay for the payroll and get things going, as he thought one of the problems Sunbaked had was they just were not capitalized enough to be able to operate. Mr. Hobson pointed out that another key thing that Marietta Biscuit has is immediate orders.

Commissioner Ledford said that he would be the first to admit to the people that the \$5,085,000 subordination is probably not going to put the City in a great position, but what they would be banking on is the ability of Marietta Biscuit Company to succeed taking into consideration the operation, the jobs and the fact that the owner is putting his own money into it. He thanked Mr. Hobson for answering his questions.

Mayor Pro-Tem Griggs wanted clarification in that Marietta Biscuit Company is borrowing \$5 million and they then have \$2 to \$3 million more. He expressed the importance of knowing, as Commissioner Ledford had stated, that the owners were investing their own money into the operation

as he agreed that was one of the problems with Sunbaked. Mayor Pro-Tem Griggs asked for more details about what the existing contracts are. Mr. Hobson explained that they would be making what is called a wire-cut cookie, which is a sugar cookie, in addition to chocolate chip, oatmeal and coconut macaroons in various sizes of packages. They will also do vanilla wafers and ginger snaps, which are two of their key items. They will be making cream sandwiches too, which is another large part of their business.

Mayor Pro-Tem Griggs asked if they were going to be planning to put another line in as there is only one right now. Mr. Hobson stated that they are immediately going to start putting in a second oven. There are some walls that need some attention as far as getting some paneling up. That is the first thing they will do, and then they want to immediately start putting the second oven in and probably a third. A representative from one of the potential contracts will be coming to tour the bakery very shortly, and they want to have it ready for them to see what can be done. Mr. Hobson said that the man in charge of North American operations for the company is very interested in what they are doing.

City Manager McCourt reiterated that the business plan really incorporates what Marietta Biscuit has in hand now, and so they are not talking about the contracts that might be out there. They have contracts and production requirements right now. The others would be icing on the cookie so to speak. It would be a viable business without the extra contracts.

Commissioner Brockett asked about the status of the oven band, and Mr. Hobson said that it has been fully repaired. There is a piece of metal that's used to shield any product that drops on the band, and it came loose and got around the drum. That snapped the oven band, and basically it had to be put back together and welded, which has been taken care of. Mr. Hobson said that he knows the people that did the repairs, and it was done to his satisfaction. He also said that while it is not a common occurrence, it does happen.

Mike Luke, vice president of sales and marketing for Lou Misterly Food Sales, soon to be Marietta Biscuit Company, explained that although Mr. Misterly is the primary investor, Mr. Hobson and he have put risk capital up as well and have as much if not more interest than the City in making sure this succeeds. Unlike Sunbaked Biscuits, Marietta Cookie has a cash flow business right now. The business that Lou Misterly Food Sales has today, the cash flow, will be transferred to Marietta Biscuit Company as soon as the acquisition is completed and operations are begun.

Commissioner Ledford stated that it was his impression that the Marietta label now sells and has product lines but doesn't have production. He asked if the significant advantage of this facility acquisition is to deal with that enabling them to have a stronger force in the market because they could produce their own product. Mr. Luke explained that Marietta has used contract manufacturers to produce products for the last 35 years, and at times there were acquisitions that took place and the brand was moved around from different co-packers, which kind of hurt its ability to grow at the pace they felt they could with the popularity of the brand both regionally and nationally. It's good news and bad news coupled together.

Co-packers liked having them there because it was good business for them, but the volume of the business strained their capacity. They also felt with the viability of the brand it was something they could do just as easily themselves. For the most part, they were held captive in their ability to grow and have turned down numerous business opportunities because of their limitations on capacity. They will be able to take line one of the bakery to capacity immediately, and their initial plan is to begin construction on line two as quickly as possible and then after that line three. In addition to some of the contracts that Mr. Hobson is working on from a contracts manufacturing side, they have opportunities right now with national accounts that have 2,500 stores nationally. All they have been able to accept in terms of the business opportunity with them has been regional business, isolated to the western United States. The consolidated margin that they get from both producing and selling the product gives them a huge advantage over a number of competitors.

