

**CITY OF ALAMOGORDO, NEW MEXICO  
CITY COMMISSION REGULAR MEETING MINUTES  
MUNICIPAL BUILDING, 1376 E. NINTH STREET  
7:30 P.M., COMMISSION CHAMBERS  
JULY 26, 2005**

**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. The Invocation was given by Rev. Rick Steele, and the Pledge of Allegiance was led by Commissioner Marion Ledford.

Mayor Carroll mentioned the passing of two citizens in our community. One was the Reverend Willy Holly, Jr., longtime Pastor of the New Hope Baptist Church, who he'd had the pleasure of knowing for many, many years. He was a very dynamic individual. If Pastor Holly ever had a bad day, he was the only one who ever knew it. He was a great influence on his congregation and on many in the community. We wanted to extend our condolences to his family, friends, and congregation. Also this past week, longtime civic activist Harold Reynolds had passed away. He and Harold corresponded on a regular basis. They did not often agree on anything, but he was an individual who was deeply interested in the community and always expressed his views on what he thought was the best course our community should be following. He wanted to extend our condolences to his family also.

**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 July 12, 2005, and Special Meeting of July 19, 2005.

*Recommendation:* Approve the minutes.

4. Consideration of a special land use permit for a micro-brewery for the Weimans by Yong Mi Rivera [Case SP-05-0112(A), 1004 N. White Sands Boulevard].

*Recommendation:* With a finding of "no detriment", approve the special land use permit for Case SP-05-0112(A) for a micro-brewery/brew pub with the following conditions: 1) that either a beer and wine license or a dispenser license from the State of New Mexico be maintained with the brew pub operation, and 2) that the brewery by-products be approved by the Public Works Department prior to discharge into the City's sanitary sewer system.

13. Agreements with the Otero County Economic Development Council, Inc. (OCEDC) for the following services:

- A) Promotion of economic development by participating in the funding necessary to operate the OCEDC (\$20,000).

*Recommendation:* Approve the Agreement.

- B) Advertising and marketing of the City for recruitment of new, expanding or relocating businesses to Alamogordo (\$50,000).

*Recommendation:* Approve the Agreement.

14. Resolution No. 2005-24 authorizing the Mayor to execute the Agreement for membership in the Southeastern New Mexico Economic Development District/Council of Governments (SNMEDD/COG).

*Recommendation:* Approve the Resolution.

15. Resolution No. 2005-26 amending the Preliminary FY2005-2006 Budget with carry-over fund balances, and adopting the Final Budget for FY2005-2006.

*Recommendation:* Approve the Resolution.

Item Nos. 7, 8, 10, and 11 were removed from the Consent Calendar. Item No. 12 was withdrawn from the agenda at the request of the petitioner.

**Commissioner Cooper moved to accept items 1, 4, 13(A), 13(B), 14, and 15 on the Consent Calendar. Seconded by Commissioner Robertson. All voted "aye". The motion carried by a roll call vote of 7-0-0.**

### **PLANNING ITEMS:**

2. Consideration of a five foot (5') front setback variance for Sedona Development, Inc. [Case V-05-0480(A), 200 Block Ascot Parade].

*Recommendation:* As a hardship beyond the control of the applicant cannot be documented, deny the five foot (5') front setback variance for Case V-05-0480(A).

Mr. Patrick Vandergriff, Vandergriff Code Consulting, was present to represent the petitioner, along with Mr. Klad Zimmerle of Alamotero Land Surveys. Mr. Vandergriff said there was kind of a misunderstanding with the way things were presented to the Planning and Zoning Commission in the understanding that there was no hardship based on the request. He would like to point out to the City Commission that in the last half dozen subdivisions, they had granted a subdivision-wide variance to allow for the 20 foot setback. The reason for that was because there was a nine foot area between the actual street-way and the property line on each of these pieces of property. Based on the normal size of a full size pickup, compact car, or even a Lincoln Towncar, there was not a setback problem in going to the 20 feet. The reason there was a hardship to the clients on this particular issue was that these lots were only 110 feet deep. Second, there were lots in other areas that had been 125 feet and plus depth that had been granted this same variance in recent months. The situation was such that people were looking for less direct habitation in the front yard areas. They were all doing desert landscaping and those sorts of things, and in addition, they were looking for a larger rear yard area for their family to occupy. In that regard, when you restricted the smaller lot and didn't allow them to

move forward to the same 20 feet, it made it more difficult to compete in the sales market. That made those other lots more appealing, and therefore, it did create a hardship for the clients. Also, he heard some question with regard to the fact that the houses would not all be in a straight line. If you looked at most of the subdivisions lately, particularly in the Cottonwood area, they were actually trying to mix that up so it didn't give the ideal of 35 or 40 boxes in a row type of situation. Even if the clients were granted the 20 foot variance, he assumed there would be some variation in that in order to make it not look like all the same run.

Mayor Carroll said if this was such a hardship, why were there four, five, or six houses already constructed. And even after the variance request was applied, three more houses were started with the 25 foot. Mr. Vandergriff said quite frankly, it was possible to sell those houses—it was not impossible. However, there was a lack of high profit margin in the extremely small houses where you couldn't move forward, and again, it cut your profit margin on the end run. On the other hand, they had an investment in property they had to develop, but it seemed a little bit difficult. He knew that in the proposed Zoning Ordinances submitted to the Commission some months back for review, none of them came back with a problem on a question of a 20 foot setback.

Mayor Pro-Tem Griggs said we'd discussed the 20 foot setback in the past and had granted variances on that. It was an issue the Commission needed to address, either through the Zoning Ordinances or whatever. The 25 foot was just a "grab out of the air" number, although there may have been some reasoning for it at the time it was done. We had to be able to be sure that we could get stuff off the street and not block the sidewalk. One of the things we would need to be concerned about when we granted a variance like this, was that the Subdivision Ordinance stated that only so much of the yard could be planted in grass or have a swimming pool. He didn't know whether that was an issue with these houses. Mr. Vandergriff said in the Subdivision Ordinance, the actual requirement was that a percentage of the entire lot was allowed to be placed in grass. So regardless of whether we moved the house forward, we would still have limitations on the back yard area and grass, sidewalk, gravel, etc. Mayor Pro-Tem Griggs said so long as that was clear and everybody remembered that, because it was pretty easy to make that statement, build the house, and then the back yard got put in by the homeowner and the control was lost. Mr. Vandergriff said even though several houses had already been built on that street, that property was platted quite a long time ago and it took some time to get it to where it could begin to develop at all. So the sale ability of that area in relation to the other subdivisions within the City showed that obviously the others were developing far more rapidly. Mayor Pro-Tem Griggs said he believed that was the case, though not necessarily the exact reason. He supported the variance on this one.

Commissioner Moncada said she could tell by the first diagram, that the pickup truck was right on the line almost to the sidewalk. If that car or truck didn't park all the way up to the house, his rear end would be sticking out in the back. If that happened and say a blind person came walking by, they would hit the vehicle. She saw that happen all the time on New York Street. Mr. Vandergriff said he knew there were places in the City that had a problem with that. In his last days with Code Enforcement, they'd worked heavily in certain areas where cars and vehicles were parked across sidewalks. That was actually illegal in Alamogordo, and DPS had been working pretty stoutly on that issue since that time. The point was that nobody was supposed to park on the sidewalk, and they would have the capacity to park completely on the property without extending over the sidewalk. Therefore, they needed to do that.

Commissioner Cole said going down to the fourth paragraph, when was this lot purchased and was it purchased by the person who was building the home? Mr. McCourt said it was platted

sometime back, so all the conditions were known on this subdivision, and had been known since it was platted. City Planner Sharon Few said it was platted in 1985. Mr. McCourt said the conditions had all been known since 1985, and when these lots were purchased, those conditions were known at that time on what the requirements were. Mr. Vandergriff agreed, but would say too that if there had been roughly 600 lots developed with a 20 foot setback in recent years, that the purchasing of the lot recently and the development by Sedona Development would indicate that they would operate under a reasonable assumption that the City would continue to enforce things straight across with all people and that they were looking at the 20 foot setback. Commissioner Cole said if the homeowner knew this in advance, why was the home built and not asked of the Commission for this variance ahead of time? Mr. Vandergriff said there was no home built, but they were simply asking for variances down there to allow the 20 foot setback. There were no homes that were built out of the current setback line. So they were asking for this subdivision to be granted on the remainder of its lots the same thing which had been granted on the last several subdivisions which had come before the Commission.

Mayor Carroll clarified that we had not gone in after a subdivision was half developed and then decided that it would be more advantageous to the developer if we granted variances on subdivisions that were already under construction. Part of his concern was if 20 feet made it more attractive, then 15 might even be better the next time. Mr. Vandergriff said 15 feet would not be possible for him to convince the City Commission. Mayor Carroll said it might be if the Commission allowed it. We were being asked to go from what the standard was and that which the developer knew and developed a third of his subdivision under that criteria, and now he'd decided that it might be more profitable if he had something else to offer. Mr. Vandergriff said there had been numerous people who had attempted to develop out that subdivision, and it had never been fully developed out. In this particular case, Sedona Ridge Development had purchased the development about three months ago. Prior to that, CDR Development had attempted to do it, and there had been other builders who'd been in there trying to fill out that particular subdivision. That indicated that there was a problem. With regard to the 15 foot setback, that could never happen because it was impossible to park the larger vehicles within that 15 foot space. This had been a problem, and there had been several contractors who had gone in and out of that location. It would help to make a go of this and make it work, and make them finish out a subdivision which had been on the books a long time. Mayor Carroll said, though, that for three of the lots they'd requested the variance on, they had gone ahead and started with a 25 foot setback, because in the Planning and Zoning Commission minutes they stated that they could not wait. They already had them sold and people were wanting them to build houses. Mr. Tommy Messer, Sedona Development, said he could not wait any longer on those lots because he had to try to sell them. Mr. Vandergriff said the point was that those were not necessarily pre-solds. When you looked at the situation and you had to invest and buy pre-developed lots and to complete them and add in all the other requirements, the lot value came higher to start with than if they were developing from scratch. Then the whole situation was something where you couldn't just sit on it for a few months and do nothing. They needed to make some attempts to get it going during the legal time limits we needed to go through in order to get before the Commission, and that was a considerable length of time.

Commissioner Ledford said normally the setbacks were 25 feet, and they were asking for a five foot variance. To give that variance, the Commission always looked for certain reasons. One reason was the hardship, and what exactly was the hardship on this case? Mr. Vandergriff said to a certain extent it was profit driven, but to a greater extent it was really sales driven. It was easier to sell a house and move forward with a larger back yard, particularly in the case of 115 foot deep lot. Commissioner Ledford said he didn't have any problem with a 20 foot variance, assuming that we were not causing a safety problem. He assumed it had been denied for the

five foot because we couldn't meet the definition of hardship or whatever other items were in here. What problem would the 20 foot setback be? Mr. Vandergriff said the hardship on financial means had been a cause for approval by the Commission in the past. Commissioner Ledford clarified that he thought that was when it was outside the petitioner's control. This particular one had been pretty well planned. What he wanted to know was whether there was a problem with the 20 foot setback because vehicles had gotten bigger. Mr. Vandergriff said there wasn't one, and that was why they'd provided the drawings to show that. Commissioner Ledford said to give the five foot variance, would it create any safety problems? Mr. Vandergriff said no. Commissioner Ledford clarified that it just required Commission action, and therefore, Mr. Vandergriff was trying to set it out as a hardship case. Personally he didn't have any problem with the five foot variance. He didn't have a problem supporting this, it was just that everyone would want a 15 or 20 foot setback. If the market was wanting larger backyards, then maybe we needed to look at our Ordinances again. Mr. Vandergriff said we'd actually done that over several years, and the proposal within the last five or six drafts had included that 20 foot front yard setback because that was what we had been doing. So that was the reason it was in the proposed Ordinance, and he had volunteered to work with Community Development Director Brian McGuire on this and not even charge the City. Commissioner Ledford said if this was going to continue to come before us on others for five foot setbacks and we were going to continue to approve them, why didn't we just change the Ordinance? Mr. Vandergriff said it had been a seven to eight year process so far.

Commissioner Cooper clarified that the lot size was not going to be changed. Mr. Vandergriff said no, it was 60 feet by 110 feet. The minimum lot size in the City was actually 6,000 square feet, so they were just a hair over. Commissioner Cooper said a Lincoln Towncar was 21 feet long, and others, like the Tahoe, were also quite long. Mr. Vandergriff said they had actually used a vehicle large than a Towncar.

Mr. McCourt asked if the understanding was that they basically wanted to have larger backyards? Mr. Vandergriff said yes. Mr. McCourt asked if they were going to agree to a larger rear yard setback, then? Mr. Vandergriff said he would hope not because there was no codicil or clause in the Ordinance which would ask them to. Mr. McCourt said they were saying they wanted a larger rear yard, but it sounded like what they really wanted was to put more house on the lot. Mr. Vandergriff said that could be the case too if somebody wanted that. His question was if somebody wanted a larger house, were we going to tell them they couldn't have one because they met the minimum yard requirements of the City? Mr. McCourt said they were asking to change it. Mr. Vandergriff said they were asking for a variance on the front yard, and not on the back yard.

Mr. Gary Lane, Sedona Development, said he had built the houses on the north side of Ascot Parade. He had built them because he had to design them to fit the lot, and he could continue to do the same. This would just give him more versatility and make a nicer subdivision. It was not as much a matter of profit, but more that it made their subdivision more desirable, and of course, maybe that would end up being profit. He had approached the City about six weeks ago to see about getting a variance on a house he wanted to build because it would not fit on the lot. It would have had a two foot encroachment in the 25 feet, so they would have been at a 23 foot setback. He was told that there was a variance before the City on this tonight, so he held off on the other hoping that this would pass tonight and then the house could be designed to sit on a 20 foot setback. The end result was that it had delayed him now four to five weeks, and he still did not have a house started. Their lots were about 6,800 square feet, and it made it a little more difficult to manage the water on the lots. Most of the front yard runoff would go to the street because they couldn't pond it and keep it on the lot, and they had more impervious

area with the driveways and sidewalks. So if you could have more area in the rear yard, you could manage the water better. On their lots, 6,875 square feet was typical. About 3,700 square feet of that was concrete, so there was no way to do anything with the water. That only left them 3,100 square feet, and they could manage it better in the rear yard than in the front. A typical lot out at Sedona Ridge had the 20 foot setback available to them, but those lots were 10,000 square foot lots, and so it gave them twice as much area to manage the water. All of them were having difficulty getting their plans which were typically used to fit on the lots, so they were having to redesign them which delayed everything. He would have had two permits pulled already last month had he been able to work them into the 20 foot setbacks. It seemed to be the trend. They had requested the 20 foot setback on Units 1, 2, and 3 of Sedona Ridge, and they had received that with a modification. He understood other subdivisions had received the same variances. Three years ago he had worked for about a year with the City trying to get the Subdivision Ordinance and the Zoning Ordinance changed, and the whole consensus of the committee was to go to 20 foot setbacks. It was happening all over the country. Even though they had that in Sedona Ridge, they didn't think it would even come into play more than 50 percent of the time because it was not always necessary. They may only encroach one foot at times, but it did give them a lot more versatility. On this layout, the distance from the house to the sidewalk equated out to 25 feet if they moved the house as far forward as possible. He didn't think the peculiarity of the zoning would be peculiar because he thought any subdivisions which would be proposed to the south would be proposed at a 20 foot setback. So that was basically a transition point. Also, there didn't seem to be an objection from the neighbors on this. There was only one neighbor out of 43 notices who protested, and that was less than 2 percent.

