

## **SPECIAL MEETING OF THE BILLINGS CITY COUNCIL**

### **January 3, 2011**

The Billings City Council met in special session in the Council Chambers located on the second floor of the Police Facility, 220 North 27<sup>th</sup> Street, Billings, Montana. Mayor Thomas W. Hanel called the meeting to order at 5:30 p.m. and served as the meeting's presiding officer. Councilmember Clark gave the invocation.

**ROLL CALL** – Councilmembers present on roll call were: Ronquillo, Gaghen, Pitman, Cimmino, McFadden, Ruegamer, McCall, Ulledalen, and Clark. Councilmember Astle was excused.

### **ADMINISTRATOR REPORTS - TINA VOLEK**

- Ms. Volek referenced Item #1 – Approval of Resolutions declaring emergency to remove sandstone boulders from public and private property and awarding contract to Accurate Concrete Cutting, and advised two resolutions were forwarded in the Friday Packet delivered on December 30<sup>th</sup>; one for Shady Lane and one for Granite Avenue. She said copies were filed in the ex-parté notebook.
- Ms. Volek referenced Item #2 – Approval of Resolution appointing ad-hoc committee to recommend placement of a 30" x 40" painting of Sacrifice Cliff donated by Mike McFadden. She said the resolution was forwarded in the Friday Packet delivered on December 30<sup>th</sup>, and was filed in the ex-parté notebook.
- Ms. Volek referenced Item #3 – Approval of appointment of Municipal Court Judge. She said an e-mail to Mayor and City Council from Kathleen Toohill, dated 1/3/11 in favor of appointing Colette Davies was on their desks and filed in the ex-parté notebook.

### **PUBLIC COMMENT on “NON-PUBLIC HEARING” Agenda Items: #1, 2, and 3.**

**Speaker sign-in required.** (Comments offered here are limited to one (1) minute per speaker. Please sign up on the clipboard located at the podium. Comment on items listed as public hearing items will be heard ONLY during the designated public hearing time for each respective item. For Items not on this agenda, public comment will be taken at the end of the agenda. Please sign up on the clipboard located at the podium.)

The public comment period was opened.

- **Sheila Kolar, 3003 Country Club, Billings, MT**, said she felt she was the best candidate for the municipal court judge and said she had been preparing the last couple of weeks and could begin the duties immediately.
- **Vicki Dunaway, 1303 Granite, Billings, MT**, spoke on Item 1 and said she was concerned that the lowest estimate for the removal of rocks from the face of the rims did not include wire netting to control the rock fall. She said she needed reassurance that the rocks would not continue to roll down. Councilmember Ruegamer asked Ms. Dunaway how long she had lived in the house and if she had insurance to cover falling rocks. Ms. Dunaway said she had lived in the

house for 24 years, had not had problems with falling rocks before, and did not have specific insurance to cover it.

- **Colette Davies, 2335 Crimson Lane, Billings, MT**, said she was a candidate for the position of municipal court judge. She said she wanted the community and City Council to know how deeply honored she was to receive the subcommittee's recommendation. She said the job had been an incredible opportunity for her the past 5-1/2 years and had been a time of great growth personally and professionally. She said she appreciated the support from the community and wanted to express her gratitude. She said whoever was appointed was very fortunate because it was a once in a lifetime opportunity.
- **Tom Zurbuchen, 1747 Wicks Lane, Billings, MT**, asked what the funding source was for Item 1. He said the staff memo indicated the only available funding source was the General Fund, but four or five paragraphs later it talked about billing the property owners. He said all of the bids indicated the rocks would be going back to City property. He said during storms City property ended up on private property and caused damage but the City did not go in and reclaim it. He asked if it was a new direction the City was going and asked if all taxpayers could rely on the City to come and retrieve its property when it ended up on private property with or without damage.
- **Dale Vermillion, 3020 Shady Lane, Billings, MT**, referenced Item 1 and said he had lived at his residence on Shady Lane for 40 years and had never had problems with falling rocks. He said it was a different situation because the rocks sitting above his house were going to fall, and he appreciated the fact that it had been designated as an emergency. He said it had been very uncomfortable living in their home the past year, and they felt they needed to spend time elsewhere because of the uncertainty. Councilmember Pitman asked if they had initially owned the property up the rims. Mr. Vermillion said they had owned approximately 50 to 75 feet behind their house, and when he was on the City Council in the 80's they donated much of the lower part of the rims above their house to the City of Billings Parks Department.
- **Margaret Vermillion, 3020 Shady Lane, Billings, MT**, referenced Item 1 and said it was very stressful. She said it was extremely uncomfortable sleeping in their house so she spent most of her time at her son's ranch in Big Timber. She said it was an emergency, and the rocks should be brought down. Ms. Vermillion asked Council to follow staff's recommendation.

