

**CITY OF ALAMOGORDO, NEW MEXICO
CITY COMMISSION REGULAR MEETING MINUTES
MUNICIPAL BUILDING, 1376 E. NINTH STREET
7:30 P.M., COMMISSION CHAMBERS
DECEMBER 21, 2004**

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

**COMMISSIONER JOHN ROBERTSON
COMMISSIONER MARION LEDFORD
CITY MANAGER PAT McCOURT
CITY ATTORNEY KEN McDANIEL
CITY CLERK ANGIE RAHN-BROYLES**

Call Meeting to Order and Roll Call.

The Meeting was called to order at 7:30 p.m.

Mayor Carroll said this past weekend Alamogordo experienced the loss of Deputy Sheriff Robert Hedman, and Courthouse Officer and retired DPS Sergeant Perry Clark. He expressed condolences to their families, friends, and co-workers. City flags would fly at half-staff through Thursday in their honor.

The Invocation was given by Rev. Richard Hicks, and the Pledge of Allegiance was led by Mayor Pro-Tem Ron Griggs.

CALL OF THE CONSENT CALENDAR: Items on the Consent Calendar are considered routine and should not require further discussion. All items marked "CC" will be approved by a single motion unless removed at the request of a Commissioner, City staff, or a member of the public. Items removed from the Consent Calendar will be heard in the numbered sequence.

1. Minutes of Regular Meeting of December 7, 2004.

Recommendation: Approve the minutes.

6. Resolution No. 2004-50 calling for a Special General Obligation (Library) Bond Election to be held on Tuesday, March 15, 2005.

Recommendation: Approve the Resolution.

7. Resolution No. 2004-52 amending the City of Alamogordo's FY2005-FY2009 Infrastructure Capital Improvement Plan (ICIP).

Recommendation: Approve the Resolution.

Mr. McCourt pointed out that there was a slight modification to the last page, which had been distributed to the Commission this evening.

8. Resolution No. 2004-53 requesting the DFA, State of NM, approve revised budget figures for certain line items in the City's budget for FY 2004-2005.

Recommendation: Approve the Resolution.

9. Resolution No. 2004-54 approving and accepting the New Mexico Department of Transportation (NMDOT) Cooperative Severance Tax Agreement and Certification Project No. ST-5912(200)00, Control No. L2015.

Recommendation: Approve the Resolution.

12. Statement regarding the Executive Session of December 7, 2004.

Recommendation: Approve the statement.

13. Award of Bid No. 1004-16, 125 HP Duplex Turbine Variable Frequency Drive Pump Station.

Recommendation: Award to Flowtronex ITT in the amount of \$98,268.00, exclusive of NMGR.T.

Commissioner Cooper moved to accept Consent Calendar items 1, 6, 7, 8, 9, 12, and 13. Seconded by Commissioner Robertson. All voted "aye". The motion carried by a roll call vote of 7-0-0.

PLANNING ITEMS:

2. Consideration of Ordinance No. 1227 for rezoning to District "D" (Business) requested by Isabel Scruggs [Case Z-04-0636 (A), 1110 Hawaii Avenue].

Recommendation: Deny Case Z-04-0636(A) to amend the official zoning map of the City of Alamogordo, to change the zoning of subject property to District "D" as the request will create "spot zoning" and will not conform to the 2000 Comprehensive Master Plan.

Mr. McCourt said he listened to the argument at the Planning and Zoning Commission meeting, and it seemed to him that there were some pretty persuasive arguments. His comment would be that we should perhaps look at amending our Comprehensive Plan to see if it would be appropriate to change it from a transitional area and moving it further into a business type of classification.

Mayor Carroll said he had discussion with Mr. Mike Nelson, who he assumed was representing one of the parties in this. He had expressed something similar to what Mr. McCourt had stated that he felt there may be an opportunity to address it either as a neighborhood transition or some other way. He did see some concerns with it as presented at this point, but he was willing to see if there was some way to address it.

Mr. Randy Burroughs, Attorney for the petitioner, said he would like to continue on with this argument tonight as the seller was anxious to have the property sold, and the purchaser was anxious to go ahead and commit and would need to use the property under Zone "D". The issue did appear to be spot zoning, but was not about protests as there were none. He felt there were no protests because of the changing character of the neighborhood. The Ordinances referred to spot zoning, but you did not see it defined there. Spot zoning had basically been interpreted by the courts. In New Mexico there was a case that dealt with spot zoning. The City of Albuquerque had a unique situation with its Paradise Hills which had a special zoning district that was moved to commercial. The City of Albuquerque said they couldn't do that because it didn't conform with the Master Plan and it was also spot zoning. The issue was taken to the District Court of Bernalillo County, and the District Court said no. Then

they got in and defined what spot zoning was. In partial definition, which was from NMSA 99.630, it stated that "spot zoning is an attempt to wrench a single lot from its environment and give it a new rating that disturbed the tenor of the neighborhood". Everyone needed to think about what was over near this request they were considering tonight. There was a governmental building across the street, which was probably not acknowledged as a commercial building. However, he would assure that there were not many places in Alamogordo that had more traffic than that building did. Look at the development of the old Post Office at Ninth and Alaska. Back in the 1960's that area was residential. However, once the Post Office came in, then the character of that area changed. The character of this particular neighborhood was already changing, and then the Post Office came in. If they looked at Alaska, the residences were just about gone there. There were parking lots, Otero Federal Credit Union, and part of the church facilities. When there was a high school there and when the Post Office was originally the baseball fields, it was a different environment. But it was not that anymore. On Alaska now on the same side as the Post Office, they would now see vacant lots, houses that needed a great deal of repair, abandoned houses, and just one nice house which he noticed tonight was nicely decorated for Christmas. That area had changed, and what those people saw when they looked out their front door was a big commercial building right in front of them.

Mr. Burroughs said he understood that the owners had sent a letter to the Commission that if this sale didn't go through, that they were leaving for overseas and would just board the house up and leave it there. That meant there would be another abandoned building in town, and that was not what we wanted. We didn't want this part of town to deteriorate anymore than it was. It was only a half block from Tenth Street. All of those characteristics existed, and that was what this case in Albuquerque was talking about. The tenor of the neighborhood was a great deal different than it was just a few years ago. When the Post Office went in, it had locked the area into become a commercial type development. Tonight the petitioners were asking for the Commission to allow for the zoning map to be amended and to allow 1110 Hawaii to be zoned District "D". It would move forward to trying to help that area. A business would go in there under District "D", and they would start to see more development in that area.

Commissioner Cooper felt that area was an embarrassment to the City. When someone wanted to come in and start to develop that area, that was a plus for everybody. He felt that whole area would be commercial within the next two to three years. We had to have a spark plug—someone who wanted to go in there and start the project. He felt in all justification that those who wanted to do it should be entitled to do so.

Commissioner Robertson asked the City Attorney what type of Ordinance we could fall under to get around the spot zoning? Mr. McDaniel said he would agree with Mr. Burroughs that there was not a definition of spot zoning, unless Ms. Few told him differently because he never recalled seeing one. He believed Mr. Burroughs was correct in at least one sense of spot zoning. Spot zoning had been interpreted as either zoning that was out of character with the neighborhood or that was out of character with the zoning around. But if the Commission was actually planning to review the zoning of that whole neighborhood because they in fact found it didn't reflect the character of the neighborhood, then he wouldn't be as worried about the spot zoning under those circumstances. If they were talking about putting it into a residential neighborhood which was in fact a residential neighborhood, he thought they'd have some real problems. He felt it could be argued either way. If somebody was in here protesting and took us to court over allowing spot zoning, they would argue that the court should look at the existing zoning and ask why they were picking out one lot. But nobody was protesting, and on the other

hand, Mr. Burroughs would be there saying to look at the existing property use. If they looked at that, then the zoning made sense.

Commissioner Robertson asked what the zoning was for the Post Office? Mr. McDaniel said as a Federal facility it probably didn't have to be zoned. He understood it was in a "C" zone, and it was obviously not a multi-family use. Commissioner Robertson asked if they could really call it spot zoning since it was right across from the Post Office, and the next lot had the old high school on it? To him, it seemed to be in a commercial area anyway.

Mr. Burroughs said sometimes we got hung up on certain words. Spot zoning was a characterization which had been made in the report to the Commission tonight. In his opinion, he didn't feel they had to overcome spot zoning on this issue. What they would have to do was just to vote contrary to what Planning and Zoning did, and say they approved this change to "D". He didn't feel they had to say that it had to be unique in any way. They'd heard the argument and that would be the basis which they would do it on, but it would not require anything to say it was contrary to Planning and Zoning.