**Commissioner Cole moved for approval of the five foot (5') front setback variance for Sedona Development, Inc. Seconded by Commissioner Cooper. Mayor Pro-Tem Griggs, Commissioner Cooper, Commissioner Cole, Commissioner Robertson, and Commissioner Ledford voted "aye". Mayor Carroll and Commissioner Moncada voted "nay". The motion carried by a vote of 5-2-0.**

3. Consideration of setback and sidewalk construction variances for Thomas Shoaf [Case V-05-0481(A), 301 Desert Sun Court].

*Recommendation:* Deny the requested five foot (5') front setback variance, approve the requested two foot (2') side setback variance, and approve the sidewalk variance only with the payment of the equivalent cost of installation (by the City) for Case V-05-0481(A).

Mayor Carroll said that was staff recommendation, and the recommendation from the Planning and Zoning Commission was to approve the variance for a five foot front setback, and to approve the variance of two foot side yard setbacks, and to approve the variance on the sidewalk without the payment for the equivalent cost of installation, and with the sidewalk on the front street side.

Mr. Thomas Shoaf, petitioner was present. Mr. Shoaf said this case was discussed at length at the Planning and Zoning Commission meeting for the three variances for which they had applied. The reason for the variance was that it was a very unique shaped lot. It was an island shaped lot which adjoined no other properties on the court. In placing a house on this lot, they were tasked with building a house representative of the neighborhood and the stature of the rest of the houses, in line with the covenants of the subdivision. As such, they had approached an architect to build them a house. The first variance in question was for a front setback of five foot. The actual house itself only encroached two foot into the 25 foot zone with a drive-thru

portico structure. Actually one post of that portico structure was what was causing the setback. The second setback was for a two foot setback encroachment on the western side of the property. It was just one corner of the building. The third issue, which was the sidewalk issue, was because if they went with the standard of a sidewalk and a cinderblock fence, the adjoining properties would all literally be looking at what appeared to be an alley or a side street. So what they proposed was no sidewalk, and in turn, he would offer an 18 foot landscaped berm around the entire property so that all the properties would have a nice scenic landscape when they walked out their front doors. Again, this was an island property and everyone who walked out their front door needed to look at some aspect of the property. There was no back yard or fence that would be against a City street. Those were his three reasons for applying for the variances.

Commissioner Cooper clarified that it was an island property which would be all bermed out. Mr. Shoaf said it should be a two-tier berm given the elevation. The property itself drained to the back of the court and then into the Golf Course. It would be drained properly because it had to be approved by the City Engineer for drainage.

Mayor Carroll clarified that there would be some fence along the back, so there would be some people looking at a fence. Mr. Shoaf said yes, but if they would look at the layout, there was about 18 foot of landscaping all the way around. They were trying to work landscaping all the way around the property in order that they could give a front yard level depth to the entire property.

Commissioner Ledford asked the reason for not wanting to put a sidewalk in? Didn't we normally require a sidewalk around a residential area? Mr. Shoaf said there was no place to go other than around his yard. They were putting sidewalk in and in view of the ADA handicapped accesses, the cutout would be part of that. So the property would have proper access with a sidewalk running in front of the property. There were no adjoining properties, given the island nature of the land. Commissioner Ledford said he'd never heard of the option of putting in the sidewalk or the cost of installation, but not doing a sidewalk was not normal. Mr. Shoaf said they were just not doing a sidewalk around the entire island. In looking at the front of the house, the sidewalk was running from the driveway to the third driveway entrance. You had a driveway for the garages, a then there was a driveway for the drive-thru portico which exited at two points. That entire front of the property had a sidewalk for access for visitors or for anyone who should purchase the property that needed handicapped access. The cutout was at the front of the property for wheelchair access, and the property would have full access. If they put a sidewalk on the back of the property, it would encroach upon the amount of landscaping they gave to the rest of the neighborhood. Commissioner Ledford asked if where there was no sidewalk, were there houses across the street? Mr. Shoaf said yes, and they all had contiguous sidewalk. Commissioner Ledford clarified that Mr. Shoaf would be a neighbor across the street with no sidewalk. Mr. Shoaf said yes, and he was the only property on that island. Commissioner Ledford clarified that the sidewalk was on the neighbors' side, and not on his. Mr. Shoaf said he was trying to put in something other than sidewalks because he wanted it to be something other than a backyard fence. The standard would be a four foot sidewalk followed by a six foot cinderblock fence. He was willing to offset that and go with something more aesthetically pleasing. The property itself would have sidewalk access.

Mayor Carroll said he was talking about an 18 foot landscaped perimeter. What was to prohibit the sidewalk and a 13 or 14 foot landscaped perimeter? Mr. Shoaf said prohibiting it was nothing. They were just trying to make it look the best they could for those properties. He thought it would look good if they had good desert landscaping. No matter which way you looked at it, it was going to be the center of the neighborhood. They could put a walking path in,

but the only one using it would be him as he went around and cleaned up the trash. He didn't know that it would serve any purpose in this case.

Mayor Pro-Tem Griggs said one question he'd received from a neighbor out there was that if it was desert landscaping, it would probably consist of gravel. However, that gravel usually came down and abutted a sidewalk so that it didn't readily get to the street. What was his plan to address that? Mr. Shoaf said they would drop the landscaping down, and then the gravel would be level with either the sidewalk or the curb. With sidewalks you had desert landscaping on the sidewalk, which impeded the proper flow of traffic. In this case, it would abut the curb but not the foot traffic because there would be none in that section. He felt it was a wash whether the gravel abutted the sidewalk and got kicked onto the sidewalk, or abutted the curb. He would think that many times where you saw that was where kids rode their bikes along the sidewalk, they rode their bikes into the gravel, and that was how it got out. If you just left gravel alone, then it usually stayed where it was at. It was the foot traffic that kicked it out there.

Commissioner Ledford asked why we had sidewalks? He liked sidewalks and we had rules for them. City Planner Sharon Few said they were for people to walk on, for tricycles, and ADA accessibility. It was an accessibility issue in this day and age to be able to provide alternate access to properties for foot traffic, wheelchairs, bicycles, prams, etc. Commissioner Ledford said since he would only have sidewalks up front, was the ADA issue a problem? Ms. Few said it could be. Mr. McCourt said in this particular case, staff felt there was the accessibility granted by the sidewalk around the outside perimeter of the roadway. There were two lots that were not developed yet, so the sidewalk was not in on those two particular lots. Staff did not see a need for the interior sidewalk to provide sidewalk around this particular property.

Commissioner Cole said for years, the thrust of the Commission was to build sidewalks which were ADA accessible. We had pushed that hard now as a Commission. Were we now turning around and making an exception with this lot? Mr. McCourt said staff felt this was a clear cut case where an exception was called for. We had the accessibility around the entire cul de sac area, and the accessibility into the access points in front of the property. There was no access into the property from other points around there. So staff felt the issue was pretty clearly establish. The concern was one which was being raised on whether we were granting a deferential benefit to this property owner versus other property owners, because property owners were required to construct the sidewalks around their property. That was where the question came in to further the ADA to require an equivalent cost to be used to develop ADA accessibility in other locations. We thought that would be necessary initially to get into this cul de sac from surrounding neighborhoods, but upon review found it was not necessary and that the accessibility question was already there. There were sidewalks leading into this particular neighborhood. The walkways were available in the cul de sac area surrounding the exterior road of the cul de sac and the accessibility to the immediate property was also addressed. Therefore, staff felt it was proper. Commissioner Cole asked if the recommendation meant that there would not be a sidewalk around the circumference? Mr. McCourt said there would not be a sidewalk around the circumference of this particular lot. There would be a sidewalk around the circumference of the cul de sac.

Commissioner Cooper said there would be accessibility to the house under ADA compliance. Mayor Carroll said there was 80 foot of sidewalk along the front of the property as proposed. They were asking for the variance of the remainder of the lot. Mr. McCourt said individual private homes were not required to be ADA accessible. Public access was what was required, and that had been provided in this particular case.

Commissioner Ledford said the recommendation stated, "...with the payment of the equivalent cost of installation". Was the City Manager now saying that we weren't going to require that either? Mr. McCourt said when that requirement went forward, it was based on the understanding that there was a lack of accessibility to this particular cul de sac and that there were some gaps in the sidewalk which needed to be filled in. Since that time, other staff had actually gone out in the field, and there were sidewalks all the way into the cul de sac. So that was not a concern of his. Commissioner Cole asked what would happen once someone got to the end of the sidewalk? Mayor Carroll said they would walk out into the street. Mr. McCourt said they could get on the sidewalk which went around the outside circumference of the street.

Commissioner Cooper asked if anyone inside the court had anything to say about this request, pro or con? Mayor Carroll said there had been several protests to the request for the variance.

Mr. Norman Lane said Mr. Shoaf was his neighbor. That particular lot had been there quite a while. No one could buy it because you could hardly get a house on it which was like the rest of the neighborhood. He thought the protests they were talking about did not pertain to the variance, but to the view which was going to be gone. Since it was a subdivision and a house was going to be built anyway, that view would be gone. He understood that a couple of people didn't want the view blocked from their home, but what Mr. Shoaf was going to do was to eliminate that problem as much as he could. From his part, he was a neighbor himself and he felt what Mr. Shoaf had presented was the best thing he could see to possibly go on that lot. He was definitely for it. Commissioner Ledford said whether or not we required the sidewalk, the same house was going to be built. Mr. Lane said he couldn't see the use of having a sidewalk around that back part, and he would prefer to look at landscaping than to look at a sidewalk which served no purpose. Also, if you had one all the way around it, you would have skaters and bikers using it for things it was not supposed to be used for. That particular lot had been sitting there, and one of the reasons was because of the shape of it. He would prefer it to be a home of the quality as the other homes there, and this one would be.

Commissioner Cooper felt we should grant the variances and let Mr. Shoaf move on this. He felt it was a very unique project and would enhance the area. He knew there were people who would complain about the view, but he was in his third house and every time another house would be built nearby and steal his view. But he felt this one would be an enhancement in that area and be very unique. Mr. Lane felt it would make the whole area nicer.

Mayor Carroll said they had asked for three separate variances, and there may be some of us who could not support all three. Therefore, the Commission might want to address each variance separately. Having just voted "no" on a five foot front yard setback variance, he was not comfortable granting this one either. He thought that was a function which could be addressed by either putting in a little less house or moving the house just a little bit back. He would suggest that we address these variances one at a time. The first variance request was for a 20 foot front yard setback rather than the 25 feet. The second one was for a two foot variance on side yard setback, and the third was a variance on requiring sidewalk completely around the entire property. Mr. Shoaf said it was not the entire house, but just the one point on the portico that broke it. Mayor Carroll said it was his understanding that if that was an unenclosed portion of the house, it didn't require a variance. Mr. Shoaf said they were not informed of that. Really what they were looking for was a two foot incursion on a setback, so a 23 foot setback. Mayor Carroll said they were still asking for a variance from the 25 feet. Mr. Shoaf said nowhere along the way did staff or anyone on the Planning and Zoning Commission tell them they were wasting time asking for a five foot incursion because they didn't need it—

they only needed to ask for a three foot incursion. So they were mistaken for asking for more than they actually had to in that particular case. The five foot was the one corner of the house.

Commissioner Cooper felt they should just go ahead and approve both variances because there was not that much difference. Mayor Carroll said he had suggested making this three individual motions so that individual Commissioners could feel free to vote for the things they were supportive of, and not vote for the things they were not supportive of, and not run the risk of each Commissioner having a problem with one thing and nothing passing.

Commissioner Cooper said it was not necessary to have a sidewalk all the way around the house as long as there was an 80 foot compliance in front of the house where you entered and exited.

**Commissioner Cooper moved to approve all three variances, with the 80 foot sidewalk in front of the home. Seconded by Commissioner Robertson. Mayor Pro-Tem Griggs, Commissioner Cooper, and Commissioner Robertson voted "aye". Mayor Carroll, Commissioner Moncada, Commissioner Cole, and Commissioner Ledford voted "nay". The motion failed by a vote of 3-4-0.**

Mayor Carroll clarified that a motion to reconsider was in order by someone on the side of the prevailing motion.

**Mayor Carroll moved for the approval of a two foot side yard setback variance. Seconded by Mayor Pro-Tem Griggs. Mayor Carroll, Mayor Pro-Tem Griggs, Commissioner Cooper, Commissioner Cole, Commissioner Robertson, and Commissioner Ledford voted "aye". Commissioner Moncada voted "nay". The motion carried by a vote of 6-1-0.**

**Commissioner Ledford moved to approve the five foot front setback variance. Seconded by Mayor Pro-Tem Griggs. Mayor Pro-Tem Griggs, Commissioner Cooper, Commissioner Cole, Commissioner Robertson, and Commissioner Ledford voted "aye". Mayor Carroll and Commissioner Moncada voted "nay". The motion carried by a vote of 5-2-0.**

Mayor Carroll said the final possible motion would be for approval of a waiver on the sidewalk, with the exception of the 80 feet as proposed on the front of the property.

**There was no motion for the sidewalk waiver, so the action remained denied.**

The Commission recessed at 8:30 p.m., and reconvened at 8:45 p.m.

5. Consideration of Ordinance No. 1242 consenting to the annexation of 46.409 acres of land requested by Bella Vista, LLC, et al. [Case A-05-0067(A)].

*Recommendation:* Approve Ordinance No. 1242 consenting to the annexation of 46.409 acres of land in Section 6, T16S, R10E, NMPM, Case A-05-0067(A), to the City of Alamogordo for first publication.

Mr. McCourt said this piece of property was located on the northern boundaries of the City. It had access off of Florida Avenue, and it lay to the west of Florida Avenue.

**Commissioner Cole moved to approve Ordinance No. 1242 for first publication. Seconded by Commissioner Cooper.**

Commissioner Robertson asked if this was a voluntary annexation? Mr. McCourt said yes. Commissioner Robertson asked if we were taking any adjacent property to it? Mr. McCourt said no. Commissioner Robertson asked if we had looked into doing that? Mr. McCourt said no.

Mayor Carroll called for the vote on the motion. **All voted "aye". The motion carried by a vote of 7-0-0.**

6. Consideration of Ordinance No. 1244 consenting to the annexation of 626.990 acres of land requested by Mesa Verde Ranch, et al. [Case A-04-0060(A)].

*Recommendation:* Approve Ordinance No. 1244 consenting to the annexation of 626.990 acres of land, Case A-04-0060(A), to the City of Alamogordo for first publication.

Mr. McCourt showed a map which demonstrated the boundaries of the proposed annexation, the voluntary participants in the annexation, and the railroad's property which did not respond to the City's inquiry regarding the annexation. There were some people who did not respond to the annexation, and some comments from the Planning and Zoning Commission meeting concerning the annexation from three of the property owners within the area. That was in the amended agenda report which the Commission had received, along with the unofficial minutes from the Planning and Zoning Commission meeting held on Monday concerning this subject.

