

SPECIAL MEETING OF THE BILLINGS CITY COUNCIL

December 30, 2005

The Billings City Council met in special session in the Council Chambers located on the second floor of the Police Facility, 220 North 27th Street, Billings, Montana. Mayor Charles F. Tooley called the meeting to order at 4:00 P.M. and served as the meeting's presiding officer. The Pledge of Allegiance was led by the Mayor, followed by the Invocation, which was given by Councilmember Dave Brown.

ROLL CALL – Councilmembers present on roll call were: Gaghen, McDermott, Brewster, Brown, Ruegamer, Veis, Boyer, Ulledalen, Clark and Jones.

ADMINISTRATOR REPORTS – Tina Volek

- Interim City Administrator Tina Volek reminded the Council that it will recess into a closed executive session relating to the Bentley and Bromenshenk litigation of which the City is one of four defendants. City of Billings' attorney Phil Walsh will give a presentation. The Council will then return to the Chambers to take official action.
- Ms. Volek thanked Mayor Tooley, and retiring Councilmembers McDermott and Brown for their time, energy, guidance and leadership in service to the community. She wished them all well on behalf of the Staff.
- Ms. Volek announced the resignation of Planning Director Ramona Mattix effective January 27th. Ms. Mattix has accepted a position as Director of Development Services with the Regional District of Central Kootenai in Nelson, British Columbia, Canada. She noted that during her five years with the City, Ms. Mattix was responsible for development of an Annexation Policy, a Growth Policy and the first Neighborhood Plans. She said that Planning Manager Candi Beaudry will assume the duties of Interim Director on January 30th. A national search to fill the position will be conducted. Mayor Tooley also thanked Ms. Mattix for the work she has performed for the citizens of Billings and Yellowstone County. He said he has had the opportunity to look at other cities in Montana and spend time with other mayors understanding how their operations work. He noted that in the City and County of Missoula several years ago there were 32 people on staff in the Planning Department. Here in Yellowstone County there are 13 staff members that do an amazing amount of work with less than half of the staff of the second largest county. Mayor Tooley said much of that is due to Ms. Mattix, her expertise and excellent staff. He thanked Ms. Mattix for the efforts she has expended on behalf of Billings. Councilmember Gaghen noted that Ms. Mattix's daughter Jennifer was in the audience this evening.

PUBLIC COMMENT on “NON-PUBLIC HEARING” Agenda Items: #1-3.
(Comments offered here are limited to 1 minute per speaker. Comment on items listed as public hearing items will be heard ONLY during the designated public hearing time for each respective item.)

(NOTE: For Items not on this agenda, public comment will be taken at the end of the agenda.)

- LEON PATTYN, 453 NEWMAN LANE, spoke on Item #2. He said he is concerned about his recent board appointment where he was accepted, confirmed and then "disappointed". He is also concerned about the threat of a lawsuit for illegal activities with respect to the Board of Adjustment. He asked the Council to research whether the Board is in violation of state law because there is not a 4th board member to serve at the next board meeting. Mr. Pattyn said this situation must be addressed before next Tuesday because there is a public hearing that must take place. Mayor Tooley said it was his intention to reappoint the three board members.
- DAVID BOVEE, 424 LEWIS, spoke on Item #3. He said he "wants his \$160,000 back." adding it was not "earned and should not have been paid in the first place." It is the Council's responsibility to go through the process that will "get the money back." He directed the Council to not hire people that may "have to go away." Mr. Bovee said it would be better to get competent legal advice before entering into contracts.
- VIOLET LEIKAM, 2719 WYOMING AVENUE, spoke on Item #3. She said she is upset about what is happening in this town. She said the Council should "quit hiring lawyers, spending taxpayer monies and ignoring their advice." Ms. Leikam said it was time the Council did its job and listened to the lawyers. She noted that the taxpayers have made their desires known. Ms. Leikam also said she thinks the citizen's rights are being taken away by the actions of the Council.
- MARY WESTWOOD, 2808 MONTANA AVENUE, spoke on Item #3. She said the Council is facing a difficult decision in a matter that has become very complicated because of previous decisions. If the Council chooses to do what she believes is right – pursue the matter – there should be insurance money that would cover costs and legal fees. The Council must accept the voter's decision to elect Mr. Tussing as their mayor, but urged the Council to make a good decision on the community's behalf and support what is right.
- FRANCIS HARRIS, THE TERRACE, spoke on Item #3. She thanked the Council for their service. She noted that when one signs a contract, one should keep true to it. She said the Council will do a great disservice to the community if it "just lets it go." Ms. Harris said this also sets a bad example for today's youth. She said it will be "shameful and pitiful" if the Council ignores this contract.
- MARY ANN PETERS, 10 ALMADIN LANE, spoke on Item #3. She asked the Council to let the activities of 2005 be over and make a fresh start with a clean slate in 2006.