There were no other speakers, and the public comment period was closed.

Councilmember Pitman made a motion to move Item 3 to Item 1, seconded by Councilmember Cimmino. Councilmember Pitman said he felt the rock issue would take a lot of time and focus, and the municipal court judge would not take very long. On a voice vote, the motion was unanimously approved.

## **SPECIAL AGENDA:**

### **1. Approval of Council sub-committee's recommendation for appointment of Municipal Court Judge. (Action: approval or disapproval of Council sub-committee's recommendation.)**

Councilmember Cimmino said it was her pleasure to serve on the sub-committee interviewing the four candidates, who were all qualified. Councilmember Cimmino moved to appoint Sheila Kolar for the Municipal Court Judge position, seconded by Councilmember Pitman.

Councilmember McCall asked City Administrator Volek for an update on the training aspect for Ms. Kolar and if Ms. Kolar had been able to obtain a waiver. Ms. Volek advised state statute required a municipal court judge have three years experience in the legal arena, be a resident of Yellowstone County for one year, and either be educated or have a waiver from the State Supreme Court in regard to position and education. She said it was her understanding from the State Supreme Court the waiver would have to be filed after an appointment was made by the City Council. She said the paperwork was ready to go to notify the State Supreme Court of the Council's decision that evening, and it was the responsibility of the applicant to make the request. She said she understood Ms. Kolar was ready to make the application, and it was up to the judge who was the head of the committee that granted education waivers to take care of the decision on his time. She said a pro-tem judge from the Justice Court was in the court that day and other judges had been lined up. Councilmember McCall asked for a timetable, and Ms. Volek said she was unable to give one. She said the waiver was provided for in the statute and not impossible to get.

Councilmember Clark asked if Colette Davies already had the training and if she was qualified to take over. Ms. Volek advised that was her understanding.

Councilmember Ruegamer said he would continue to support Ms. Davies because her experience as a judge spoke for itself. He said he was troubled by the interview process and was not sure why there was an interview. He said they did not take enough time, and there were a lot of things that needed to be done.

Mayor Hanel asked Attorney Brooks to state the votes necessary in order for the motion to pass or fail. Attorney Brooks stated pursuant to Montana Code Annotated, the Council must appoint the new municipal court judge by a majority of the councilmembers as a whole, which would be six people.

Councilmember Cimmino said the interview process was a thorough analysis of the applicants, and the sub-committee was able to meet a head of time and devise and analyze the questions. She said by the time of the interviews, the applicants had received the questions and were able to prepare. She said she felt the interviews were a positive process.

Councilmember Pitman advised three of the four candidates would have had to go through the waiver process, and it was not anything extraordinary. He said Ms. Kolar could assume the position that evening, show up the following day, and start getting other things done. He said the only thing she could not do was sit on the bench while waiting for the paperwork, and there were pro-tems available to cover.

Councilmember McCall said at the last vote she supported Colette Davies and the recommendation of the sub-committee because she believed in the integrity of the

process. She said she felt Ms. Davies was highly qualified for the position but based on the fact the Council was choosing to approve Ms. Kolar, she would support Ms. Kolar because she wanted her to know that the Council was going to be very supportive that she have a successful year if the motion passed.

Councilmember Ruegamer said he would support the judge, whoever the judge would be. Mayor Hanel said the interview process was very well conducted and very thorough with very good questions. He said the top two candidates were separated by a very narrow margin, and he was very confident either one of the candidates would be able to do a very professional job.

Councilmember McCall said she wanted to support Councilmember Ruegamer's statement regarding the interview process. She said she did not feel they had it down really well and felt it needed to be addressed at a future work session so they could work through the process to make sure it was a little tighter than it had been the last two times it was used.

Councilmember Clark stated he would still support Ms. Davies and agreed the interview process could be improved.

On a roll call vote, the motion to appoint Ms. Kolar as municipal court judge was approved 7 to 3. Councilmembers Ronquillo, Gaghen, Pitman, Cimmino, McFadden, McCall, and Ulledalen voted in favor. Councilmembers Ruegamer, Clark and Mayor Hanel voted in opposition.

Mayor Hanel congratulated Ms. Kolar and thanked Ms. Davies for her participation and support. Ms. Davies advised she respected the Council's decision. Ms. Kolar was given the Oath of Office. City Attorney Brooks left the Council Chambers to deliver the Oath of Office to the Yellowstone County Elections Office and returned to the meeting.