Commissioner Ledford said typically in a residential area where somebody wanted to come in next door and it was a commercial property and would need to be rezoned to "D", then the neighbors wouldn't like that because it was surrounded by residential. He felt it was important to protect those residential areas from that, and also where there were protests. In this case he'd gone and talked to the neighbors, and they were actually in favor of it and they saw it as a positive thing. What did "D" zoning allow? In talking to the neighbors, this was apparently proposed to be a tanning salon. However, if it wound up noisy or something, then the neighbors may have a problem with it. Could we rezone it to "D" with the restriction that it be used for only that? Mayor Carroll said yes. Commissioner Ledford said the argument was that this would be conducive to the area, but he wanted to protect the residents. What was our issue about spot zoning, because Planning and Zoning turned this down completely. Were we setting a precedent here regarding spot zoning?

Mr. McCourt said this was currently a transition zone between the businesses and the residential property that was further in. What we were talking about doing was that this may start to chip away that buffer zone between this and other residential property. That may be okay, but the way we usually do that and the protection people usually had was to look at the Comprehensive Plan and get some assurance of what was planned in their area. Zoning was then a tool to implement the Comprehensive Plan. That was why his comments were that this may be a good argument, but there may be other arguments, too, which had not been brought up or discussed on traffic flow, public safety, parking, etc. As had been pointed out, that was a very busy street already. Getting parking around there was going to be difficult for these types of businesses. So it may be that there were some additional concerns and that the community at large may be interested in discussing it. That was why his comments at Planning and Zoning and again tonight were that there may be some good arguments to do this, but that the appropriate course of action would be to amend the Comprehensive Plan prior to doing this.

Commissioner Moncada said she had no problem with this, but she could foresee that they were probably going to have to come back before the Commission to get a variance for parking. Obviously they were going to have to use the alley to get to their parking. Mr. Burroughs said they could use the parking in back for the employees, and would make accommodation in the front for the patrons that would use the facility. Commissioner Moncada said if so, generally there was only enough parking for one car, so did that mean that the residents then would come to the Commission requesting "Resident Parking Only" signs in front of their homes. Mr.

Burroughs felt that would be unusual with all the parking which went on there for the people that walked across to the Post Office right now. That street was already being used for commercial parking. If there was going to be some issue involving how that property was used, then she was absolutely right. They would have to go and comply or come up with some type of variance that had safety features involved in it and had proper parking. If they took a piece of property that was already zoned "D" and presented some sort of construction to the City, they would have to show the City a plan. Whether it was "D" or not, that plan would still have to be there. Commissioner Moncada said if we were to grant this to the owners, then that didn't necessarily mean that they were going to be able to build what they wanted there. And they had to understand that. Mr. Burroughs said that was correct, and he thought they did.

Commissioner Cooper said about 30 years ago, another citizen of Alamogordo had a plan and she worked it. As a result, she revitalized Ohio Street. There were law offices there and a tanning operation as well, and it was a nice part of town. We were going to have to go forward, and he felt this was a worthwhile project, and he was all for it.

Commissioner Ledford said you could have a restaurant under "D". If we approved this to "D", then was it doable when they came back and addressed parking? What was the next step for them? Mr. McCourt said the alley was a public right-of-way, so they certainly could use that to access the property. Commissioner Ledford asked how many could park back there? Mr. McCourt said within the zone, they would have to meet the compliance for the number of parking spaces for the type of business, and they could present that however they wished on the lot. As long as they could show that they could do that, whether the access was from the front or the rear, they would meet the requirements. Commissioner Ledford said as a restaurant, there was not enough parking. Mr. Burroughs said the City had approved the lot for a tanning place on Ninth Street, and the parking was dominantly in the back. It was also in an area that had a great deal of residential. Commissioner Ledford said he didn't have a problem with the proposed use, but what if they changed that use? Then it became a different issue. Mr. Burroughs said for anybody that did anything in the City that caused those changes, they would have to come back to the City and comply. Zoning was only one step and if they were going to go in and use the property for something other than that, they would have to show that they could do it.

Mayor Pro-Tem Griggs felt that if we had one or two protests, then spot zoning would be a big issue here. He still was a little leery about it himself. He was a little leery about the parking, and he was a little concerned as well that we were considering taking a jump and calling it "D" when the next block over was duplexes and homes. He wasn't sure that we should say that just because there was commercial across the street, that meant we should be business right here. "C" zoning also allowed for certain office buildings, which theoretically were more conducive to the area than tanning salons or any sort of retail type of business. While he appreciated the request, he was not sold on it being the best route for the City to take on this piece of property. Mr. Burroughs reiterated that Tenth Street was a major thoroughfare and was only a stone's throw from this location. Mayor Pro-Tem Griggs said there was residential on Washington Avenue and Cuba Avenue which probably shouldn't be either, but that was the way it was. Mr. Burroughs said, though, that it was okay to have residential if the people wanted to be there. Mayor Pro-Tem Griggs said he wasn't sure this was the best use for this property. Personally, he felt the office-type approach was the best use.

Commissioner Robertson said this was currently "C" zone, and could tanning salons go in under "C"? City Planner Sharon Few said "C" was multi-family, and it allowed single family, duplex, multi-family, nonprofit, boarding and lodging houses, and professional offices. Zone "D" would

allow anything from a 7-11 Store to a full-fledged grocery store, car lot, etc. Mayor Pro-Tem Griggs said if the Commission were to vote for "D" zoning, then it would have to be restricted to some certain types of "D", and not full-fledged "D".

Commissioner Cole asked about the transition in the Comprehensive Plan. Mr. McCourt said what we tried to do when we planned the City and used zoning, was to have complimentary uses next to each other. To do that, sometimes you had to transition and move in steps from one type of use to another type of use. For example, when moving from business areas to residential areas, they didn't transition well when they just immediately abutted. Therefore, you would build some transitional type zones, like multi-family housing in between them. He believed that transition existed here at this time with the "C" zoning. Ms. Few said the area currently was all multi-family zoning, and then the area north of Twelfth Street was basically single family. Commissioner Cole asked why the Planning and Zoning Commission had voted to deny this? Ms. Few said it didn't conform to the Comprehensive Planning and it was spot zoning. There were people in this area who were single family homeowners that were working very hard to bring their homes up. On the property immediately to the south of this, the owners had done extensive work to bring their single family home up. They were working on it continually and had taken a very rundown residence and were really making it shine. To classify with a broad brush that this was a block that did not have property owners who cared or that there were no single family uses in it or other residential uses in it, was a gross misrepresentation and an insult to property owners that were working very hard to bring properties up and to improve the tenure of the neighborhood. Commissioner Ledford said he'd talked to the property owner to the south of this, and he was in favor of this, so he didn't know what Ms. Few meant by that. Ms. Few said she knew him personally and he'd stated that he didn't want to sell it or move. He had been working very hard on bringing the property up.

Mayor Carroll asked what the requirements for parking were for "D" zoning? Ms. Few said three square feet of off-street parking for every square foot of business building. From the square footage that they had on the lot, if all the area were put under parking, they would have about 5:1. Mayor Carroll said obviously some of it could not be used for parking. Ms. Few said that was a rough representation. The potential was there that they could meet the parking requirements using area in the back. Mayor Carroll said this particular business as proposed didn't appear to be a high traffic business. His first concern was that with the traffic currently on Hawaii Avenue and with the emphasis the City had placed on trying to eliminate backing into traffic on highly trafficked streets, it would limit to a large extent the parking in front of the building. To utilize a narrow, unimproved alley as your main parking for the employees as well as the customers, concerned him as well. Right now the neighbors to the east may not have a concern with what went on, but they might have a different opinion if that alley turned into an ingress and egress for businesses behind them. If we did it for one business, then we were hard pressed not to do it for every potential business on that block. The Comprehensive Plan issue could be worked and this may be a neighborhood in transition, but how did we transition it in such a way that we were not fostering or encouraging the use of alleys as ingress and egress to businesses? Mr. Burroughs said it would be improved, because his client would pave the area behind the business. Several years ago he and the others on Texas and Virginia all went in together and had the area between them paved for parking. Those people that had residential property also went in and paid for the paving because it benefited everyone to have it in that condition. All the things his client intended to do pointed towards improvement. Mayor Carroll said he didn't think the argument was that it was not a neighborhood that was right to transition to something else, but the question was how we did it in the best way possible. There was still a 16 foot unimproved alley and the fact that his client was willing to improve 50 foot of an alley that ran the whole block, may or may not be the answer to the problem. He believed

there were also dumpsters back there and that was where the garbage collection was done in that neighborhood. As the City Manager had stated, he felt there was a way to amend the Comprehensive Plan to allow additional use. Maybe at this point in time a conditional use of the property might be appropriate rather than just a full scale "put in anything that you can put into 'D' zoning" type of thing because the traffic patterns and demands on the business may change depending on what business was in there.

