

**CITY OF ALAMOGORDO, NEW MEXICO
CITY COMMISSION REGULAR MEETING MINUTES
7:30 P.M., COMMISSION CHAMBERS
APRIL 10, 2007**

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

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

CALL MEETING TO ORDER, ROLL CALL, INVOCATION, AND PLEDGE OF ALLEGIANCE

Mayor Don Carroll called the meeting to order at 7:30 p.m. The roll call was taken, and all of the Commissioners were present. The Invocation was given by Reverend Steven Trout followed by the posting of the colors by the Alamogordo High School Air Force Junior ROTC. The Pledge of Allegiance was led by Commissioner Ledford.

PRESENTATIONS:

1. Presentation by Beth Zigmond the past president of Altrusa International of Alamogordo to the City of Alamogordo for the Toys for Joy program.

Ms. Beth Zigmond presented a certificate from Altrusa International of Alamogordo to the City in recognition of their contribution to the Toys for Joy program.

2. Presentation to Kimberly Turner to congratulate her in recognition for being named a distinguished finalist among youth volunteers in New Mexico for 2007 in the Prudential Spirit of Community Awards.

Mayor Carroll explained that Kimberly is a sixth-grader at Chaparral Middle School, and she initiated a program called "Bed & Bath Blitz." She also participates in a puppet program to teach elementary school children how to prevent bullying. Mayor Carroll presented her with a certificate and asked that she explain the program. Mayor Carroll thanked Kimberly for all of her hard work.

3. Presentation of the Disability Award Certificate to Alamogordo Orthopedic Associates and Surgical Center.

Mark Goffman, Chairman of the Alamogordo Disabilities Council, came forward to make the presentation along with Mayor Carroll, and the certificate was read and presented to Dr. Allen Rickman.

CALL OF THE CONSENT CALENDAR:

MINUTES:

4. Minutes of March 27, 2007 Regular Meeting.

Recommendation: Approve the minutes.

CONTRACTS AND AGREEMENTS:

5. Approval of the Airport Certification Manual revisions.

Recommendation: Approve the revisions.

OTHER BUSINESS:

11. Award of RFP No. 2007-006, Concession Stand Services.

Recommendation: Award the bid to Tropical Sno.

12. Award of RFP No. 2007-007, Appraisal Services.

Recommendation: Award the bid to Denton Colvin & Associates in an estimated amount of \$30,000.00, including NMGRT.

13. Consider award of IFB No. 2007-7, Solid Waste Collection and Disposal – City Facilities.

Recommendation: Award the bid to Waste Connections of New Mexico, Inc. d/b/a Southwest Disposal Corp. in an estimated amount of \$7,514.11 per month (\$90,169.22 per year), including NMGRT.

14. Statement regarding the Executive Session of April 2, 2007.

Recommendation: Approve the statement.

Commissioner Ledford made a motion to approve Items 4, 5, 11, 12, 13 and 14 of the Consent Calendar. Commissioner Moncada seconded the motion. A vote was taken, and all voted "aye." The motion carried with a vote of 7-0-0.

ORDINANCES AND RESOLUTIONS:

6. Consider Ordinance No. 1296 relating to Affordable Housing.

Recommendation: Approve the ordinance for final publication.

Mayor Carroll explained that this Ordinance was passed several months ago, but it was found out from the Mortgage Finance Authority that it wasn't done in the proper order. The Ordinance was then sent to them, and they looked at it and said it was fine. The Mortgage Finance Authority said to go ahead and approve it again.

City Manager Pat McCourt pointed out that in Section Three, "General Definitions," specifically on page five in the proposed Ordinance there are a couple of minor errors, specifically on CC it says, "Ordinance shall mean this Ordinance No. 1246..." and that should be 1296. On that same page, there is duplicate numbering, and that will be corrected.

Mayor Pro-Tem Griggs made a motion to approve Ordinance No. 1296. Commissioner Cole seconded the motion. A roll call vote was taken, and all voted "aye." The motion carried with a vote of 7-0-0.

Mayor Carroll noted that Habitat for Humanity will probably be coming before the Commission at the next meeting requesting that they be provided some support as allowed by the Ordinance. The Ordinance is fairly complex to not only interpret but also to operate under. Staff is looking into what would be required should the Commission desire to approve any assistance to Habitat for Humanity or any other group that might come forward and ask for assistance under the terms of the Ordinance.

7. Consider Ordinance No. 1297 amending Section 11-05-270 of the Code dealing with Unreasonable Noise and a section of the Traffic Code dealing with prohibited acts while driving.

Recommendation: Approve the ordinance for first publication.

Director Sam Trujillo explained that a few months ago they were contacted by a couple of citizens raising concerns about the current City Ordinance. They also received some comments from the members of the Commission asking that the Ordinance be reviewed based on some concerns that they had received. They met with some citizens, and there was one citizen in particular who spent a lot of time researching noise ordinances from around the country and was very helpful in the process. The Department's legal advisor and Captain Bird reviewed what had been happening over the last couple of years with complaints relating to the noise ordinance, and before the Commission are the recommended changes dealing with those particular issues. Director Trujillo asked Captain Bird to present the specific changes.

Captain Jim Bird explained that there had been some difficulty in the past enforcing the Ordinance as written. It was more subjective to the officer, and there weren't specific guidelines. They felt that the best way to approach it was to look at the two existing ordinances that were being enforced and make some amendments to them. There were a lot of complaints regarding cars, boom boxes, construction at late hours, trash collection, music coming from homes and parks and things of that nature.