**2. Approval of Resolution #11-19016 appointing a 5-member ad hoc committee to make a recommendation to the Council on the appropriateness and placement of a 30" x 40" painting of Sacrifice Cliff donated by Mike McFadden.**

**Staff recommends approval. (Action: approval or disapproval of staff recommendation.)** City Administrator Volek noted the painting on display that evening and said the artist, Mr. McFadden, was in the audience. She said the City's Art Policy called for an ad-hoc committee to be appointed by the City Council. She said the job of the committee was to review the painting and find an appropriate place to display it. She said Mr. McFadden's only condition was that the painting not be placed in an office but in a place where it could be enjoyed by the public. She said the Council's action that evening was not to accept the painting but to appoint the ad-hoc committee as required by the Art Policy.

Mr. McFadden said he named the piece "Magic", and it was a picture of Sacrifice Cliffs from Coulson Park looking across the Yellowstone River. He said he and his wife would like to donate the painting to the City as a gift with no strings attached. He said the only condition would be that it was placed where the public could enjoy it. Mr. McFadden said he would also do 50 limited edition prints on canvas to be sold in the business community.

City Administrator Volek advised the requirements of the donation were that it be a complete and absolute donation to the City and a document be provided to Mr. McFadden for his attorney to review.

Councilmember Ulledalen said the committee needed to address some of the loose ends in the current policy. He said there were some top notch people on the committee and some analysis of the existing art policy needed to be made such as maintenance and security costs. Further discussion included possible locations for the painting such as the library, the city hall conference room, the airport, transit center, and the community center. Councilmember McFadden suggested rotating the painting to different locations within the City. Mayor Hanel thanked Mr. McFadden and his wife for the donation. Councilmember Pitman asked that the committee report back to the Council with suggestions on how to make the process better, more efficient, and with parameters that would help in making the decisions more uniform. City Administrator Volek listed the names recommended for the ad-hoc committee as Charles Fritz, Carolyn Thayer, Michael Capser, and Donna Forbes. She said the appointment of a Parks, Recreation, and Cemetery Board member to the committee would be made at its January 12<sup>th</sup> meeting.

Councilmember Ruegamer moved for approval of Item 2, seconded by Councilmember Ronquillo. On a voice vote, the motion was unanimously approved.

**3. Approval of Resolutions declaring an emergency to stabilize or remove sandstone boulders from public and private property and award a contract for removing and stabilizing the sandstone boulders at 1313 Granite and Shady Lane to Accurate Concrete Cutting, Inc. for \$189,225. Staff recommends approval.**

**(Action: approval or disapproval of staff recommendation.)** Superintendent of Parks Jon Thompson began his PowerPoint presentation showing pictures of the house at 1313 Granite Avenue that sustained major damage from a rock fall on October 9, 2010. He showed an aerial view of the home and the rock fall area where a 60-foot section of the rim face weighing approximately 1,000 tons failed, broke into pieces, and tumbled down the slope and into the house. Mr. Thompson advised the rim face above the house was parkland.

Councilmember McCall asked Mr. Thompson for the total amount of property currently owned by the City along the rims. Mr. Thompson advised he could not give an accurate count of acreage but said the City owned parkland along the rims from Main Street to the Yellowstone Country Club, in Moon Valley, and Pow Wow Park. He indicated in some areas the parkland extended down the talus slope to the private properties and in some areas it did not. He said it was "all over the board."

Mr. Thompson advised that after the rock fell on October 9<sup>th</sup>, the City contacted Terracon to determine if there were other unstable rocks in the area. He said between October 15<sup>th</sup> and October 27<sup>th</sup>, the rock that had tumbled into the house had rolled another six to eight feet. He said the rock entered the top two levels of the four-level house and was sitting on the structure of the house with two levels below. Mr. Thompson said they estimated the weight of the rock at approximately 50 to 75 tons. He said the homeowner had hired a private contractor to shore up the front of the house with steel beams in an attempt to keep the house from moving further off the piers it had been built on. Mr. Thompson advised after the rock inside the house moved, they

contacted Terracon and Whitten and Borges Structural Engineers to take a look at the house. He said Whitten and Borges' report indicated that the structure of the house over time could not continue to support the rock and advised that efforts be undertaken to mitigate the risk by moving or stabilizing the rock. Mr. Thompson showed additional pictures of the rim face that fell and a rock estimated to weigh between 100 and 150 tons that had detached from the cliff face but had not yet fallen.

Councilmember Clark asked how many other areas of parkland along the rims could fail. Mr. Thompson advised they had not done a thorough inspection of the seven miles of parkland.

