

REGULAR MEETING OF THE BILLINGS CITY COUNCIL

October 28, 2013

The Billings City Council met in regular session in the Council Chambers located on the second floor of the Police Facility, 220 North 27th Street, Billings, Montana. Mayor Thomas W. Hanel called the meeting to order at 6:30 p.m. and served as the meeting's presiding officer. Councilmember Ronquillo gave the invocation.

ROLL CALL: Councilmembers present on roll call were: Cromley, Ronquillo, Pitman, Cimmino, McFadden, Bird, McCall, Astle, and Crouch. Councilmember Ulledalen was excused.

MINUTES: October 15, 2013 – Councilmember Cimmino moved for approval, as written, seconded by Councilmember Ronquillo. On a voice vote, the motion was unanimously approved.

COURTESIES:

- Tree City of the Year – Parks Director, Mike Whitaker, introduced Fred Bicha, City Forester; and Jon Thompson, Parks Superintendent. Mr. Whitaker stated they were able to upgrade the operation in their Forestry Division with the passage of the city-wide Park District. Mr. Bicha said in 2013 they were able to prune 800 trees in parks around the city, and they planted approximately 240 trees. In February they started a memorial tree program and to date they have had 18 people participate. In May 100 volunteers helped beautify Rose Park for Arbor Day, and environmental professionals talked to 200 fourth graders about the environment. They removed several acres of Russian Olives in Riverfront Park with the Montana Conservation Corps and other volunteers. A couple of weeks ago they held "Replant the South Side," which was a 2-day event. The first day they planted 50 trees in South Park, and the following day citizens and volunteers from MSU-B helped plant 50 trees in the boulevards around South Park. He said it was done in part through a DNRC grant and help from NorthWestern Energy. The first-ever Parade of Trees bike ride was recently held where approximately 88 riders rode through Billings looking at the different trees. Mr. Bicha said all of their activities helped secure the award for 2013. He said the great thing was they were just getting started with their Forestry Program, and he hoped to use the grant in 2014 on four projects. One of the projects would include a couple VISTA Corps volunteers working in the Parks Department to establish community gardens around Billings. The grant would also go towards a fruit tree component to the community gardens. He said part of the grant would help Arbor Day become a bigger and more vibrant program and help establish an experimental nursery at Wilson Park. He said the last piece would go towards a cost-share program for boulevard trees. Mayor Hanel presented Mr. Whitaker, Mr. Thompson, and Mr. Bicha the 2013 Tree City of the Year certificate given to the City of Billings on behalf of the Montana Department of Natural Resources and Conservation and the Montana Urban and Community Forest Association. City Administrator Volek advised Billings was the "Large Tree City" this year and with it came a \$10,000 grant to achieve the programs Mr. Bicha talked about.

- Councilmember McFadden said a “Drug Take-Back” program was held the previous Saturday morning at the Elks Club that netted more than 50 pounds of prescription drugs that would be incinerated. He said the “Take-Back” was part of a national Elks program. Many old or expired drugs contributed to drug abuse, toxins in the water and landfills, and were the target of thieves. Councilmember McFadden recognized Police Officer, Tom Keightley, who staffed and worked the program, and thanked Mike Yakowich for his involvement. Mayor Hanel commented it was the second annual event that was held in cooperation with the Billings Elks Foundation and Mike Yakawich.

PROCLAMATIONS: Extra Mile Day - November 1, 2013

ADMINISTRATOR REPORTS - TINA VOLEK

Ms. Volek commented on the following items.

- The groundbreaking ceremony for the Inner Belt Loop had been rescheduled for Thursday, November 7, at 1:30 p.m. at High Sierra Park. More details would be forwarded to the City Council as they became available.
- **Item 3A: Resolution relating to Storm Sewer Revenue Bonds, Series 2013, authorizing the sale and prescribing the forms and terms for storm sewer improvements for the Shiloh Conservation Area.** Council received an updated resolution from Patrick Weber, Finance Director, in the 10/25/13 Friday Packet. Copy was filed in the ex-parte notebook.
- **Item 5: Approval of letter to the PSC in support of the petitioners regarding ownership fees assessed by NorthWestern Energy in the City’s street lighting districts.** Council received e-mails from Russ Doty on October 22, October 25, and October 27, 2013. Copies were filed in the ex-parte notebook.