The first one is, "Unreasonable Noise," which is Ordinance 11-05-270, and there is a minor change that adds distances. Having reviewed ordinances from across the country, the common distances were anywhere from 25 feet to 100 feet. They felt that 25 was kind of unreasonable, but 100 feet would not be effective in residential areas where there are narrow streets and the house is sitting less than 100 feet from the curb. They settled on 50 feet, which has been adopted by a lot of other cities in their ordinances. That was in Section one, paragraph two.

Section three is an amendment that was put in that gives a clear definition of times. It addresses construction tools, construction and demolition and the times of the day that kind of noise would be prohibited without a special permit from the city manager or his designee. There are noise permits and parade permits that go through the city manager's office and city clerk's office, which would allow construction during those hours. They commonly see that kind of thing in the summer where they have to pour concrete at 2:00 and 3:00 in the morning because of the heat in the middle of the day. There was some concern on the part of the construction companies that it be addressed, and that is what they came up with.

There have also been a large number of complaints of people working on their cars and testing them at all hours of the day and night, and that is what Section Four covers. Section Five has to do with refuse collection, and there was no problem not collecting during the noted hours. Captain Bird went on to say that they needed a better definition of what "plainly audible" is, and what they put together from other ordinances makes it clearer for the officer doing enforcement as well as the individuals to whom it might be applied.

Captain Bird indicated that they didn't want to impair people in business districts from protecting their business, and that was why Section Seven was added. If zoned for business, that business should be able to be conducted.

The biggest complaint area is loud music coming from vehicles. The most appropriate ordinance that was cited when they believed that music was unreasonable was, "Prohibited Acts," in that it impaired an individual's ability to drive safely down the road. Paragraph six was added making it easier to enforce and easier for the public to understand in terms of what the limitations are for music.

Commissioner Brockett expressed his gratitude for the citizens that have worked with DPS on this.

Commissioner Cole asked a question regarding the best way to notify DPS of a noise situation, and Captain Bird said that the best thing is to just call DPS. It is a petty misdemeanor and has to occur in the officer's presence for a violation. Citizens also have the right to go in and see the city attorney to

file a complaint though often citizens won't because they don't want to get in a feud with the neighbor.

Commissioner Moncada asked if a dog barking in the middle of the night is something that is handled by this Ordinance. Captain Bird said there is a more specific Ordinance that would have to be cited, which is, "Barking Dogs." That wasn't looked at, but it is a subjective thing also. If the officers can stand in the front yard and hear the dog, they try to contact the owner and either give them a warning or a citation. A lot of times the owner of the pet isn't there, and so DPS documents it and has animal control officers follow up the next day. If it is a continued problem or if all the dogs on a block are barking, it is difficult to enforce.

Commissioner Ledford asked what it means in Item Eight and Nine when it says between the hours of 10 and 6 a.m. and the following day. Ms. Becky Ehler, DPS Legal Advisor, said that the short answer would be that Friday night at 10 p.m. is effectively the start of the weekend for this Ordinance. Between 10 p.m. on Friday night and 8 a.m. on Saturday morning is when it can't take place. The relevance of "the following day" is that they are trying to limit time so that it is not continuous.

Commissioner Lujan asked for clarification regarding getting permission from the City Manager, and Ms. Ehler explained that is for the construction activity. They recognize that there are times when it is necessary for a business, and if the City Manager has given permission, they can have an idea of how many people are being disturbed. Also, those permits can be in dispatch so that when people call in, the dispatchers will know that it is a permitted activity. Commissioner Lujan asked with the number of things that can be permitted if there would be the same confusion that has occurred in the past. Ms. Ehler explained that the permits give them permission to go beyond the hours that are set forth in the Ordinance, but it does indicate that if the noise is excessive, the officers can shut it down. Captain Bird explained that the noise permit does not give someone permission to violate the Ordinance. The noise permits let the City know what is going on, and it reiterates what the Noise Ordinance is. Generally, a resident is given a warning initially, and if the officers have to return several times, they take action either with a citation or by shutting it down. It usually doesn't get that far.

Commissioner Lujan explained that a band has to get a permit if they are going to be using an amplifying device. It doesn't give them permission to be unreasonable. If there are complaints from the neighbors, DPS responds and generally speaking gives them a warning. If they don't abide by the Order and additional complaints are received, DPS will respond and issue citations. In terms of the construction, the proposed changes provide a time period within which construction can be done. They do realize, however, that in certain circumstances like the pouring of large areas of cement a start time of about 2:00 to 3:00 in the morning is required for them to be able to finish it during daylight hours. There is a provision to get a permit to do that, but that is very seldom. This gives DPS the opportunity to let citizens that are going to be affected know. They would not be stopped as long as it doesn't go beyond the normal course of business. In addition, there are emergency provisions built into the Ordinance.

Commissioner Cole made a motion to approve Ordinance No. 1297 for first publication. Commissioner Brockett seconded the motion. A vote was taken, and all voted "aye." The motion carried with a vote of 7-0-0.

8. Consider Resolution No. 2007-16 approving a quitclaim deed releasing all of the City's reversionary interests in the C.O.P.E. Michigan Avenue property.

Recommendation: Approve the resolution.

Mayor Carroll explained that this Resolution is in keeping with an agreement that the City made with COPE (Center of Protective Environment) when they were in the process of pursuing funding for their new facility. The City allowed them to sell the old facility and put that money into the new facility. Since the facility was technically owned by the City of Alamogordo, this Resolution is necessary.

Mayor Pro-Tem Griggs made a motion to approve Resolution No. 2007-16. Seconded by Commissioner Lujan. A roll call vote was taken, and all voted "aye." The motion carried with a vote of 7-0-0.

OTHER BUSINESS:

9. Mr. Henry Elliott regarding a water bill issue.

Recommendation: Deny the request.