Ms. Few said of the almost 627 acres, 546 acres were under petition requesting to come in, and that was 87 percent of the total acreage which was requesting. We had five owners of approximately 11 acres, or less than 2 percent that had stated emphatically that they preferred not to come in. Five property owners currently had petitions out on 36 acres, almost 6 percent of the land, and one property owning 33 acres, or 5 percent of the property, had not responded.

Mr. McCourt said staff felt this was a contiguous parcel which should all be brought in so we didn't end up with islands within this parcel. Staff felt that was important from a service delivery position. There was a slight extension down past the intersection on the Relief Route per Public Safety's request. When an accident happened at an intersection, it didn't stay right in the intersection but extended outside of it. So we had worked to accommodate that in the Annexation Petition.

Commissioner Ledford asked which properties specifically indicated that they did not want to be annexed? Ms. Few said the Bearden property; Mr. W Fireworks, represented by John Hakanson; the Bishops; the Summit Foundation; and the Hayes property which currently had Button Brand Veterinary Clinic on it. If not included in the annexation, these properties would create islands within the City. Mayor Carroll clarified that there were also properties in there who did not respond to the petition. Ms. Few said that was correct, or those who had petitions out. For example, Otero County was considering tonight whether they would sign for their rights-of-way.

Mr. Patrick Vandergriff, Vandergriff Code Consultants, said he was representing the Rabon Brothers and Mesa Verde Enterprises. The Rabons had been working on this for approximately nine to nine and a half months now with the City. Originally they came forward with a smaller annexation and were asked to hold off until such time that other property owners could be contacted to see about incorporating and squaring everything off. He did know there had been

some spoken objection on the part of Mr. W Fireworks. Their concern was what they would or would not be allowed to sell after they came in. That could be argued as a restriction of trade or under the ideal of whether they should be grandfathered in, but he didn't think it really negated the need and necessity to bring this property into the City at this time. The City had worked very hard to make sure that there was very little protest percentage-wise. He felt it aligned everything up in such a way that DPS, the Sheriff's Department, and other people would have no problem in determining where the City limits were. They requested that the City Commission advertise this for first publication tonight.

Mr. John Hakanson, Attorney, said he was representing Mr. W Inc. Fireworks in regard to Lot No. 1 of the Lunt Subdivision. There was property out there and owners who were not contacted. There was no notice to Mr. W Fireworks, and this came to their attention through a rumor. He had requested from Mr. McDaniel the documentation, including the map and the legal description of the property that was being annexed. So for the statement to be made that all the property owners were contacted was an incorrect one. Notice was a very important subject, and he felt substantive due process had been negated here and this proposal should be turned down. He spoke only in regard to the people that didn't want to be annexed. He didn't speak in detriment of the voluntary annexation proposed by the Rabons and others. There were other property owners who were contacted and they were allowed to opt out. All his clients were asking for was the same consideration that was given to the other property owners. Why were they able to opt out, and not his client? The best reason was expressed yesterday in the Planning and Zoning Commission meeting, that the commercial properties would pay their way because there would be tax revenue. That was not a major consideration for annexation. He believed that if you had a currently legal business that fell within the perimeters of State and County rules and regulations, if you annexed that property in, you fundamentally interfered with the Interstate Commerce Clause. At the last meeting on this issue, DPS Chief Sam Trujillo had stated to the Commission that once this property came in, it would come in residential property. Then there would be a zoning accomplished to try and return the status of the property to what it currently was. The problem was that there was a direct diversity of the laws between what was allowed in the County and what was allowed in the City. Chief Trujillo had stated specifically that unless the Commission changed the law to say that the laws of the City did not apply to the current owner, that the new laws would apply. That would interfere with the current business which had existed there for a number of years. Those people had specifically bought that property way outside of the City so they could be in that location and comply with the laws of Otero County. So two things needed to be considered tonight. As far as his client was concerned, there was no notice and the City was required to give notice. Second, he felt they should be treated as every other property owner that was contacted and had the option to opt out. Also because of this unique situation, the City was either going to have to find some way to amend the City Ordinance or they were going to be substantially in violation of the Interstate Commerce Clause.

Commissioner Ledford thought once property was commercial, that it was allowed to stay commercial when it was annexed. Mr. Hakanson said allegedly they were grandfathered into the rezoning. Commissioner Ledford said that was his point. If it was grandfathered in, could we keep it as is, or was there another rule as related to the fireworks? Mr. Hakanson said there was another rule, and there was a conflict between City Ordinance and the County Ordinance. There was no conflict between County Ordinance and State Ordinance. Commissioner Ledford said the issue of keeping it commercial wasn't the problem, but it would be the fact that what it could be used for as compared to now would be different. It had nothing to do with the zoning. Mr. Hakanson said the type of sales would be changed. Commissioner Ledford said that was not a zoning issue. Mr. Hakanson said it still had to be considered because of the fact that it

was a unique situation. If it was a McDonald's and it was grandfathered in commercially, there was no problem because there was no conflict in laws.

Ms. Few clarified that there had only been basically two changes in the outlines of the original annexation area that the City Commission directed staff to proceed on. The only opt-out was one small area of approximately 10 acres on the north side owned by Mr. Larry Berry. He was moving his recycling facility to the west side of the arroyo and felt it would be in his and the City's best interest to opt that piece of property out of the annexation. Since it was on the edge, management concurred that we could do it, and that was the only piece which was left out. Regarding the piece on the south side of Mesa Verde Road, the property owner came to the City and said since they abutted the Mesa Verde property, could they be brought in at the same time. They had signed the petition and this property currently had a landscaping business on it—it was the Ruiz' property. Another point of clarification which Mr. Vandergriff had eluded to was that we had been working on this annexation in general for over nine months. The Mesa Verde property did come in originally requesting annexation, and we were ready to proceed. It looked like it was a viable option. Then there were protests to the annexation that had previously occurred on N. White Sands at the Hwy 54/82/70 intersection. We found out that property was not in the City anymore. Therefore, the Rabon property was no longer contiguous to the City limits and could not come in as an annexation because it didn't touch the City limits. We revisited the area and some of the original property owners in the original annexation along White Sands and 82/70 still wanted to come in, so the two actions were combined and other property owners had joined in. There were specific regulations in place for a property use being continued and classified as grandfathered or pre-existing nonconforming, even if the zoning wasn't changed subsequently. That was continuous use uninterrupted for two years or more. Mr. Bearden's property was an existing use and would be a continuation. There were other uses that were already existing out there. A great amount of this property was not in use at all, and therefore, rezoning would be required, as noted in the report the City was planning to initiate.

Commissioner Robertson said under our current Codes, was a business like fireworks that only operated a few days actually classified as a regular going business? Mr. McDaniel said if he owned the land for those sales and had some sort of building there, then that was the nature of his business. Just like a ski lodge was only open when there was snow, a fireworks stand was only open the 4<sup>th</sup> of July or New Year's. As a legal nonconforming use, if there was a structure there, he was grandfathered forever as long as he continued to use it. If there was no structure there and it was just open land, he was grandfathered for five years, and then it had to come into conforming use. That was if there was nothing done to zone it back to commercial. Since this was highway frontage, he felt it was virtually certain that everybody would come in and say they wanted to be commercial, and the City would agree. Then there wasn't a nonconforming use at all, other than Mr. Hakanson's issue as to how big a bang you could make with your firecrackers. He, Chief Trujillo and Mr. Hakanson could discuss that at a later date, but he didn't think it was directly relevant to the annexation question. Commissioner Robertson asked if Mr. Hakanson's client had been notified of this annexation? Ms. Few said yes, we had attempted to notify them. We had been in contact either through letters or telephone to everyone that we could possibly contact. We had also contacted property owners between Alamotero Road and Mesa Verde Road along the Relief Route by letter, and we did not have a response as to people wanting to participate. We had not sent certified letters because there was no requirement for that, but we had diligently attempted to contact everyone. She didn't have the chapter and verse of exactly who was spoken with at which location. Mr. Anderson had been assisting with this, and he was not here at the moment. There also was notification with publication of the

Ordinances, which was the legal requirement for the annexation action. It required two publications, and then once the annexation was filed, it did not become complete for 30 days.

Commissioner Ledford asked if he was notified or not? Ms. Few said he was. Commissioner Ledford said she had stated that she didn't know for sure how he was notified, but she did say that some of these specifically said they didn't want to be annexed. How did he deny annexation if he wasn't notified? Ms. Few said Mr. Hakanson had advised us directly that they did not want annexation. Commissioner Ledford asked if the issue was whether or not he could have the big fireworks, and we weren't sure where we stood on that? Mr. McDaniel thought it was true as to the size of the fireworks. Commissioner Ledford said that was the problem. If he could be annexed and converted to commercial and then continue to sell his fireworks, we didn't have a problem here. Mr. McDaniel said he had not discussed that with Chief Trujillo yet, and he was sure Mr. Hakanson would ably present his client's view that he didn't feel we could stop him from selling dynamite or whatever, as long as it was allowed in Interstate Commerce. Then we would have to review that and determine whether he had a point there or not. Commissioner Ledford said his point was if that issue had been addressed and satisfied, then we wouldn't be having this discussion. So his question was whether they would be allowed to be sold as they were before we annexed it, but apparently we didn't know the answer to that yet. Ms. Few said that was correct. As far as zoning, the City was planning on initiating rezoning on this property that would be in conformance with our Master Plan, which did show the majority of this area for commercial use.

Commissioner Moncada said she believed in our Ordinance for the sale of fireworks, they could not sell anything which went above 10 feet. The type of fireworks Mr. W sold definitely went higher than that, so if we were to allow him to sell, then he wouldn't be able to sell anything which went above 10 feet. Commissioner Ledford said he understood that, but if he were grandfathered in, the question was whether or not he could be grandfathered in to go over 10 feet. Mayor Carroll said at this point, that was a separate issue. Commissioner Ledford said if we settled that issue, though, then we wouldn't be having this debate as to whether or not he wanted to be annexed. Mayor Carroll said we may or may not. No matter what he was able to do, he may still choose to not want to be annexed into the City. He thought the issue of what types of fireworks may be able to be sold on this property in the future was an issue separate from tonight's discussion of whether or not we should annex this area. Commissioner Ledford said he appreciated that, but it had something to do with how he thought about it. If a guy could come in and do what he was before, then it would have an effect on whether or not he wanted to annex. He felt it was a relevant question tonight and not tomorrow, because if we could settle it and they agreed to it, then it was no longer an issue and we could go onto the next guy who protested. Mayor Carroll said, though, that we had an Ordinance which spelled out the fireworks issue. So we were not in a position to change the Ordinance this evening, assuming a majority of the Commission was willing to grandfather a particular business or a particular location. He would assume that if it was a desire of the Commission, that we could amend the Ordinance to allow the sale of certain types of fireworks that were previously allowable. Mr. McDaniel said he had not studied that because he'd had that issue in front of him for approximately two hours. We were dealing with Fire Codes and life safety Codes and things like that, so he couldn't guarantee that the same size fireworks necessarily must be saleable. Mr. Hakanson had made a fairly broad argument that neither we nor the State of New Mexico could prevent the sale of any type of fireworks. We could prevent people from blowing it off. In fact there were states which took the position that people weren't allowed to shoot off stuff, but they could buy it. Mayor Carroll said the State in fact had given municipalities the authority to prohibit the sale of certain types of fireworks. The counties also had that same authority. Some had chosen to exercise it, and some had not. So if we annexed this property, the question

which the Commission would at some point have to decide was whether or not we change our prohibition on certain types of fireworks at certain locations where they were previously allowed. Mr. McDaniel said that was a possibility, or the other possibility was he may decide the value of that location had gone up enough that he wanted to sell it to somebody else and move another mile up the road. Mayor Carroll said it was still a separate issue from whether or not we should proceed with the annexation.

Commissioner Cole said if this was a first reading, the Attorney would have time between now and the second reading to research this and answer the question. Mr. Vandergriff said it was a separate issue, but he did understand Commissioner Ledford's concern. His personal belief was that the Ordinance was one which was more of a statutory type one than a Zoning Ordinance where things were grandfathered in, and therefore, it would require a change. Regarding Mr. W Fireworks or any of the others, when those things were actually allowed out in the outer county areas, then prohibiting them from selling them actually stopped in-City sales of something that was legal throughout the County. That certainly was a loss of gross receipts tax to the City. Second for consideration was the fact that he was in Alamogordo on the 4<sup>th</sup> of July, and as dry as the canyons were, he took advantage of watching the City's fireworks displays. He noticed that this town was alight with a lot of things that were going up a lot higher than 10 feet in the air. So there was an enforcement issue now and the City could put a codicil into the issue of Mr. W Fireworks that made them give a listing of what fireworks were illegal. Mayor Carroll said, again, it was a separate issue.

Mr. Larry Berry said he owned the property Ms. Few was describing on the map. One of his concerns was to being allowed to keep doing what he had been doing. Mayor Carroll said that was the existing, nonconforming. Mr. Berry said he wanted to clarify that as long as he kept doing what he was doing now, that he would be fine. Mr. McDaniel said that was correct. If he was doing his business on a property where there was a building for his purpose, then he was grandfathered forever as long as he kept doing it. If it was a piece of land which was not improved, such as just storing junk vehicles on a piece of land, he would be grandfathered for five years. If the land was then zoned back to heavy commercial or manufacturing, then you were a completely legal use and didn't need to worry about grandfathering. Mr. Berry said he had acquired his property in about five different purchases, and he had three separate Deeds. There were buildings on two of them, one of which the City was wanting to annex. The property was viewed as one piece of property, but it was deeded right now in three separate pieces, two of which were in question. Mr. McDaniel asked if both of the pieces coming in had buildings on them? Mr. Berry said no, only one. Mr. McDaniel asked the use on the one which did not have a building? Mr. Berry said it was used for the same thing—he had a dealer's license, a welding shop, and a scrap yard. They had moved the scrap yard behind the ten acres, and it was going to stay back there. Mr. McDaniel said if it did not get zoned to a heavy enough commercial zoning to cover what he was doing, certainly what he was doing on the property which contained a building was grandfathered forever. It was all in use as one property and was under common ownership, and part of that unimproved property was coming into the City. Therefore it was grandfathered forever. Mr. Berry said at the Planning and Zoning Commission meeting they said these were all coming in as family units. He understood the City was going to take the lead and bring them all back in as commercial. Mayor Carroll said yes, or at least to their current use. His would be zoned commercial. Mr. Vandergriff said depending on how intricate Mr. Berry's welding shop became, it might have to come in as light industrial, along with Mr. Bearden's paint shop. Mayor Carroll said the intent was to address existing nonconforming uses as a part of whatever rezoning went on. Mr. Berry confirmed that the City was going to handle all of that and the property owners didn't have to apply for anything or do any work. Mr.

McCourt said that was correct. Some of the other land out in that area would remain residential as it currently was.

**Commissioner Cooper moved to approve Ordinance No. 1244 consenting to the annexation of 626.990 acres of land requested by Mesa Verde Ranch, for first publication. Seconded by Commissioner Robertson.**

Commissioner Cole asked if this would bring in the land Mr. Berry was talking about, as well as the Mr. W Fireworks area? Mayor Carroll said yes.

Mayor Carroll called for the vote on the motion. **All voted "aye". The motion carried by a vote of 7-0-0.**

7. Consideration of the preliminary plat of LAS LOMAS SUBDIVISION for fifty-three (53) lots located outside the City of Alamogordo, but within its extra-territorial planning and platting jurisdiction, for Tierra de Suenos, Inc. [Case S-05-0882(A), 1700 Block of Ocotillo Road].