Commissioner Ledford said he would be in favor of the "D" change if we could restrict it to what went in. He realized that if something else went in, they would first have to come back to the Commission for approval. The area was in transition, but the thing he kept thinking about was that there were no protests, even from the people behind it. He'd even talked to some of the residents there, and they were in favor of it. Maybe we needed to take it slow and going with a restricted "D" might make a little more sense.

Commissioner Cole clarified that to access the alley would be off of Twelfth Street. Mayor Carroll said it was one thing to say that the employees would park back there, but he was not sure it was viable for a business to tell the customers that you had to drive down a half block in the alley to get to the business. So if there was not adequate parking and if the business was such that it was a big traffic demand, how long would it take before it became a problem for residents in the future? Commissioner Ledford agreed that there could be parking problems as things stood now with the current zoning.

Mayor Pro-Tem Griggs stated that perhaps we could allow rezoning to "D", but it still would not respond to the Master Plan. While everyone was in agreement that an improvement was needed, spot zoning was inappropriate. However, it may be possible to get around the Master Plan. Mayor Carroll felt it was not the City's intention to deny rezoning this to "D", but without conditions it may come back to bite us down the road.

Mr. Burroughs said the suggestion of going to "D" with the restriction was an acceptable alternative. Ms. Few said we could even go to the neighborhood business restriction, which was a lesser classification with additional restrictions. Mayor Carroll said in reading through the Planning and Zoning minutes, he thought he understood that the one property could be rezoned "D-2", but if the entire block were rezoned that way, then the City Ordinances wouldn't allow private residences. Ms. Few said yes, at this time, but we were taking steps on that issue. Also, we were not talking about doing the entire block, because the entire block was not an issue tonight.

Mayor Pro-Tem Griggs clarified that if we could zone this one "D", then we could zone it "D-2" Ms. Few said yes. Mayor Pro-Tem Griggs said he had thought that this couldn't be rezoned to "D-2" because of the homes in there, but that was only taking in the whole block. Commissioner Ledford said if we did "D-2", what about the next time someone came around and said, "well, you did it over there!". Would that happen? Ms. Few said yes. It had happened several times. Commissioner Ledford asked if what Mayor Pro-Tem Griggs was talking about was to resolve the issue in such a way that we didn't have the issue? Mayor Pro-Tem Griggs said currently we had both Mr. Burroughs and Mr. McDaniel agreeing on this spot zoning. Mr. McDaniel said it could be interpreted in either fashion. It could be interpreted as the City Planner was talking about where spot zoning was a deviation from the zoning, or it could be interpreted that spot zoning was a deviation from the actual use. It was up in the air, and what the actual use was became sort of a matter of judgment for the Commission as to what extent it was residential and to what extent it was already a business climate on the street. Ms. Few said one of the safeguards for going with the neighborhood business should this be approved, was that in the

“D-2” zone, all uses were restricted to inside the building. Mayor Carroll asked if that was acceptable to the petitioner? Mr. Burroughs said yes, it was.

Commissioner Cooper moved to accept the transition into a “D-2” zone with this particular piece of property [for Case Z-04-0636(A), 1110 Hawaii Avenue]. Seconded by Commissioner Robertson.

Mayor Pro-Tem Griggs said his mother owned two lots on Desert Lakes Road which were surrounded by residential property. If the City was to go in and zone that “D” or “D-2”, then that would be more clearly spot zoning because that was not a neighborhood in transition. However for this particular neighborhood because of some of the uses surrounding it, it could be called a neighborhood in transition and it could be something that was not as easily identifiable or called spot zoning. If that was the case, we still were talking about the Comprehensive Plan and what steps did we take to get around the fact that it did not apply or conform to that. Mayor Carroll asked if it would be enough or appropriate, assuming this item passed, to have the motion read, “to approve “D-2” zoning and express the Commission’s intent to revise the Comprehensive Plan to show this block as an area in transition between existing zones”. Mr. McCourt suggested the Commission couldn’t really make that decision before they held the public hearings. Mayor Carroll clarified it was the Commission’s intent to do that. Mr. McDaniel said it could be the Commission’s intent to hold public hearings on the issue. Mayor Carroll asked if that got us over the initial concern that we were not addressing the Comprehensive Plan or the potential impact on the Comprehensive Plan? Mr. McDaniel said he did not have the Comprehensive Plan Ordinance in front of him to know what we were required to do. Ms. Few said we had included in approval Ordinances for rezoning, wording that stated that if it did not conform to the Comprehensive Plan, then the rezoning would amend the Comprehensive Plan in that action. Mr. McCourt suggested going back to the Mayor’s suggested wording because with the action tonight staff hadn’t done any publications. Ms. Few said yes, we had. When we published the proposed Ordinance, which was for two publications, it included changing the classification of a certain area from its present designation and zoning district of “C” to “D” for that certain tract of land within the corporate boundaries of the City. In the text it did include amending the Comprehensive Plan, or a lesser classification.

Code Administrator Pat Vandergriff said if the Commission did not amend the Comprehensive Plan, they may create a situation where a Comprehensive Plan was not legally enforceable. Mayor Carroll said he believed the intent was to go in that direction. Mr. Vandergriff recommended that the Commission request staff to address that issue of amending the Comprehensive Plan for the entire area at a later date, and he further requested that we do it after completing the new Zoning Ordinances because there may be commercial zoning systems that were more appropriate for this.

Mayor Carroll said if the information as publicly noticed indicated that the Comprehensive Plan would be changed to reflect any possible rezoning, then he felt we were covered. Ms. Few said because of the extraordinary majority needed to approve this given the recommendation of denial... Mayor Carroll said it was a simple majority of the Commission. Ms. Few said yes, but it needed a finding that the rezoning would not grant a discriminatory benefit that would harm the landowner or neighboring properties.

Commissioner Cooper amended his motion to accept the transition into a “D-2” zone with this particular piece of property [for Case Z-04-0636(A), 1110 Hawaii Avenue], with the finding that the rezoning would not grant a discriminatory benefit that would harm the landowner or neighboring properties. Seconded by Commissioner Robertson.

Mr. McDaniel pointed out that the definition of spot zoning was not written in stone in the Statutes of what exactly it was. It was a term used to mean that you were screwing around with your Comprehensive Plan. Depending on who you were talking to, it was either changing from the existing use or it was changing from the plan for special interest purposes. Mayor Carroll said it was also typically used in the context that you were doing something negative to someone who had a legal right to oppose what you were trying to do—that somehow you were being detrimental to their best interests. The fact that no one within the legal protest area had expressed a concern put a little different light on the spot zoning issue in relation to this particular case. Mr. McCourt clarified that the property owners did not need to give us warning when they were going to sue us. Mayor Carroll said he understood.

Mayor Carroll called for the vote on the motion. **Mayor Carroll, Mayor Pro-Tem Griggs, Commissioner Cole, Commissioner Cooper, Commissioner Robertson, and Commissioner Ledford voted “aye”. Commissioner Moncada voted “nay”. The motion carried by a roll call vote of 6-1-0.**

Mayor Pro-Tem Griggs said he would ask the petitioner and staff to work very closely together to handle the specific issues we brought up on this, primarily the parking, to make sure that those things were addressed to keep the roadway safe.

The Commission recessed at 8:25 p.m., and reconvened at 8:30 p.m.

3. Consideration of a side yard setback variance for Tierra de Suenos, Inc. [Case V-04-0475 (A), 2506 - 2669 Los Alturas Ct].

Recommendation: Approve the side yard setback variance for Case V-04-0475 (A) with the requirement that two hour fire wall be required on all walls abutting/adjacent to the property line.

Mr. McCourt said this was a piece of property located off of Tenth Street, and it was zoned for townhouses. In a townhouse development you were not required to have a side yard setback at all. So each of the units in theory could have a common wall between them, and you could have a solid block of units. That was not necessarily what was being suggested. There were two examples in the backup, and they may use a zero lot line on some of the units, and they may then have a setback of four feet on other units. The staff concern here was in a public safety or fire situation. We were not necessarily opposed to the four feet which was a little tough for our fire fighters, but we were more concerned in making sure that corridor had fire protection. That was why the recommendation was written in the manner it was.