SPECIAL AGENDA:

1. **RESOLUTION 05-18380 setting the annual salary of the Municipal Court Judge. (Delayed from 12/19/05).** Staff recommends approval of adjusting the base salary by indexing it to the salary of district court judges as follows: 80% of district court judge salary for first term; 85% of district court judge salary for second term

and 90% of district court judge salary for third and subsequent terms. (Action: approval or disapproval of Staff recommendation.)

Councilmember Gaghen moved for approval of the Staff recommendation, seconded by Councilmember Boyer. Judge Knisely thanked the Council for all the time it has spent on this ministerial item. On a voice vote, the motion was approved with Councilmembers Ulledalen, Brown, Ruegamer and McDermott voting "no".

2. REPORT on Board of Adjustment Appointments. (At the request of Councilmember Brewster at 12/19/05 meeting.) Recommendation to be made at meeting. (Action: approval or disapproval of Staff recommendation.)

City Attorney Brent Brooks said that in his review of the appointments to the City Board of Adjustment, the appointments that have been previously made by the Mayor are appropriate and are validly appointed. The four remaining members should be appointed at the pleasure of the Mayor and Council. He recommended that the Council proceed with advertising for those positions for 30 days to fill these positions and appoint those members at the next regular council meeting after the advertising period and to comply with the ordinance that requires the seven (7) board members' "terms run concurrent with the Mayor." Mr. Brooks noted that a potential draft of a proposed future ordinance staggering the terms is available in Option 2 if that is the desire of the Council.

Mr. Brooks addressed Mr. Pattyn's concern by noting that there is a provision that allows extension of a signed permit application that is the subject of his concern. Interim City Administrator Tina Volek said the subject application was made by the City and the Staff will request the extension.

Councilmember McDermott moved for approval of Option 1 (the positions held by Cox, Wagner, Paterson and Lawson to be reopened for appointment), seconded by Councilmember Gaghen. Mayor Tooley noted that with this option, the three people that have been appointed and approved will continue as members of the Board of Adjustment and four new members will be appointed by the next mayor and approved by the Council next year. Mr. Brooks noted that an emergency does not exist so a fourth member (for quorum purposes) does not have to be appointed at this time. He added that the three appointed positions were advertised according to the provisions of the Charter, but the four remaining positions were not advertised because it was assumed that those positions were current due to past practices. A new ordinance would be required to allow those positions to be staggered.

Deputy City Administrator Bruce McCandless noted that he was the author of a letter to the chairman of the Board of Adjustment that pointed out the need to state the reasons for its decisions particularly those that are not consistent with Staff recommendations. He said the Board did not make any public statements that were contrary to the Staff recommendations and therefore did not present any facts upon which it based its decision. Even though the letter stated that the Board may be exposing itself to a lawsuit, Mr. McCandless said he did not intend to indicate that the City of Billings would bring a lawsuit against members of the Board of Adjustments. Councilmember McDermott said she felt it was the duty of the advisory staff member to advise the Board that it should give reasons for any recommended denial. On a voice vote the motion was unanimously approved.

Councilmember McDermott moved to direct Staff to prepare an amendment to the ordinance as indicated in Option 2, seconded by Councilmember Gaghen. Councilmember Veis made a substitute motion to table this item to the second meeting in March, seconded by Councilmember McDermott. Councilmember Veis said he would like time to talk with members of the Board to get their input on staggering the board member terms. Councilmember Brewster said the ordinance would require two readings and it would be more appropriate to go forward with the original motion and present a draft of the ordinance to the board members for their input at their next meeting. On a voice vote on the substitute motion, the motion failed with only Councilmember Veis voting "yes".

On a voice vote on the original motion, the motion was unanimously approved.

3. LEGAL ADVICE on Tussing Settlement Agreement. (Delayed from 12/19/05). Staff recommends the Council review the Singer report and direct Staff regarding further action. (Action: direction to Staff).