PUBLIC COMMENT on “NON-PUBLIC HEARING” Agenda Items: #1, #3A, #3B, #4 and #5 ONLY. Speaker sign-in required. (Comments offered here are limited to one (1) minute. Please sign in at the cart located at the back of the council chambers or 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.)

The public comment period was opened.

- **James Cox, 2822 Poly Drive, Billings, MT**, referenced Item 1J. He said it was unclear if it was a commitment by Billings to spend \$151,000 to award to a contractor or if the cash went to the City of Billings to acquire the bomb robot. Mayor Hanel said it was a non-commitment to the City of Billings Police Department, and it was a grant as stated from Homeland Security but no obligation.
- **Dennis Ulvestad, 3040 Central Avenue, Billings, MT**, referenced Item 5. He said he was the task force chair for four years, and Mr. Doty gave a very interesting presentation about the lights in Billings and the lighting districts. At

that time he did not think much of it. He saw the approval letter to the Public Service Commission, and he started thinking about it and looking at the facts. In the long term Billings residents would be better off. He said with LED lights, crime was down 5 to 10% in New York in certain districts. He said he supported the approval letter to the Public Service Commission.

- **Leo Barsanti, 3316 Pipestone Drive, Billings, MT**, referenced Item 5. He said he highly encouraged the Council to get onboard and intervene because he thought it was an important one for their constituents and the taxpayers of Billings. It had been going on since 1975, and they needed to step up and do something about it. He thought if Billings would get onboard the Montana League of Cities and Towns would probably look very seriously at getting onboard at a later date.
- **Bruce Simon, 217 Clark Avenue, Billings, MT**, referenced Item 5. He said nearly 10 years ago he saw his tax bill and thought for downtown it was an awful lot of money for the street lights. He inquired at the City and had a copy of the bill sent to him for the month of October. He was shocked when he got the bill because he had no idea. The bill was for about \$11,000; \$7,000 of the bill was the ownership charge. After doing the research, the lights were installed in 1960 at a cost of about \$200,000. They had been modified once, which brought the total cost to still less than \$300,000. Back 10 years ago, the ownership charge for the year was about \$85,000. He suspected today it was well over \$100,000. The largest payer of Street Light District #97 was the City. The taxpayers were paying the biggest part of the bill. They needed Council to get onboard.
- **Mike Patterson, 3096 Heritage Drive, Billings, MT**, referenced Item 5. He said he was one of the original persons as a plaintiff but was dropped from it because he was not in a lighting district where he lived. His interest was the lighting districts that were overcharged. He had to pay part of the fees that dealt with some of the city parks and thoroughfares. He was in favor of a claw-back and taking money to invest in much more efficient lighting than what the City currently had. It had been tested and proven that LED lighting was safer for thoroughfare driving.

Councilmember McFadden asked Mr. Patterson if he was an advocate for using LED lighting on the streetlamp posts. Mr. Patterson said he was in favor of a much more efficient system, which would be LED. Councilmember McFadden asked if at the present time NorthWestern Energy would allow LED lighting to be placed on their poles. Mr. Patterson said he could not answer that question because he was not an expert. He was just talking about the general idea of becoming more efficient.

- **Tom Towe, 2739 Gregory Drive South, Billings, MT**, referenced Item 5. He said he supported one or more of the attached resolutions. He was in the legislature in 1975 when the issue of original cost came up, and he was privileged to be the sponsor of the bill. The reason for it had a long history. Senator Metcalf and many others had complained many, many times that there was an unfair use of the value of the assets that determined the rates. They measured the rates according to a percentage of the asset. It was a terribly important issue for Billings. There was some discretion in the Public Service Commission which was why he thought the City needed to have an intervention.

- **Russell Doty, 4957 West 6th Street, Greeley, CO**, referenced Item 5. He displayed a table on the screen and said it was what a tariff looked like. He said over 85% of the lighting districts in the City were owned by NorthWestern Energy. If a district went beyond a certain number of years, it became phantom rate based. It was left in the rate base for 30 years, and they would charge for that entire time period. That was where the overcharge came from that they were trying to claw-back because of the law Tom was able to get passed, which said they could not charge more than original cost depreciated. Mr. Doty said he hoped the City would intervene.
- **Rick Burt, 2511 Raymond, Billings, MT**, referenced Item 5 and said he was an engineer with NorthWestern Energy. He said the rate process in Montana was a very public process. A utility presented its financial and technical information to the Montana Public Service Commission (PSC), who studied the information. The Montana Consumer Council and other various interveners were also involved in the process; so testimony was out there going back and forth, and it typically took about nine months. After the public process the Commission set the overall revenue requirements for the utility and then based on that, the Commission set the allocated costs for service for all the different areas whether it was for street lights, irrigation, commercial or residential. The rates were average rates across the system, and there were no allocated costs for service for individual depreciation rate for any individual street light district. Mr. Burt said he hoped the Council would make an informed decision.