Mr. Tom French, Tierra de Suenos, said the Commission had approved this zoning and had ultimately approved the subdivision as well into a townhouse zoning. Everything was fine until his business discovered that they had misunderstood the subdivision regulation regarding the side yard setback. They had gone into it knowing they could build these single family detached townhouses, and they could build them all the way up the side yard with no setback whatsoever. There was a provision within the Zoning Ordinance that stated at the end of the structural entity you had to have a five foot setback. So it said basically it was zero or five feet, and there was nothing in between. They had misunderstood that and thought that meant at the end of the blocks of houses similar to a corner setback. The International Residential Code (IRC) which the City adopted governing the Building Codes, recognized that on townhouses you had to have a two-hour fire separation when they were connected. They were proposing that they would agree to the two-hour fire separation, except that when they had separated them by that four

feet, that each of the walls would have a one-hour fire separation or either wall would have a two-hour fire separation. That was acceptable to Mr. Vandergriff and something he could live with. That was above what the IRC recommended.

Mr. McCourt asked if we were in agreement on this? Mr. French said he thought we were in agreement, other than he had heard that Public Safety was not in agreement. The IRC stated further or more restrictive building guidelines, not at five feet, but at three feet. What they were agreeing with Code Enforcement on was that they would adhere to a two-hour fire separation, either by one of the walls having two-fire separation or both walls having a one-hour fire separation if it was less than five feet. They were asking for four feet, which was still in excess of the three feet that the IRC called for. They felt it was safe and that it was a better solution in a townhouse setting than zero side yard setbacks.

Mr. McCourt said the fire walls would inhibit the spread of the fire across those areas. We had a concern with our fire fighters in moving down those corridors. In the event of a fire, we would be moving fire fighters and equipment down through those corridors. That was why we wanted the fire protection. He thought we wanted it on both walls. Fire Chief Joe Bailey said both from a police and fire standpoint, we would not want people going down that corridor. They normally made access on two points to a structure when there was a fire. Under Option 1, to gain access to the structure at two points, would require them to go down that corridor. That would also pertain to a police scenario where you had a domestic inside or something. You would want Officers to go to both access points. It would be a death trap going down that corridor. We would much rather see Option 2 where there was a two-hour wall separating the two structures, and then we would have access on the four foot setback, which gave eight feet between the structures. From a fire and police standpoint it would be much better to do Option 2.

Mr. McCourt thought we were also willing to accept Option 1 with adequate fire protection on both walls. Mr. Bailey said that was not what was agreed upon. Police Chief Sam Trujillo said that the four foot space was not acceptable, and it would actually be safer to connect the walls. Mr. Vandergriff said from a Code standpoint whether the construction rating was all on one wall or on both walls was kind of irrelevant. It was designed to protect property A from property B to prevent the spread of fire. Mr. McCourt said that was from the Building Code standpoint, but we were talking about a people protection standpoint here. When we had people in that narrow corridor, it did make a difference if the fire could come through on one side. We wanted to block it on both sides so that anyone in that corridor was safer. Mr. Vandergriff thought that was what the contractor would want to do economically anyway, because the cost of penetrations and equipment in a two-hour opposed to just running a one-hour wall on both sides was much more expensive.

Mayor Carroll said in the packet there was an Option 1 and an Option 2. Did they want to use both of these options as part of their development, or one over the other? In looking at Option 2 if they were just proposing to flip it across the property, then there would be enough separation on both sides. Mr. McCourt said we did not have a problem with Option 2. Mr. French said they would have the same disagreement on Option 2 if the property adjacent to it were on the property line. Then you were still back at a four foot separation. They would use both options. He didn't believe that the argument was whether they would prefer four foot or eight foot because that was not really the question. The question was whether four was acceptable where five foot was actually the minimum. If the Commission did nothing tonight, they could have one of these homes on the property line and the other one five feet away, and make no provisions for increased fire separation on the one building. They would not be required to upgrade the building methods at all for the house that was five feet off.

Ms. Few disagreed. If there was no variance, then ten feet would be required between two buildings. There would be a requirement for a five foot setback on each side. They would have no zero lot line unless it were attached. Mr. French said he stood corrected. Ms. Few said if we did nothing tonight, then any corridors would be ten feet wide. Mr. French said there would still be five feet between the building and a fence. So when we talked about whether we should send people in the area or not, that was actually a different conversation because you still only had five feet. What they had agreed with Code Enforcement on was that they would upgrade it to a two-hour fire separation either by both walls having one hour, or by either wall having two hours. That would exceed the Building Codes that were applicable because the Building Codes didn't recognize that hazard until we got to a three foot separation.

Mr. McCourt said he thought our concern was that we wanted both walls to have one hour, and not one wall having two hours and another having ten minutes. We wanted both walls to have one hour. We were agreeable to the variance, but we just wanted the one hour so that the fire couldn't come in from either side of the corridor. If you had two hours on one wall, that was great because no fire was coming through from there. However, it could come through from the other way into the corridor, so we were saying we would like one hour on each side of the corridor.

Mr. French said that did greatly affect their designs in how they designed the buildings. For instance, if they had a one-hour wall requirement on both walls, that meant they couldn't put a window in that wall. Mr. Vandergriff said they could put one in, but the window itself would have to be rated for 40 minutes. Mr. French said they could not economically put residential windows in. Mr. Vandergriff said on the other hand, if they went with a two-hour wall and tried to put a window in there, it would actually have to have an automatic closure. One of the things they would find out was that the cost of penetrations when doing electrical outlets and so forth in two different one-hour walls would be a lot cheaper than trying to run it through a two-hour wall. So the electrical prices would be driven up on that. He suspected it would be quite a bit cheaper to try and figure out how to do both of them with one-hour walls. That didn't prohibit them from opening the windows in the porch area. Mr. French said regardless, their plan was that there would not be any penetrations in the wall on the property line. That just didn't make any sense.

Commissioner Ledford asked if the disagreement was that it was required five feet, but that they wanted to go four, yet three met the standards that we'd adopted? Mr. French said three feet met the building standard. Commissioner Ledford clarified that didn't meet fire and safety, though. Mr. McCourt said it didn't meet the zoning standard, but then we did have public safety concerns as well. Commissioner Ledford asked where the disagreement was? Mr. French said his only disagreement right this instant was that they wished to move forward with a two-hour fire separation between these units, and that they have the flexibility to designate one of those walls with a two-hour fire separation or both walls with a one-hour, which would leave them with design flexibility. Mr. McCourt said the City wanted the one-hour on each wall so we didn't get the fire in the corridor area. Commissioner Cole asked why they had to have a window in the wall? Mr. French said it could very well be that they would have to have a bedroom egress in that area. The whole concept was that there was a one-acre park in the center of this townhouse arrangement. With the side yards, even that one foot became a premium because they had taken the heart of the watermelon and given it up as the shared space in the front. This one foot may seem nit-picky, but in the grand scheme of things it made quite a bit of difference in their designs.

Commissioner Cole thought we had agreed to a compromise on this. Mr. French said he was in agreement with Mr. Vandergriff, but not with Public Safety. Mr. Vandergriff said his memo of December 13th basically outlined what the Code would require. As he stated earlier, however, Public Safety had the two additional concerns they had brought up. That was why Mr. McCourt was trying to address that by asking for the one hour on both sides or for the additional space. He thought everyone could work this out on some design criteria if they did wind up having to have windows in that area, but it would make the windows somewhat more expensive. Windows in a one-hour wall were somewhat more expensive, but windows in a two-hour wall were astronomical.

Commissioner Robertson didn't think the one-hour fire walls was really the problem, but rather the corridor space. Mr. McCourt said the Frenches had reluctantly agreed to reduce that five foot down, but then they wanted the one-hour fire wall on each side. Chief Trujillo requested that they either have enough space in that corridor to go through, or not have the corridor at all. They did not want a reduced corridor. But if the vote tonight was to accept the smaller corridor, then they would like improved firewall on both sides. Public Safety's preference was to not have the space in between the buildings, or make it big enough for them to get in there. They would prefer Option No. 2.

Commissioner Ledford asked if five feet was the current zoning, and if it would take a variance to get to four feet? Mr. French said yes, and there was nothing in between. Mr. Vandergriff said if there was a ten foot separation, then it would have the standard construction material rating which was roughly 40 minutes. Mr. McCourt said because we were looking at allowing that reduction to four feet between structures instead of ten feet, then we would like the additional fire wall protection. He thought what Mr. French felt was that if there was a two-hour fire wall on one side, then they could utilize standard construction because the IRC had a three-foot separation requirement where it had to be three feet or less before it required the one-hour fire wall. However, from a Public Safety standpoint, we wanted protection on both sides of that corridor.