Some of the co-packers that they use right now produce goods on 140-foot to 180-foot ovens, and Marietta Biscuit Company will be producing product on 300-foot ovens. Output typically grows exponentially with the length of the oven, and so based on the efficiency and output of the ovens, the land and floor cost is going to give Marietta Biscuit a tremendous advantage in terms of their finished goods cost on the floor not to mention from a logistical standpoint being centered in Alamogordo is fantastic in terms of freight going east, west, north and south if the opportunity presents itself. In their business plan, they were able to shave about a third of their over-the-road freight costs out of their delivered cost of goods just because of the opportunities on the freight lines. The Marietta label is currently producing about \$10 million worth of revenue annually. Mike Hobson is also working on contracts with some of the major manufacturers who are looking for the opportunity to have some of their own products contract manufactured, as they just do not have the capacity to supply the needs for their own strong national brands. The hurdles they have to jump within their own bureaucracy are tremendous, and so a project that Marietta Biscuit could take on and get into operations within a period of six months in an organization such as they are discussing, it would take two years or better.

Commissioner Brockett asked how much of their baking is being done south of the border? Mr. Luke said that right now it is about 50%, and that is not by choice. It is not because labor is so cheap, but it has to do with limited options. They would love to have the brand in the U.S., but about 50% of their production is being done through three different sources in Mexico. They have another contract source in Canada and four in the United States, but he expressed that it means a great deal to them to put "Made in America," back on the label. That is not an option without a production facility.

Commissioner Brockett asked Mr. Luke how long they have been looking into acquiring their own production facility, and it has been something Mr. Misterly has considered over the last 15 years. They have looked at building from the ground up and acquiring properties mostly in the western United States, California, Arizona and Nevada. Commissioner Brockett asked for clarification on their position in terms of additional production in Mexico. That is not in their current plan, and they are planning to ultimately have five lines in the Alamogordo facility. It would actually hold six, and there is additional acreage that could perhaps be expanded into.

Commissioner Brockett asked what challenges exist in Alamogordo in terms of distribution. They haven't brought in their logistics manager yet, but they will be doing some paving on the property. Once they leave the parking lot, there is a challenge in terms of getting across the highway. There may be an opportunity down the line for a stoplight to accommodate ease of movement.

Mr. Hobson said by year three they are forecasting to be producing between 40 and 50 million pounds of product. Each truckload is 40,000 pounds, and there would be a huge number of trucks coming and going every day. Commissioner Brockett expressed his concern about acquiring help in terms of developing the infrastructure. The road is going to need some repair with the amount of traffic. Mr. Hobson and Mr. Luke expressed their desire to be in the facility in Alamogordo.

Mayor Carroll expressed that while they knew they were taking a risk with Sunbaked and it is obviously some risk whether it is Marietta Biscuit Company or someone else, he believes with what Marietta Biscuit Company has outlined and what they have seen they have an excellent chance of making this work. He is willing to work with them.

Commissioner Lujan asked if their current contracts would support the business plan or if they would need to obtain new contracts to fulfill their agreement. Mr. Hobson said that the business plan that they put together in year one is based on existing business based on last year's actual sales plus 10% being built in for growth. They are at 12% right now. They are careful in their business relationships to put right out front what they can and cannot do. Mr. Hobson said that their goal is to always build the business. Commissioner Lujan asked for more information on the number of contracts they would need in the future to fulfill their part of the agreement. Mr. Hobson said that the contracts they are negotiating right now with major manufacturers would require two ovens just for them alone.

Commissioner Lujan asked about what their thoughts are in terms of employees and technology. Mr. Hobson explained that the niche of Marietta Biscuit Company is speed to market for new products. They understand that, and they will likely be getting contracts to produce X, Y, Z for perhaps one to three years at most to bring it to market. If it's a winner, the manufacturers will take it in-house. If it's not, they will replace it with the next new initiative. The types of things Marietta Biscuit Company will do are things that cannot be automated. Mr. Luke also pointed out that as technology evolves in the plant, the jobs change into more high-tech and higher paying jobs.

City Manager McCourt clarified that this facility would not absorb the entire Marietta capacity. They will still have co-pack agreements out there to help produce the Marietta brand. There are different things that have to be prioritized in terms of how they want to use the capacity. Sooner or later they would love to have everything produced out of that facility, but it would come over time.