Mayor Carroll explained that this is a situation that the Commission faces on too often a basis where there is a large amount of water that apparently has flowed through the meter, and there is no way for the City to account for it. There is no evidence of a leak, and so the conclusion that is reached is that the water did in fact go through the meter for one reason or another. The City is very limited by procedures in giving any relief other than allowing a mechanism by which the large amount can be paid off over time.

Mr. Elliott explained that he understands where the Commission is on this, but he has had the property checked out and there were no leaks. Mr. Elliott stated that the water would have to have been stolen, as the consumption was 34,000 gallons in a total month, and the house was vacant at the time.

Mayor Carroll explained that the water did go through the meter, and that is the basis by which Mr. Elliott was billed. Since it is a rental property, Mayor Carroll explained that Mr. Elliott does have the option of requiring a higher down payment from a renter. That would put the burden on the renter, and some landlords choose to go that route. At this point, Mayor Carroll said he doesn't see any way that the Commission can provide financial relief because they cannot prove that the water was not used.

Commissioner Lujan asked how much the water would have run to get the bill as high as it is, and Mr. Armando Ortega explained that for the amount of water that was consumed for that month it would have to be constantly running for the whole month. Commissioner Lujan went on to ask if there is any kind of mechanism by which the City notifies the customer if their bill reaches perhaps double what it used to be. Mr. Ortega explained that their handhelds alert the meter readers to high consumption. At that point, the meter readers conduct a leak test, and if they find that there is a substantial amount of water still running, they will do an emergency shut off and leave a door tag.

Mayor Pro-Tem Griggs asked if the dollar amount is based on tier five, and Mr. Ortega said that is correct for anything over 5,000 cubic feet, which would be the 29,000. Mayor Pro-Tem Griggs said that he thought at one time they were looking at coming up with a policy that allowed for charging less in instances where a determination cannot be made of what happened. Mr. Ortega explained that the policy states that with proof of a leak the bill can be adjusted according to that formula. Mayor Pro-Tem Griggs pointed out that in this particular instance he doesn't see that the water could have been used, but it must have been some kind of mechanical issue with the meter. That can't be proven, but it just doesn't appear that Mr. Elliott could have used it. Someone likely would have noticed a water truck parked there with water running into it, but he thought that they looked at this in terms of charging based on the average amount of water that the owner used. He suggested that the Commission should consider doing that in this instance.

Commissioner Brockett asked what is adjacent to that property, and there is a vacant lot to the South and an empty house to the North. Commissioner Brockett asked Mr. Elliott how many times he visited the property during the period in question, and Mr. Elliott said at least once a week and he did a walk through. He also checked in with the caretaker during that time.

Commissioner Moncada commented that the water is so much that if it were running in the street or

the yard even something would eventually grow. In September, it shows the consumption is 34,000, and then in October it drops to 700. It was then 800 and 900 the following months, but in January it went back up to 1,300. Mr. Elliott explained that the tenant had family in at the time of the increased consumption.

Commissioner Brockett asked if September was the only month that the property was vacant, and Mr. Elliott indicated that it was.

Commissioner Ledford asked if there were a mechanical problem, a constant leak, or a running toilet if that could cause enough flow to consume 34,000 gallons. Mr. Ortega said that it would be possible if it were running 24/7. Mr. Elliott said that there was nothing running, and all of the plumbing had been inspected. Commissioner Ledford asked if a running toilet would be considered a leak, and Mr. Ortega indicated that it would. Commissioner Ledford then asked if it is possible that the meter could have not been working and then began to work again. Mr. Ortega said that anything is possible. It is possible that the meter is faulty, and Mr. Ortega said that they don't take the meter back to the original read. It is tested from the current read that is in the ground at the time it is taken out of the ground. Commissioner Ledford asked if they had installed a new meter, and Mr. Ortega said that they did. He has the old meter sitting in his office, but he has never seen a meter come back faulty.

Commissioner Lujan asked if Mr. Elliott paid to have the meter checked if that would tell them if one of the numbers just flipped over, and Mr. Ortega said that would show up. The test looks at the flow against a brand new meter.

Commissioner Moncada asked how much water it was for the month if it were divided by 30 days, and it was clarified that the amount was 34,000 cubic feet of water. Commissioner Ledford asked what the cubic feet cut-off is for tier one, and it is 1,500. He went on to ask what the cost would have been if it were billed at tier one or tier two. It would be substantially less at about \$360 for the total cost of the water not including the base.

Mayor Carroll asked if under the current City policy the Commission has the authority to charge at a graduated tier rate for consumption. City Attorney Bill Brogan said that in this instance the Commission is sitting in a judicial situation, and as finders of fact, the Commission could determine that there was apparently something wrong with the meter. Based upon that, the Commission could decide that Mr. Elliott should be charged for less, back to his average cost. That said, a finding of fact would have to be put in whatever the Commission decides to do. They would have to determine that had the meter been functioning properly, it would have only registered "X" number of cubic feet of water.

Commissioner Lujan asked if it is possible for a number to skip on a meter, and Mr. Ortega reiterated that in his opinion anything is possible. Commissioner Lujan went on to ask if that happens whether it can be identified as such, but Mr. Ortega said that he is not an expert on the test. If the tester saw a register skip, it would be noted in the remarks.

Mayor Carroll reiterated that the Commission could find that because a leak was not detected and the property was vacant at the time, it is not realistic to expect that so much water could have been used and there must have been some defect or malfunction in the recording device. The bill could be adjusted accordingly.

Commissioner Moncada asked Mr. Elliott routinely turns off the water when a property is vacant, but Mr. Elliott said that he does not as he pays the water for his tenants. Commissioner Ledford asked if there is a finding of fact such that they provide relief in the next instance the Commission would be bound by that. Mayor Carroll pointed out that in his mind what makes this instance different is that the property was unoccupied during the period of time.