Commissioner Cooper asked if there would be a fence around the outer walls? Mr. French said no. Under Option 1, the house on the property line served as the fence. The construction method of that wall was 2 by 6 with fiberglass insulation, 5/8th inch sheetrock on the inside, and a cement siding on the outside. So they would get a two-hour fire wall on the wall which was on the common property line. From a Building Code standpoint, he felt they were on solid ground. The IRC didn't even recognize an increased hazard until you got less than three feet of building separation. From a Building Code standpoint, he and Mr. Vandergriff were in agreement that they had agreed to go one step further than that. The issue became whether it was felt that a four foot wide corridor was a significant enough safety risk to fire and safety to warrant deviation. Commissioner Cooper asked if he could live with the five foot separation? Mr. McCourt said actually we were talking about going from ten foot down to four foot. Mr. French felt the point which kind of confused it was that if there was a fence on the property line, under current residential Building Codes you could have a five foot corridor between the house and the fence with no fire classification for that exterior wall. The fence could be combustible as well.

Commissioner Robertson said he had a problem with putting a two-hour fire wall in one wall and not in the other. It seemed that was taking it for granted that a fire would be in the house where the two-hour fire wall was. What if it started in the house and there was only four feet to get through there? That was where the problem was. The only way he would support this was if they put a one-hour fire wall in each one of those walls.

Mayor Pro-Tem Griggs asked the difference between a one-hour fire wall and standard normal construction? Mr. French said for his purposes, the problem became with those window holdings. If it wasn't for that, he would have no problem. Because these were exterior walls and they were only using 2 by 6 exterior walls filled with fiberglass insulation, the only difference was the 5/8th inch block. Mr. Vandergriff said the 5/8th took it to the one hour, and basically they were doubling up everything for the two hour. The entire purpose of the Code up until recent years had been solely for the purpose of slowing the spread of fire and to allow fire departments enough time to actually deal with it. In the last cycle it went up to the two-hour fire wall. The other thing they'd started trying to do was to design into the Code cycle for the poor sucker that had to go in and fight the fire. That brought up an issue on these very types of designs and it was probably something that needed to be addressed in the Code if they were going to have it in their intent to protect fire fighters. Under the Code, in order to protect one building from another they required that fire wall to meet assembly from both sides. So it could take two hours to burn out, but if the building next to it caught on fire, then it took two hours to burn through and into that building as well. But that didn't take into consideration if somebody happened to be in between the buildings when it flashed back and gave a nice good oxygen explosion. The other intent was that basically the partition wall last long enough that the buildings were consumed on both sides, or that technically on one side it was consumed and the fire still had not penetrated into the next unit because it was brought under control.

Commissioner Ledford said if that was true, then why did Public Safety not agree with it? Mr. Vandergriff said he wasn't in disagreement with Public Safety. In fact if he were instructing a fire fighting situation where there was a corridor, his instructions would be to fight the fire from the front and the back, and not to go in there. A fire would flash over at a certain point, and it was pretty explosive.

Mr. French said they were requesting the flexibility to have a two-hour or two one-hour fire walls, and a variance to four feet. They could live with one hour on both of those walls if they could get the variance for four feet. He didn't agree with Public Safety on this, but in the spirit of cooperation they could live with it. If they did that, then he didn't think there was a disagreement. Mayor Pro-Tem Griggs asked what their current plans were regarding the Option 1 and Option 2? Mr. French said they would have primarily Option 1's, and would face that portico to the east and south, shielding it from the summer sun. Option 2's would be used on corner lots or irregular shaped lots where they couldn't do that and where they would actually have common walls.

Mayor Carroll said if they could live with the agreement with Public Safety, then the one hour on either one with the four foot would work. Mr. French said the way this was written was that the recommendation be for a two-hour wall to be required on all walls. Mayor Carroll said that was not what they were talking about. Mr. McCourt said he would change that right now.

Commissioner Cooper moved that we accept the side yard setback variance for Tierra de Suenos, Inc. [Case V-04-0475 (A), 2506 - 2669 Los Alturas Ct], with the requirement that the one-hour firewall be required on any wall closer than five feet and running parallel to a property line or an adjacent building. Seconded by Commissioner Robertson. All voted "aye". The motion carried by a vote of 7-0-0.

4. Consideration of Ordinance No. 1228 amending Chapter 22 of the Code of Ordinances relating to subdivisions [Case M-04-0318 (A)].

Recommendation: Approve the Ordinance for first publication.

Mr. McCourt said there were two items being looked at in this Ordinance. One item was a question that it appeared our Code was in conflict with the State law. That question was that in the extra-territorial area, we didn't have a choice on whether or not we could exercise jurisdiction—we had to exercise jurisdiction. There was a way of reading the Code under 22-01-020 that could imply we were not going to exercise jurisdiction within some areas of the extra-territorial and only in portions of it. So that was being struck out.

Mr. McCourt said the second area had to do with family exemptions and exempt subdivisions. Exempt subdivisions by definition were not subdivisions i.e., they did not have to meet the subdivision requirements when they were done. There were eight classifications that met exempt subdivisions, and one of those had to do with the family exemption which allowed a lot division and property be given to a family member. We didn't have any problem with that concept. However, what we did have a problem with was that some day that property was likely to change hands and go out of the family. Because of that, we felt there should be a legal access to that property, and that had been put into the Ordinance. We also thought it should meet some minimum requirement as far as size. This was normally used on very large lots, so the minimum of two acres was put into the Ordinance. The third item put in was that the family member it was given to had to stay in the family for a ten year period of time. That was to avoid somebody carving off a piece this year and giving it to a family member, who then turned around and sold it, and then carving off another piece, etc. There was no limit on the use of this, so we put in a suggested time limit of ten years that it would remain in the family.

Mr. McCourt said he'd had a chance to talk very briefly with Klad Zimmerle of Alamotero Land Surveys, and he'd indicated that this was in line with what was going on at the State level. Mayor Carroll clarified this was for first publication, so there would be time for public input.

Mayor Pro-Tem Griggs said he'd visited with the City Manager on this earlier. To him, it seemed that the ten year number was unreasonable and really unrealistic. In numerous instances, in years past when some of these properties were divided and given to family members, some of it was specifically given to them so that they could look at selling the property to provide funding for them. For us to pick a number like ten just opened us up to a lawsuit action of some sort. If we wanted to do that, then we needed to look at what a more reasonable number would. If we wanted to put some kind of limit on it, he felt we should pick something like three years instead. Commissioner Robertson agreed. He felt the ten years was a little far fetched.

Ms. Few said just because an exemption was given on one piece of property, it didn't mean that they couldn't come back in later and do a full subdivision. Coming through as an exempt subdivision under a claim of exemption for the family, if they wanted to sell it a later date within that ten years, they could come back in as a full subdivision. It didn't mean that they couldn't dispose of the property, but it meant that it was going to come back for the full review. Mayor Pro-Tem Griggs said what this did, though, was to say that the only way they could sell it was if they came in and subdivided to sell that. However, they couldn't sell their whole tract because this said that they couldn't. Ms. Few said they hadn't had a subdivision, so they were not re-subdividing. Mayor Pro-Tem Griggs said he understood, but if someone wanted to sell their whole two acres, they wouldn't be able to. Ms. Few said the point was that there were means by which it could be disposed of. Commissioner Robertson said, though, it would be very costly and time consuming. Ms. Few said actually State law did not provide for municipalities to have exempt subdivisions. That was a provision in State Statutes specifically reserved for County

subdivisions. We had put it in under our Charter status. This was something that was very unique for municipalities to do at all. Mayor Pro-Tem Griggs asked if she had a special disagreement against three years or against any number other than ten years? Ms. Few said no. She simply wanted to make the point that there were other options. Mayor Carroll said three was as arbitrary as five or ten at this point.

Mayor Carroll said in the Manager's conversation with Mr. Zimmerle, did he give any indication of what time limits at the State level that they may look at? Mr. McCourt said he did not recall him mentioning that. Mayor Carroll said this was not something which came up on a regular basis. If there was concern about the ten year period, he was not adverse to some shorter period. If it turned out that seemed not to be working the way the intent was meant, then there would be an opportunity for a future Commission to possibly change it. Commissioner Cooper asked if we could put a sunset timeframe on somebody's personal property? Mayor Carroll said he believed so, under this. He didn't have a problem with whatever number was picked, and if three years made the majority of the Commission more comfortable than ten, then fine. Mr. McCourt said that would be fine.

Commissioner Cooper moved to approve Ordinance No. 1228 amending Chapter 22 of the Code of Ordinances relating to subdivisions [Case M-04-0318(A)], amending the ten years to three years, for first publication. Seconded by Commissioner Robertson. All voted "aye". The motion carried by a vote of 7-0-0.

ORDINANCES AND RESOLUTIONS:

5. Ordinance No. 1229 amending the foundation requirements of the International Residential Code as adopted by Section 8-03-030 of the Code of Ordinances.

Recommendation: Approve the Ordinance for first publication.