*Recommendation:* Approve the preliminary plat of LAS LOMAS SUBDIVISION, Case S-05-0882(A), located outside the City of Alamogordo, but within its extra-territorial planning and platting jurisdiction.

Ms. Few said the Commission was seeing this plat at the preliminary level at the request of the developer who wanted to make sure that the City Commission was comfortable with the concept of these large lots and the location. The property was potentially coming into the City with the south annexation. The developers were planning to connect to City water at a minimum. There had been some questions on required right-of-way widths on Ocotillo and in working out some technical details. However, our engineering staff and the engineering staff of the developer were working well together. If this received approval today, it would be brought forward in the next two months for final consideration.

Mr. McCourt recalled two issues. One was the right-of-way necessary on Ocotillo Road, and our engineer Mr. Hunt said he was working very aggressively with the developer to resolve that issue and thought he was approaching an acceptable solution to that. The second issue was whether this area should be sewerred, as opposed to having septic tanks. He didn't know what, if any, progress had been made on that issue. All the other issues staff felt comfortable working with the developer on. Ms. Few said staff was still working with the developer on the sewer issue.

Mr. Tom French, developer of Las Lomas Subdivision, said it was unusual to come forward at this time with a request for a preliminary approval, but the reason was quite simple. As the City Manager said, they were in principle in agreement on all the issues. There were a few technical issues they were still working out, and he was confident they would all be worked out. There was, however, a fundamental difference of opinion on the way we ought to treat sanitary waste in this development. The City Manager was recommending that we use sewer, and in this case he was recommending that we don't. Las Lomas was approximately 102 acres and it was located in a flood zone that was generally "A" and "B". To do any kind of development in the flood zone if it was high density, we would have to elevate the entire area up out of the flood zone above the base flood elevation. In that area, what was under proposal was 72 or 74 acres, and it would take over 300,000 cubic yards of fill to do that. That meant we would have to do another flood control project just to have enough dirt to bring that 74 acres up out of the

flood zone. So when you started looking at what was the highest and proper use of a development like this, it was the rural residential type of development we had been flirting with for quite some time of creating a new zoning for. They were proposing that 74 acres be the rural residential type setting. It was a very rugged desert, and there would be green belts in between all of the lots. The lots were between one and two acres. They were proposing that City water be put all the way through the development and they connect from Ocotillo Road down to Canadea. From a practical standpoint, what they were proposing in Las Lomas was identical to what was in Canadea right now. It was also identical to Foothills III which was approved along S. Scenic. So there was prior precedence to what they were talking about. He would agree with the City Manager that as a matter of principle and policy, that they should pursue sewer for sanitary waste. He thought in general that should be the policy. However, there were going to be places where that was not practical. For this 74 acres of Las Lomas, that simply was not practical. Lot 53 was 28 acres and that was practical. They didn't have to bring that as far out of the flood zone, and they could develop it in normal density developments around four units per acre. So in that case he didn't have any complaints. This was the tenth development they'd brought before the City Commission, and this was the first time they'd ever proposed a development with septic systems. So he was not at all proposing that we start a policy of promoting septic systems throughout the City. He thought there were "horses for courses", and he felt this was the right solution for that development. The only issue they really had which they were disputing with the City staff was the sewer. They had a good plan for the water, and by tying that waterline in, they were going to increase the water pressure—both the static head pressure and fire flow conditions at the corner of Desert Lakes and Florida so that it would boost the pressure for the entire Golf Course area. They had a 60-acre development which they were engineering right now, and they were working with City staff at the corner of Florida and Desert Lakes so they were looking forward to helping resolve that issue and make sure they had enough water for that. All in all, he felt they had a good plan and a good development. It matched the surrounding area. There had been precedence for this type of area, so he was asking the Commission for an approval of the preliminary so they could continue with this development. If the Commission decided they couldn't do that, then they would be adamantly opposed to the annexation of this property they had been participating with on the south side annexation.

Mr. McCourt said as Mr. French mentioned, they had a disagreement on the sanitary question. His concern was that the raising of the area out of the flood plain was not connected with the sewer directly. It was indirectly connected and it was because of the density question, i.e., the number of lots that would be put on and how you could spread the cost of installing the sewer over more individual lots. His concern was twofold. First, the underground flow in this alluvial fan was towards the southwest. We had a substantial number of homes in that area that were already on well systems, and he was concerned about groundwater pollution reaching those. That was further exasperated because of the flooding situation which came through the area and how it saturated the ground and moved that groundwater further along. Second, he believed we should be returning this wastewater into our stream for recycling. He felt that was an important aspect we should be considering with any development within the entire City. Canadea was approved about 1990, and probably we should have required sewer there. That was totally in the County at that particular time, and later annexed in so that they could request the water system.

Mr. French said he would also contend that we had a more recent example of this Commission approving a development just like this on S. Scenic. He would disagree with Mr. McCourt in that the density of the wells in that area—there weren't that many wells in that area and they would be at least 1,000 feet from the nearest well. He was not going to be putting wells in.

Mayor Carroll said one of the issues we had started some conversation on and some thinking on was the future impact of County subdivisions adjacent to the City that were in some point in the near term going to wind up probably being part of the City, and as to just how much of our extraterritorial subdivision requirements we should enforce in some of these. In concept this would be a nice addition to the community, but hopefully we could resolve the sewer issue. The City did have the ability to require that even in an extraterritorial area, whether it came into the City or not. This was one of the issues which was going to continue being a struggle and how did we go about doing it? We had not at this point fully addressed how we handled the rural residential, extra large tracts of land. He understood some of it may be a technical problem and some may be an economic concern, or a combination of both. He would be more than willing to approve the preliminary plat tonight and have the continued dialogue between City staff and French Brothers as to whether there were real technical reasons this couldn't be done anywhere, or were there portions of this development where it could be done at a cost approximating what the septic system would run to be put in. He read through the Planning and Zoning Commission minutes, and he knew that Mr. French's engineer had indicated that he felt there were some real technical obstacles that might make it cost prohibitive to do it. Apparently City staff had a little different opinion of that. He would be more than willing to approve the preliminary plat and see if we could continue to come to some resolution as to what made sense and what didn't in this particular subdivision as far as sewers versus septic tanks.

Mr. French said for the areas they felt were reasonably economical to put sewer systems in, they were doing that. That would be Lot 53 and the 28-acre parcel of it where they would indeed do that. To be straight up with the Commission, it was all about economics. If you throw enough money at it, you can fix anything. However, this was simply not economical. It would be four to five times the cost of septic systems to put sewer in. That was an approximation based on unit costs they had run, even though they hadn't done engineering to do that. They had a difference of opinion from City staff, and at some point in time the Commission was just going to have to decide for them.

Mayor Carroll said they were indicating that Lot 53 would work for sewer. Would any or some of the lots that would be directly bordering on Lot 53 work to be sewer? Obviously the further away, the more expensive it got. But was there a portion of the 52 lots that they were looking at now which could in fact be sewer along with whatever they developed in Lot 53? Mr. French said possibly. Mayor Carroll thought that was an area which could be explored. While it might not be technically or economically feasible to do the whole subdivision, were there portions of it that could in fact be done?

Commissioner Cooper asked if this was going to be similar to the one at S. Scenic where the roads were put in, but there were no curbs or gutters? Mr. French said yes. They would have 24 foot paved streets, plus paved shoulders so that they didn't have curbs and sidewalks, but would have ADA access on the side. In their talking with staff, staff was comfortable with using a paved shoulder on one side. They were leaning towards paving the shoulders on both sides for aesthetics. It would be very similar to the development on S. Scenic. Their plan was to have a 25 foot greenbelt around every lot so that they maintained at least 50 feet of the natural vegetation throughout the whole development. They'd seen some patterns in rural Albuquerque and Las Cruces which were done this way, and it was very attractive. Also, that south side from where they were at to the east was an interesting question for future development. The reason it was so interesting was because most of those properties were divided up into 2 ½ to 5 acre tracts. There were deed restrictions on most of the properties that prevented them from ever being subdivided into lesser properties. So on the southeast side between the future S. Scenic

extension all the way down through the Canyon Road area and on down to the Ocotillo Lane area, it was going to be interesting in how the City moved in that direction. He didn't have a clear cut answer on that one. However, they still felt this was the proper and right development for this particular area.

Mayor Pro-Tem Griggs said we'd discussed a rural residential type of zoning off and on for several years, and we'd never exactly got our arms around what it was going to be. He thought rural residential was going to develop in certain places and really not in others. He believed it was going to be driven as much by economics as it was by proximity to the City. He believed what they would be seeing out south were ones like this subdivision, Canadea, and others where they could be developed high density. He supposed there was more opportunity to make a greater return if you developed high density instead of low density. He didn't see the argument as much for the sewer as he saw it for the septic systems. The State law right now required an acre or three-quarters of an acre for well and septic. These lots were larger than that and there were no wells on them. There was a distance between the closest wells, which would be on the west side of Florida in Diver's Cove and along Florida. He didn't know what that impact would be, if any, and he didn't know when it would occur, if ever. He would support the French's proposal to go ahead and say that septic systems were the way to go on this particular property. In saying that, he would also like Mr. French to look into the variety of septic systems there were available now. One of the last times we got into discussions on septic systems, there was a guy telling us that a lot of things had changed and there were some that were far more efficient than the old style. It could be that those could be implemented in or required in his subdivision. It could be that the Commission could require that type of septic system or septic tank. Perhaps those things could be looked into while we were discussing some of the other. He believed we needed to go with the septic systems and not for the sewer on this development. Mr. French said that was a good point, as economics would drive them to denser developments. There was more profit potential if that 74 acres could be developed into higher density. He was proposing that they follow all of the State's regulations on septic installations. A couple of years ago the Legislature had passed gray water legislation which allowed them to make efficient use of that, so they would certainly comply with all the State regulations.

**Commissioner Cooper moved to approve the preliminary plat of Las Lomas Subdivision located outside the City of Alamogordo, but within its extraterritorial planning and platting jurisdiction, and allow City staff and Mr. French to get together and iron out some of these questions. Seconded by Commissioner Cole.**

Mayor Pro-Tem Griggs didn't believe the motion went far enough to satisfy Mr. French. He believed Mr. French was wanting the assurance that the septic systems could be used. Commissioner Cooper said it didn't, but the motion as stated would allow Mr. French and the City staff to get together and he was sure that question could be ironed out, and they could spend some time describing other types of septic systems which the Commission may be unaware of. Those questions should be brought between Mr. French and the City staff. Mr. French said they really did need a direction from the City Commission, because he and the staff had worked diligently together, and they were simply at odds to the point where they needed a policy decision from the City Commission. They were fully prepared to meet all of the State regulations regarding septic systems. Commissioner Cooper asked if there was a portion which would be sewered and another portion would use strictly septic? Mr. French said yes. If he could word it himself, he would approve the preliminary plat with the first 52 lots having the use of septic systems. Commissioner Cooper clarified that the rest would be sewered. Mr. French said that was correct.

**Commissioner Cooper amended his motion to approve the preliminary plat of Las Lomas Subdivision located outside the City of Alamogordo, but within its extraterritorial planning and platting jurisdiction, and to approve the first 52 lots with the use of septic systems, and the remainder to be sewerred. Seconded by Commissioner Cole.**

Mr. McCourt said he had stated his opinion, and he felt we would pay for it down the road. Mayor Carroll said he understood Mr. French's dilemma and position, and also what staff was trying to accomplish. He was questioning whether there was a position in between where some of these lots could be sewerred, such as the ones immediately adjacent to Lot 53 and whether or not as they were developed they could be included as a part of a sewer plan for that area. Mr. French said his answer to that right now would be "not economically".

Mayor Carroll called for the vote on the motion. **All voted "aye". The motion carried by a vote of 7-0-0.**

Mayor Carroll said at this point he would urge staff to become a lot more knowledgeable on septic systems and the various types so that when this plat came back for final, then whatever we felt we required for adequate systems, that be part of the final plat.

8. Consideration of the final plat of PUEBLO ESTATES SUBDIVISION, REPLAT A, for five (5) lots located outside the City of Alamogordo, but within its extra-territorial planning and platting jurisdiction, for Jack Bates [Case S-05-0879(A), Mercados Drive].

*Recommendation:* Approve the final plat of PUEBLO ESTATES SUBDIVISION, REPLAT A, Case S-05-0879(A), located outside the City of Alamogordo, but within its extra-territorial planning and platting jurisdiction, with variances on the construction and installation of alleys, on the installation of utilities (water and sewer), on the construction of streets to City standards (dedication, curb, gutter, and sidewalk), on the dedication of public land, from Section 22-01-140(b)(1) relating to drainage plans, and on the length of the cul-de-sac, and with a Waiver of Protest Agreement.

Mr. McCourt said he did not agree with the recommendation. This was an area immediately outside the City limits, immediately north of Griggs Field, and it was extremely likely this area would come into the City in the future. Therefore, we would be building ourselves a situation where we would have an area similar to what we were facing on Florida with undeveloped roads, utilities, etc., and it would wind up creating the same types of problems we were seeing in the south annexation. He suggested that this should be constructed to City standards.

Mr. Klad Zimmerle, Alamotero Land Surveys, was present to represent the petitioner. He stated that this was a five lot subdivision which had been developed adjacent to the City limits on Florida Avenue, but it was still outside the City. The developer was planning on putting in his own personal home, as well as some duplexes on the lots. The lots had been sized to handle duplexes. The roads would be paved 24 feet wide with shoulders. It had been worked out with staff that this would all comply. They had dedicated 50 feet of right-of-way at the request of the City, and then when this came in there would not be an issue of dealing with private roads or anything like that. There had been comments about a moratorium, and they had discussed briefly and selectively lifting the moratorium to allow the connection of these utilities. But if he was understanding the City Manager, they would install everything and it would just sit high and dry until the annexation was done. Mr. McCourt said they would be hooked to the system, and whether they wished to come into the City or not would be their decision. Mr. Zimmerle asked if

there was a new policy now? Mr. McCourt said that ultimately would have to be the decision of the City Commission.

Mayor Carroll said this got back to what we were talking about earlier. This was likely to be in the City limits sooner than later. We currently had a moratorium on the outside-the-City water connections which he would recommend the City revisit. He felt we needed to redo that policy to attempt to address situations like this where even though it was currently outside the City but abutted the City, that we either require connections to the City's system or a community water system that would take care of fire protection, etc. at the developer's option. He would like to see the Commission pursue a revised Resolution which set the moratorium to allow us to address this type of subdivision adjacent to the City. He would suggest that the approval be contingent upon us revising the Resolution and requiring that this subdivision hook to City utilities. Mr. Zimmerle felt that was good, but with the timeline which would be required to get this Resolution and then to be able to selectively lift this, it was not going to be within the timeframe that Mr. Bates wanted to develop this land. Mayor Carroll said this Resolution could be ready and addressed at the next City Commission meeting. Mr. Zimmerle said if they were to do that, it would essentially allow them to replat all of this again into 60 by 100 foot lots. Right now they had been working with staff and the Planning and Zoning Commission for quite awhile to develop this subdivision. They'd gotten County approval and Environmental Department approval, and it had been approved for shared wells. They would like to continue to get it approved so that the developer could start building.

