

PRESCOTT CITY COUNCIL
SPECIAL MEETING
THURSDAY, NOVEMBER 17, 2011
PRESCOTT, ARIZONA

MINUTES OF THE SPECIAL MEETING OF THE PRESCOTT CITY COUNCIL held on NOVEMBER 17, 2011, IN THE LOWER LEVEL CONFERENCE ROOM located at CITY HALL, 201 SOUTH CORTEZ STREET, Prescott, Arizona.

◆ **CALL TO ORDER**

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

◆ **PLEDGE OF ALLEGIANCE**

Dispensed

◆ **ROLL CALL:**

Present:

Absent:

Mayor Kuykendall
Councilman Blair
Councilman Hanna
Councilman Lamerson
Councilman Scamardo
Councilwoman Suttles

None

I. DISCUSSION/ACTION ITEM

- A. Implementation of the provisions of Ordinance No. 4755-1106, pertaining to commercial solid waste service within the City of Prescott; and discussion/direction regarding pickup of solid waste outside the City limits by the Field Operations Department.

City Manager McConnell said that legislation pertaining to commercial solid waste service within the City of Prescott became effective in July 2010. He noted that the Council had a Workshop on July 20, 2010, and on July 27, 2010, adopted Ordinance 4755-1106. He said the Ordinance amended Chapter 2-13 of the City Code pertaining to the Field Operations Department and their activities and responsibilities including sanitation and solid waste.

He noted that the Ordinance created a permit process for private solid waste hauling companies who elected to operate within the City of

Prescott for the purpose of commercial solid waste collection services. He said the Ordinance also required monthly filing and a fee of five percent of gross revenue received from commercial customers within the City by those private hauling firms and established requirements for vehicles and trash containers.

He said that litigation was brought to Federal Court regarding the Ordinance. The case was dismissed without a determination on the merits.

He noted that collection trucks and commercial trash dumpsters of private firms had been observed within the City. Compliance by those firms had been deficient. He said the agenda item was an opportunity for Council discussion and directions regarding two items:

- 1) Chapter 2-13 of the City Code amended by Ordinance 4755-1106
- 2) Collection of solid waste outside of the City limits by the Field Operations Department

He said with respect to the collection of solid waste outside of the City limits, A.R.S. §9-511.03, Outside Waste or Garbage Collection Services, addressed the circumstance in which a city or town elected to provide waste or garbage collection services outside of its corporate limits.

He noted the statute established a level playing field for competition outside the corporate boundaries. He said that his reading of the statute applied to the City of Prescott since one of the tests which would make it NOT applicable was not met. He said if the City wished to continue services outside of the City limits a detailed financial analysis should be made.

Councilwoman Suttles said she thought it was passed in the July 13, 2010, meeting. She asked if any of the five percent revenues had been paid from the outside.

Mr. Kidd said there was one company that was in compliance (as far as they could tell) and paid all their fees. He said several of them have paid licensing fees and others had paid licensing and container right of way fees. Several had not gone through licensing process. He noted that one company paid up to a certain point in time and had recently engaged in discussions of coming into compliance and asked for discussion with the City. He noted that there were five companies operating in the City at that time.

Councilman Blair asked why they were not paying. Mr. Kidd said there was a federal court challenge. He said it was filed under Federal Ant-Trust Statutes which prevented any type of entity engaged in any competitive conduct. The court said there was not diversity of citizenship because there wasn't diversity of citizenship, it was not between two entities outside of the state of Arizona, the Federal Act did not apply, which was why the action was dismissed. He said that the City asked for a dismissal without prejudice and now needed to be filed in state court.

Councilman Blair said that the ordinance passed 7-0 that the City had to pay the same five percent to put in a streets fund to take care of repairs and alleys for what trash trucks do to the surfaces. He said that the commercial haulers had dumpsters in the City's right of way and they should also pay a fee and they should come into compliance.

Mayor Kuykendall noted that the resolution said that except as provided by this subsection or subsection B, *no private commercial solid waste collector or recycler or person contracting with a private commercial solid waste collector shall place maintain or cause to be placed or maintained any solid waste container UNLESS the commercial solid waste collector has obtained a license issued by the City of Prescott pursuant to procedures contained in this chapter. The private commercial solid waste collector shall obtain a license prior to container placement. Location of each container is subject to approval by the City.* He asked if that chapter had been complied with.