Councilmember Pitman asked if freezing and thawing or building too close to the rims could have caused the failures. Mr. Thompson advised that sandstone was a very porous material and the freeze/thaw cycle, age, and erosion from water had been going on for thousands of years.

Councilmember McFadden asked if staff thought the leak from a large water tank located in the same area could have caused the failure. Mr. Thompson advised the water tank was below the rims and quite a distance to the west of the failed areas.

City Administrator Volek asked Mr. Thompson to go back to the slide that showed the culvert on top of the rims and explain the situation with the culvert. Mr. Thompson advised the property owner claimed that the culvert was dumping water onto the cliff face and contributed to the failure. He said the culvert was installed at the time the highway was built approximately 30 to 40 years ago, and the outlet of the culvert had been blocked with concrete at one time. He said there was a small corner where the concrete had come out and there was a small water trail going down into where the cliff face failed. He said he could not say if it had anything to do with the failure because water permeated the rock face at all times. Mr. Thompson advised the culvert was on state land. He said he had been advised by Dan Nebel of Terracon that the entire rims had been moving for thousands of years, especially in the talus slope areas, and would continue to move.

Mr. Thompson began the second part of his presentation discussing Shady Lane. He showed the location of the Vermillion's home and the rock slab in question above Shady Lane, which was located on parkland. He said in January 2010, the entire bottom of the rock slab broke loose, and boulders fell down the slope. Mr. Thompson advised after the failure, he contacted Dan Nebel of Terracon to assess the situation. He said they felt the rest of the slab was estimated to weigh 300 tons and was being held up by a small area of rock below it. Mr. Thompson reviewed before and after photos of the rock slab taken from the backyard of the Vermillion's neighbor to the east, as well as photos taken from atop the rims looking down onto the slab showing the separation from the face of the rims. He said Terracon's report indicated the rock would be subject to complete failure in the near future and recommended it be removed.

Councilmember Clark asked how much money the City had spent so far on both properties. Mr. Thompson advised to date they had paid \$10,954 to Terracon for consulting fees. City Administrator Volek advised Jerry Murphy and Emily Jones from the Moulton Law Firm, who had been assigned by MMIA to provide the City with counsel even though litigation had not been formerly filed, were present that evening. She said their fee would be paid out of MMIA funds but would eventually come back to the City in an increased fee over the year. Mr. Thompson advised Whitten and Borges

was a subcontractor of Terracon, so their fee would be figured into the cost he had previously provided for Terracon.

Dan Nebel of Terracon said it was a very unique situation. He said the rims were formed along a prominent east/west joint plane and it was a matter of freeze/thaw situations. He said as the surfaces failed, the joints further back progressively opened and worked their way forward. Mr. Nebel said most all of the contractors they contacted had experience working on highways and in rural areas but very little experience working in an urban environment. He said there was a significant difference between the two locations due to distance and steepness of the slopes. He said they were only able to receive proposals from three of the many contractors they contacted, and they were COP Construction of Billings (\$1,131,200), Hi-Tech Rockfall Construction of Portland, OR (\$727,300), and Accurate Concrete Cutting, Inc. of Vancouver, WA (\$189,225). He said the three proposals were similar in that they would all stabilize the rock mass, stabilize the boulder inside the house on Granite, install rock blocks up the slope to stabilize the loose rock, provide some type of retention, and then fail the rock. He said Accurate Concrete Cutting, Inc. had a different approach from the other two when it came to stabilization. He said instead of putting large netting around the rocks, they would install retention plates and tie them back into rock anchors and then break the rocks into smaller blocks. He said rather than using the granular fill at the Granite Avenue site, they would place cables under the beams the house was built on to provide the support, and felt they would be able to remove the rock inside the house without having to demolish the entire structure. Mr. Nebel advised each of the three contractors would use cranes to mobilize equipment.

Councilmember Gaghen said she was amazed at the discrepancies in the costs. Mr. Nebel advised the major cost was the netting and cables that Hi Tech Rockfall Construction and COP Construction proposed to use. He said Accurate Concrete was choosing to use retention plates instead of the cables and netting. He said after the rock had been removed, the netting would be removed.

Councilmember Ronquillo asked Mr. Nebel if he was familiar with any work that Accurate Concrete Cutting had done. Mr. Nebel said he had just finished up a project with them at the Madison Dam in Ennis, and they had done a very good job. He said most of their work was done in the Vancouver area, but they did do work throughout the United States.

Mr. Nebel advised that there was the potential at both locations that as any one of the three contractors began the work, the rock blocks could fail before anything was done. He also said they proposed holding a meeting with the local property owners, conducting pre-construction and post-construction structural surveys of the homes, and monitoring of vibrations.