Councilmember McFadden said he was hung up on the words “a very public process” and asked if the power company minded if the issue was brought out in public. Mr. Burt said anyone could join in the process or observe the process in various forms. It was all public information.

Councilmember McCall asked how often the rate process with the PSC occurred. Mr. Burt said the PSC could call for rate hearings or the utility could go in and ask for a rate. Councilmember McCall asked if it was yearly. Mr. Burt said the last allocated cost of service they were currently working under was 2010.

Councilmember Bird said it was her understanding the Fair Value Bill passed in 1979 stated that all parts of a utility charged the same rate to be fair and equitable. She asked why lighting districts were treated differently than other aspects of the utility. Mr. Burt said after the public process with all the input from the interveners and the Montana Consumer Council, the Montana Public Service Commission set the overall revenue requirements for the utility on a go-forward basis. Once they had the number, they looked at all the different factors and allocated costs to street lighting, irrigation, commercial, residential, substations, and large industrial customers that made up the rate base. Everyone had seen the costs, so it was fair and equitable. He assumed it was the same way the City set their water and sewer rates. They did not set the rates by a block, but by a system average. It was the same with their utility. It was based on a system average and not on an individual street light basis.

Councilmember Bird asked if they were paying a rental fee for using the lights. Mr. Burt said they were paying all the costs for the investment the utility had in the street lighting, which included transmission, distribution, initial investment, and annual property tax. He said they paid the highest property tax in

Montana. Approximately 18% of the customer bill was property tax as part of the Montana tax philosophy. The costs continued to come into the street lighting "bucket" and little by little parts depreciated over 35 years.

Councilmember Bird said they had the costs for the equipment and the ongoing costs with maintenance and distribution getting the power to the pole. She asked at what point had the rate payers paid for the goods and were just paying for the use and distribution of energy. She asked if it took 35 years to pay off a pole and the fixture that brought the energy into the neighborhoods. Mr. Burt said they used generally-accepted accounting practices, and straight line depreciation for a utility was 35 years. Councilmember Bird asked how there could be such disparity between districts once the equipment was paid for. Mr. Burt said each district could be made up of various numbers of lights at different wattages, material, and underground or overhead installation. It went into an individual matrix, which would be the cost for the light within the district. The overall costs were based on the system average for approximately 80,000 lights. There were always new systems coming in, old systems being slowly depreciated, annual tracking, and annual costs to keep electricity flowing. That was what the Commission looked at when adjusting the rates.

Councilmember Crouch asked to what extent NorthWestern Energy was using LED lighting. Mr. Burt said at this time NorthWestern Energy did not offer it as part of its lighting system.

Councilmember Pitman said it was not just simply the pole sitting in front of a house. The fee was for maintenance of the pole, replacement, ongoing taxes and insurance. Mr. Burt said there was an energy component based on wattage and an annual maintenance fee. The actual infrastructure fee everyone was talking about was the "ownership."

Councilmember Cimmino said Mr. Burt had indicated he was an engineer for NorthWestern Energy and asked if he was part of a legal team. Mr. Burt said he was not and currently worked with community relations. Councilmember Cimmino asked if other representatives of NorthWestern Energy had met with the legal team or some of the other parties who had represented their viewpoints that evening to review the documents. She said there was obviously a discrepancy because he was saying NorthWestern Energy was not overcharging, but there were documents indicating a different perspective. Mr. Burt said it was a different perspective. Once the Montana Public Service Commission set the tariffs, NorthWestern Energy followed them because it was the law. The other folks were making the claim there was an overcharge. The Montana Public Service Commission looked at all of their documents and said they would open up one single item and review it. He said the City was being asked to be an intervener, which would mean bringing its own attorneys, economists, and expert witnesses to make the case.

Councilmember Bird said it was unfortunate there was no one present from NorthWestern Energy's legal or accounting departments. She asked where depreciation fit in since the rate assessed was essentially the same since the inception of the lighting districts. She said she totally understood the need for maintenance and replacement, but it seemed to her there was no depreciation given to what was already paid for. Mr. Burt said it went back to the costs; it was

based on system average. If no new lighting systems came in, the cost would eventually go down; but new systems were always being added.