Mr. McCourt said currently we had a requirement that all foundations had to be engineered within the City of Alamogordo. This apparently related back to a time when we had some areas in town where there were houses that were settling and cracking and our insurance company had wound up buying quite a few of those structures. In order to provide a safer foundation, we apparently had adopted this policy that they had to be engineered. The builders had asked us to reconsider that particular policy. Staff had met with representatives from the Building Association, as well as with members of Code. We had also talked with our insurance company concerning this. We feel we had worked out a mutually acceptable manner of addressing the concerns expressed, which did not require an engineered foundation in every case.

Mayor Carroll asked if he was correct or incorrect in saying that with this change it didn't even require any soil evaluation, just that you had to build a wider footing? Mr. Vandergriff said it allowed us to use the assumption that it was the amount which the Code said you could automatically assume for design criteria. However, if we used that assumption rather than doing it by testing, we had asked for a one-third increase or factor of safety in the width of the footings to spread the load even further than what it would require otherwise. We also maintained a provision where the inspectors or himself could go out and say they weren't happy with the condition of the soil and that they wanted a site specific soils investigation done. Mr. McCourt said he believed we were also able to designate specific areas of town where we would always require an engineered foundation. Mr. Vandergriff said one area was specified within the Ordinance re-write, but we allowed others to be added by the Building Official based on their location within the community. Most of the developers had also asked us to consider a

change to our Subdivision Ordinance to now require that site specific soils investigation on the lots within a subdivision, so we would be meeting with them to discuss that. Then they could provide that information to the contractors to utilize in this requirement.

Mayor Carroll asked if we were assuming more liability under this procedure than what we currently had? Mr. Vandergriff said we had established a training procedure by which the contractors had to meet to comply, and then there would have to be a certification that would be developed for them to sign specifically in the same way that an engineer certified his work. They would be certifying it, and according to our insurance people, that really protected us along with the fact that we were going with requirements that were over Code and which had actually been designed to ensure that they meet or exceed the standards of what had been submitted under those engineered designs. On page 3 of the Ordinance, item No. 4, it stated, "Non-conventional foundation designs shall not be allowed under the contractor's certification provisions of this section except as approved by the Building Official, when the Building Official determines that such non-conventional design meets the intent of the Code". That was wording staff actually came up with, and it was to try and cover a situation where somebody built a foundation that needed exactly these requirements, but they decided they wanted to put something extra in, such as post-tensioning. We could allow them to put something extra in there and not have a problem. He believed we could do that under the provisions even if we struck everything from the word "except" on through. As long as it met or exceeded our standards, he thought we could still do that without putting something on the onus of the Building Official saying that we might have a non-conventional design, period. His standard habit would be that if it was purely a non-conventional design and didn't incorporate the requirements of this Ordinance, he would turn it down. However, at some future point there might be a Building Official who might take that and accept it as a totally non-conventional design. So if we struck those words off the end of that, we could utilize the basic minimum standards on it and if somebody wanted to exceed it, it certainly would not be harmful to the Building Official.

Mr. McCourt felt from a liability standpoint, what we had now was an engineer's stamp indicating it had been designed in a specific manner. If it was not built there, then it would fall back on the builder. If it had been built according to design and then failed, it still didn't necessarily give the City any additional protection. If it was designed, been built as designed and it broke, then we would still get sued. Plus, the engineer was going to be dead someday and they would not be available to go back against, and then it could still come back against the City. The same was true of the builder, and the City was the only entity that was still going to be here. We either got an engineer on it or a trained knowledgeable contractor on it, plus we still had some Code backup on it.

Commissioner Cooper suggested in paragraph 4 to delete the word "except". Mr. Vandergriff said he'd planned to put a period after the word "section", and just delete everything from the word "except" on. Commissioner Cooper said that was fine. Mr. Vandergriff said that he would also make the Ordinance consistent with the words "Building Official", and not use different titles. Mayor Pro-Tem Griggs also pointed out that it might not be a good idea to refer to the Community Development Department as that department may not exist in the future. Mr. Vandergriff said he would change it to "the City" instead.

Mayor Pro-Tem Griggs asked about the houses being built south of First Street and east of Scenic Drive. Was the soil such that they would want to exclude it from the contractors' certification already? Mr. Vandergriff said it would depend on the method of development. One of the important issues we needed to think about was the method of subdivision approval,

subdivision design, and subdivision inspection. This City had taken a monstrous leap forward technologically over the last 25 years in that regard. Therefore, we didn't have situations where we had excessive amounts of fill of old arroyo locations of which we had not compacted until we reached the upper two or three feet. Those things plagued the City in those years of incidents. Also, most of that area was being developed more on a raw, native type of atmosphere and it was not as critical of an issue.

Mr. Tom French, representing the Building Contractors Association, said they were in favor of this proposal. They believed it protected the City because only contractors licensed by the State of New Mexico would be allowed to sign off on their own foundations. Other than that, if it was an owner/builder, then they would have to have it engineered. The logic behind that was that the State of New Mexico had certified that anybody holding these two licenses was qualified and competent to interpret the applicable Codes. That was the intent of that license. The other thing which had changed in the last several years was that with the adoption of the International Residential Code, that Code was far easier to read and to implement in the field than the old UBC which it replaced. That greatly increased the odds that the quality of the foundation was going to be understood, that it was going to be designed adequately, and that it was actually going to be built in the field, and they didn't have to just rely on the Building Inspector. That was an additional protection to the City which didn't exist just a few years ago because the UBC was a complex Code that was difficult to read. There was a requirement for continuing education, and the cost of that would be borne by the builders and not the taxpayers. So at least every two years, all the people that held these licenses who wanted to sign off on their foundations, would have to go to four hours of training, and that was specifically on soils testing and evaluation and how it applied to foundation designs. Third, they were increasing the Code requirements as part of this regulation. So not only were they increasing when there was not site specific testing, but they were increasing the footprint by 33 percent automatically, and they were also adding requirements for reinforcing rebar that didn't exist. They were not only adding them, but were building onto it. There was a paragraph in there which said they would take the cross-sectional area and there was a calculation which was made to determine how many sticks of what size rebar went into it. So between the Building Contractors Association and Code Enforcement, they had actually increased by far above minimum Code requirements which they were willing to go to so they could get this Ordinance passed.

Mr. French thought the area south of First Street and east of Scenic was a good example to talk about. There were some developments that would require site specific soils testing that were different from other developments. For that development, we would not use the same type of requirements that we would use on a typical lot at Los Alturas. Los Alturas was a development where all of the lots were cleared. They were compacted and soils testing was done before it was started, so the whole thing was engineered. On subdivisions that were more rural, such as the Bar M one or Canadea Subdivision, they agreed that the subdivision regulations needed to be amended so that as part of the subdivision approval, there was a method which was agreed upon on how they were going to deal with soils testing for that development. They felt that was important and was a hole in the game plan which needed to be fixed. All in all they felt it was a win-win situation. It would help the builders to control costs, and it shouldn't greatly increase the City's liability or theirs. At the end of the day, the builders were liable and the City was liable for its part in it.

Commissioner Cooper said if someone was building a home and requested a post tension foundation, could it be done? Mr. French said yes. Post tension was a design method which exceeded the minimum Code requirement. Either we could go to an engineer and get an engineered design with a stamp and the Code would accept it, or we could use the IRC with

these proposed upgrades, and on top of that we could use post tension. There was nothing in the Code which prevented anyone from exceeding Code requirements. Code requirements were minimum acceptable standards.

Mayor Pro-Tem Griggs asked Mr. French if he viewed the penalty provision in this as being either sufficient or overly harsh? It was worded to state that any contractor found circumventing the intent of the provisions shall be permanently barred from using the self-certification option. Mr. French thought that was harsh only because permanent was a long time. He agreed in principle that there should be a harsh penalty for it. Honestly a contractor would be very foolish to take on the liability of signing off on someone else's foundation. They really shouldn't. The Building Contractors would be coaching their members not to do that under any circumstances because they would take on a level of liability that was ridiculous for a project which was not theirs. If the Commission wanted to change that to a time frame so that if a young 21-year old made a mistake that he wouldn't be barred forever, he would probably support that.

Commissioner Cooper moved to approve Ordinance No. 1229 amending the foundation requirements of the International Residential Code, with the change in language on 401.42.4 as discussed (putting a period after the word "section", and striking all the wording from "except" on through), for first publication. Seconded by Commissioner Robertson. All voted "aye". The motion carried by a vote of 7-0-0.

10. Resolution No. 2004-55 declaring a portion of the Fairgrounds Parking Lot as surplus property.

Recommendation: Approve the Resolution.