Councilmember Pitman asked if the bid amounts included liability insurance. Mr. Nebel said they did not and said that was the whole problem finding more contractors to do the work.

Deputy Attorney Kelly Addy clarified that the representatives from the Moulton Law Firm had been retained by MMIA to represent the City in connection with litigation that had already been filed concerning the Granite Avenue location, and they did not represent the City on the Shady Lane project. Mr. Addy advised early on it was apparent there was no firm anywhere that would be able or willing to secure all risk

coverage for the two locations. He said the three contractors did have professional liability insurance. Mr. Addy advised the Bureau of Mines had been studying several sites on the rims and no one saw the failure at Granite about to happen. He said the problem they were up against was gravity with big rocks. Mr. Addy said there was a separate emergency resolution for each location because they were two very different legal situations. He said the Granite location was already in litigation and the City had been named as a 'John Doe' defendant. Mr. Addy said if the City were to plan and induce the failure successfully, it would be able to dictate when the failure would happen so it would not happen unexpectedly. Mr. Addy said by hiring someone to address the situation, it would be one solution to two different problems.

Mayor Hanel asked about the liability of being pro-active versus waiting for something to happen. Mr. Addy said both sites were going to fail and if they came down at 3 a.m. and five families were wiped out, he did not want to be listening to a plaintiff attorney sum up the case to a jury. He said if the City was proactive and did everything it could, he thought it would be in a better position. Mr. Addy advised the entire staff was recommending adoption of both resolutions. Mayor Hanel asked City Attorney Brent Brooks the same question. Attorney Brooks advised that staff had held two lengthy discussions with MMIA, and their advice was if and when the City was determined to be negligent on either of the sites, the MMIA would step forward and provide coverage and assignment of counsel if the City was named as a defendant in a lawsuit. Attorney Brooks added that any contractor working for the City was required to name the City as an additional named insured. He said because of the nature of the two projects, the companies and their carriers were not willing to provide the additional expense of naming the City as an additional insured. Mayor Hanel added they simply could not put a value on a human life.

Councilmember McFadden asked if they would be opening the City up for punitive damages if they were not proactive. Mr. Addy commented the City had its destiny in its own hands. Attorney Brooks advised according to statute with both the state and local governmental subdivisions, there could not be a successful recovery of punitive damages.

Councilmember Pitman said what they were really talking about was who would pay the bill; either it would be paid from the General Fund or MMIA would step in if there was a failure. He said he understood that the MMIA would pay afterwards but not pay to prevent anything from happening. Attorney Brooks advised right now the MMIA would not pay because the City had not been sued for negligence. He said the total cost of the two projects would be borne by the City in one way or another. He said if the City were sued where it was alleged the City was negligent in either acting or failing to act and a judgment or a settlement was obtained from act of litigation, the MMIA would, depending on the allegations and complaint, step forward and cover the City. Councilmember Pitman said the original emergency declaration for the City of Billings from the tornado was never sunsetted, so they already had one and asked why additional emergency declarations were needed. Mr. Addy advised because they were not dealing with a tornado. He said the problem they were remediating had to be declared an emergency before they could get to the emergency procurement statutes that allowed the City to hire someone without going through the whole bidding process.

Councilmember Ruegamer asked why, without a lawsuit, the City would take responsibility. Mr. Addy said because if they did not do something, something worse than \$189,000 could happen, and they did not want that to happen. He said they were trying to identify the least undesirable alternative and go that way. Councilmember Ruegamer asked if the City was admitting liability. Mr. Addy advised the City would not have to pay until a court told it to pay and the Supreme Court affirmed the judgment. Mr. Addy said the City was looking down two paths and needed to decide which path it wanted to take. Councilmember Ruegamer said he was looking down the path of more of it happening and the City paying more and more until the City was broke, which could be very quickly. Attorney Brooks advised it was ultimately the decision of the Council, but based on what they had heard from Mr. Nebel and other experts both locations were emergency situations that were distinguished from other unknown locations across the rim rocks that may develop in the future. He said the MMIA was leaving it up to the City to determine if it wanted to be pro-active or leave as is. He said the distinguishing factor was the emergent nature because it could be argued that if the City failed to act knowing the emergent situations, the City's failure to act could lead to a lawsuit.

Councilmember Ruegamer said the City had seven miles of rims that could fall down on anybody. He asked what would happen if they took care of Granite and Shady Lane and not the other locations they knew about and they fell. He said if the City took care of all of them, the City would not have the money. He said once the City opened the door of paying, it would not be able to stop. Mr. Addy advised by acting now, they were not committing a future council to act. He said by acting now, they would not be requiring action anywhere else, and before acting anywhere else, it would need to be brought back to the Council and the process would start all over again.