Commissioner Lujan said that his concern is what will happen if the word gets out that the

Commission has provided relief and the difficulties that may bring up in the future. Mayor Carroll said that does become difficult, and that is why this is addressed on a case-by-case basis.

Commissioner Moncada said that she understands the Ordinance very well, and it is always a problem because everybody that comes before the Commission with a problem like this has a particular reason. The problem that she has is they have not proved that the house was vacant in that month. Mr. Elliott cited a court document from the State of New Mexico Magistrate Court indicating that the renters had moved out. Mayor Carroll asked when the renters vacated the premises, and Mr. Elliott said that it was on the first of August. The water that was used was used during the month of August. Mr. Elliott also indicated that the gas and electric were off during that month.

Commissioner Brockett asked what the duties of the caretaker are, and Mr. Elliott said that he is the renter of the house in the back and knows what goes on in the front house. He is, however, on a separate meter. Commissioner Cole asked for clarification as to when the 34,000 cubic feet of water was used, and it was August 2nd, 2006, through September 1st, 2006.

Commissioner Lujan asked if this is the only house hooked up to that meter, and it is. Commissioner Moncada asked if the bill were calculated based on tier one rates what the amount would be, and it would be approximately \$360.40.

Mayor Pro-Tem Griggs said that he thinks they should look at it perhaps in terms of no one knowing exactly why this happened. A lot of water ran through the meter, and maybe they should charge it at a tier two rate. City Attorney Brogan indicated that would likely be arbitrary and capricious as there must be a finding of fact that supports what is being done.

Mayor Pro-Tem Griggs made a motion to charge the bill in question at the tier two rate, and Commissioner Moncada seconded the motion for discussion.

Commissioner Moncada asked if tier two is where Mr. Elliott's bills generally fall, but they are generally in tier one. City Attorney Brogan reiterated that the Commission would have no way to support choosing tier two. They could support tier one by finding as a matter of fact that something happened to the meter.

Commissioner Ledford pointed out that in terms of a finding of fact, any number of things could have happened. It could have been something other than the meter, and he pointed out that there seem to be a lot of issues in this case that have not been encountered in the past. Mr. Ortega indicated that the City staff had followed basic policy. Commissioner Moncada said that it seemed to her that the City had done everything in its power to check and see what could be found. The house was vacant, and the utilities were turned off.

Commissioner Cole said that what was puzzling to him was how a meter could function in the months previous and the months afterward but foul up in that particular time. He had a hard time accepting that. City Manager McCourt said that it is obviously a large reading, but under any scenario, there had to be water going through the meter. Even if it jumped digits, there had to be water going through it, and yet they are told the building was vacant the entire time.

Commissioner Lujan asked if there is a well on the property, but there is not. Commission Lujan made the point that it is not the Commission's job to prove that customers are using the amount of water they are billed for. It is the customer's job to prove that they did not.

Commissioner Moncada asked City Attorney Brogan to clarify what he had said about not having a basis for charging based on tier two. Mayor Carroll reiterated that the City Attorney's concern was there would be no basis on which to make that determination. City Attorney Brogan stated again that the Commission would have to make a finding of fact that there was something wrong with the meter.

Mayor Carroll suggested that they vote on the motion, and his recommendation was that they vote no

because they could not adequately justify charging based on tier two.

A vote was taken and all voted "nay." The motion failed with a vote of 0-7-0.

Mayor Carroll recessed the meeting at 8:55 p.m., and it was reconvened at 9:05 p.m.

Mayor Carroll indicated that he believed the Commission had one of two choices. One was to deny the request, and the other was to make a determination that because of the fact that the property was unoccupied, the other utilities were shut off and amount of the reading was so large, it must have been caused by some defect in the meter. Therefore, based on that the City could revert to the leak abatement policy and adjust the bill accordingly.

Commissioner Moncada asked for an explanation of the leak abatement policy. Mr. Ortega explained that the leak abatement policy takes the average tier the customer is in and charges them anything over that average tier at the average tier rate. For example, if they average tier one, any water over tier one would be charged at the tier one rate. Commissioner Moncada asked if then it would be about \$364, and that would be the approximate amount.

Commissioner Brockett made a motion that they find as a matter of fact that there was apparently a defect in the meter and direct staff to refer to the leak abatement policy. Commissioner Moncada seconded the motion. A vote was taken, and the motion carried with a vote of 6-1-0.

Mayor Carroll explained that the bill would be adjusted according to the leak abatement policy. Mr. Ortega asked if Mr. Elliott's letter to the Commission would be considered his letter requesting the relief. That would be adequate, and City Manager McCourt asked Mr. Ortega to also get a copy of the minutes from the meeting and the supporting Court document and attach those as well.

10. Approval for hiring special consultants for the Gerald Champion Regional Medical Center (GCRMC) Industrial Revenue Bond Issue (IDRB).

Recommendation: Approve the hiring of Special Counsel and Bond Advisor for the City to assist in reviewing and making a recommendation on the GCRMC IDRB.

City Manager McCourt explained that the City has in the past worked with Gerald Champion Regional Hospital in the issuance of what are called industrial revenue bonds, which allow the hospital to borrow money at government rates. The interest is then non-taxable. The City last did it in about 1998 or 1997, and the hospital now wishes to refund the old bonds and raise additional capital. That is how they're getting the money to build the buildings and construct the campus of the Gerald Champion Regional Hospital.