Commissioner Cole asked if this land was contiguous to the City limits? Mr. Zimmerle said where Mercados Drive touched Florida, that was the contiguous portion of it. There was a 50 foot strip lying south of this property that had been reserved by the Norton Family Trust to access their property on the south side. They were not contiguous on the south side at all. Commissioner Cole clarified that all of Griggs Field was in the City limits. Commissioner Cooper asked if this was north of La Placita? Mr. Zimmerle said yes.

Mr. McCourt said this was the issue which had been brought up at the last Commission meeting. We had these areas immediately outside our City limits which we were basically allowing to become developed at lower standards than we allowed within the City limits. They then created problems in the future because they had inadequate water and sewer systems and streets. That was what the big discussion had been on that south annexation, because a great deal of that property developed with inadequate water, sewer, and streets. And now they didn't want to come in, but they had started to create service problems for the City because of pockets outside the City. These areas were in the immediate vicinity of the City, and this particular subdivision was in the immediate vicinity, and therefore, it should be required to come up to City standards. If they wished to come into the City, then fine. If they didn't wish to, then that was also fine, but the standards would be there and they would not be barred in the future. Mr. Zimmerle felt that was a good policy to come, but it was not here at this point. Mayor Carroll said what he had stated was that policy could be established in the short term if it was the desire of the Commission. He also understood that when a policy changed that nobody wanted to be the first one affected by it, but the reality was that somebody was always going to be the first one that it hit. So if we could get that done in a short period of time, assuming the Commission wanted to go that route, then he didn't think it would be posing a hardship on anyone. Mr. Zimmerle said this whole thing would have to be redesigned to make it economical to install water and sewer into this development. There were five lots, and they were talking over 1,300 feet of water and sewer. Plus, it would have to be looped. This had been designed as a County subdivision within the extraterritorial jurisdiction. They'd given rights-of-way and paved streets, and they designed it for shared wells and septic tanks on large lots. It would

require another whole approval process to make that economical. Mayor Carroll said, though, that the City did have the authority to require development to City standards.

Commissioner Cooper said it looked so close to Florida, and we had water and sewer lines right through there. Mr. Zimmerle said right, but this was in the County and they had to get County approval and to do these duplexes they had to have 1 ¼ to 1 ½ acre lots.

Commissioner Ledford said this was an approval for a final plat but we needed to change policy and somebody needed to be first. Why was it we couldn't have policy established such that it wouldn't affect those already in the planning or final plat stage? In order to make this directional change, which he probably agreed with, why were we picking on a final plat guy? Why couldn't we pick on a date where there hadn't been this much work done? Mr. Zimmerle agreed—where they knew what the policy was. Commissioner Ledford said we needed to find a point at sometime and we had been talking about this for a long time, but it was something we needed to actually start doing. We needed to get to where when someone did develop, that was the policy. Mr. Zimmerle said correct, and they knew what the policy was. Commissioner Ledford assumed that could be established fairly easily.

Mr. Vandergriff felt part of the problem was that the design was basically completed, so there had been a monetary investment. He agreed with the concept and had pushed for reconsideration on the concept of handling things with the City. He did believe, however, that to turn around at this point—basically the developer was here with these size lots and with this size of information because the City did have a moratorium and they had no other opportunity unless that moratorium was lifted. He didn't think the Commission was in a position to make a decision on lifting the moratorium tonight because it needed to be on the agenda as an item to be voted on. The point was, that locked them out of development. Second, if the moratorium was lifted, then they would need to redesign and need to put an appropriate number of lots on there in order to be able to comply with the requirements. So the cost of completely redesigning it and going to a formal standard subdivision was going to be considerably higher and it was basically going back to ground one and starting over again. They would have to go back through Planning, City staff, and back through the Planning and Zoning Commission. It would simply cost the developer a great deal of money which he was already not planning on spending because he was complying with the City's current policy.

**Mayor Pro-Tem Griggs moved to approve the final plat of Pueblo Estates Subdivision, Replat A, for five lots located outside the City, as recommended by staff. Seconded by Commissioner Ledford. Mayor Pro-Tem Griggs, Commissioner Robertson, and Commissioner Ledford voted "aye". Mayor Carroll, Commissioner Moncada, Commissioner Cooper, and Commissioner Cole voted "nay". The motion failed by a vote of 3-4-0.**

9. Consideration of the final plat of COTTONWOOD HEIGHTS, UNIT 5, PHASE 2, REPLAT A, SUBDIVISION for four (4) lots located within the City of Alamogordo for OHHO Limited, Inc. [Case S-05-0884(A), 4101 through 4131 Wood Loop].

*Recommendation:* Approve the final plat of COTTONWOOD HEIGHTS, UNIT 5, PHASE 2, REPLAT A, SUBDIVISION, Case S-05-0884(A), located within the City of Alamogordo, with the requirements that a street name be changed, and that construction plans be approved by the City, and with a Subdivider's Contract.

Mayor Carroll asked if the issues had been resolved? Mr. McCourt said the only issue which had not been resolved on this was the street naming. Ms. Few said that was correct, except that when she spoke to Mr. Charles Herrell today, he said they would give a different street name and he would get it to us next week. It appeared that it had been resolved. Mr. McCourt said that was from a Public Safety standpoint because they didn't want a loop when we had a street going through. But if that issue had been resolved, then we were ready to go.

**Commissioner Cooper moved to approve the final plat of Cottonwood Heights, Unit 5, Phase 2, Replat A (as recommended by staff). Seconded by Commissioner Robertson.**

Commissioner Cole asked why the plans for the extension of public water and sewer had not already been taken care of? Mr. McCourt said this land abutted that earlier annexation which we sent for earlier reading. So this was one of the ways we would be accessing and getting utilities to that new annexation, and that was why it was happening at this time and the replatting was occurring. Commissioner Cole clarified there was no problem, but they were just working out the details. Mr. McCourt said yes, everything had been resolved.

Mayor Carroll called for the vote on the motion. **All voted "aye". The motion carried by a vote of 7-0-0.**

10. Consideration of the final plat of SEDONA RIDGE ESTATES PHASE 4 SUBDIVISION for sixteen (16) lots located within the City of Alamogordo, for Sedona Development, Inc. [Case S-05-0883(A), Oakmont Drive at S. Florida Avenue].

*Recommendation:* Approve the final plat of SEDONA RIDGE ESTATES PHASE 4 SUBDIVISION, Case S-05-0883(A), located within the City of Alamogordo, with variances on the construction and installation of alleys and on the dedication of public land, and with a Subdivider's Contract and an Avigation Easement.

Mr. McCourt said we generally didn't have a problem here, but we had some questions still remaining on what was happening on the construction of S. Florida, as well as the public land dedication questions. This was wrapped up into Sedona Ridge 1, 2, and 3 which had previously occurred, and we had been putting off the public land dedication. We had also put off the construction of Florida Avenue and had an agreement which indicated that when we got 70 percent of the lots developed in Unit 3, then a section of Florida needed to be developed. We were not at 70 percent yet. That agreement also made reference to some construction in Desert Hills East Subdivision, which was now Sedona Ridge 5. So we had some questions about how the Florida Avenue development agreement was being implemented and if we were shooting ourselves in the foot by approving some more lots out here which may delay the further development of Florida Avenue because we wouldn't hit the 70 percent. Also, we had never resolved the question of the public land dedication. These were primary concerns on this and the following item.

Mr. Klad Zimmerle, Alamotero Land Surveys, was present to represent the petitioner. He stated that he felt all of the concerns could be addressed. He had a calendar which started in 2004 and went through 2006. Sedona 2 and 3 were approved by the Commission on November 25, 2003. The amended contract came into play approximately that time. Construction on the subdivision infrastructure started the end of February 2004. By the end of August 2004, Phase 3 was under construction. Now as of this date in July 2005, they had 30 percent occupancy in both units. By the end of November, they would have 50 percent occupancy in both units. If this trend continued and there was no dynamic economic problem, there was a real good

chance that they would hit the 70 percent in April of 2006. That was the trigger mechanism. It took from February to almost the end of February 2005 to construct the lots. What they were looking for with this approval of these units was so they could continue the planning so they could go out to bid to get the lots built by the time they were sold out in Phases 2 and 3, by the time the 70 percent was hit. Sedona had all respect for this contract. They were not trying to go build up in Units 4 and 5 and forget about Units 2 and 3. They were going along very well in Units 2 and 3, and they wanted to be able to have some lots in 4 and 5 about the time these were sold out. The trigger mechanism was the 70 percent in Units 2 and 3. That was when the funds for the construction of that portion of Florida that they were responsible for would start. That could be accomplished almost as early as April and May.

Mr. Zimmerle said regarding the public land issue, Ms. Few had some numbers which had been put together. There was a half acre that was given credit but which wasn't noted in the original backup, so there was .3 of an acre due. In the development of Sedona, they were putting in a 50 foot drainage. In that drainage, they were looking at a bench which could be used as emergency vehicle access and ditch maintenance to the rear of the houses. It could also be a walking or hiking trail to be integrated in through other streets in Desert Hills 11 and on up to some of the future developments. They had a lot which was 3.5 acres that was being dedicated as public space for a walking park or neighborhood park. That was similarly done in Hermosa. So they had been living up to their obligation as far as the public plan and as far as their Subdivider's Contract. They had every intent to honor that. The trail to be built in the drainage would be 15 feet wide and would be graded and base course, from one end of the subdivision to the other.

Mr. McCourt asked Assistant City Manager Matt McNeile if he was aware of these plans? Mr. McNeile said no. Mr. Zimmerle said they had discussed it with staff, and Mr. McNeile was not there. Ms. Few said the issue was brought up, but she understood that Mr. Zimmerle was to get together with Mr. McNeile and would get final approval on it. Mr. Zimmerle said he had not gotten together with Mr. McNeile, and he didn't remember saying he would. Ms. Few said staff had seen no plans on it. Mr. Zimmerle said they were in the engineering plans for the subdivision. The final ditch sections would show that. They had been tossing around the idea of green-belted the whole thing, but that was uneconomical. The other option was to provide access on the south side where emergency vehicles could access the properties from both sides of the ditch and it could be used as a walking trail. Mr. McCourt asked if we had a small park plan for down there? Mr. McNeile said no, not in that area. Mr. Zimmerle said we'd all seen where they had been successful in neighborhoods so far where they were done through xeriscape and sand, and they were basically specific to an area. The kids wouldn't have to go out on the next streets, but could stay in the same neighborhood and could play safely. Mayor Carroll said he didn't think there was a disagreement that it might not be a good idea or satisfy the public land dedication, but it appeared that for whatever reason, the coordination between Mr. Zimmerle and staff had not gotten to where they were comfortable. Community Development Director Brian McGuire said the coordination in talking about this as open space with Mr. McNeile did not occur. That was his own fault because he had not been in the office to do it since he and Mr. Zimmerle had talked about it. He had talked with them about the drainage and the fact that one of the things we didn't have in that part of the community was access to the back of the property for emergency vehicles. So when we talked about them designing the drainage channel, he had asked them to assure that they would put roads in on the sides of the channel so our weeds and drainage people would be able to get in there, and also so we could use it in the future as far as a pedestrian or bicycle pathway in the future if we wanted to expand it to that. He did talk with them, though he had not talked to Mr. McNeile about it. We had allowed parks in other subdivisions which were not in our Master Plan. Other

than that, he didn't know what type of use we would have for the public land they were dedicating. Mr. Zimmerle said the acreage on the trail which was going to be built through there came out to .3 acres. That combined with the other half acre did satisfy the current land obligation.

Mayor Pro-Tem Griggs said right now in Sedona Ridge 5 we had public land set out at about 3/10<sup>ths</sup> of an acre. He would guess that everyone had approved that before it came to the Commission because it was on the final plat as public land. The only thing he thought we were missing was another 3/10<sup>ths</sup> of public land dedication. We had a letter from Mr. Messer saying they wanted to work on that and come up with where it would be, but we'd also waited approximately 18 months to determine where the park land would be for all of this stuff, and this was now what was starting to show up. What he was looking at was we had this one tract set up for a part of it, and now Mr. Zimmerle was bringing up what could be additional public land dedication, but we didn't have any agreement or real discussion on whether that was acceptable to staff or not. Mr. Zimmerle said in the construction of the subdivision, those roads for the pathway and emergency access would be built in base course.

Commissioner Ledford clarified that the public walkway had not been agreed to by staff, and it was still just a suggestion. Were they telling us what to do with the public dedication? What if the City didn't want a walkway? Staff had not agreed with this. Mr. Zimmerle said there was a need along the drainage and the rear of those lots for access by emergency vehicles and for ditch maintenance. Rather than let that stay there and become weed cover, it was going to be graded in base course to be utilized in a trail system. Commissioner Ledford suspected that would be agreeable with staff. Would that trail go through Phases 2 to 5? Mr. Zimmerle said it would go down the drainage between Phases 4 and 5, and it connected further down on Phase 2.

Mr. McCourt said he didn't know whether that would be acceptable as public land dedication or not, as we may wind up with a little trail to nowhere. We hadn't run it through our trails system or through Public Safety to see what they thought of the concept. He tended to agree with the idea of having a trail there and he liked the idea of being able to get in there to maintain the drainage. It sounded like it might be all right. He was still not clear on Florida Avenue. He heard what was said, but he was not sure when we were actually going to get anything built.

Commissioner Ledford asked if the City Manager was okay with the agreement so far? Mr. Zimmerle said they were living up to it so far. Commissioner Ledford said they hadn't reached the 70 percent so far, and he guessed the concern was when they reached that if they were going to continue to expand it. He didn't think that was the intent. Mr. Zimmerle said it was going to take six months to bid and to build the other units. They planned to be out of Units 2 and 3. Commissioner Ledford said when we did this agreement, we did it to put it off because maybe we weren't ready to figure out this public land dedication. Maybe it had taken longer than City staff expected. Our concern was to make sure we got it, and that whatever we got we had agreed to, whether it be a walkway or not.

Mr. Vandergriff said the original contract that was worked out around the addendum contract had two kicks in there—one was at 70 percent and the other was at five years. They were looking at hitting the 70 percent in roughly two years from the time the agreement was put in place. So the agreement would kick in at the current pace well within the five years that was in the contract. So those were the two limiting factors that were in that agreement—five years and 70 percent, one or the other.

Mr. Mark Bolin, Sedona Development, said they were not trying to get out from putting in part of S. Florida. They planned on complying to the Subdivider's Contract completely. They were at about 30 percent occupancy, and were at right around or over 50 percent under construction. Somewhere between November and January they planned to have 50 percent occupancy. It was also written in there that since it was an arterial road, that they would be off the hook completely. They did sign on that road, but he believed the only thing it stated was 24 feet of pavement and five feet of sidewalk. If that was ever made an arterial road, then it didn't address the culverts that went across to the ditch. When you got into the land dedication part of it, that was a pretty sizeable ditch that continued all the way down through and out of the Golf Course and out past the back nine on the course. There was not much else they could do other than to keep an easement for maintenance of the ditch. It seemed like DPS was wanting to be able to get around the back of this. A lot of the City was developed now without alleys, so this did give an access. They were really close on the land dedication, and if that wasn't added in, there was still not enough land dedication to give a large type of park.