Commissioner Brockett commented that they basically have three years to gain the confidence of the people, and he would love to see Marietta Biscuit Company come before they are required to the Commission and say they have exceeded the expectations. There are a lot of people who are going to be looking at Marietta Biscuit Company to see whether economic development works. Mr. Hobson said they understand the importance of these things. They are partnering with the community and with the Commission and will do their utmost to keep them informed and involved.

Commissioner Ledford asked what the water requirements would be, and if their water demand will fluctuate. City Manager McCourt said that they had looked at the issue of being able to supply adequate water with Sunbaked Biscuits. They do feel they have an adequate supply of water available.

3. Settlement of legal actions relative to Sunbaked Biscuits, Inc. case.

*Recommendation:* Direct staff to file the appropriate documents to settle the cases.

Mayor Carroll restated that part of this settlement is the condition that all of these things take place at the same time. City Attorney Brogan said that is correct, and there are four documents that are required and have been prepared including the Amended Project Agreement, the Assumption of Mortgage, the Release of Sunbaked Biscuits, Inc., and the Order of Dismissal of the lawsuit. All of the parties except the two cited earlier have signed the Order of Dismissal, and all of the documents that are required have been deposited with Alamogordo Title Company. City Attorney Brogan thanked Robin and said they have been very cooperative and done an incredible amount of work on the closing.

Mayor Carroll said that in terms of the two parties who have not signed the Order of Dismissal, it is his understanding that with one party it is not a question of the amount of the settlement but the timing of their receipt of the settlement. In the other case, it is a question of consummating the negotiations between Marietta and that particular creditor. It is anticipated that both of those things will be resolved enabling the closing to take place.

City Attorney Brogan said that in terms specifically of the litigation settlement, the creditor being discussed was never served with a lawsuit. Alamogordo Federal Savings and Loan has filed a voluntary dismissal of that creditor from the lawsuit. They are no longer an issue in settling the lawsuit. That unfortunately leaves a secured creditor out there, and it is Attorney Brogan's understanding that Marietta is working directly with them because they are a secured creditor to get that issue resolved.

Commissioner Ledford asked City Attorney Brogan if Sunbaked agrees with this transaction, and City Attorney Brogan said he couldn't answer that. It is his understanding that there may be some difficulties between Marietta and Sunbaked, but he is not privy to those discussions.

Robin McCracken from Alamogordo Title Company stated that it came to her attention from the attorney that represents one of the outstanding creditors that there has not been an agreement as far as the amount due and they have not agreed to sign the release, which was a last minute development. The closing cannot take place without that.

City Attorney Brogan suggested that if it is the Commission's pleasure that they authorize the Mayor to enter in to the necessary documents contingent upon the last creditor agreeing to dismiss the lawsuit. If that creditor does not agree to dismiss the lawsuit, it will not go forward.

**Mayor Pro-Tem Griggs made a motion that the City Commission authorizes the Mayor to enter on behalf of the City Commission into the Amended Project Agreement between Marietta Biscuit Company, Inc., a New Mexico corporation, and the City of Alamogordo. In addition, the motion is that the City Commission authorizes the Mayor to act on behalf of the City Commission and sign the Subordination Agreement between the City of Alamogordo and CommerceWest Bank moving the City of Alamogordo's position from first position to second position under the Project Construction Mortgage Agreement that was entered into between the City of Alamogordo and Sunbaked Biscuits, Inc., which will be assumed by Marietta Biscuit Company, Inc., and further that the City Commission authorizes staff and the Mayor to proceed toward complete settlement of the litigation filed by Alamogordo Federal Savings and Loan Association. All of the above will be contingent upon full and complete settlement of the litigation filed by Alamogordo Federal Savings and Loan Association. Seconded by Commissioner Moncada. A roll call vote was taken, and all voted "aye." The motion passed 6-0-0.**

**EXECUTIVE SESSION:** Recess into Executive Session to discuss threatened and pending litigation with Sunbaked Biscuits, Inc.

There was no need for an executive session

#### **ADJOURNMENT.**

**The meeting was adjourned at 3:27 p.m.**

*/s/Donald E. Carroll*

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Mayor Donald E. Carroll

(SEAL)

ATTEST:

*/s/Reneé L. Cantin*

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City Clerk Reneé L. Cantin

*(Prepared by Ubiquis Reporting)  
Approved at Regular Meeting held on August 27, 2007.*