City Manager McCourt went on to explain that staff is not sufficiently knowledgeable about industrial revenue bonds to properly advise the Commission, and their feeling is that special bond counsel needs to be hired in addition to a bond consultant, which is what the City does itself every time a bond issue is handled to make sure that the Commission is advised appropriately and that all the documents are in order. The City has a proposal from Modrall Sperling in the amount of \$12,500 plus out-of-pocket costs. The total was estimated to be not more than \$14,000. He spoke with Mr. Kevin Powers, who the City had used in the past on bond issues, and Mr. Powers had not submitted his proposal yet. He did indicate to City Manager McCourt that it would be less than \$20,000.

City Manager McCourt stated that the costs would be paid for by Gerald Champion Regional Hospital. The City would hire the people, and they would be advising the Commission particularly in terms of risks and how the City would be participating.

Commissioner Cole asked if it had to be a government agency as the sponsor, and City Manager McCourt indicated that is the case.

Commissioner Cole made a motion to approve hiring the special consultants. Commissioner Brockett seconded the motion. A vote was taken, and all voted "aye." The motion carried with a vote of 7-0-0.

15. Appointments to Boards and Committees.

Mayor Carroll appointed Mr. Bob Flotte and Ms. Beverly Coble to the Alamogordo Promotion Board, Ms. Beverly A. Eckman-Onyskow, Mr. Warren Robinson, and Ms. Harriett S. Damski (county representative) to the Public Library Board and Mr. Sam Pilgteen to the Alamogordo Disability Council.

Mayor Carroll asked the city clerk to notify these individuals.

SCHEDULED COMMUNICATIONS FROM THE CITY COMMISSION:

16. Request for an update on the Mountain View Mobile Home Park by Commissioner Brockett.

City Manager McCourt said that they would be getting a briefing from the legal folks, and the City is continuing to pursue weed and trash violations that exist separate from what had previously occurred.

Ms. Becky Ehler, DPS Legal Advisor, explained that there are several different pieces to this situation, but she is dealing with the Municipal Court weed violations. They also have cited the owner for several building code violations, which the owner of the park was found guilty of on all seven counts but has appealed to District Court. They are therefore awaiting a new trial in District Court. Last year, Mr. Won was cited for garbage, refuse and debris, junk storage, dangerous containers, and unlawful growth (weeds). He was found guilty of that in August and given 30 days by the Court to correct it or pay a fine. Ms. Ehler contacted the attorney who was representing Mr. Won and asked that they go ahead and clean it up. The attorney indicated that they would do so, but they would need about a month because Mr. Won was out of state. The time passed, and that was not done.

Last week, the Code Enforcement Division sent a certified letter, which starts the ten days for citation for weeds again. If the property is not cleaned up in that amount of time, another complaint will be filed in the Municipal Court to start that process again. The Judge has leeway to make the fines and penalties, but what they have seen is that with repeat violators the fines get heavier in an attempt to induce people to comply with the ordinances.

City Attorney Brogan explained that another piece of the puzzle is the civil side. Mr. Won filed suit against the City in Federal District Court for a 1983 violation of his civil rights. It is kind of a mysterious complaint, and that was forwarded to the New Mexico Self Insurance Fund, NMSIF. They are dealing with that, and Mr. Won's attorney has served the City with what is called a spoliation letter as well as now a demand for production involving virtually all of the City's electronic data collection systems. That would include e-mail and everything involving the City's computers. Staff is meeting next Tuesday to discuss the demand for production, and City Attorney Brogan has contacted Jamie Sullivan's office to ask him to have either an attorney present or participate in a telephone communication conference to figure out how to respond to the demand for production. It is extremely expensive and extremely time consuming.

City Attorney Brogan went on to say that the third part of the puzzle is what he has asked Ms. Nelson and Director Trujillo to talk about in terms of the future of Mr. Won and the property adjacent to Indian Wells as well as what options are available to the City. The property is in sad disrepair. He understands from Director Trujillo, however, that there may be some folks living there still. Commissioner Brockett has advised City Attorney Brogan that it is unpleasantly aromatic, and Ms. Nelson is extremely knowledgeable about what avenues are available to the City through additional property management code violations. City Attorney Brogan asked Director Trujillo to bring them up to speed on what DPS knows is going on there and what may be available to the City in terms of dealing with the problem.

Ms. Becky Ehler said that at one point Mr. Won's attorney did complain about some of the activities that were going on, and he is not happy about people occupying the property. She had asked for a letter that would allow the City to enter the property and remove people, and the attorney said that he would get one of those to them. They have not received it.

City Attorney Brogan explained that one of the problems is that they cannot simply go on to the property, as it would be trespassing and arguably criminal trespassing. They can't simply send inspectors or DPS officers there to wander on to the property and correct the problem. With that in mind, City Attorney Brogan asked Ms. Nelson to explain what options may be available in the future. Ms. Lora Nelson, Building and Zoning Manager, explained that through the International Property Maintenance Code the City has adopted, it could be addressed as a life/safety issue, and through the City Code of Ordinances they could call it an attractive nuisance. Other issues that have come up would include unsecured structures and appliances that could be considered safety issues particularly for children. It is a matter of the City citing Mr. Won regarding securing the structures. If he would fail to do so, the City would have two options. One would be going back into Court, and the second would be to go ahead and hire someone to secure the structures. It would be at the City's cost at the time, and then a lien could be filed.

Commissioner Brockett asked if Mr. Won owns a trailer park in El Paso if there is an agreement with El Paso County that would allow a lien to be placed on that. City Attorney Brogan said that would be very difficult to do. They would have to get what is called a Confession of Judgment into Texas, and it would be very difficult to get a lien across State lines. Commissioner Brockett asked if Mr. Won has been out of State, and City Attorney Brogan said that is what they have been led to believe though they don't have an address for him yet.