Mayor Pro-Tem Griggs said other than Florida, the only issue was the land dedication and that issue wasn't exactly resolved. What was available to us to work forward with that and resolve the public land dedication? How critical was it if we put off one of the approvals for two weeks to get the issue resolved? Was that a viable solution or one we needed? Could we do what we needed to without that?

Commissioner Cole said it looked like as much as the Commission had worked with these guys and others, it appeared that we could take it at their word that it would be worked out with staff and go ahead and approve it this evening. He couldn't quite see any conflict with what they said on the percent at the moment and what it would be in the future. He assumed we would still be working together as a Commission, and he didn't think there would be any problem in the future of getting a satisfactory dedication of the land. Mr. Zimmerle said they had all worked well with staff, and would continue to. They had that additional option tract which would be coming in at one time or another, so they could defer .3 of an acre to that. That was located on the east side of Florida. Commissioner Ledford clarified that wasn't Phase 5, but was beyond that. Mr. Zimmerle clarified that was only an option tract at this point. Commissioner Ledford asked what in the Subdivider's Contract had not been done? Mr. Zimmerle said they were in complete compliance. The public land dedication was in improvements and in the grading of the walking path and surface material, as well as the park itself within Unit 5. Mayor Pro-Tem Griggs said we had up to 5 percent currently, or we also had the cash in lieu part as well. If the roadway or the drainage channel turned out to be not acceptable, would the developers be willing to pursue the cash in lieu side for that .3 of an acre?

Mr. Gary Lane, Sedona Development, said they wanted to get it resolved and not keep carrying it over. They wanted to resolve the public land dedication tonight so that it would take care of all five phases of their subdivision. They would prefer to do the cash in lieu instead of trying to carry it onto another phase. He would appreciate it, though, if the Commission would consider that they were now trying to live up to their total land dedication so that it would accumulate a large enough parcel for the City to use. They wanted it to be a usable parcel instead of an unusable small 3/10<sup>ths</sup> of an acre here or there. They felt they had accomplished that with a parcel that was large enough to do something with for a public park. There was the option of land in lieu of the remaining balance that was due, but there was also the option to waive the remaining 3/10<sup>ths</sup> of an acre because they had accomplished what they were trying to. One consideration was that they had continued to give land to the City that they were not getting credit for. The biggest instance was on S. Florida Avenue. When their subdivision was approved in the beginning, a standard right-of-way for a street like Florida Avenue was a 60 foot

right-of-way, and the City wanted a 100 foot right-of-way so that more improvements could be done to Florida anticipating an arterial road there. They had given a 100 foot right-of-way which equated out to about 1.5 acres. They were getting credit for only a half of that extra acreage. So they had given quite a bit of public property which was not counting towards their public land dedication. He thought they were getting credit for ½ of an acre, and they had actually given an additional 1 ½ acres. He felt they had exceeded the amount of land they had contributed to the City for public land.

Commissioner Cole said if we took the cash in lieu of, what would happen to the emergency road for vehicles? Mayor Pro-Tem Griggs said his only suggestion would be if that particular option couldn't be worked out. At the moment he didn't see why it couldn't be. Or if it didn't come out to a sufficient amount of acreage, then the cash in lieu option was an available one which was at our disposal.

**Commissioner Cole moved to approve the final plat of Sedona Ridge Estates Phase 4 located within the City of Alamogordo, with variances on the construction and installation of alleys and on the dedication of public land, and with a Subdivider's Contract and an Avigation Easement. Seconded by Commissioner Robertson.**

Mayor Carroll asked if we were saying that we were pushing the public land dedication which would normally go with Unit 4 into Unit 5? We were asking for a variance on the public land dedication, so were we saying that we were going to work out whether it turned out to be the walking trail or the ditch? Mr. Zimmerle said the walk-to park was in Unit 5. The trail was in Unit 4. Mayor Carroll said that was the part which hadn't been agreed to as the public land dedication. Mr. Zimmerle said that was correct. Regardless, it was part of the grading plan for the system, to provide the access for the City and emergency vehicles, and hopefully a trail. Mayor Carroll asked if there was really a variance on the public land dedication being requested for Unit 4 if they were proposing to provide that as the public land dedication? Ms. Few said on their application it stated "no public land dedication". Mr. Zimmerle said because it was in Unit 5. Ms. Few said the lot which was identified for public land dedication was in Unit 5. We had not even considered any of the grading or other improvements for possible dedication. If it was given with Unit 4 or 5 was really not the issue, but it was just the total development for the entire complex.

Commissioner Moncada asked how much public land dedication was in Phase 4? Mr. Zimmerle said in the drainage they would be constructing emergency vehicle access and maintenance vehicle access which would provide the City with the means to get to the rear of those houses. They felt it would be very beneficial to the trail system that would be developed within the City. Commissioner Moncada said that meant none. Mr. Zimmerle said the area within the trail and the maintenance in the road was .3 acre. It was a 50 foot right-of-way total. They were giving 50 foot in there and they wanted to use 15 foot of it for that part of the dedication.

Mayor Pro-Tem Griggs asked if the motion was to grant or allow a variance on 3/10<sup>ths</sup> of an acre of public land dedication, or was it to allow them to work out the difference to where we could achieve that additional 3/10<sup>ths</sup>? Commissioner Cole said the latter.

Mayor Carroll said regarding S. Florida and their timetable, were they planning anything past Unit 5 as part of this development? Commissioner Ledford clarified that Phase 5 was the last phase of what they had deeded. Mayor Carroll asked what the build-out in Units 2 and 3 were again? Mr. Zimmerle said 30 percent occupancy, and an anticipated 50 percent by December or January. Mr. Bolin said by March they will have complied with the agreement.

Mayor Carroll called for the vote on the motion. **All voted “aye”. The motion carried by a vote of 7-0-0.**

11. Consideration of the final plat of SEDONA RIDGE ESTATES, PHASE 5 SUBDIVISION for thirteen (13) lots located within the City of Alamogordo for Sedona Development, Inc. [Case S-05-0885(A), S. Florida Avenue].

*Recommendation:* Approve the final plat of SEDONA RIDGE ESTATES, PHASE 5 SUBDIVISION, Case S-05-0885(A), located within the City of Alamogordo with variances on the construction and installation of alleys, and with a Subdivider's Contract and an Avigation Easement.

Mayor Carroll said this was basically the same issue we had just discussed under item No. 10.

**Commissioner Cooper moved to approve the final plat of Sedona Ridge Estates, Phase 5 Subdivision (with variances on the construction and installation of alleys, and with a Subdivider's Contract and an Avigation Easement). Seconded by Commissioner Robertson. All voted “aye”. The motion carried by a vote of 7-0-0.**

12. Consideration of the final plat of ALAMO BLOCKS, BLOCKS 1 AND 2, REPLAT C, SUBDIVISION for two (2) lots located within the City of Alamogordo for CAP II – 10<sup>th</sup>/White Sands, LLC, and Walgreen Hastings Company [Case S-05-0888(A), 895 & 923 N. White Sands Boulevard and 120 & 150 E. Tenth Street].

*Recommendation:* Approve the final plat of ALAMO BLOCKS, BLOCKS 1 AND 2, REPLAT C, SUBDIVISION, Case S-05-0888(A), located within the City of Alamogordo, with variances on alleys and public land dedication, and with a Subdivider's Contract.

The item was **WITHDRAWN** from the agenda at the request of the petitioner.

#### **OTHER BUSINESS:**

- 15-1. Westward Airways, Inc. – Essential Air Service.

*Recommendation:* Provide direction to City staff.

Mr. McCourt said he and a couple of the City Commission members had been involved in this item within the past week. Westward Airways had ceased operations in New Mexico, including us. They were essentially serving two distinct groups—one was a consortium of cities including Taos, Gallup, and Las Cruces who had an agreement worked out between those cities and the State to fund a subsidized air service among those cities. Also, there were flights down to Phoenix out of Las Cruces and out of Gallup. In addition, the Department of Transportation (DOT) had entered into an agreement with Westward Air to provide Essential Air Service (EAS) to the City of Alamogordo. So when the original bids were out there, we were all trying to cooperate together to create a financially viable operation for whomever the bidder was. There were four potential bidders in the early stages, and Westward Air was eventually the successful bidder. It appeared they were now unable to fulfill their contract. At this time they had ceased operations, and the information he had received as of today on a conference call was that the absolute earliest they would be permitted to start operations again would be 45 days. And that was not a sure thing because there was no assurance that they would be able to meet the

necessary requirements to be able to resume even after that 45 day period. This would be under FAA requirements. The feeling he got was that the most viable option would be to go out for an emergency RFP for essential air services. The USDOT was willing to do that immediately and were waiting for our recommendation. It was actually their decision, but our recommendation. The City and Holloman were jointly in that recommendation, and he'd had an opportunity to talk to the staff person out at Holloman and bring them up-to-date. They had not had an opportunity to discuss it within their entire chain of command, and they were speaking from their previous conversations. They felt the RFP was the route to go, and that we should be following that.

Mayor Carroll said both Commissioner Cooper and himself had sat in on the various conference calls with representatives from Westward Airways and representatives of the three other communities involved, and also with the DOT. He wouldn't try and speak for Commissioner Cooper, but it was his feeling that with the position that Westward Airways found themselves in or had gotten themselves in, it was in our best interest to have the DOT go out on an emergency RFP for continued air service to Alamogordo. Assuming that Westward Airways were able to resolve their current problems, they would be free to bid on any proposal that went out. But right now they were unable to fulfill the terms of the contract and the longer we went without air service, the more difficult it would be to get people back to even trying to depend on it. So his recommendation would be to authorize the City Manager to contact the DOT and tell them to go out for an RFP for air service.

Commissioner Cooper said no amount of damage control could solve the problems that Westward had created for themselves and for us.

**Commissioner Cooper moved that we go out immediately for an emergency RFP to get air service back here as soon as possible. Seconded by Commissioner Robertson.**

Commissioner Cole said he wasn't trying to say that the community did not need air service, but he would like to ask if there was a cost to the City if the Commission approved this tonight? Mr. McCourt said it would potentially depend on who the bidder would be. In the short term, no. In the long term there was a potential cost depending on the type of plane that might provide the service. Over a couple year period we might have to come into compliance with providing additional fire protection when the plane landed. Commissioner Cooper said it depended on the capacity. Mr. McCourt said it did, and that was why he was hedging a little bit on his answer, because we didn't know who may potentially bid on the contract. Commissioner Cole said he'd heard the comments on why we should do this immediately, but personally he felt we were too close to El Paso to have air service. Probably there were good reasons to have air service, but he was wondering why it was so important to move so quickly other than to try and continue air service at the moment. Why couldn't we sit back and see what the future was going to hold for several months? Mayor Carroll said because the longer we went without air service, people that had been using the service would gravitate and would find some other method of transportation to satisfy their needs. Then when, and if, we brought air service back, we will have lost that potential market because they had made other arrangements. It was not like no one flew on Westward Airways. There were a significant number of passengers that had come to use the service and to some extent, to depend on it. So he felt it was essential that we restore that option for them as soon as we could. Commissioner Cole said he knew there were good reasons to have an air service, but he was not sure there were enough good reasons for our community to have that type of air service and make it successful given our close proximity to El Paso. We had lost air service in the past week, and we were trying tonight to figure out if we wanted to continue, and he didn't feel like he had been given any good reasons why we would

want to continue it, other than we were afraid that we would lose the service. He thought he understood that the plane flew many times without anybody on it, although there was freight on it which did help to bring in some revenue. So if it was going to cost the community... Mayor Carroll said there was no cost to the community to have the DOT go out and solicit proposals for continued air service to Alamogordo. The time to make the argument as to whether or not we wanted it or could afford it was at the time we were faced with making a decision of who we would pick, assuming that anybody bid it. There was a possibility that no one would submit an acceptable bid. But if they did, then that was the time to have the discussion of whether or not we wanted to continue air service, whether we could afford it, or what the cost to the community might be.

Commissioner Cole said if the City Commission did not approve this tonight, what would the State do? Mayor Carroll said the State would do absolutely nothing. What would probably happen was that we would no longer be qualified under EAS because the Federal Government would determine that we were not interested in air service or any subsidy that we were currently getting, and he suspected that would be absolutely the end of commuter air service to Alamogordo. Commissioner Cole asked what the radius was within a larger metropolitan airport? Mayor Carroll said the Federal Statute for a medium hub airport—we qualified for EAS for a couple of reasons. First was that we had it prior to either 1987 or 1978—we were grandfathered in under having had it in a previous time. He understood that we qualified if we were more than 200 or 210 miles from a hub airport. Albuquerque had been designated by us as our hub airport. We would cease to qualify for EAS if we were not able to get the passenger load and the average subsidy down below a certain figure. We were trying to nurture an air carrier that would be able to provide the service. It was very questionable and had been for a long time whether anyone could do it without a subsidy. But if we didn't at least try, there was no way that someone would come in without a subsidy and try. Commissioner Cole asked if Taos or the other communities were classified as EAS? Mayor Carroll said they had a different arrangement. They had formed a consortium and they were putting their community dollars and some State money into providing a subsidy for an air carrier. They would make their own decision as to what was in their best interest and whether they went out for another proposal or whether they waited to see if Westward could correct their problem. He suspected that they would not wait, but that they would find it was in their best interest to solicit other proposals for air service.

Mayor Carroll called for the vote on the motion. **All voted "aye". The motion carried by a vote of 7-0-0.**

The Commission recessed at 10:55 p.m., and reconvened at 11:04 p.m.

Mayor Carroll moved item 18 up to be heard prior to items 16 and 17.

**SCHEDULED COMMUNICATIONS FROM THE PUBLIC:**

18. Request of Carles E. Williams II, 805 Azelia Street, to discuss the overcharging of a water bill while he was out of the country on a military obligation.

*Recommendation:* Deny the request.

Mayor Carroll said the water was physically turned off while Sgt. Williams was out of the country on military duty. What appeared to be an obvious case of water theft had occurred, and therefore, Sgt. Williams was appealing his request to the Commission.

Sgt. Williams said he was out of town on military obligation, and had returned home the end of May and found a notice on his door saying his water was shut off. However, he went inside the house and the water was still on. He then received a bill for over \$600. Mr. McCourt said we had actually shut off the water twice at the house—once when he first requested it and someone had physically gone and turned the valve back on. The next time was when we detected the high reading which was abnormal, and apparently it was then turned on again. In staff's opinion, this was a theft and we had reported it to the police. He had to say that the chance of solving this case was probably pretty small. While we certainly understood the Staff Sergeant's position, staff did not have the authority to provide any additional relief.

Commissioner Robertson asked if he lived by himself? Sgt. Williams said yes. Mayor Carroll asked when he left? Sgt. Williams said on January 7<sup>th</sup>, and he got back the end of May. Mayor Carroll said the billings of March, April, and May were billing periods when Sgt. Williams was not in the country. It appeared it was obvious that it was not water which Sgt. Williams consumed or which he should be held responsible for. He would suggest that the fair thing to do would be to remove the consumption charges from the bills of 3/16/05, 4/13/05, and 5/11/05.