Mr. McCourt said this was a citizen-initiated request to see if the City would be interested in selling a piece of public property, which was some of the Fairgrounds parking lot. It was located to the south of Peppers Restaurant. There had been a question whether it was a dedicated roadway between Peppers and this piece of property, and according to all the records we'd researched, it was a dedicated roadway and it was not included in the parcel. We currently had an agreement with the County which permitted them to utilize this piece of City-owned property for Fairgrounds parking. The agreement with the County did allow us to carve off a piece or pieces and declare it surplus if we chose. As of this date it had not been declared surplus by the Commission, and so no sales could be considered unless the Commission felt it was surplus.

Mayor Carroll said normally his understanding of surplus property was that there was no current or proposed governmental use of the property. This was currently being used under an agreement with another governmental entity. He didn't know whether we'd had any contact with them on it, and so he didn't know that he was necessarily in favor of just chopping off a piece of this and putting it up for sale without any overall plan or idea on what it was worth. Obviously if we wanted to divide the whole piece of property up into possible parcels for sale, it would have a much higher value than if we just chopped off a little piece. He didn't know that he was in favor of disposing of any of it at this time. Commissioner Robertson said he wasn't in favor of it either.

Commissioner Cooper moved to decline Resolution No. 2004-55 declaring a portion of the Fairgrounds Parking Lot as surplus property. Seconded by Commissioner Robertson.

Mayor Pro-Tem Griggs didn't know whether he was actually opposed to this, although he may be opposed to this approach. When we re-entered the agreement with the County for the use of the land, the City Manager and he had talked about certain building parcels should someone come to us and have an interest in buying part of the lot. He still favored that approach to an extent, but before we jumped and did either one of those, it would be preferable to get input from the County to see whether it was something that would destroy them or not.

Commissioner Ledford asked what we did when somebody approached us on purchasing surplus property? We didn't sit and pick about subdividing it and what the best market value was. So if we had surplus property, wouldn't we want to sell it to have money available for other things much more important to the residents than surplus property? Mayor Carroll said right now it was being used. It was not property that was not in use or that had no potential for use in the future by the City. We had an agreement with Otero County to provide this piece of property in conjunction with the Fairgrounds for parking, so it was being used for governmental purposes. Commissioner Ledford thought we had talked with the County about putting this up for surplus property. Mr. McCourt said we talked with them when we redid the Lease Agreement, and we'd discussed potentially cutting out lots. To the best of his knowledge, we had not taken this precise proposal to them and asked what they thought of it.

Mayor Carroll said if we were going to consider disposing of this piece of property, we ought to have an overall plan. If we declared this piece surplus and just told the County that it was in the agreement, and then someone came along and asked us to declare four acres in the middle of it as surplus, what did we do then? Commissioner Ledford thought we did need to talk to the County, but if there was a piece of property that was worth quite a bit of money, that could come to better use than just renting it for \$100 a year. The County needed to have some input, but he didn't understand surplus property if it was not intended to put it to good use. Mayor Carroll said it wasn't surplus property—the request was to declare it as surplus. Commissioner Ledford asked what it took to declare it? Mayor Carroll said that was exactly what was being proposed. Commissioner Ledford asked if the concern was that we needed to talk to the County to see what their input was on this? Mayor Carroll said he was just saying that he had a concern with it; not that we just shouldn't do it. Commissioner Ledford said if we talked to the County and they were okay with it, then why wouldn't we want to declare it surplus and sell it and put it to better use than \$100 per year?

Mr. Vandergriff said if we were going to sell a piece of it, then he personally felt we should subdivide the whole property into equitable sized properties so that we didn't get stuck with some small corner or section. If they were going to declare it as surplus, he would recommend that the whole thing be declared as surplus and that staff come back with some form of subdivision. Another thing he would point out was that Mr. Hartman was primarily interested in this in order to protect the area that he parked in. Even if it was declared surplus and if it was subdivided, then we actually came in and had an appraisal done on the property. It was actually advertised so that other people would have the option to make a proposal to buy the property, and Mr. Hartman may very well not end up being the buyer. He would recommend subdividing so that we didn't wind up with a small unwanted piece of it somewhere. Commissioner Ledford said if we sold it, then we wouldn't have it anymore and that was the whole point. Mr. Vandergriff said generally if we sold property off, that property was utilized to buy up right-of-way for other projects or where we needed City funds to match Federal funds, etc. Commissioner Ledford said we had a piece of property on South 54 that was just sitting there with a sign on it, so why didn't we subdivide that and sell it? Mr. Vandergriff said we actually occasionally got calls on that property. Hopefully at some point the right buyer who was really serious and who had the financial backing would show up and surprise us all. Actually, that

particular piece of property was zoned industrial and was really designed and laid out for a bigger occupant.

Mayor Carroll asked if this road in the Fairgrounds parking was or was not a dedicated road? Mr. McCourt said to our knowledge, it was a dedicated road. Mayor Carroll said if it was dedicated, then unless this was on a property line, were we retaining some portion of ownership to a strip of property on the north side of the road? Mr. McCourt said it was not intended to indicate that. Mayor Carroll said he understood that Mr. Hartman was interested because he wanted a piece that adjoined his property, or were we going to wind up with a strip between his property and a dedicated road? Mr. McCourt said we were not intending on retaining any property between the roadway and the property that was being declared surplus. Mr. Vandergriff said the City's property line stopped at the south side of that roadway, although the roadway may not be exactly where it was intended to be constructed. Mr. Hartman's property line was at the other side of that roadway. There was a roadway through there which ran all the way back to the current County shops, and it was a dedicated roadway. Mr. McCourt said there was no gap. Mr. Hartman was the person who had initiated the request, but there was absolutely no guarantee that he would be the successful buyer if we declared it surplus and put it for sale. Commissioner Cooper asked if it would have to be advertised? Mr. McCourt said yes, and even then we'd had circumstances where people put in bids and on the night it was before the Commission for approval, others would come in and put in their bids at the last minute.

Mayor Pro-Tem Griggs said this was a big chunk of highway footage which could be a fairly valuable piece of property. His recommendation would be that we set aside building blocks, but that we talk to the County and get their feel on it first before we just went ahead and did it.

Commissioner Cole felt we should not sell anything in that area until we had a better understanding of the entire piece of property. Was some of it owned by the County? Mayor Carroll said yes. Commissioner Cole asked if some was owned by the City? Mr. McCourt said yes, on the map provided, it was the large triangular-shaped piece. The area to the east of that was owned by the County, down to where the drainage ditch was. They were in the process of relocating their County yard at this time. Commissioner Cole felt if there was the possibility of selling the entire thing or of some type of development between the County and City, it would be better to not have it broken up until we had a plan in place. Mayor Carroll said there had been some talk through the years of the County's long range plan regarding the Fairgrounds, whether they continued to have it there or to move it elsewhere out into the County. That re-emphasized his concern that if we were going to do this, that we ought to do it in more of an overall plan than just coming in and cutting off a two-acre section and see what happened. The County may not care, or they may ask us not to do that. Commissioner Cole reiterated that we needed a plan, and said at this point he would agree with the motion.

Commissioner Ledford said since he suspected we were going to deny this action, were we going to have staff go back to the individual who had requested this and explain to them that he needed an overall plan and we needed to talk to the County? If some other business wanted to come in and get that property, it would happen. If staff's recommendation was that this could be surplus property, then all of a sudden it couldn't be? So his point was that if Mr. Hartman wanted this, how would he get the overall plan started? Mayor Carroll said we weren't talking about him coming up with a plan, but for the City to come up with a plan. The motion was to decline the request to declare the property as surplus, period. If that action carried tonight, then we could direct staff to come up with an overall plan if the intent at some point was to sell off the property. We might want to look at the overall thing and to have it divided into parcels that may

be marketable for most of them, as opposed to just chopping off parcels from it. In conjunction with that, we should contact the County and get their input as to whether or not they cared if we did that, what their long range plan may be for their property, and whether there would be any advantage to combining the two parcels if they ever intended to move away from their part of it. That was what he meant by an overall plan for the property, and not just take the first request which came along and put the first two acres up for sale. As was pointed out, it may or may not go to Mr. Hartman if it was declared surplus. It could go to someone else who decided that two acres would be a nice place to put another restaurant.

Commissioner Robertson said he wouldn't be interested in selling any of this so there was no need to go to the County. However, he felt he knew what the County's answer would be anyway because they'd been using it, and over the last few years they'd averaged \$44,000 per year income off of this to help with the Fairgrounds. He was pretty sure the County wouldn't agree for us to sell it without an argument. Commissioner Ledford said he wasn't sure about that because he understood that the County had talked to Mr. Hartman about it and had said it was okay.