Councilmember Cimmino said it was clear as mud as far as she was concerned because if it were an emergency on the Shady Lane property, according to the resolution, the incident took place 12 months ago. Mr. Addy advised the first half of the emergency occurred on January 17, 2010, and the rest of the emergency was still up there waiting to land. He said while the bottom half fell out and hit the ground, the top half was going to fall a lot farther before it landed. He said he had heard it would land with 2 million pounds of force and rattle windows for a great distance. Councilmember Cimmino asked how the City was liable if it was considered a natural occurrence. Mr. Addy said he hoped they would never have the answer to the question because it would come at the end of a verdict sustained by the Supreme Court. Attorney Brooks said the situation with both locations was that the City had now been put on notice, and what they did with it was their own final decision.

Councilmember McCall said as far as she was concerned, she thought they had very clear, extremely high risk situations and it was as clear as clean water to her, and the Council needed to support both resolutions. She said she agreed with the Mayor that there was high risk, not only in damage, but in injury and death to possibly many people.

City Administrator Volek said staff had spent many, many hours of discussion with the geotechnical experts and legal experts. She said it was a very sober responsibility and one staff had taken very seriously and had spent a lot of time on. She said because of the eminence of the failure of the rock in both locations, the staff recommendation was that Council approve the emergency resolutions and enter into a

contract with Accurate Concrete Cutting for the stabilization and rock removal project at both locations. Ms. Volek emphasized it was a Council policy decision with possible implications for the future. She pointed out they had searched far and wide throughout the country for firms who would do the work, and the emergency would allow staff to contract with Accurate Concrete Cutting rather than go out to a bid process that would add an additional four to six weeks to the process.

Mayor Hanel asked if Accurate Concrete Cutting had given a timeframe from start to finish. Mr. Thompson said they could mobilize within a couple of weeks; however, it was also weather dependent with the snow on the rims. He said they would need more melting to occur before accessing the sites. Mayor Hanel asked how long the homeowners would be displaced. Mr. Thompson advised there would only be approximately one day of inconvenience for the homeowners. He said there was a lot of set up work required above and below the rock, and he thought Accurate Concrete Cutting gave a timeframe of two weeks to do both projects. He said the majority of the time would be in the set up, and the actual dropping of the big boulders above would occur in one day. Mayor Hanel asked Attorney Brooks if Accurate Concrete's insurance covered their employees. Attorney Brooks said it did.

Councilmember Ulledalen asked if they should amend their annexation policy stating that land within so many hundreds of feet of the base of the rims would not be annexed to eliminate future liability. Ms. Volek said it was something they could look into, but unfortunately the situation was that much of the area had already been annexed.

Councilmember Pitman asked if people could buy some type of falling rock insurance. Attorney Brooks said they had been advised it was available; but how much it would cost and cover would vary from agency to agency.

Councilmember Ulledalen asked where the money would come from to pay for the work. City Administrator Volek advised it would come from the General Fund. She said the City could attempt to recover from the homeowners' insurance on the Granite property, but less likely on the Shady Lane property.

Councilmember Ruegamer reminded everyone that the demolition of Athletic Park was awarded to a firm out of Boise, ID, whose bid was substantially less than the other bids. He said they did a great job and their bid seemed too good to be true. He said they just needed to be sure Accurate Concrete Cutting was a well-known, reputable company. He said the homeowners along the rims should be notified that insurance was available and they should buy it. He said he had lived in Billings 60 years and had never seen anything of such magnitude. He said as long as he could remember, people asked why anyone would build by the rims because the rims were unstable. He said he hesitated to put City money into it. He said he wanted people to be safe but people were taking a risk living under the rims.

Councilmember Ulledalen asked where they were supposed to stop once they started the process and what criteria they were supposed to use to decide if a rock was taken down or not. He asked if they should just put it in their budget to remove the seven miles of rims. He also asked if it would be cheaper for the City to just buy the houses and remove the liability. City Administrator Volek advised in other circumstances involving rivers, it was very common for communities to buy and demolish homes to create waterway paths in order to avoid the same issues. She said the City had been

contacted by an individual about a small rock with a small foothold on a public right-of-way, but there was no eminence in that case, which was the dividing factor. Councilmember Ulledalen commented the rock at Glacier was not eminent either and it failed, so there was no end to it.