**Commissioner Cole moved to remove the consumption charges for the billing dates of 3/16/05, 4/13/05, and 5/11/05.**

Mayor Carroll clarified that he had continued the very basic service, so there would be some charge for those three months. Basically, we were removing the consumption charges which would take most of the \$700 plus charges for those three months away. In fact, he may still have some credit even after the consumption charges were removed. Sgt. Williams said yes, as he had paid \$200 before he left for the basic charges. Mayor Carroll said with just the basic standby charges he would have incurred while he was gone, the \$200 should probably more than cover what he might owe.

Mayor Carroll called for the vote on the motion. **All voted "aye". The motion carried by a vote of 7-0-0.**

**OTHER BUSINESS:**

16. Public Works Bid No. 2005-011, Golf Course Clubhouse.

*Recommendation:* Provide direction to City staff on whether to negotiate or re-bid.

Mr. McCourt said at the last meeting there was some information presented which our Attorney, who was not present, could not give us an opinion on. He had now changed the agenda report by adding two paragraphs at the end. We had met the next day with the City Attorney, who still had not had a chance to read the information at that point, but assured he would be fully prepared to discuss it at length tonight. Mr. McCourt said his opinion still remained the same. He didn't have any problem with any of the construction companies that bid on this. His concern was that he was interested in avoiding large attorney bills, and he wanted to make sure we actually got this project built.

Mayor Carroll said the discussion at the last meeting kind of centered around whether or not there was State Statute which said we needed to go back out to bid or not, whether protests would be upheld or overturned, or whatever.

Mr. McDaniel said he didn't think the protest put in against the White Sands bid would likely be upheld in court if we decided to just go ahead and take them as the best bidder and negotiate with them. But he felt it still might very likely go to court and delay us further. The other possibility was that because of the amount of the change in the project, since we would be having to chop things out of the project, might also be a subject of litigation. It was one which probably would not be successful against us, but one which would also create delay. Given that we did need to do some major surgery on this Club House in order to bring it in on budget, his recommendation was that the most expeditious way to do it would be to do that major surgery and then re-bid the project. He knew that White Sands and some of the other bidders had spent some time looking at ways that money could be saved on this project. He suggested that before we send it back to the Architect, that rather than holding a pre-bid meeting, we hold a pre-design meeting. In that meeting we could invite any of these contractors to come forth with any ideas which might save money and which we might chose to put in our instructions through the Architect. There may be some good information there where some of that gold plate could be taken out. This tended to be the case frequently in architectural contracts—they tried to spend every penny that was budgeted and they wound up spending more than was budgeted. Frequently contractors could tell us places we could save money, and we ought to use that expertise with both White Sands and the other bidders, and then send it back to the Architect with the requested deletions. We could tell them we wanted it redesigned to come in within the bid, and they were going to keep redesigning until they did come in within budget. At that point we may get what we wanted.

Commissioner Moncada said she sat in a lot of these meetings. We did need a Club House, and she felt everyone who worked on that committee put in their requests. We told them how much money we had and we tried to work around that. That Architect knew how much money we had, and she felt we needed to stick with that amount. She didn't know where we would get anymore money to add to this. She felt the best thing we could do would be to re-bid, and we needed to come into compliance with the money we had. If we had to get another plan, so be it. But she didn't think we needed to go any higher than we had allocated for this.

Commissioner Cooper said he would have to concede to the City Attorney and take his advice.

Mr. Randy Burroughs, Attorney for White Sands Construction, said he had talked with Construction Industries a little while ago. He agreed with some of what Mr. McDaniel said that the protest was not likely to be upheld and it might go to court. His client could also bring up negotiations and time they had spent in trying to work with the City on this particular matter. What had occurred on this matter was that the bidding process started and there were two shots at bids on it. The Statute was real clear that after two bids if the City wanted to, they could sit down with the lowest bidder, which was White Sands Construction. White Sands had started that communication several weeks ago in attempting to do that. The City should use the lowest contractor bid because he was the one closest to the budget. They didn't want to go out and get all four of these contractors to sit down because they wouldn't be able to get them to agree. He didn't think that was a realistic approach. He was suggesting that we try to work this out. The City had a certain sum of money, and White Sands was comfortable they could work with the City and within the framework in getting to that amount. If the City went back to re-bid, the Club House would be sitting out in that trailer another long period of time. If they had anymore technical problems again, then we'd be sitting here again with the same situation. The Legislature was not always using common sense, but in this case they were. The City could take a couple of shots at this thing, and then if it didn't work and they wanted to sit down with the low bidder and negotiate, they could do that. Staff was asking for guidance on either renegotiating or going to re-bid. He was suggesting the negotiating, which his clients had

already started doing. The City staff, White Sands, and Mark Doporto from Lane Plumbing had already been talking, and they were ready to sit down, sharpen the pencil, and go to work. That process should be done within a couple of weeks, and then if it didn't work, at that time the City could go back to bid. But why go back and start all over when things were pretty close now? They could use the common sense the Statute allowed, which was to sit down with the lowest bidder and see if they could work something out. That way the City wouldn't have to go back to the Architect again, because the Architect would charge the City again. White Sands Construction had many projects with the City in the past, and he felt they could sit down and help the City come to a conclusion on this. They'd also done construction with other municipalities, such as Las Cruces, Clovis, and Roswell. So they knew how to meet the needs of the municipality. He would suggest that was the best approach.

Commissioner Ledford thought the reason why we were looking at this was because it was a disqualification issue with White Sands. Mr. Burroughs said he was following what Mr. McDaniel said in that he felt the protest filed would not likely be successful. Commissioner Ledford said we were in negotiations and that seemed to be acceptable by the City, but the only reason it was stopped was because of this possible disqualification. Now were we saying that was not an issue? Mr. Burroughs said it should not be an issue. Mr. McDaniel said he thought that more than likely the protest to their bid would fail ultimately. What he was also saying, though, was that we might be tied up in court for some time while doing that. It was a matter of some risk either way. There was some delay if we went back to the Architect, although he understood that through the Architect contract we could make him redraw it as long as we needed to in order to get it under budget, and he didn't get another dime to do it because he messed up. Mr. Burroughs said if you were a professional and not being paid, you could put it on the back burner. Commissioner Ledford said he was concerned because we'd already tried this twice. Since day one we'd had a number, and nobody seemed to understand that number. When you were 20 percent or more off on the original number, there was no guarantee in going out a third time and getting it right. If we went through the re-bid process, it might take enough time to where we could lose another \$200,000 in the cost of materials alone because we'd been working on this for a year. He was concerned about the additional costs just because of inflation and everything else.

Commissioner Ledford said if we went back to negotiating, what was the problem with that? Mr. McGuire said he understood that at the time the issue of the possible disqualification of Lane Plumbing came up, that we were within two days of when White Sands was supposed to get back to us anyway. They'd already had two weeks' work on it, and the fact that it might take a long time—they should have had that ready for us. So we ought to be able to readily find out how quickly White Sands was willing to give us some preliminary figures, because they had already been working on it for close to two weeks. Commissioner Ledford clarified that we were close to the point that we could probably see if we could get within budget with the negotiation process. Mr. McGuire said that was his understanding. Commissioner Ledford asked if there was a reason we would want to try and go back for a re-bid, then, if we were this close to negotiating a number? Mr. McGuire said he understood that Lane Plumbing was not a qualified bidder on both 15 and 16. The advice from our Architect and engineering firm was to proceed with a re-bid. As a staff member, that was the advice he'd been acting on. It was not expeditious and wasn't as quick of a resolution, but their advice was that it was the most cleanest purchasing-wise method of doing it. That was because there were no guarantees with anything, nor that we would get to that price.

Commissioner Moncada asked if the engineers had a ballpark figure about what this was going to cost? Surely we had told them the money we had and they knew that figure. Mr. McGuire

said the only people who could say why the price was what it was, were the subcontractors. Because of the State Subcontractors Fair Practice Act, the prime contractors had to accept what the subcontractors gave them and then submit that. He believed the engineering firm we worked with did in fact practice due diligence. We delayed the bidding of the project originally for two weeks, and we told the estimator for the Architect that we wanted to verify all the estimates with local vendors. They did that and came back and said that our estimates showed that we could build this structure within the budget the Commission had given us. That was when we went out for the original bid. It came in over budget, so we'd made several modifications in the designs and re-bid it. This second time most of the bidders came in about the same as they had the first time. White Sands had reduced their bid by about \$20,000, but it was still not enough of a reduction. We then sat down to try and begin the negotiations, and this legal issue came up. That was why we were caught in this quandary on what to do.

Commissioner Ledford said for him to decide which direction to go, he needed to know if we were legally allowed to go out to re-bid? Mr. McGuire said yes. Commissioner Ledford said if we went back to negotiation, was there still the issue that the second bidder could protest? Mr. McGuire said yes. Mr. Burroughs said yes, but if somebody went in and protested, they would have to also put up a bond. Commissioner Ledford said he didn't want to delay this. Mr. Burroughs said White Sands didn't either, and that was why they'd sat down in good faith and started to negotiate with the City, spending time and money with their staff, and worked with their subcontractors. They would know by next Tuesday whether they could do this or not.

Commissioner Robertson said he'd spent quite a bit of time with our engineer regarding this protest from Gentry. The deal was that they were protesting because under the State law a bidder must name all the contractors in the bid before it was awarded. In this case they named Lane Plumbing as the plumber and electrician, and Lane Plumbing was not electrical. So as far as the City engineer was concerned, their bid was not valid to begin with. If we let them go ahead and negotiate it now, Gentry would probably have a valid suit against us. Mr. Burroughs said there was a specific Statute which said if that type of problem existed, they could go back in and make those adjustments. He had given that citation to Mr. McDaniel, and it was Section 13-4-36(A). It contemplated in those types of situations where you got into a little type problem like that, you could go back in and make a change. The laws in New Mexico were pretty common sense in this area. They were not designed to establish a whole bunch of pitfalls.

Mayor Carroll said the City was in a position where the low bid was 25 percent over budget. After there were changes made to the original bid, he had some real concern that they couldn't take 25 percent off of that project by putting one coat of paint instead of two, etc. He was concerned they were going to have to significantly change that project, maybe to the point to where it was no longer the same project that was originally gone out to bid for, and that the City may open itself up again to potential challenges that the project was changed enough that it wasn't the original bid gone out for. Mr. Burroughs said the Statute didn't require that the City sit down and negotiate and accept what they did. They were asking for one week to sit down and negotiate, and then at the end of the week if the suggestion was to go back for a re-bid, to implement that.

Mr. Vandergriff said he was originally hired to represent Lane Plumbing on this issue a week or so ago. It was true Lane Plumbing was a mechanical and plumbing contractor, but they also held a GB98. Under State Statute, a GB98 could bid all or any portion of any residential, commercial, or industrial project. So Lane Plumbing was within their rights to bid that electrical section. The only thing required of them was that they in turn have somebody who was a licensed sub in that area performing that work. So under their GB 98, they were actually

allowed to bid that part of the work. He was also involved in this quite some time back, and he had made some very unkind remarks on the plans submitted because there were some bells and whistles and expensive product materials that were being utilized in there. At that time he had told other members of staff that it would be impossible to get it within \$400,000 of budget going out to bid. They gave a shot at bidding it. Then there were some very minor changes made to the plans and specifications, and it was bid out a second time. In commercial construction in New Mexico in the last 12 months there had been a 27 percent increase in costs. The biggest part of that recently was that even a sub who had subs under him, was also required to bond everybody beneath him, and that was creating a bonding tier system which was part of that. But about 16 or 17 percent of that was sheer increase in the cost of doing business in the commercial construction field. So he really did think there was a problem which originated with the Architect, and the Architect seemed unwilling to realize what the real pricing structure of construction was in New Mexico, and for some reason he seemed to think that the City could come up with additional money it didn't have.

Commissioner Ledford said that didn't address what the Mayor had asked. If the City went back and negotiated with White Sands and could do it in a way that it got within budget without major change, then maybe we had something. But if we couldn't, then we may need to go to re-bid. Mr. Vandergriff said he'd talked to the owner of White Sands Construction the other day, and he had indicated that after the City told him they wanted to begin negotiations, he had begun to work on it. He was simply asking the City to let him finish the negotiations. If he couldn't meet the price, then go back to a re-bid. Commissioner Ledford thought the question was whether we could drop \$300,000 to \$400,000 without a major change to the project. Mr. Vandergriff said he could drop \$190,000 in a heartbeat. He made a very good estimate, and other staff could tell them that his estimate was right on the button for what the bid was, and he hadn't take time to cost it out. But the point was that from the legal standpoint brought up by the Attorney, anybody could sue anybody for anything. But no businessman was going to go put out the bond and spend about \$30,000 in legal fees on a case that his Attorney would tell him wouldn't carry through. That challenge was based on the licensing of the subcontractor, and that subcontractor had an appropriate license under the Construction Industries. Commissioner Ledford said it seemed like it was worth the week to find out if we could get there. The longer it took, the more it was going to cost without anybody's fault just because that was the way cost was. Mr. Vandergriff said it would take more than that week time period to go out and redesign and do a whole lot of things anyway.

Commissioner Moncada asked if our design engineer had changed anything at all from the first bid to the second bid? Mr. McGuire said yes, and he would strongly disagree with Mr. Vandergriff that they were minor changes. The kinds of changes that were done on this was that the gauge of the metal studs was the same throughout the entire structure. We had a specialist who did framing say we could take over \$100,000 off the price by allowing the interior non-baring studs to be a different gauge. We did do that, and he considered that a major change in design. Commissioner Robertson said every wall in this building was low baring. Mr. McGuire said not according to the Architect. Commissioner Moncada said since there were some changes done, they had some different material to look at now. Mr. McGuire clarified we had not made any changes since the last bid was let. We were waiting for the negotiators to present us with some alternatives, so we had not done anything as far as design changes on our part. We'd been waiting for White Sands to come back to us.

Mayor Carroll said at this point, when we said we were negotiating, what we had done was ask White Sands to give us a proposal, period. If in fact White Sands Construction Company still wanted to give us a proposal with no commitment on our part, whether it met the price or not of

us incurring any liability or responsibility to accept or compensate them, if at that point we chose to go out and re-bid it, then it might be reasonable to give them a week or ten days to make that proposal. Commissioner Robertson said he agreed, provided the Attorney would tell us it could keep us out of hot water. Mr. McCourt said the question then became if that was going to then be interpreted that they had been awarded the low bid, and that we then had some commitment to them. Mayor Carroll said it had to be with the understanding that we were making no commitment. If in fact that was agreeable, we would be back here after we heard from White Sands. Commissioner Ledford thought the Attorney had said we were not committed and could still RFP.

Mr. Burroughs said White Sands had probably a couple hundred hours already logged into this thing. They didn't want to sit down with the City staff and teach them how to build this thing cheaper, and then the City say, "Thank you very much White Sands—Good-bye". White Sands thought if they got down to the Architect's number, that they should be awarded that contract. If they got down to that number, if they came in and did value engineering—there were ways to save those things. They didn't want to come in and put in a couple hundred more hours and require people to work this weekend, reach that number, and then the City... If they came up with the proper structure and it was down to that number, then they felt they should be entitled to that bid.

Commissioner Ledford said he didn't have a problem with that if staff agreed with the changes. Mr. Burroughs said he expected good faith from the staff, and in value engineering there was a lot of give and take. If they sat down with staff and everyone in good faith looked at it, and if they got down to the number which had been budgeted, he felt they were entitled to be awarded that contract.