Ms. Nelson reiterated that she can cite Mr. Won again for securing the structures, and right now that is about as far as her office could go. Commissioner Ledford asked what happens if someone gets on the property and there is personal injury or death, and Ms. Ehler indicated that they are pursuing it as vigorously as they can. Mr. Won is exercising his right to due process.

Commissioner Brockett said there are properties around there, and he wanted to know what would happen if someone got into one of the trailers and starting cooking meth. City Attorney Brogan said that the sewage system is effectively not being used by anybody, and he asked Director Trujillo if he had any suggestions on how they could access the property without getting into trespass problems. Director Trujillo said that it depends on what's happening. If DPS were to receive information, for instance, that the property was being used for a meth lab, they would request a search warrant to go in and arrest individuals and seize the property involved along with the evidence. In terms of somebody being on the property, it is normally the property owner that is contacting DPS to say that someone is trespassing, which is not occurring in this instance. To just go and remove someone is inappropriate at this particular time. They are utilizing every mechanism that is available.

Commissioner Brockett said that he has contacted a representative from the New Mexico Environmental Department, and he is looking for some answers as well but having some difficulties. It has become kind of a nightmare. City Attorney Brogan asked Ms. Nelson if there is something in the International Management Code about defining an attractive nuisance or maintaining an attractive nuisance. All of the trailers are wide open, the windows are broken out, the doors are hanging open, and the appliances are lying about. Ms. Nelson said that would more or less define an unsecured structure. As far as determining it an attractive nuisance, she couldn't say off the top of her head whether that is an actual definition that appears in the International Maintenance Code. City Attorney Brogan then asked Ms. Ehler about a per se nuisance, as the City has a statute that deals with per se nuisances. Ms. Ehler indicated that the City's nuisance ordinance is pretty basic.

Commissioner Brockett asked about condemning the property, and City Attorney Brogan explained that condemnation is a method by which the City takes ownership of the property based upon in this case a dangerous situation. Commissioner Brockett asked if it would include a potentially dangerous

situation, but City Attorney Brogan said he believes it has to be an existing dangerous situation. The problem with condemnation is the City then owns the property and is faced with remediation. The City would have to pay Mr. Won fair market value for the property, and Mr. Won would argue that the City had diminished the value and he would be entitled to get paid what the property was worth prior to his allowing the cesspool to exist. The second issue is the City would then be faced with remediation, and the City does not know what is out there. It could be that the soil contains a very serious environmental problem, which is what the State fellow is dealing with. It could be extremely expensive.

Commissioner Brockett asked if the legal proceedings surrounding the property would continue if the property were to be condemned, and City Attorney Brogan said they would continue on their normal course.

Mayor Carroll asked Ms. Ehler if she had indicated that there is a process that the City is implementing that will at some point allow the City to go in and secure the property and place a lien on it. Ms. Ehler said that there is a line item in the code enforcement budget that is used in instances where they can't get the weeds cleaned up. However, that is nothing of this magnitude. Mayor Carroll asked what additional steps would have to be taken to go in and secure the property, and Ms. Nelson said that the typical process in abatement would be to send out another ten-day notice indicating that Mr. Won had ten days to correct the violation. If he failed to do so within the ten days or failed to contact DPS to work out a situation by which he could abate the violation, the City could go in and take action after the ten-day notice.

Mr. Alterson commented by way of clarification that the Property Maintenance Codes would allow them to secure the structures but not the property. Director Trujillo said that even if that action were taken and the individual units secured, people going on to the property would still not be trespassing because the City would not be taking ownership of the property at that time.

City Manager McCourt indicated that it is one piece of property that has many housing units on it. He asked why the City couldn't fence off the whole property, and City Attorney Brogan said that would constitute a taking and the City would be subject to inverse condemnation. City Attorney Brogan said that at that point he believes a Court would listen to an argument that the City would be denying Mr. Won any beneficial use of the property. At this point in time, Mr. Won still has access to the property and beneficial use of the property, as he can go in and clean it up himself. City Attorney Brogan said that the way to approach it would be to file a petition for a criminal injunction to prevent Mr. Won from maintaining an attractive nuisance. There is case law in New Mexico on per se negligence, and that could be pursued.

Commissioner Brockett said that the whole point is the City can't allow it to continue as it is indefinitely. He liked City Manager McCourt's suggestion. Commissioner Lujan asked if it would give the City any protection to put signs on each trailer indicating, "No Trespassing," but the City doesn't have access to them and has no jurisdiction to tell people to stay out. Commissioner Lujan asked then how it would be the City's responsibility if someone got hurt, and City Manager McCourt said that people would claim that the City should have taken aggressive action to prevent individuals from wandering in.

Commissioner Ledford asked if there had been any complaints and what had been done to address those. Director Trujillo said that a variety of complaints had been received, and they had been handled in different manners. As far as the trash, debris, and weeds, that had been handled through the Code Enforcement Division following the Ordinance, which is posting, sending a certified letter and then issuing a citation. They have not taken abatement action, which is a possibility, but it would be a significant cost, basically the entire budget for that property alone. There have also been complaints about individuals being in possession of narcotics, and DPS responds at the time to investigate. If they catch someone, they are charged on criminal violations.