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

1. **CONSENT AGENDA**

A. **Bid Awards:**

1. **Airport Cupping Snow Plow Blade.** (Opened 10/15/2013) (Delayed from 10/15/2013) Recommend M-B Companies, Inc.; \$68,817.

2. **W.O. 13-03, Street Maintenance Program, Contract #3, City Crack Seal.** (Opened 10/15/2013) (Delayed from 10/15/2013) Recommend Hardrives Construction; \$154,542.

B. **Change Order #1 - City Hall Lighting Retrofit,** Action Electric, \$10,547.

C. **Contract** with Walker Restoration Consultants for City Parking Garage Condition Audit; \$33,500 plus reimbursable expenses estimated at \$8,000.

D. **Empire Parking Garage**

1. **Contract** with Michael Walker, NAI Business Properties, to market the retail units in the Empire Parking Garage; fee: 7% of the selling price.

2. **Resolution #13-19321** approving City Administrator's authority to negotiate and/or execute buy/sell agreements and other necessary documents for the sale of the Empire Parking Garage retail units.

E. **Approval** of Limited Commercial Aviation Hangar and Ground Lease 5-Year Renewal on Lot 7, East Hangar, with Billings Clinic (9/1/2013-8/31/2018); first year revenue - \$28,728; subsequent years adjusted annually using the Consumer Price Index for all Urban Consumers (CPI-U).

F. **Acknowledge receipt of petition to vacate** a 5-foot strip of right-of-way along the north side of Rimrock Road adjacent to Whisper Ridge Subdivision; LAIS Development, Inc. and Buscher Development, petitioner; setting a public hearing date of November 18, 2013.

G. **Acceptance of Quitclaim Deed** for a portion of land in Certificate of Survey 3329, 2nd Amended, from Suncap Billings, LLC; with no financial impact to the City.

H. **Acceptance of Donation** to the Fire Department for purchase of public safety and education supplies; Exxon Mobil Corporation; \$2,500.

I. Acceptance of Donation to the Police Department to fund Crisis Intervention Training (CIT) in Hartford, Connecticut, for three law enforcement personnel; Department of Public Health and Human Services; \$5,000.

J. Grant Application Request to submit FY13 U. S. Department of Homeland Security Grant Application for a Bomb Squad robot and associated training; and **authorize** the Mayor to sign the award letter; \$151,000.

K. Resolution #13-19322 adjusting the City Council meeting schedule for November and December 2013 to allow for strategic planning meetings and the holidays.

L. Second/Final Reading Ordinance #13-5616 repealing BMCC Article 6-1600, "The Billings, Montana Floodplain Regulations," in its entirety and enacting a new BMCC Article 6-1600 to be known as "The City of Billings Floodplain Hazard Management Regulations."

M. Bills and Payroll:

1. September 30, 2013
2. October 7, 2013
3. July 1, 2013 - September 30, 2013 - Municipal Court

Councilmember Cromley separated Consent Agenda Item B. Councilmember Cimmino separated Consent Agenda Items 1A2, C, M1, and M2. Councilmember Pitman moved for approval of the Consent Agenda with the exceptions of Items 1A2, B, C, M1, and M2, seconded by Councilmember McCall. On a voice vote, the motion was unanimously approved.

Councilmember Cromley referenced Item B and asked if the rebate would increase by the amount of the change order. Assistant City Administrator, Bruce McCandless, said it would not, and the rebate far exceeded the cost of the change order. Councilmember Cromley said the wording in the staff memo indicated the change order would not have a negative effect, but he felt it would. Mr. McCandless said he felt what was intended was that the amount of the rebate exceeded the amount of the change order; and therefore, the City would not end up paying the cost because the rebate would cover it. Councilmember Cromley asked if the contractor had any responsibility for the change order. Mr. McCandless said he did not believe they did. The pre-engineering was done by a reputable firm the City had used before, and it was an unknown that could not be discovered until the lighting was changed.

Councilmember Cimmino said the way the staff report was written, it was discovered many of the newly-installed lamps were burning out soon after installation, and the contractor identified the problem was with the ballasts. It seemed to her if it was the existing equipment and they put in new lamps and lights that were high voltage and they burned; it was almost like it defeated the purpose. Mr. McCandless said he was not a lighting engineer and could not explain the exact problem. It was his understanding the ballasts were incompatible with the lights. The ballasts had to match up with the lamps, and in this case they did not. Councilmember Cimmino said in looking at how the

project was contractor bid, the whole point was to retrofit the existing lamps. It was an unfortunate situation that now would cost close to an additional \$11,000, and she did not know what the answer was.