Mayor Pro-Tem Griggs said he didn't have a tremendous amount of disagreement with that. His concern at this particular moment, though, was that the changes Mr. Burroughs talked about were cosmetic ones in a lot of ways. At what point did we get into an issue where significant changes were made to where a re-bid was almost mandated because we had changed the scope of the project to such an extent that we were at risk? Mr. Burroughs said they weren't just going to say they could reach the budget number, here it was, and they could do it. Every time the Architects would always overdo it, the contractors would under-do it, and the answer was somewhere in between.

Mr. McCourt said he would just advise the Commission that he didn't disagree with what Mr. Burroughs was saying. However when you did these frequently, you traded off construction costs for operational costs, and you wound up driving up your operational costs because you had units that didn't last as long or flooring that didn't last as long or material. So you drove up your operational costs of running and maintaining that building. He just wanted the Commission to be aware that was a very realistic possibility in doing this type of work. Mr. McGuire said an example was the retrofitting of the Senior Center for the sprinkler system. That was one of the things which was negotiated out of the construction of the Senior Center when it was constructed some years ago. His only concern was that as the person who was going to try and negotiate with these folks, at what point were we asking that if we came to a period where we said no, would they cry foul because they'd just invested another 200 hours in this, and therefore the City owed them something? What happened if we didn't reach it within seven days from now and White Sands and Mr. Burroughs came back on us?

Commissioner Cole said he was concerned if we did a lot of this negotiating, later on there would be Change Orders coming in. Mr. Burroughs said if they went back and re-bid and got

“XYZ Company” out of Albuquerque to build it, he guaranteed there would be changes to it. He didn’t care what structure was built, there would be changes. He’d handled hundreds of construction jobs for clients, and he had never seen one that didn’t have a Change Order. Commissioner Cole said he didn’t know how to define significant, but he would say there would be significant Change Orders down the line. Mr. Burroughs said White Sands was ready to act in good faith in their negotiations with Mr. McGuire, Mr. McCourt, other staff and all the subs, and see if they could come up with something. Just sitting here tonight, White Sands had told him three things they could change right off the bat, and they were not the kinds of things which would cause operational costs—they were certain types of things that had to do with hardware and things like that.

Commissioner Ledford said his concern was if we went to re-bid, we were going to have to change the project drastically just to get there, and we might be able to get there without a reduction. Mr. McGuire asked at what point was this non-economical for White Sands, as well as the City? One of the things which made him nervous was when Mr. Burroughs stated that they had all of these hundreds of hours in this, and at some point... His belief was if you didn’t get that bottom line, you didn’t get the bid. That was kind of a simple way of looking at it.

Mr. Burroughs asked what the City’s budget was? Commissioner Cooper said \$1.8 million. Mayor Pro-Tem Griggs said there was a little more to that. While the \$1.8 million was important, it was the significant change to the building. If they could change the HVAC, but in turn would need to cut 1,500 or 2,000 square feet off the building, it may be significant enough to where it would kill the whole deal. If we came back in and White Sands met the number, at what cost did they meet the number? We still had to have the option to say any change was too significant for us to accept. Mr. Burroughs said if they got that number down under budget, then they just needed to know they were going to get the project. Mayor Pro-Tem Griggs said that was something he wouldn’t disagree with, but he just wanted to be sure that when we were talking about this stuff, we weren’t only talking about the number but what happened to the building to get to the number. Mr. Burroughs said we could work from the bottom up or from the top down, but White Sands had already given good faith of 100 hours, and they were sitting here tonight talking about this. In turn, they were asking the City to give them good faith that if they got down to that budget number and Mr. McGuire and his staff were comfortable with that number and everything looked good and the square footage hadn’t been cut down, then the City would accept that. Mr. Vandergriff said if it came back to the Commission and if that number was reached and the specifications were agreed upon, when it came back to the Commission, they would have a listing of all of those items that were being changed.

Mayor Pro-Tem Griggs said he didn’t want to say that we would tie into the budgeted number, but if there was significant change made to the building where we were uncomfortable with that number, then he felt we had to reject the negotiation. If we came to it and we didn’t believe it was significant enough, then he agreed we ought to give it to White Sands. Mr. Burroughs said the number they were going to get was from White Sands and staff working together. Mayor Pro-Tem Griggs said not initially. Commissioner Ledford felt if there were significant changes of reduction, then Mr. McGuire was going to say no. If Mr. McGuire said no, then Mr. Burroughs agreed we were done. Mr. Burroughs said yes—it had to be good faith negotiations on both parties. Mayor Pro-Tem Griggs said he agreed with what they were saying, but he was trying to be sure that we interjected the fact that we couldn’t have significant changes made to the building in order to get to the number. Mr. Burroughs suggested the way for the City to protect itself on that was for the Commission to direct staff to continue to negotiate with White Sands in good faith for the next seven days to determine whether or not they could reach those numbers and reach what was satisfactory to the City. Then if not, staff could go back and talk to the

Architect and see what else was the option. Mayor Pro-Tem Griggs said he was afraid he was beating his head against the wall a little bit. The number was what was driving some of the discussion awhile ago, and the number had to be supported by this same type of building. It couldn't be okay that we had to cut the building in half to get to the number. Mr. McGuire said he understood Mayor Pro-Tem Griggs's concern was that if they were to negotiate and could get down to a structure which could be built within the budget, that the Commission still wanted to be sure that everyone was aware that they had the authority to say they felt the structure had been modified beyond what was acceptable and that it wasn't going to work. Mayor Pro-Tem Griggs felt staff had to tell the Commission that. He didn't think the Commission could say that, because they didn't know what the definition was. Mr. McGuire said one of the issues they'd talked about a lot was to continue to provide for the function of the Golf Course, and to provide that service to the community. What he was hearing the Commission say was that staff had to assure that they were going to continue to provide for a functional structure within the budget, and if they couldn't reach that with White Sands, then they had to come back and say they'd failed, or come back with a possible solution.

Mayor Carroll felt where Mayor Pro-Tem Griggs was going and where he had tried to elude to earlier, was that they didn't think just gingerbread changes were going to be enough to get this price down. So his concern would be shaving the quality down, such as 2 by 4 construction instead of 2 by 6, or a 10-year roof instead of a 30-year roof. Sure it will have been brought down to something resembling the project, but where did the line get drawn as to what was too much reduction in either quantity or quality of the finished project? Mayor Pro-Tem Griggs said in essence that was right, but what it really got back to was a comment Mr. Burroughs had made that if we got to the \$1.8 million, White Sands should get the bid. If they got there within acceptable guidelines, then that was a good deal. If they had to go outside those acceptable guidelines, it wasn't a good deal. Mr. Burroughs said that was where they were going to get the staff and White Sands meeting, and if they didn't meet, then they would go back and have the Architect redesign something and go back to bid in January or February of next year, and then we could be sitting here in August of next year having this same discussion. He wasn't a golfer, but he still felt the Golf Course was an essential part of the community. They were just asking staff and White Sands in good faith over the next seven to eight days to sit down and negotiate this thing and see if they could come up with a number that was satisfactory to staff and satisfactory to White Sands.

Commissioner Ledford asked if that was okay with staff, as it seemed Mr. McGuire had some hesitation on this. Mr. McGuire said his hesitation and concern was the kinds of things that had been mumbled around over the past week—things like those expensive toilets in there and they could just go buy commodes off the shelf. With 20 commodes in the building, they might save \$5,000 to \$6,000 there. Without a real look at redesigning of the structure, he hadn't heard anything that gave him confidence that we were going to get there. He was willing to wait a week to find that out. However, when he talked with our engineer, he was skeptical. Commissioner Ledford said if we re-bid, how long would it before we got back here to approve a project? Mr. McGuire said approximately 90 days. If the Commission was to instruct him to go out for a re-bid, he had already set up a meeting this Friday with the Architect and engineer. It would probably delay this another three to four months.

Commissioner Moncada said Mr. McGuire had mentioned that we had asked for a certain type of commode in our first bid. But now we were allowing White Sands to go back and bid a lower quality of commode. So anybody could have also done this and perhaps come to this figure. So where was the fairness in that? Mr. McGuire said that was absolutely true. When you entered into negotiations, the people that were left out of that process could always say, "Well, if

you'd given me the chance". But in this case White Sands was the only bidder that did in fact reduce their costs from the first bid to the second bid. Commissioner Ledford said White Sands had earned the right because they were the low bidder. Mr. McGuire said that was exactly right, and they had earned the right in that sense. Mr. Burroughs said the Statute also said that the municipality could bid a couple times and if it didn't work, then if it wished to, it could negotiate with the lowest bidder because they were the one who had come closest to it to begin with. Commissioner Moncada said *if* they wanted to negotiate. Mr. Burroughs said right. If the City didn't want to negotiate, then that was fine. But they all knew that 90 days became 180 days became 360 days, and then we were sitting here next August looking at it again. His client was offering for the City one week the opportunity to see if this could work.

**Commissioner Cole moved to go out for re-bid based on staff recommendation. Seconded by Commissioner Moncada. Mayor Carroll, Commissioner Moncada, and Commissioner Cole voted "aye". Mayor Pro-Tem Griggs, Commissioner Cooper, Commissioner Robertson, and Commissioner Ledford voted "nay". The motion failed by a vote of 3-4-0.**

Commissioner Ledford said we could go to negotiations and give it another week. He felt the issue of concern was to make sure that the City had the ability to say we'd crossed the line and we wanted to say no to the negotiation and go to re-bid. Mr. McDaniel asked if Mr. Burroughs would accept a commitment that if we rejected a particular piece of design as being too big a chop from the project and we go out to re-bid, we won't put what we have rejected in the bid? In other words, we won't use his work product that we had rejected to allow a re-bid to be lower. Mr. Burroughs said he would assure that the City's Architect would not take what they had to offer as a reduction and that was just making it too complicated. They were willing to sit down in good faith with City staff over the next week and see if they could work something out. Mr. McDaniel said what was necessary and what he had heard from the City Commission was that we had to retain discretion to say if something didn't work for us. These were the people that wanted to retain that discretion. Even if Mr. McGuire said he thought it looked pretty good, the Commission needed to have the discretion to say it didn't work for them and they wanted to go out for re-bid. The question was if Mr. Burroughs and his client were willing to commit to do that? Mr. Burroughs said if staff would deal in good faith, his client would too. And if they didn't reach a resolution, then they didn't reach one.

Mr. Grant Dalpes, Golf Pro, said being involved with this from the very beginning, he believed in the discussions they'd had was that the footprint of the basic building would never change in these negotiations. They could additionally state that the management to allow the capability of the quality they originally asked for was important. He felt it was important to go through this process, because if it didn't get there, we were still going to learn a lot to where we could get the next one right. That was a big key, because part of the problem was that the contractors specifically were given numbers which we didn't get the first time. There was nobody to blame. He'd heard blame go every which way here.

Mayor Carroll said we brought this item to a vote, and the vote to re-bid failed. So we either negotiated with White Sands or we forget the whole project. That seemed to be the choices at this point.

Commissioner Cole said he would be willing to make a motion that we negotiate with White Sands. Mr. McCourt suggested that the Commission table this to the next meeting, and staff would move forward. Staff would negotiate with them, and the Commission hadn't committed to anything yet. White Sands had been told that we were willing to work in good faith, but that the

City Commission wanted to retain the final decision. Mr. Burroughs said he would sure like a little confidence from the City Commission if they were going to spend the next seven to eight days working on this, putting all their other projects to the side. He would like a little confidence from the Commission that they approved for them to go back and negotiate.

Commissioner Cooper said that was what we had decided—not to go out to re-bid, but to negotiate. Mr. Burroughs said the City Manager wanted to table the whole thing and make no decision tonight. Mr. McCourt said no—he wanted to retain the authority of the Commission to ultimately say no. And if the Commission said negotiate and that magic number was hit, then we were open to saying now we had to award. Mr. Burroughs said if they reached a number of \$1.8 million and Mr. McGuire came back and said it was not a good number because it took away from the quality of the building, then the negotiators hadn't reached a resolution.

Mayor Carroll said the item on the agenda was to provide direction to staff on whether to negotiate or re-bid. The direction to staff at this point was to negotiate. Mr. Burroughs asked if they were going to pass a motion to that effect? Mayor Carroll said they didn't need one. Mr. Burroughs said he was hoping to have a little confidence to go out and work on this.

17. Notification of vacancies on Boards and Committees.

*Community Development Advisory Committee.* One vacancy.

No appointment was made, and the vacancy was rescheduled.

**UNSCHEDULED COMMUNICATIONS:**

A. Comments by Mr. Larry Berry regarding need for regulation football fields in the City.

Mr. Berry said he was on the Little League Football Commission, and he'd heard discussion tonight on setting parks aside from new subdivisions. They sure needed a football field somewhere which was designed just for football for the Little League. Right now they were over at Griggs Field, which they appreciated, but it was not really what you would call a real football field. Perhaps if the City Commission would keep that in mind, maybe we could get something which we could call a regulation football field. We had soccer and baseball fields already. Commissioner Robertson asked why Griggs Field wasn't a good football field? Mr. Berry said they had fields they were playing on, but one was very short and narrow, and the other one didn't have a good grade on it. It was better than playing in the street, but perhaps if they could find something and stick it in the budget somewhere, they would sure appreciate it. Mayor Carroll said there had been discussion of other large areas we might be able to utilize for activities, and one of the areas we were looking at was the old landfill. Mr. Berry said he understood the water desalt plant was also supposed to build some kind of a park in that area and use the water from the plant. Mayor Carroll said that was going to be more of a test bed for different grasses and that sort of thing. We were looking at the whole area over there to possibly reclaim. That might be an opportunity for us to do.

B. Comments by Mayor Pro-Tem Griggs regarding recognition of "Miss Alamogordo" and "Miss Otero County".

Mayor Pro-Tem Griggs said he wanted to recognize and congratulate Danielle Delone and Amanda Wiley who were named "Miss Alamogordo" and "Miss Otero County" last Saturday night. At the next Commission meeting there would be a presentation to them.

C. Comments by City Manager regarding water report; and NMML Annual Meeting.

Mr. McCourt said the water report was okay. He did want to point out that we'd had a major problem with Well No. 7. The good news was that we were in pretty good shape and could currently get by and get in there to fix it. The preliminary analysis was that the casing had failed. We would be instituting repair action on that immediately. Commissioner Robertson asked if we were still taking 3 million gallons per day out of Bonito Lake? Mr. McCourt said yes. The levels were falling, but of course, we were now starting to get some rain. Commissioner Robertson said he was up there Sunday and it looked bad. Mr. McCourt said yes, but that was what the reservoir was there for—to build up and then take the water out in the summer.

Mr. McCourt reminded the Commission that the New Mexico Municipal League was meeting at the end of August in Roswell. If they were interested in attending, they needed to talk to the City Clerk.

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

There was no need to adjourn into Executive Session.

**Commissioner Cooper moved to adjourn. Seconded by Commissioner Robertson. All voted "aye". The motion carried by a vote of 7-0-0. The Meeting was adjourned at 12:10 a.m.**

*/s/Donald E. Carroll*

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Mayor Donald E. Carroll

ATTEST:

*/s/Angie Rahn-Broyles*

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City Clerk Angie J. Rahn-Broyles  
(SEAL)

(Prepared by Teresa Y. Gutierrez)

Approved at the City Commission Regular Meeting of August 9, 2005.