Mayor Carroll called for the vote on the motion. **Mayor Carroll, Mayor Pro-Tem Griggs, Commissioner Moncada, Commissioner Cole, Commissioner Cooper, and Commissioner Robertson voted "aye". Commissioner Ledford voted "nay". The motion to deny the Resolution carried by a vote of 6-1-0.**

Mayor Pro-Tem Griggs said he would like to proceed with the instruction to staff to see what type of development we should look at. He still believed if you just ran back 200 feet along the highway frontage, you could cut it up into several building type pads which would be marketable to a number of individuals, and still leave the County a tremendous amount of property to utilize during the Fair. So once we went to the County and if they didn't think it was a good idea, we could still think it was and proceed. Mayor Carroll said that was true, but at least at that point we will have some sort of plan and not just be chopping off corners of it.

The Commission recessed at 9:55 p.m., and reconvened at 10:03 p.m.

OTHER BUSINESS:

11. Request to make Ordinance No. 1210 retroactive.

Recommendation: Do not make the Ordinance retroactive and therefore no additional action is necessary.

Mr. McCourt said Ordinance No. 1210 was the Ordinance which removed the fee charged to connect to the system to a fee to disconnect from the system. This item was discussed by the City Commission on August 24, 2004, and at that time the request was to consider making it retroactive. As the minutes indicated, it was clearly discussed by the Commission, and they decided not to do it at that time.

Mr. Tom French, Building Contractors Association, said it was discussed, but they believed it was discussed along with a lot of other issues from that particular Ordinance. They believed that from the beginning that Ordinance was misunderstood. A proof of that was that after the Ordinance was enacted by this Commission, that it was reworked, modified, and passed in a very different way. They felt that the original intent was not to include new construction in the \$250 fee, but it was to deter disconnects and reconnects, or the frivolous wasting of the City's

resources. The reason he was here tonight was because they wished to have the issue considered all by itself. The only issue at hand was for the residents or contractors that paid that \$250 for new hookups, they would like that refunded. They did not believe that was a conflict with Anti-Donation Clauses because it wasn't a donation when they gave it to the City, but was a requirement and should therefore be a refund. They did not feel the intent was to tax new construction meters for that \$250, that it wasn't the original intent, and they would like it refunded.

Mayor Carroll said the comments from the City Attorney indicated that in his opinion it would very likely be a violation of the Anti-Donation Clause, and that also the idea of retroactive actions were generally bad policy and could be seen as Anti-Donation Clause problems. The recommendation at that time was that the Commission not make the Ordinance retroactive. It was part of the packet. His feeling was that the Commission did understand at the time the request which the builders had made, and they chose not to act on it.

Commissioner Ledford said his recollection of it was that it was a violation of the Anti-Donation Clause. Was that still the position of the City Attorney? Mr. McDaniel said he believed it would be. He had not changed his opinion on this.

Mr. French said if they felt the City had charged a resident too much money for whatever type of service, and that money was given back, it certainly was not a donation. Doing a retroactive Ordinance was probably bad policy or bad business. However, this Ordinance wasn't a good Ordinance to begin with. There were lots of misunderstandings in that first Ordinance, and the proof in that was that they'd gone back and redone it and the Commissioners voted for it. There were misunderstandings on the part of enough of the Commissioners to do that. It was bad to begin with, and they were asking to correct that bad situation. They did not believe it was a donation.

Mr. McCourt said we understood it was not a donation, but was a payment as per the law that existed at that time. As he understood it, it was actually a donation to the builder from the City without the City getting anything in return. The Anti-Donation affected the City. When we gave up any public item without receiving compensation, it was a violation of the Anti-Donation Clause. That was what was being asked here. It was enacted, the law was filed and correctly assessed, and now we were being asked to basically give money back. Mr. French said if it was found that was assessed in error... Mr. McCourt said we changed Ordinances all the time because new or different information came before the Commission. It was a continuing process which always went on.

Mayor Carroll said it could be construed that when the Commission passed this, they knew exactly what they were doing and intended to charge that. Now someone had come along and said it wasn't fair because the Commission went back and changed it because it no longer intended to do that, and so now they felt they were entitled to a refund. What we did had not accomplished what we were trying to do, but we did in fact pass an Ordinance that had that provision in it. The fact that we later determined that it didn't accomplish what we wanted it to do didn't speak to the fact that the Commission meant exactly what the Ordinance said when they passed it. That was part of the possible concern that the Anti-Donation Clause raised, that if the question were raised that we would all fall back and proclaim ignorance that we didn't know what we were doing. A lot of people might sign onto that, but it didn't relieve us of the liability that accrued for us going back after the fact to try and correct something. Unless the majority of the Commission wanted to do something different, we would just stay with what we had done.

Mayor Carroll stated that no further action was needed.

SCHEDULED COMMUNICATIONS FROM THE PUBLIC:

14. Request of Mr. Kevin G. Dunshee, President, Silver Linings Aviation, Inc. to enter into a contract with the City to lease land and install a self-serve fuel tank at the Alamogordo Airport with the following stipulations:

- 1) The company will provide the public only Aviation Gas, not Jet-A fuels via the self-serve tanks.
- 2) The self-serve tanks will be available to all members of the flying community, either locally based or transient.
- 3) The company will install a public use phone at the self-serve tanks to aid pilots in dispensing or reporting self-serve tank problems in lieu of having a person on duty.

Recommendation: The City Manager feels it is inappropriate to take action on this item at this time.

Mayor Carroll said we'd had a conversation prior to tonight's meeting with Mr. Dunshee, and the agreement was along the lines that in keeping with the City Manager's concerns, the request would be to table this until such time as the necessary work had been done to bring it back to the Commission for us to be able to make an informed decision.

Mr. Dunshee requested that this be tabled to another time where it was more appropriate and where we had more information as the City Manager had requested. Mr. McCourt said internally he'd sent out a memo instructing staff that he wanted their comments back as quickly as possible. Our big question mark at this point was that we were right at the holidays and we needed to consult with the Federal and State agencies, and many of those folks were out on holiday and we had a difficult time getting feedback. We would move as quickly as possible.

Commissioner Cooper moved to table this until the City Manager can get more documentation. Seconded by Commissioner Robertson. All voted "aye". The motion carried by a vote of 7-0-0.

UNSCHEDULED COMMUNICATIONS:

Various members of the Commission wished everyone a Merry Christmas and Happy New Year.

A. Comments by Mayor Pro-Tem Griggs regarding the recent passing of his grandmother.

Mayor Pro-Tem Griggs said his grandmother had passed away on December 11th, and he wished to thank everyone who had sent cards and their condolences to him and his family.

B. Comments by City Manager regarding water report, recent training conference in Albuquerque, and upcoming absence from the office.

Mr. McCourt gave an updated water report. We were doing okay, and no additional restrictions were needed. The Bonito Pipeline had another break, which was the second one also north of Tularosa. He'd talked with Mr. Miramontes and he reported that it was being repaired and they

expected to have it back on line by tomorrow. He was not sure exactly why it broke as it was at low level flows. He believed this time it was at one of the pressure relief valves. The break prior was at one of the joints in the pipe.

Mr. McCourt thanked the Commission for allowing him to attend the City Managers Conference in Albuquerque last week. It was extremely beneficial and he was looking at bringing that training to the City and having it provided here in-house.

Mr. McCourt said he would be taking off Monday and Tuesday of next week, and Mr. McNeile would be Acting City Manager.

C. Comments by Mayor Carroll regarding holiday wishes, and continued prayers for our military personnel.

Mayor Carroll wished everyone a Merry Christmas and Happy New Year, and asked that all of us keep the men and women in the Armed Forces that are overseas and in combat, and those on duty throughout the world in our prayers during this holiday season.

EXECUTIVE SESSION: Adjourn into Executive Session to discuss threatened and/or pending litigation and/or acquisition of water rights, and personnel matters.

Commissioner Cooper moved to adjourn into Executive Session to discuss threatened and/or pending litigation and/or acquisition of water rights, and personnel matters. Seconded by Commissioner Robertson. All voted "aye". The motion carried by a roll call vote of 7-0-0. The Meeting was adjourned at 10:20 p.m.

"The Governing Body of the City of Alamogordo, New Mexico, hereby states that its regularly scheduled meeting of December 21, 2004 was called into executive session and the matters discussed in the closed meeting were limited only to those specified in the motion for closure."

/s/Donald E. Carroll

Mayor Donald E. Carroll

ATTEST:

/s/Angie Rahn-Broyles

City Clerk Angie J. Rahn-Broyles
(SEAL)

(Prepared by Teresa Y. Gutierrez)

Approved at the City Commission Regular Meeting of January 11, 2005.