Commissioner Ledford asked if Commissioner Brockett had received calls from the neighbors wanting to know what the City is doing, and he has received 800 or 900 calls. Director Trujillo said that they do explain to those who call that it is private property. The City does not own the property. Commissioner Brockett said that the problem, as he understands it, is that a crime or a horrible incident has to occur before the City can take any action. Director Trujillo said that someone being on the property is not a crime. If the person is committing a crime, then DPS can respond. It depends on the crime that is occurring. Director Trujillo said that they do have the capability of entering property under emergency circumstances. Most other cases would require a search warrant. There would have to be enough evidence to present to a magistrate or district judge to get the authority to go on the property. Director Trujillo said that there are avenues to be more proactive, but DPS is pretty proactive right now in being aggressive in charges and using the court system and local ordinances. There are other mechanisms in place, but there are consequences to the City in using those mechanisms. Commissioner Brockett explained that he is interested in preventing horrendous things from happening such as an individual taking a young girl into one of those trailers and committing rape and murder. Director Trujillo said that what they are doing right now is holding the property owner responsible for the property.

Mayor Carroll said that it seemed that they were talking about two issues. The first is cleaning up the weeds. The other is securing the individual trailers so that people cannot get into them. Mayor Carroll is more concerned about securing the individual trailers, and that appears to be a process that the City can in fact go through. Commissioner Lujan said that he thinks if they start securing individual trailers they will have to secure the whole property.

City Manager McCourt said that he is not even sure of the avenues that are available to pursue condemnation with the latest legislation that has gone through because the City does not need this property for a public purpose. There were quite a few pieces of legislation that would prohibit the City from taking the property. Mayor Carroll said that it would have to be for health and safety reasons. If the City is pursuing the mechanism for securing the individual trailers, City Manager McCourt said that would seem to him to be the most the City could be doing at this particular time. The weed issue is a different issue and a different funding source.

City Manager McCourt said he would like to encourage doing more than securing the individual trailers as there is still a cesspool sitting there. Somebody could wander into it or fall into it. Even with the individual trailers secured, there are items on the property that could cause injury.

Commissioner Ledford asked if there is anything that could be done or that the City has done to recommend that this be fast-tracked. Ms. Ehler said that because it is considered criminal in nature the trial has to be within six months of the date of the Notice of Appeal, which was filed around the middle of February. It will be to trial by August. Any violation of a City Ordinance is a petty misdemeanor so the cesspool and the building things were taken that way through the Court.

Mayor Pro-Tem Griggs brought up the issue of holding the property owner accountable. He suggested pursuing the injunction. City Attorney Brogan said that he would be happy to do that, but he wanted to clarify what is meant by condemnation. One definition of condemnation is when the City takes private property for public use such as a highway, street or the Metropolitan Rehabilitation Act. Building Codes use the word "condemn" completely differently. In the Building Codes, the word "condemn" means to declare a building unfit for human occupancy. Once that is done, the building becomes an unsafe structure. If the trailers are declared to be unsafe structures, then the City could go on to the property and post the structures. Little would really be accomplished, but it would be another step toward protecting the City. Commissioner Brockett said that he would be all for that.

Commissioner Ledford said that if they were doing everything they could do, to go beyond that would be invading Mr. Won's property rights. He is not in favor of that. Director Trujillo reminded the Commission that they are going after criminal charges, which is pretty significant compared to civil charges. Mr. Won has the right to due process and the right to appeal, which he has done. That doesn't stop the City from addressing new violations that come up. Director Trujillo asked if they

condemn it based on Building Codes and post it whether DPS would be able to go in and charge somebody for being on the property if the property owner allows it. City Attorney Brogan said the only thing it would give the City is an additional action against Mr. Won. It does not give the City any additional action against people going on to the property.

Commissioner Cole said that he received a phone call from a lady asking if he knew about the people who were living in that trailer court, and he told her that the City was doing everything it could. Commissioner Cole asked if that is what Commissioner Brockett has received complaints about, but Commissioner Brockett indicated that the complaints he has heard the most pertain to the smell, the danger of fire, and how it might affect the surrounding neighborhoods and businesses.

Mayor Carroll said that they have defined the problems and the concerns, and at this point all they can do is direct staff to continually address it in the most aggressive way that they feel is possible. They will then have to go from there.

Commissioner Lujan asked if the Commission is trying to protect the City or the people because putting up the signs may protect the City but to protect the people the only option may be to condemn it. Commissioner Ledford said he is not in favor of doing anything else other than what the Mayor mentioned. Mayor Pro-Tem Griggs said that he has a difficult time coming to the conclusion that the City could condemn it as there are a bunch of different trailers on the property and they can't condemn all of them. City Attorney Brogan said that he could comfortably tell them that none of the trailers are secured. The old manager's office is boarded up. It has a tent out in front of it, but there is no indication of how long the tent has been there. He doesn't know, however, whether the office is secure.

City Attorney Brogan concurred with City Manager McCourt's comments on condemnation of that type of property. The City would have to find a way to define that it is for public use.

UNSCHEDULED COMMUNICATIONS:

A. Commissioner Cole

Commissioner Cole asked for an update on Abbott Ditch. Mr. Mark Threadgill, Operations Analyst, said that they have not received written confirmation that the funds for Abbott Ditch have been obligated. He has received only an informal verbal approval, so in his mind it's not there yet. They have not received a sub-agreement for the funding.

Commissioner Cole asked if they are on schedule with the bridge on Scenic, and City Manager McCourt said that to the best of his knowledge they are on schedule.

Finally, Commissioner Cole asked if there is any update on Sunbaked Biscuits, Inc. City Attorney Brogan said that the City was served late in the afternoon with a lawsuit that the Alamogordo Federal Savings and Loan has filed suit against Sunbaked Biscuits and all of the folks that have filed lawsuits against Sunbaked Biscuits and against the City. They had to name the City because it is a lien holder. The City is in second position with a very good mortgage. He provided each Commissioner with a copy of the lawsuit and the exhibits. He indicated that he had read the body of the lawsuit, and it is a very straightforward foreclosure action against Sunbaked and against the City's mortgage. Alamo Fed is trying to establish their position as being superior to all of the unsecured creditors and the City, who is the only other secured creditor at this point. Because it is in litigation and because it's not on the agenda for tonight, the Commission should feel free to discuss it but can't take it into Executive Session because it is not on the Executive Session declaration.