Councilmembers Clark and Ulledalen expressed their concerns over failures being induced just by the set up, anchoring, drilling, and vibrations caused by the heavy equipment. Mr. Nebel agreed that there would be vibrations, and there was a risk that once the operation started, there could be failures right away. Councilmember Pitman asked how close the other 15 locations they knew were failing were to Granite and Shady Lane. Mr. Nebel said he did not think they were very close but he could guarantee there were other locations.

Councilmember McCall said based on the discussion, they had a very precarious situation and they could play the game all night of asking questions with no clear answers. She said she thought it was time to start the motions.

Councilmember Clark asked for the actual total cost, including the \$189,000. Mr. Nebel advised there were costs associated with pre and post construction surveys of the residences, etc. He said from Terracon's standpoint, it would be in the range of \$30,000 extra for both sites. Councilmember Clark commented they would be well over the \$200,000 mark.

Councilmember Ulledalen asked if stabilizing the rock in the residence at Granite by filling in aggregate below was a permanent solution. Mr. Nebel said you could look at it as a permanent solution. He said if it was filled in and the frame was left until it deteriorated, he assumed the rest of the house could be removed.

Councilmember McCall moved for approval of the resolution declaring an emergency to stabilize or remove sandstone boulders from public and private property and award a contract for removing and stabilizing the sandstone boulders at 1313 Granite, seconded by Councilmember Gaghen.

Councilmember Pitman asked if the homeowners on Granite had insurance and if the City could possibly collect from them. Mr. Addy said The Hartford was their insurance carrier and had not committed to the site. He said they would only be talking about the rock inside the house, and it would be a fight and take a long time and a lot of money.

Councilmember Ulledalen asked if stabilizing the rock inside the house would buy time to explore the insurance aspect. Mr. Nebel said it might but would not address the rocks from above.

Councilmember Clark said he was having a hard time with the whole thing. He said people built their homes where they knew the rocks were already falling. He said they built the homes for the view of the rims in their backyards. He asked if those homeowners had some real responsibility in the matter rather than all the people in other parts of town who were going to end up paying for it. Mayor Hanel said he agreed; however, it was something that should have been discussed when the permits were issued and said the current situation was beyond that.

Councilmember Ronquillo said it was hard for him. He said the people knew they were building up against the rims where the ground was constantly moving. He said it was no different than building a house by a river with the risk of flooding.

Councilmember Gaghen said she felt it was a unique circumstance that was jeopardizing the safety of the homes, and that was really weighing in on her decision. She said she saw it as a true threat that needed addressed.

Councilmember Ruegamer said they were talking about a lot of money. He said the first thing they needed to think about was they built under the rims by choice, and it was always a given the rims were unstable.

Councilmember McCall said she agreed that people chose to build where they did, and it would be great if they had more responsibility for it; but if they did not take care of it and something did happen, the City would have a much greater liability than they could ever imagine.

Councilmember Cimmino asked City Administrator Volek why the only available funding source was the General Fund. Ms. Volek advised the land was parkland, and the parkland was funded out of the General Fund. She said the cost could be assigned back to the Parks Department, which would mean cutting services in other areas. She said they did not have a very large Parks fund to begin with.

On a roll call vote, the motion failed 5 to 5. Councilmembers Ronquillo, Gaghen, McFadden, McCall and Mayor Hanel voted in favor of the motion. Councilmembers Pitman, Cimmino, Ruegamer, Ulledalen, and Clark voted in opposition to the motion.

Councilmember Gaghen moved for approval of removing the rock above Shady Lane and the declaration of emergency, seconded by Councilmember McCall.

Councilmember Ulledalen asked Attorney Brooks if he knew if other Montana cities had dealt with similar situations. Attorney Brooks advised according to the MMIA, it was a very unique situation, and they had never had to deal with anything like it before.

Councilmember Clark asked if the homeowners who were worried about the rocks coming down could create a neighborhood special improvement district to take the rocks down. Attorney Brooks said it was a possibility but one of the driving forces behind both locations was that they were on city-owned or city-controlled property. He said they could explore an SID but the conditions would still exist.

Mayor Hanel said they had been presented with the facts and they could not turn their backs on them. He said he was speaking heavily in favor of the second motion and hoped someone would reconsider their vote on the first motion.

Councilmember McFadden said he felt everyone in the City had a responsibility for the safety of others. He said so far they had only been talking about property, but it was more about when the rocks came off the rims, ripped through houses and natural gas lines, and people got hurt.

Councilmember McCall said she really urged at least one or more councilmembers to reconsider their vote. City Administrator Volek advised an emergency resolution required a 3/4 majority of councilmembers present.