Councilmember Pitman clarified that they retrofitted lights that were working with LED lights but they did not use the right ballasts, so they burned out the LED lights. He asked if they needed to replace the ballasts and the lights again. Mr. McCandless said that was his understanding.

Councilmember Bird asked at what point they hired a contractor who did not figure out that he had the wrong equipment matched with the wrong equipment. It did not make sense to her, and she was troubled the City was paying the price for someone's error and decision making. She asked whose error it was. Mr. McCandless said he did not know whose fault it was. He said for the most part all that was being replaced was the lamps; the ballasts were not part of the project. Why the ballasts were not identified as being improper for the lamps he did not know. The company they used to do the engineering was the same firm used on every other project, and they did not encounter the problem anywhere else. Councilmember Bird said she could go to WalMart and look at the book to see what she needed to buy. They were relying on professionals to do the work, and she could not understand how it happened. It was not something the City should be paying for.

Councilmember Pitman said it seemed like since it was not part of the scope of the project, the assumption was that the ballasts would work with the new lights. The money they were going to save was based on just replacing the lights, and now it was not saving them the money. He said he did not know how it was missed, and that it should have been part of the project. Mr. McCandless said where the ballasts were wrong, they were not LEDs; they were fluorescent. There were LED lamps in some of the emergency lighting but not for the standard lighting. He suggested that Council delay action on the item for a couple of weeks so he could get more detailed information.

City Administrator Volek pointed out the original contract was \$46,698. The change order was for \$10,547, which took the cost to \$57,245. They were getting a \$92,000 rebate, which would absorb the additional cost.

Councilmember Bird asked if it would be appropriate to ask someone from Action Electric to come in two weeks to answer questions. She said even though they were getting a \$92,000 rebate, they just lost \$10,547 they could have used elsewhere.

Councilmember Cimmino asked at what point the contractor would bear the responsibility. It was Council Contingency Funds that provided the additional funding for the project. If they had not received the SID Revolving Fund rebate they would not have had it in the first place; \$11,000 was a lot of money to be just "whispering in the wind."

Councilmember McFadden said, in defense of the contractor, if a fluorescent light was replaced in an old fixture and the ballast was wrong or burned out, the light would not come on. Because the light came on initially, the contractor would not have known it was going to burn out because the ballast was wrong. He believed it would be an easy error to make, especially with the new LED lights.

Councilmember Astle moved to postpone Item B for two weeks in order to get the information on what happened, why it happened, and if the contractor was suppose to know better, seconded by Councilmember Bird. On a voice vote, the motion was unanimously approved.

Councilmember Cimmino referenced Consent Agenda Item 1A2 and said she needed to abstain because a construction company was involved. Councilmember Pitman moved for approval of Item 1A2, seconded by Councilmember Ronquillo. On a voice vote, the motion was approved 9 to 0.

Councilmember Cimmino referenced Consent Agenda Item C and said she needed to abstain because it involved another consulting firm. Councilmember Pitman moved for approval of Item C, seconded by Councilmember Ronquillo. On a voice vote, the motion was approved 9 to 0.

Councilmember Cimmino referenced Consent Agenda Items M1 and M2 and said she needed to abstain from both items due to invoices submitted by architectural or engineering firms, or due to a perceived conflict of interest. (Item M1- Invoice #'s 769484, 769517, 769578, 769581, 769584, 769604, 769634, 769639, 769670, 769702)(Item M2 – Invoice #'s 769740, 769743, 769791, 769827, 769845, 769856, 769875). Councilmember Pitman moved for approval of Items M1 and M2, seconded by Councilmember Ronquillo. On a voice vote, the motion was approved 9 to 0.

REGULAR AGENDA:

2. PUBLIC HEARING AND SPECIAL REVIEW #912: a special review to allow the expansion of an existing casino, the Lucky Diamond, from 1,339 square feet to 2,224 square feet in a Community Commercial zone on Lot 1A, Block 1, Circle Fifty Subdivision, located at 3969 Grand Avenue. Townhouse Inns of Conrad, Inc., owner; Kestle Architects, agent. Zoning Commission recommends conditional approval. (Action: approval or disapproval of Zoning Commission recommendation.) Planner II, Nicole Cromwell, showed a zoning map and photographs of the subject property and surrounding properties. She noted in 2003 City Council approved the original location of the liquor license, and the casino was opened. A recent remodel and update project was undertaken, and the applicant was proposing to expand the casino area from 1,339 square feet to 2,224 square feet, which triggered the special review. Ms. Cromwell showed an aerial view of the property, a site plan of the existing floor plan, and the proposed expansion. She noted they were not expanding the exterior of the building and only changing around the uses within the building. The Zoning Commission was recommending approval based on the following conditions.

1. The special review approval shall be limited to Lot 1A, Block 1 of Circle Fifty Subdivision, generally located at 3969 Grand Avenue
2. Development of the site shall be in substantial conformance with the site plan submitted with this application and shown in this staff report. Deviations from the approved site plan that show additional on-premise alcohol service area greater than 10% of the total approved 2,224 square feet will require additional special review approval.
3. The applicant must provide drawings at the time of building permit submittal showing the property can meet the required parking for the additional 885 square feet.

4. These conditions of special review approval shall run with the land described in this authorization and shall apply to all current and subsequent owners, operators, managers, lease holders, heirs and assigns.
5. The proposed development shall comply with all other limitations of Section 27-613 of the Unified Zoning Regulations concerning special review uses, and all other City of Billings, regulations and ordinances that apply.

Ms. Cromwell noted the property was not within 600 feet of a church, school, or public park with playground equipment so no waiver was required.

Councilmember Bird asked if there was adequate off-street parking. Ms. Cromwell said there was. She said originally the Engineering Division had commented to staff they were not certain the parking was adequate. The applicant's agent met with the City Traffic Engineer, and it was determined there was adequate parking for the expanded area.

Councilmember McFadden asked if the expansion would create more customers or just provide more space for their existing customers. Ms. Cromwell said it would be more space for their existing customers. They could not exceed the number of gaming machines they were allowed under their liquor license, so they were not adding machines. They would just have more area for people to sit.

Councilmember Bird asked about lighting. Ms. Cromwell advised the Shiloh Corridor Overlay District was a zoning overlay district for the location. The gas station was there before the overlay district was in place. When a major remodeling happened, the City ensured that the remodeling and site improvement complied with the overlay district, which included lighting standards.

The public hearing was opened. There were no speakers, and the public hearing was closed.

Councilmember McCall moved for approval of Item 2 with the recommended conditions, seconded by Councilmember Astle. Councilmember Cimmino advised she would abstain because an architectural firm was involved. On a voice vote, the motion was approved 9 to 0.

3. SHILOH CONSERVATION AREA

A. RESOLUTION #13-19323 relating to Storm Sewer Revenue Bonds, Series 2013, authorizing the sale and prescribing the forms and terms for storm sewer improvements for the Shiloh Conservation Area. Staff recommends approval. (Action: approval or disapproval of staff recommendation.)

City Administrator Volek advised there was no presentation, but staff was available to answer questions. She noted staff had made previous presentations, and Council had received a memorandum on the bond interest, which was a flat rate of 3.875%.

Councilmember Ronquillo moved for approval of Item 3A, seconded by Councilmember Astle. On a voice vote, the motion was approved 9 to 0.*

*Note: Councilmember Bird left the chambers at 7:34 p.m. and was absent for the vote. Councilmember Bird returned to the chambers at 7:38 p.m.

B. BID AWARD: W.O. 10-19, Shiloh Conservation Area. (Opened 10/15/2013)(Delayed from 10/15/2013). Staff recommends CMG Construction in the

amount of \$4,482,231. (Action: approval or disapproval of staff recommendation.)

City Administrator Volek said thanks to the hard work of the Public Works Staff, the bid was trimmed, and there was now sufficient funding to pay for the project.

Councilmember McFadden said he had never heard of CMG Construction and asked if they were local. Deputy Public Works Director, Vern Heisler, confirmed CMG Construction had been around for quite a while, had done a number of projects for the City, and was the low bid.

Councilmember Astle moved for approval of Item 3B, seconded by Councilmember Cromley. Councilmember McCall said it was such a great project, and it would add so much to the west end of Billings. It would serve a tremendous importance in terms of storm sewer improvements, but the amenities in terms of recreation would be exceptional. Councilmember Cimmino advised she would need to abstain because it involved a construction company that would be awarded the bid. On a voice vote, the motion was approved 9 to 0.

4. INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS (IAFF) LOCAL 521 UNION CONTRACT (7/1/2013-6/30/2015). Postponed from 8/12/13, 8/26/13, and 9/23/13. Staff recommends postponing until November 12, 2013. (Action: approval or disapproval of staff recommendation.) City Administrator Volek advised that at one time the item was brought to the table and then discovered there was disagreement on the terms. She said they met again on September 23 and resolved the conflicts, but the IAFF was not able to schedule a vote on the contract until November 4 and 5. She asked that Council postpone its vote on the agreement until November 12 to allow the union to vote first.

Councilmember Cromley moved to postpone until November 12, seconded by Councilmember McCall. On a voice vote, the motion was unanimously approved.

5. APPROVAL OF LETTER to the Public Service Commission (PSC) in support of the petitioners regarding ownership fees assessed by NorthWestern Energy in the City's street lighting districts. Staff recommends approval. (Action: approval or disapproval of staff recommendation.) City Administrator Volek said the item was the result of a presentation made October 15 asking the City to support an intervention with the PSC on Document D2010.2.14 on ownership fees. She said the Council could (1) take no action; (2) choose to intervene in which case staff would request better direction from Council as to what extent it wished staff to intervene. A resolution of intervention could be sent with no further involvement or staff could become actively involved in the intervention which would have some financial consequences; or (3) send a letter in support of the review by the PSC. Ms. Volek advised the intervention request technically should have been made by last Friday, but because of the City's requirements for public notice, indication was received from the PSC attorney they might favorably allow the City to intervene at a later date. Ms. Volek said staff's recommendation was to send a letter.

Councilmember Pitman asked if the vote would be to simply send the letter of support for them to review and nothing more or less than that. Ms. Volek said that was correct. Ms. Volek said there had also been a resolution provided to Council should they choose to intervene.

Councilmember Bird moved that the City of Billings intervene and support Resolution #13, seconded by Councilmember McFadden. Councilmember Astle said that was not on the agenda. Agenda Item 5 was for approval of the letter. Councilmember Bird said the City Administrator just gave them their choices, so she was confused.

Mayor Hanel asked Ms. Volek for clarification. He asked if there was possible opportunity of intervention in the future and if that evening was simply whether or not to send a letter based on staff recommendation. Ms. Volek advised another alternative would be to substitute a resolution for the letter. She said at that point they were behind the time they would normally intervene and if the Council wished to intervene they needed to do so now rather than wait.

Councilmember Bird said she would like to modify her motion. She moved that the City intervene in the case as opposed to just writing the letter, seconded by Councilmember McFadden.

Councilmember Bird read from the Monday, October 28, 2013, Billings Gazette, as reported by Ed Kemmick, that after that meeting last week "a PSC attorney notified the Billings City Attorney Brent Brooks that if there were good cause the PSC would probably accept a late filing to intervene. The attorney also said that the city's need to give advance notice of its vote, and the fact that the city was notified of the case late in the process, would most likely be considered good cause." Councilmember Bird stated Council agreed on a 5 to 4 vote in April to write a letter. She felt as a representative of Ward 3 that the City should be intervening because they needed to know what the facts were. It would not only help the people they represented but be an incredible savings. The Council would not lose anything by intervening, and they could intervene at whatever level they decided. Showing support for the citizens was an obligation they should seriously consider.

Councilmember Astle asked Attorney Brooks to define "intervene" and tell him what it would cost. Attorney Brooks said, as explained to him by one of the PSC staff attorneys, the intervention could occur at different levels; however, once a document was formally submitted to request intervention the City would be engaged more formally and may be required to answer discovery, as well as articulate its position with document support. He said he could not say what the cost would be at this point. There would obviously be staff time from his office and travel expense. He advised Helena sent a letter with a request to be on the list of people served all of the documents so they could monitor what was happening. They were not moving to intervene; they were simply on the list and allowed to make comments periodically as the case progressed. Attorney Brooks said he was more than willing, if Council directed, to formally prepare an intervention document. Councilmember Astle said when Mr. Barsanti testified at the work session he asked for a letter and not an intervention so it was all new and different than it was before. He said they could add a paragraph to the letter to be kept informed like Helena did. He said he would vote no on an intervention.

Councilmember Pitman said he was on the same wave length as Councilmember Astle. He could not see the benefit to getting involved in intervention other than a lot of legal time and expense. The PSC would decide whether it was appropriate or inappropriate, and it would have an effect on all of it. He said he was not sure what the benefit would be of dragging the City into a legal fight at this late hour. Councilmember Pitman asked what the benefit would be. Attorney Brooks said the benefit would be that

the current petitioners would have more formal support from the City of Billings because it would be an active party to the issue.

Councilmember Astle asked how long it would take. Attorney Brooks said he was told it would take at least a few months.

Councilmember McCall said she would not support a resolution to intervene. She really thought the ownership matter had merit, but she did not think it was time for the City to intervene legally at that point. She supported the letter, and they should, as Helena had done, ask to be on the interested parties list for all the information, keep tabs on it, and potentially look at it down the road.

Councilmember McFadden said he supported the letter but he also supported intervention. The reason he supported intervention was because if the City of Billings officially intervened it would give the case a boost and a better chance of winning. He said if this case did not win, the City Council would not be able to pass the savings back to their constituents, their taxpayers, and the general coffers of the City of Billings. He did not think they should sit on the sidelines because they owed it to the public to get in there and fight for them. That was why he was supporting the intervention.

Councilmember Bird said she was obviously supporting the intervention. She had waivered back and forth on it, but she felt very strongly that the PSC needed to determine if there was overcharging going on in the City of Billings, which according to the documents submitted by the plaintiffs, could be as high as \$60,000 a month. She said if they were going to be saving a substantial amount of money for the community, they could more than afford the legal fees. She referenced the earlier issue with Action Electric and the \$10,000 over cost request and said they just seemed to hand it out every time somebody came for more money. Mayor Hanel told Councilmember Bird she needed to stick to the discussion with the motion on the floor. Councilmember Bird said she was just trying to make the case that the cost for legal did not prevent or negate their obligation to the taxpayer. One of the criticisms they get constantly was they were always in a lawsuit of some kind. This was an opportunity for them to stand up for the people of Billings and at least say they were going to look into it. She said she agreed with Councilmember McFadden that to intervene was standing up for the people. It was important for them to be strong and "not wimp out."

Councilmember Pitman said his concern was they had the plaintiffs on one side of the lawsuit who believed they were right and presented the information that proved their point, but there had not been a complete discussion held where all of the parties were involved. He said he could support the letter and following the case. He thought the last minute "come in and join the lawsuit and here's our side, believe us and go this way" was not appropriate for the Council. The Council needed to take all the information from both sides and make a decision. The prudent thing was the letter and not getting involved any further at that point.

Councilmember Astle made a substitute motion to send the letter with the caveat similar to the City of Helena's request to be kept informed of the status, seconded by Councilmember McCall. On a voice vote, the motion was approved 6 to 4. Councilmembers Cromley, Ronquillo, Bird and McFadden voted in opposition. (Mayor Hanel asked for clarification from Councilmembers McFadden and Crouch on their votes. Councilmember McFadden confirmed his vote was in opposition of the substitute motion. Councilmember Crouch confirmed his vote was in favor of the substitute motion.)

PUBLIC COMMENT on Non-Agenda Items -- Speaker Sign-in required. (*Restricted to ONLY items not on this printed agenda. Comments here are limited to 3 minutes. Please sign in at the cart located at the back of the council chambers or at the podium.*)

The public comment period was opened.

- **Russell Doty, 4957 West 6th Street, Greeley, CO**, thanked the Council for their deliberations. He said with what the Council just voted for in terms of staying informed, he would have to copy the City Council and the City of Helena with everything he sent to anybody at his own expense.

Mayor Hanel asked Attorney Brooks if it was accurate that it would be at Mr. Doty's expense or if there were other sources. Attorney Brooks advised he did not have the answer, and he would need to contact one of the PSC staff attorneys the following morning to inquire. Mayor Hanel asked Attorney Brooks to find out if the correspondence coming through the PSC could be forwarded directly to the Council to alleviate the expense to Mr. Doty. Councilmember Astle asked if the information could be sent electronically. Attorney Brooks said he would inquire. Councilmember Pitman noted the public comment period was for non-agenda items. They had already discussed it as an agenda item and should not be talking about it.

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

COUNCIL INITIATIVES – There were no initiatives.

There was no further business, and the meeting adjourned at 8:03 p.m.

CITY OF BILLINGS



ATTEST:

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

BY: Cari Martin
Cari Martin, City Clerk