City Manager McCourt said that the City has filed a notice to declare the default. SBI is in default under their second with the City, and under that notice they have 60 days to clear the default. The City has taken the legal action it can to start proceedings, and that is all the City can do at this point. The City has given SBI two notices, one in February for breach of contract and opportunity to cure for

non-payment of insurance, and one in March for breach of contract in several areas. They have 60 days in which to cure. City Attorney Brogan said he feels comfortable at this point that the City could probably file a cross complaint against SBI for anticipatory breach because it has become pretty clear that they are not going to pay the City. The City's mortgage was intended to be paid through jobs and not through money so the City has an interesting argument in this case. City Attorney Brogan suggested that the Commission authorize staff to retain the services of a foreclosure specialist to proceed against Sunbaked and perhaps against Alamogordo Federal Savings and Loan.

Mayor Carroll suggested that the direction to staff is to take every action they feel appropriate to best protect the interest of the City and the taxpayers. City Attorney Brogan said he has been doing that and is happy to continue to do so. He also suggested that the Commissioners read the complaint carefully along with the supporting documents. He was surprised at the amount of money that Alamogordo Federal Savings and Loan loaned to Sunbaked, as they are about \$4 million into Sunbaked.

Commissioner Cole asked if the City has a figure that it can state, and City Manager McCourt said that he knows they earned back about \$138,000 in job production. If he recalls correctly, the amount of cash delivered to SBI since the start of the project was \$1.95 million. So, they paid back a portion of that through job creation through the first audit. They also had jobs after that first audit. The audit was in October, and they had employment through October, November, December, some into January, and by February it was gone. When they do the audit, which isn't due until October of 2007, they will have paid off another portion of that amount.

Commissioner Lujan asked if the City would include what was already given back through jobs. That would have been cleared through the contract. What the City will endeavor to do is to make sure that if the building and the land are sold that the City will recover the remaining amount that is owed to the taxpayers. Commissioner Lujan asked how they figured in attorney fees, and City Manager McCourt said he suspects there is a clause in the contract that allows the prevailing party to collect attorney fees.

B. Commissioner Brockett

Commissioner Brockett said that last week he visited Twelfth Judicial District Scott Key and requested an investigation of the Sunbaked matter. He took Commissioner Lujan with him as a witness and provided Scott Key with some information that has not been made public yet. He provided copies for the Commissioners as well as the press of Mr. Key's comments.

Commissioner Brockett also submitted a signed complaint to the FDIC, the Federal Trade Commission and the Department of Justice. He has been in contact but has had no luck whatsoever with the New Mexico Attorney General. These things have been done with regard to the Subordination Agreement and what he feels were intentionally inflated figures on an appraisal in order to get the City to subordinate the building. He came in and saw the lawsuit, but his personal opinion is that Sunbaked Biscuits and Alamogordo Fed will be investigated. He was told by Scott Key that he is going to use his subpoena powers if necessary and that he would do an inquiry. He is not going to start a criminal investigation at this time, but he also said that he would use the assistance of the New Mexico Attorney General. Commissioner Brockett said he had been looking for this information for well over a month, and he finally got someone to talk. He believes what the man said, and he has documentation to substantiate what he says.

Commissioner Brockett also thanked Ms. Ehler, Director Trujillo, Ms. Nelson and Attorney Brogan for their work on getting information on the Mountain View Trailer Park.

C. City Manager McCourt

City Manager McCourt reported that on Thursday and Friday of next week he and Mr. McNeile would be out of town for training in Santa Fe. Director Trujillo will be the acting city manager.

Next Tuesday the City is participating in Leadership Otero, and they would appreciate it if any of the Commissioners could come at approximately 3:00 in the afternoon on the 17th so the members could talk with them about the City and what's gone on.

In terms of the water report, the City is in its normal daylight savings time schedule. The City is in good shape.

EXECUTIVE SESSION: Recess into Executive Session to discuss threatened and pending litigation (Won and Star Paving).

Commissioner Brockett made a motion to go into Executive Session to discuss threatened and pending litigation (Won and Star Paving) at 10:19 p.m. Seconded by Commissioner Lujan. A roll call vote was taken, and all voted "aye." The motion carried with a vote of 7-0-0.

OPEN SESSION: Motion to go into open session.

Commissioner Brockett made a motion to come out of Executive Session and back into Open Session for the purpose of conducting business in accordance with what was discussed during Executive Session at 10:40 p.m. Seconded by Commissioner Lujan. A vote was taken, and all voted "aye." The motion carried with a vote of 7-0-0.

15. Action if any from the Executive Session.

Recommendation: Need a motion to approve any action taken on any posted items discussed in Executive Session.

Commissioner Brockett made a motion to accept the letter dated January 16, 2007, from Star Paving offering to settle the City's outstanding balance of \$149,349.07. Seconded by Commissioner Cole. A vote was taken, and all voted "aye." The motion carried with a vote of 7-0-0.

ADJOURNMENT:

Commissioner Brockett made a motion to adjourn at 10:47 p.m. Seconded by Commissioner Lujan. A vote was taken, and all voted "aye." The motion carried with a vote of 7-0-0.

/s/Donald E. Carroll

Mayor Donald E. Carroll

(SEAL)

ATTEST:

/s/Reneé L. Cantin

City Clerk Reneé L. Cantin

(Prepared by Ubiquis Reporting)
Approved at the Regular meeting held on April 24, 2007.