Deputy City Administrator Bruce McCandless noted that the Council has received a copy of the advice on the options by local attorney Tom Singer. He said Mr. Singer is in the audience and available for questions. Councilmember McDermott noted that the definition (IRS definition) of employee as it applies to an elected official was missing from his report. She asked why that was omitted. Mr. Singer said the reason he did not address it is because he disagrees with the assumption that the IRS definition supersedes any definitions. He said the specific directive to him in the engagement letter was to consider state law, the City Charter and the City Code. That was his focus, but none of those are determinative because in a contract what is determinative is the intention of the parties. He suggested that part of the IRS Code prevails because the Mayor is treated as an employee by the Human Resources Department and that happens because of the IRS Code.

Councilmember Boyer asked about the risks that concern the Mayor working with Interim City Administrator Tina Volek. Mr. Singer said this is an incredibly odd situation where Mayor-elect Tussing will become an agent of the City in four days and his actions in that role will bind and also create liability for the City. He will be the principal supervisor (which is rather unclear) of the City Administrator, who in the acting role is currently Tina Volek. Mr. Tussing's behavior toward her could create liability for the City under the settlement agreement. Mr. Singer said the agreement gives the City the right to recover its attorney fees and costs for any breach of that agreement. That is the meaning of indemnity in his report. Councilmember Boyer admitted that the report clarifies where the Council "miss-stepped" by not taking legal advice.

Councilmember Ulledalen echoed Councilmember Boyer's concern and asked if the remedies are clear enough in the agreement or is more clarification or reinforcement needed relating to the working relationship between Mayor-elect Tussing and Interim City Administrator Tina Volek. Mr. Singer said there is no available legal channel for forcing more specific language or legal remedies. He said it is worth exploring (in an informal effort) some type of conversation to work out the issues.

Councilmember McDermott asked if Ms. Tussing's employment in the Planning Department would create any legal issues. Mr. Singer said his "off the cuff answer" would

be that due to the fact that the Charter draws a line that the Council cannot supervise anyone, he said he did not think that would be a big issue.

Councilmember Brewster moved to terminate any action going forward by this Council against Mayor-elect Tussing and his agreement as it relates to his status as an employee of the City, seconded by Councilmember Ruegamer. Councilmember McDermott said the Council is making a mistake and should pursue enforcement of the settlement agreement. Councilmember Gaghen agreed and added that the agreement is a matter of trust. Councilmember Boyer said the Council is trying to speak for the entire City and not a mandate that says the voters that elected Mr. Tussing are "running the City." She said the Council represents all of the voters not just the small number that elected him. Councilmember Brewster said trust of the community is foremost for elected officials. He said the Mayor-elect has "a row to hoe" in gaining the trust of the entire community. On a voice vote, the motion was approved with Councilmembers McDermott, Gaghen and Clark voting "no".

Councilmember Brewster moved to have Deputy Mayor Boyer, Councilmembers Brewster, Ruegamer and Clark enter into discussions with Mayor-elect Tussing relating to processes that would mitigate risk relating to Mayor-elect Tussing's working relationship with Interim City Administrator Tina Volek, seconded by Councilmember Boyer. On a voice vote, the motion was unanimously approved.

4. PUBLIC COMMENT on Non-Agenda Items.

- TOM ZURBUCHEN, 1747 WICKS LANE, spoke in regard to the *Gazette* article regarding the discipline of three Billings police officers. He said "the discipline is a joke" and that the offense is certainly much graver than the mere two weeks unpaid leave they received. He asked what wage earner would not accept eight weeks off with six weeks paid without losing accrued paid vacation, sick leave and seniority for any violation of City policy. Mr. Zurbuchen said anyone who would not agree to that "is a fool." He stated if this is "the Council's idea of a policy for discipline, it is a joke." He also thanked the Mayor and retiring Councilmembers for their service. He said it is a "horrible task, but someone has got to do it and they stepped forward."

Mayor Tooley called a recess to move to closed executive session at 4:55 P.M. Mayor Tooley reconvened the meeting at 6:15 P.M.

5. EXECUTIVE SESSION: Litigation Settlement Discussion. (CLOSED SESSION).

Councilmember Ruegamer moved that the Council authorize its attorney to act in accordance with his recommendations relating to the Cloverleaf litigation, seconded by Councilmember McDermott. On a voice vote, the motion was unanimously approved.

ADJOURN – With all business complete, the Mayor adjourned the meeting at 6:17 P.M.

THE CITY OF BILLINGS:

By: _____
Charles F. Tooley MAYOR

ATTEST:

BY: _____
Susan Shuhler, Deputy City Clerk