Mr. McDowell said that the chapter was being complied with at first. He said that some of the dumpsters were set on private property, or which the City had no jurisdiction. He said that because there was no current application fee, they were not in compliance. Mayor Kuykendall asked if there was a fee for each dumpster. Mr. McDowell said that it was a standard right-of-way fee, which was enough to make sure it went through Planning and Zoning Department and Public Works.

Mayor Kuykendall asked if there was anything in place so that once a commercial hauler was out of compliance there was a procedure to make them aware that they were no longer in compliance and they should vacate the location. Mr. McDowell said they would be notified right away. He noted that, early on, some of the haulers were in compliance. He said that some were in compliance until the legal action and they chose not to be in compliance and some had never been in compliance.

Mayor Kuykendall said that one of their reasons they were today was that they took an oath to uphold the laws and Charter of the City of Prescott. That did not mean that they would only uphold half of them. He thought the reason he was there was to make sure that the ordinances that they

approved were complied with for all people that wanted to do business in the City of Prescott.

Councilman Lamerson said he was a little irritated because they were 14 months down the road. He said if they had one person that complied with the ordinances, everyone should be treated equally. He noted that there seemed to be conflict with various issues between state ordinances versus City ordinances. He said that he did not know how they could expect private enterprise people to comply with City ordinances when the City did not comply with state ordinances. Mayor Kuykendall said that was the second part of what they were there for.

Councilman Lamerson said the issue was not a Patriot (Disposal) issue, it was a City issue with other private sector haulers. He said if they were not going to enforce the ordinance, they should get rid of it.

Mr. Kidd said that it was Council's pleasure as to how to vote on the item, but it was appropriate to direct the manager to take necessary steps to enforce the provisions of the ordinance. He said there was also a provision of that ordinance that said all of the departments and anyone who was involved in the enforcement aspect of it to have the authority to assist the manager in enforcing the ordinance.

He said that it was a criminal ordinance that came under a Class I misdemeanor. He said there were fines and potential for jail under one provision if it were enforced criminally. He said it also had sections that allowed civil enforcement and a third element that dealt with the licensing issues.

Councilman Lamerson asked if there was something about monthly compliance or payments within the ordinance and if the City did that. Mr. McConnell said that he has not seen that the City itself was regulated by the ordinance and he would need legal advice. He said that they had heard that the City was regulated, but he did not find that provision. Mr. Kidd said the City was not exempt from the ordinance.

Mr. McDowell said that they currently had \$247,000 budgeted for the current year and around \$260,000 budgeted for the year before. He said the City had been paying the fee for the last few years. Councilman Lamerson asked if the City was doing the same thing they required by ordinance of the private sector. Mr. Kidd said that the ordinance did not specifically say that it applied to the City. He said that if they were to modify the ordinance, he would say Municipal Corporation. He said that when they talked about the ordinance, the City intended to comply.

Councilman Blair said their intent was to make sure that they had funds available to repair infrastructure if the trucks were beating up the alleys. Mr. Woodfill said the City Sanitation Funds had been paying the Streets Funds since before the ordinance went into place. He said they were doing it before the private haulers came into the City for the past three years. He said they did it on an annual basis. If the Council would like it to be done monthly, he could do that. Councilman Lamerson said it should all be done the same way.

Councilman Scamardo said that he read the minutes from the meeting in July 2010, and the Ordinance. He said the options that the City had with the lawsuit being out of Federal Court and back into State court were 1) there was a moratorium on the action until a decision is made; 2) rescind the ordinance; 3) modify the ordinance; 4) enforce it. He said they had discussed enforcement when the other three had not been discussed.

He said that he would like to have some consensus that if they were going to enforce it, everyone was in favor of enforcing it and then talk about specifics. He said they should decide which one of the four choices they would like to proceed with.

Major Kuykendall asked where the choice came from. Councilman Scamardo said from his head. Mayor Kuykendall said that he was lost on the state court portion. Mr. