

PRESCOTT CITY COUNCIL
JOINT STUDY SESSION/SPECIAL
MEETING
TUESDAY, AUGUST 18, 2009
PRESCOTT, ARIZONA

MINUTES OF THE JOINT STUDY SESSION/SPECIAL MEETING OF THE PRESCOTT CITY COUNCIL held on TUESDAY, AUGUST 18, 2009 in the COUNCIL CHAMBERS located at CITY HALL 201 SOUTH CORTEZ STREET, Prescott, Arizona.

◆ **CALL TO ORDER**

Mayor Wilson called the meeting to order at 3:00 p.m.

◆ **INTRODUCTIONS**

◆ **INVOCATION:**

Larry Gotfredson gave the invocation.

◆ **PLEDGE OF ALLEGIANCE:**

Councilman Bell led the Council and audience in the Pledge of Allegiance.

◆ **ROLL CALL:**

PRESENT:

Mayor Wilson
Councilman Bell
Councilman Lamerson
Councilwoman Suttles
Councilman Luzius
Councilman Roecker
Councilwoman Suttles

ABSENT:

None

◆ **SUMMARY OF CURRENT OR RECENT EVENTS**

Mr. Norwood noted that the summer has been busy with state and regional softball tournaments, and September would be even busier. He said there was a national tournament on Labor Day weekend and then another national tournament near the end of September. Additionally, he said, Prescott would be hosting three national tournaments in 2010.

Mayor Wilson mentioned that Dr. Bill Arnold delivered the final 2050 report to him, and copies were made for Council Members and the City Manager. He said he would schedule a workshop after it has been reviewed.

STUDY SESSION

I. DISCUSSION ITEMS

A. Approval of amendment to agreement with Yavapai Combined Trust.

Ms. Jackson spoke about Yavapai Combined Trust, explaining it was the health insurance cooperative between the City of Prescott, Chino Valley, Yavapai College and Yavapai County. She said that every couple of years they go through the trust agreement with each of the entities to modify their language to match with the business practices with what the agreement says. This year they made a few changes; nothing that affects benefits provided to employees or dependents, or that costs any money. She said it was just clarification language.

Ms. Jackson said that they have received a couple of comments from Mr. Peters, and Mayor Wilson asked her to answer those comments.

Ms. Jackson said that he indicated that the Principal office should be designated within the trust agreement and the reason that it is not designated currently is that the Trust Administrator rotates every few years. Since the trust agreement has to go to each governing body of each entity, they make it a little more fluid. They do we publish their address on the web and documents, but not in agreement.

Secondly, he had suggested that instead of a sliding scale for trustees of each entity, each agency should have one trustee. When the trust was set up in early 80's they had discussions about having both. As they are a larger entity they have more votes because the votes affect a larger populous. It is set up now with their trustees so that not one entity can run the table with votes. The small entities have a proportional share of votes.

The other item was that if the entity numbers slide down in number, to where they would remove a trustee, or increased in number that they would add a trustee, that the language be in there. She said that it is actually in the 3.02 section. If they slide upward in enrollment numbers they would receive another trustee; if they go down they would lose trustees.

She said she did not understand what his section 10.04 means.

Mr. Kidd said that he looked at it and he, too, did not understand the comment. He said that it had to do with distribution in event that the trusts were terminated. There are provisions in the agreement that deal with the need for final accounting and distribution of revenues at 75%. His guess was that when it was originally created, everyone would get 75% of the overage dealing with the cost of the administration of the trust with the remaining 25%. His suggestions in terms of modifying that are something that could be done over the next time period that it is being reviewed. It is not a bad idea to have good accounting. The agreement does provide for accounting – the original intent was to retain a certain amount of money to pay expenses.

Councilwoman Suttles asked if the schools and hospitals were part of the trust when it was first set up. Ms. Jackson said no. She advised that the agreement had been reviewed by the trust attorney Dean Pickett and Dave Hunt, the attorney for the Board of Supervisors at the County. It was adopted by all entities other than the City of Prescott and Yavapai College, both of which had it on their respective agendas.

Councilman Luzius asked how long they have been with Yavapai Combined Trust. Ms. Jackson said the early 80's. Councilman Luzius said that it was good to know it has worked well for the past 29 years.

Ms. Jackson said that they have been able to control their costs by leveraging their claims over multiple entities. They are less subject to the volatility of having one entity with a couple sicknesses affecting the rate. They have kept their increases under the industry averages over the last several years.

- B. Notice of Public Hearing (August 25, 2009) and approval of a License Agreement between the City of Prescott and Cable One, Inc.

Mr. Fenech introduced the public hearing for the license agreement with Cable One, Inc. which is formally scheduled for August 25, but noted that they can also take comments today.

He said that it was a ten year licensing agreement between the City of Prescott and CableOne, Inc. The current agreement expires August 27, 2009. In the staff report they have laid out that it is currently a 4% license agreement of the gross monthly subscriber's receipts, along with other various items in the agreement. Federal statutes do allow up to 5% of the gross monthly subscriber receipts to be paid to the licensor, but there is a caveat, with that in the new statutes that any additional items wanted to throw into the agreement would come out of that 5%. That is a substantial

change in the way the statutes are written. The other licensing authorities around, Yavapai County, Prescott Valley, Dewey-Humboldt, and Chino Valley have all, at some time in the recent past, changed their fee to the full 5%.

On July 14, the City Council approved an ordinance allowing cable television systems. In the new agreement, staff has referenced the current Federal and State statutes as well as House Bill 2812. That is the bill that talks about other items such as, if they were to put in a clause for number of commercials. The value of those things would have to come out of the 5%.

The recommended agreement increases the license fee from 4% to 5% and represents a document that has been reviewed by the counsels of the City of Prescott and CableOne, Inc., and has the agreement of Cable One, Inc. Risk Management, Budget and Finance and the Engineering departments for the City of Prescott have all reviewed the documents. The new agreement would commence on August 28, 2009 and go through August 27, 2019.

There is included a comparison showing how the current agreement and the new agreement differ, and also compares the Prescott agreement with the Prescott Valley's agreement. The comparison was compiled by Connie Tucker.

He said that Dennis Edwards from CableOne was there for questions.

There was also a comparison between June 2008 and May 2009, which shows what the City actually did receive from CableOne at 4%, which was \$338,286.30 versus a 5% agreement.

Mayor Wilson said that it looked like Prescott Valley was getting more bang for its buck. Ms. Tucker said that it was because they negotiated before the house bill took effect and took away the "in-kind" donations. The City would have to pay for the Public Service Announcements and the hook up to the police department.

Councilwoman Suttles confirmed that the City would be paying the access channel \$87,000 per year. She asked if the 5% collected from CableOne goes to the General Fund of the municipalities.

Councilman Lamerson asked Mr. Fenech to explain the difference between a user fee and a tax. He said that many people think this is a tax.

Mr. Fenech said that in a user fee situation, the user has an option of whether or not they wish to pay that. If they are a subscriber, they have to

pay it, but they have other options available like, Direct TV, Dish TV, AT&T, etc. A tax, like sales tax, is something they pay regardless of who they are.

Councilman Luzius asked if they will get four spots a month for free for any type of public notice. Mr. Fenech said that the background says they were getting four spots per month, which is in the current agreement. They will not get that in the new agreement. If they want that, they can ask for it and, he believes CableOne would grant it; however, the value would have to come out of the 5% as a result of the new State House Bill.

Ms. Tucker said that about two years ago, Senator Bennett took their current agreement and used it for a baseline. That was even reduced somewhat. There are larger cities that had seven to ten PEG channels, they had a lot of in-kind services that were taken out.

Councilman Luzius asked why they started to negotiate with CableOne after this house bill became effective. Mr. Fenech said that it would have behooved them to start earlier, but the contract does not expire until the end of the month.

Councilman Luzius said that it seems they are taking it in the shorts because this is their expiration date.

Councilman Roecker asked why it is a ten year agreement. Mr. Fenech said that they could make it whatever the Council decides. It could be shorter or longer. The agreement they are ending was a 17 year agreement. Councilman Roecker asked what the advantage to the City was to have this long of an agreement, with a fixed 5% for ten years.

Mr. Fenech answered that these bills tend to shorten up what is available, so the ten year contract may work in the City's advantage. Councilman Roecker said that anything that is added comes out of the 5% and he does not see the advantage to that.

Mr. Norwood said that every year there are Federal and State challenges which gets more and more restrictive.

Mayor Wilson said that they know the 5% is locked in for ten years.

Councilman Roecker asked how they would function without using the City's easements. Mr. Norwood said that they do not. Councilman Roecker asked why the City was afraid that they would lose the right to charge them. He asked what was going on.

Mr. Norwood said that there are so many preemptions of Federal and State laws and the cable companies are fighting Dish Network because they do not have to pay a franchise fee and feel that they are at an unfair advantage. Most cities go away from the 15-20 year agreements down to a ten year agreement.

Ms. Tucker commented that the negotiations were not started earlier because there was a provision in the bill that was almost a retroactive provision for agreements that were in effect in September of 2006. This was passed in 2007, so they would not have been able to do it any earlier.

Councilman Luzius said that he would like to take this off the consent agenda. Mayor Wilson reminded him that it was a public hearing.

Councilman Luzius asked if they would hear it one more time. He thought that they needed to hear it a lot more and said that it makes Dish Network look more attractive.

Councilwoman Suttles asked why Direct TV and Dish do not have to go through this. Mr. Norwood said that the difference is that they are not in their rights of way. CableOne is digging, running lines, in the City's rights of way.

Councilwoman Suttles asked if they had considered taxing Dish and satellite. Mr. Norwood said that he thought those were regulated by the Feds.

Paul Katan, 844 Flora Street, brought up the value of the City's Public Service Announcements. He understood that it has been very successful to educate through them with the existing contract. He was wondering if there was some value in figuring out how much that economic value is right now and negotiating that, with this contract, to lock in a current advertising rate, rather than being subject to varying rates and paying as they go.

Mr. Fenech answered that the way it reads is they have to give fair market value to anything that would be given up by CableOne. He does not believe that they could lock in that rate.

Mayor Wilson asked if they were getting the lowest rate. Mr. Edwards said they were; it was a nonprofit rate.

Ms. Tucker noted that they do have the two public access channels which they can put what ever information they want on it.

- C. Adoption of Resolution No. 3987-1017 – A resolution of the Mayor and Council of the City of Prescott, Yavapai County, Arizona, authorizing the City of Prescott to enter into a Library Services Agreement for FY2009/2010 with the Yavapai County Library District to participate in cooperative funding to the benefit of the City of Prescott Public Library, and authorizing the Mayor and staff to take any and all steps necessary to accomplish the above.

Ms. Kaus noted that the Yavapai County Library District was established in 1987 to assist with provision of library services to citizens of Yavapai County. It uses a secondary property tax levy to provide supplemental funding and support for library operations and materials. The formula used is based mostly on assessed valuation, population, number of patrons, number of items checked out and number of items owned.

In 1988, the funding from the County Library District was \$170,000; over the last 21 years, this amount has more than tripled. This year the Library District will provide the City with \$561,101. By accepting these funds, the City agrees to provide equal access and library services to all citizens of Yavapai County, to provide interlibrary loan services, to use the County Library District Funds solely for library operations and materials and not to accumulate County Library District Funds from year to year.

- D. Award of bid and contract for the Airport Zone North and South Loop Water Main Improvement Project to Sellers and Sons, Inc., in an amount not to exceed \$1,887,796.00.

Mr. Nietupski introduced the item and said that 23 bids were received. He said that it was for the installation of about 16,500 feet of 12" water main and it will enhance service capabilities in the airport area. The project is funded at \$2.15 million coming from the American Reinvestment Act. Sellers was the low bid. Background and performance history has been done. The project does require utility easement from Cavan. This includes the airport area; the line loops around the northeast end of the airport. This will not conflict with the runway extension. Cavan has given the written authorization. This is not contemplated to begin until the south loop is substantially completed.

Councilwoman Suttles asked to have it pulled because of the dollar amount. She asked if Cavan would be paid for the right of way once the appraisal is completed. Mr. Nietupski said that was the intent. The appraisal has been completed and forwarded to Cavan for their review. Once they complete that negotiation and get the agreement in place, they will bring it back to Council for consummation of that transaction.

Councilwoman Suttles asked if they are locked into the dollar amount for the easement. Mr. Nietupski said that it is not an approach that puts the City at risk; they have done it this way in the past.

Councilwoman Suttles asked if the other projects been in that dollar amount. Mr. Nietupski did not understand her question. Mayor Wilson restated said that she was asking if they had done that in the past with projects this large. Mr. Nietupski said that they did it on Iron Springs Road.

Councilman Luzius said that the way he understands the memo, is the project is \$4 million. Mr. Nietupski said that was the budget amount. The actual cost will be the cost of construction plus the cost of engineering design and administration to deliver the project. There will be costs that are less than the \$4 million budget. All of those costs that they incur are eligible for the American Recovery and Reinvestment Act funding.

Councilman Luzius asked if the project would be more than \$2.15 million. Mr. Nietupski said that he could not recall the cost of engineering but, he could provide them with more information next week.

Councilman Luzius said that the American Recovery and Reinvestment Act is stimulus money. It is forgivable and not going to cost the City anything. He asked where the money would come from for the extra charges. Mr. Nietupski said that is would come from the water fund, the rates and fees that are collected.

Councilman Lamerson commented that he sees all of the people on the bids and three are from the Prescott area. It is nice to have some of the people who work here also employed here. He asked what the criteria were set forward by the state to pick and choose vendors.

Mr. Nietupski said that the City's procurement code and ARS have provisions for bidding projects. The lowest responsible bidder is the party to whom an award should be recommended. They could have ten bidders from Prescott, but if they had someone from Mesa and they were the lowest responsible bidder the City would need to recommend them for award.

Councilman Lamerson asked if there was any mechanism to change that in the procurement code. Mr. Nietupski answered that his understanding is that local preferences are not allowed by state statutes.

Mr. Kidd commented that it was correct. A number of years ago it was decided that it was not permissible. They can evaluate the economic benefit to the City, as part of the criteria, but it would be illegal and unconstitutional to have a local preference. He said that it has been a fairly

debated and challenged issue around the state and it is something that all the cities are trying to do.

- E. Approval of minutes of the Prescott City Council Public Regular Voting Meeting of August 11, 2009 and the Joint Study Session/Special Meeting of August 18, 2009.

No discussion.

- F. Selection of items to be placed on the Regular Voting Meeting Agenda of August 25, 2009.

Councilman Bell said that the Consent Agenda consisted of items I-A, I-C and I-E.

II. ADJOURNMENT

The Study Session adjourned at 3:38 p.m.

SPECIAL MEETING

- 1. Call to Order.

Mayor Wilson called the meeting to order at 3:38 p.m.

- 2. Approval of Settlement in *Seastrand v. Prescott Unified School District and City of Prescott*.

Gary Kidd said that this was a request to approve settlement of a lawsuit. The City of Prescott, as part of alternate dispute resolution, went to mediation. As a result, the mediator recommended that the matter be settled for \$75,000 paid by the City of Prescott and \$15,000 paid by school district. Their claim was significantly more than that. They were looking at \$850,000 to \$1 million. This was a settlement where all sides were unhappy, but in terms of potential costs, this is a case that involved serious medical injuries; they would have had to hire numerous medical experts to go to trial. The legal department recommended that they settle the matter.

Mayor Wilson wanted to give some background to the public. They have had criticism for having numerous Executive Sessions. When they have them, this is one of the things they consider, litigation and settlements. They have discussed this on multiple occasions. They cannot take action in Executive Sessions. This is a culmination of discussions in Executive Sessions, and he wanted the public to understand the process they go through. When they are in negotiations it has to be in Executive Session.

Mr. Kidd noted that Executive Session statements and comments are usually made in Executive Session so that it can be fully discussed. If discussed in public sessions, those issues would be construed as factual omissions or otherwise and would be able to be used by a plaintiff that was suing the City.

Councilman Lamerson said that maybe if the City paid attention to providing basic services they would not be in some of these scenarios.

COUNCILMAN BELL MOVED TO APPROVE A SETTLEMENT OF \$75,000.00 IN THE CASE OF SEASTRAND V. PRESCOTT UNIFIED SCHOOL DISTRICT AND CITY OF PRESCOTT; SECONDED BY COUNCILMAN ROECKER; MOTION PASSED UNANIMOUSLY.

3. Approval of a Settlement Agreement with Kimley-Horn and Associates, Inc., associated with engineering and increased construction costs for the Copper Basin Road Improvement Project.

Mr. Nietupski introduced the agreement and said that they had concerns with some of the engineering and how its relationship was with respect to the increased costs they were incurring. The City sent a letter to Kimley-Horn requesting \$1.2 million in design errors and omissions associated with the project. Ultimately, Kimley-Horn submitted a written offer of \$191,000 in cash and \$30,605.00 in service associated with design modifications necessary for the Williamson Valley Road improvement project. In arriving at the settlement, they looked at a number of things with regards to Copper Basin Road. The intent, water, sewer, drainage, curbs gutters and sidewalks and retaining walls. They looked at the standard of care in design. There are issues that occur in projects of this scope. They looked at betterment, in what they receive when they have an improvement like a retaining wall. They looked at damages and how the City would be damaged relative to the whole contracting process. They were damaged by the inability to have the advantage of competitive bidding to allow for those new improvements that were allowed after the bids were received. They did not have the same cost benefit from the competitive bidding.

They worked through a process to determine how much the City was damaged. They came up with a conclusion and contract summary. The original contract was worth \$1.8 million. There were two amendments in the amount of \$500,000 and \$495,000. The total contract authorization was \$12.8 million. The final construction cost was \$12.5 million, which was less than the authorized amount. During the course of the work the engineering staff looked at things that could be implemented, but not jeopardize their ability to provide service to customers. They were able to eliminate some of the work and maintain a system that was meeting the needs of the project and their customers.

If they take the savings of \$274,068.00 versus the \$221,605.000 that Kimly-Horn offered, it puts the final project cost at \$12.3 million which is 4.25% over the original contract amount. They think overall this was a reasonable approach to resolving the dispute.

Mayor Wilson commented that he heard on the radio that there was a vast difference between the \$1.2 million and \$221,000 and people wondered why that was. Mayor Wilson said that he thought they needed some background.

Mr. Nietupski said that the \$1.2 comprised everything identified in the change order or contract amendments. Those costs were all put together. Once they knew they had issues with the design, they gave them the costs they had incurred. It took them eight months to gain some understanding of what the cost in damage was. When sewer line was put in, the City did receive benefit from it. The City Council could have been faced with determining whether to litigate, if they did not feel this was a responsible settlement. That is still an option they have. There are no guarantees in that area either. There will be other costs associated with that. In this instance they worked to try and avoid that.

Councilwoman Suttles asked what the total amount of Kimley-Horn's design bill. Mr. Nietupski answered that the engineering for Copper Basin was slightly less than \$900,000. Councilwoman Suttles asked what percent that was. Mr. Nietupski said about 20%.

Councilwoman Suttles said that Kimley-Horn has taken some ownership by agreeing with the dollar amounts that they did make some mistakes. Mr. Nietupski said that there is recognition on their part that this is a better solution than litigation.

Councilwoman Suttles said that she did not want to take it to court, as there was enough out there already. To come up to this dollar amount seems to be acceptable. Kimley-Horn may want to come back and do more design work.

Mayor Wilson said that he appreciated the clarification.

Councilman Bell noted that in his experience it is seldom that architects or engineers end up paying up like has been set up. In most cases, the specifications put that load back on the contractor every time. He thinks Mr. Nietupski has done a good job in coming up with this money and that it will be refunded to the 1% sales tax.

Councilman Lamerson said that they can keep this in court if they choose to. He asked what the cost would be. Mr. Kidd said that an estimate on the damage issues and cost of engineering, based on other cases. They would need to hire an engineering design expert not connected with the case. They would also need to hire a damage expert. The expert witness costs would be from \$25,000 to

\$60,000 a piece just for those first two. Every time they add an expert the City would need to add another. This could involve 3,4,5, 6 experts and the staff time, which the costs would be substantial. The in house engineers would be involved as well. The staff time estimate would be \$50,000+; they would be looking at hundreds of thousands of dollars. One issue, the betterment issue – they would have to prove that there were design errors and omissions and they would have to prove that they actually incurred damage. When there is a damage claim everything is included. It would be very expensive.

Councilman Lamerson said that it would be a case made for attorneys.

COUNCILMAN ROECKER MOVED TO APPROVE A SETTLEMENT AGREEMENT AND RELEASE WITH KIMLEY-HORN AND ASSOCIATES, INC., ASSOCIATED WITH ENGINEERING OF THE COPPER BASIN ROAD IMPROVEMENT PROJECT; SECONDED BY COUNCILMAN BELL; PASSED UNANIMOUSLY.

Mr. Nietupski said that the project was completed on time and that a lot of effort went in to completing the project. He acknowledged that many City employees were involved and offered great team work. Two individuals were there from day one, representing the City. They were the front line and interacting with the public and solving problems. He introduced Ben Muktari, Project Manager and David Duke, Project Inspector.

As well, Councilman Bell thanked the contractor AP&S, Gary Hudder. He looked at the job, once a week and it was very difficult to do. He said they did a fine job.

Councilman Lamerson and Councilwoman Lopas also thanked them for the good job as they live in the area. Councilwoman Lopas said that Primavera School also thanks them for the paved road and for the field at the school.

Mr. Hudder, AP&S, 2425 North Glassford Hill, Prescott Valley, said that one of the most challenging pieces was maintaining public interest and complaints. It was a very difficult winter the first winter. He wanted to recognize Pete Thompson who worked hand in hand with the City on the project. He said they had to change course four months into the project, and he could see further out that it was going to be a much bigger challenge than it needed to be. Pete came on board and helped them clean up some messes. He improved it and turned the project around and made it successful.

4. Recess into Executive Session.

COUNCILMAN ROECKER MOVED TO RECESS INTO EXECUTIVE SESSION; SECONDED BY COUNCILWOMAN SUTTLES; PASSED UNANIMOUSLY. The Prescott City Council recessed into Executive Session at 4:01 p.m.

5. EXECUTIVE SESSION:

Discussion or consultation for legal advice with the attorney or attorneys of the public body, pursuant to ARS §38-431.03(A)(3).

- i. Grant of Easement for City's 18" Chino Valley to Prescott Water Transmission Line in the West Airport area.

6. Adjournment

The Prescott City Council reconvened into Open Session at 5:54 p.m. at which time the Joint Study Session/Special Meeting of August 18, 2009, adjourned.

JACK D. WILSON, Mayor

ATTEST:

ELIZABETH A. BURKE, City Clerk