On a voice vote, the motion failed 5 to 5. Councilmembers Gaghen, Cimmino, McFadden, McCall, and Mayor Hanel voted in favor of the motion. Councilmembers Ronquillo, Pitman, Ruegamer, Ulledalen, and Clark voted in opposition of the motion.

**PUBLIC COMMENT on Non-Agenda Items -- Speaker Sign-in required.**  
(Restricted to ONLY items not on this printed agenda. Comments limited to three (3) minutes per speaker. Please sign up on the clipboard located at the podium.)

The public comment period was opened.

- **Kevin Nelson, 4235 Bruce, Billings, MT**, said there should have been a public hearing advertised and held for Item 3. He asked why Four Square Properties tax assessments were considerably less than the properties directly across the street. Ms. Volek advised she would look into the situation. She noted for the record that Four Square Properties had paid the first half of their property taxes.

There were no other speakers, and the public comment period was closed.

## **COUNCIL INITIATIVES**

- **Ulledalen**: MOVED that the annexation policy include references to geological factors that made development undesirable and include mandatory insurance or deed restrictions, seconded by Councilmember Ronquillo. On a voice vote, the motion was unanimously approved.

There were no other Initiatives.

Councilmember Ronquillo said the Sugar Factory was located in the County but a lot of City resources were recently spent when the Sugar Factory's holding ponds failed. He asked if the City could bill them for the expense. City Administrator Volek advised she would visit with Mr. Mumford, but she thought the legislature would not allow it.

Mayor Hanel asked if the proposals submitted by the companies on Agenda Item 3 had expiration dates. Parks Director Mike Whitaker said the COP Construction proposal did but the Accurate Concrete Cutting proposal did not. He said he would contact Accurate Concrete Cutting the following day and report to the Council.

Councilmember McFadden asked if there were any concerts planned similar to the Mellencamp concert at Dehler Park. Parks Director Mike Whitaker advised there were none scheduled at the moment.

Councilmember Clark asked who had the right to bring forth a motion for reconsideration of Agenda Item 3. Attorney Brent Brooks advised it would be the five councilmembers with the 'no' votes or the absent councilmember.

Councilmember Pitman asked to have voting requirements included in the staff reports when more than just a majority vote was required. He said it would be nice for Council to know what was needed ahead of time.

Councilmember Ulledalen suggested holding a strategic planning/goal setting meeting in January and possibly bringing Bruce Whittenberg back to take them to where they left off last year so they did not have to re-invent the wheel. City Administrator Volek advised she would contact Mr. Whittenberg and set a meeting.

Councilmember Cimmino asked about the snow plow program. She said she had received reports that the major arterial streets were plowed first, minor arterial streets second, but collector streets were not plowed. City Administrator Volek advised arterials were plowed first and collector streets second. Councilmember Cimmino asked if there had been a proposal for the City to hire private contractors to make up the difference on some of the other roads, such as school routes or other side streets. City Administrator Volek advised they worked with the School District to identify routes to school that

needed plowed for the buses after the arterials and collectors had been plowed. She said they had also discussed contracting with private firms to help remove snow and pile it on properties the City did not own with the concurrence of the property owners. She said they traditionally stored the snow in parks, but they were running out of room. She said Mr. Mumford was working on an emergency snow ordinance to anticipate plowing other streets after at least 12 inches of snowfall. She said the problems were where to put the snow and the costs involved. She said Mr. Mumford told her the City would need to charge a street maintenance fee three to four times what the fee was currently to plow every street in the community. She said she was not certain the public would be agreeable. Councilmember Cimmino referenced the city code requiring property owners to clear their sidewalks within 24 hours of snowfall, and said during the night the snow plows cleared the streets and put the snow back on the sidewalk and into driveways. City Administrator Volek advised enforcement of the code was done on a complaint-driven basis, and it was the down side of trying to plow.

Councilmember Ulledalen said one of the issues of strategic planning was defining service levels. He asked what a reasonable service level was and what did people expect. He said they either needed to reaffirm the status quo or look at other alternatives. City Administrator Volek advised she was looking for peer communities to request a copy of their budget and compare services. Councilmember Ulledalen said he did not think the City currently charged enough for street maintenance.

Councilmember Ulledalen said he wanted to raise the issue of looking at the 2.9% salary increase they gave overall that reduced the City's ability to deliver services. He said as part of the budget process they needed to look at what it would take to rebuild the service level.

There was no further business, and the meeting adjourned at 8:35 p.m.



CITY OF BILLINGS

BY: Thomas W. Hanel  
Thomas W. Hanel, Mayor

ATTEST:

BY: Cari Martin  
Cari Martin, City Clerk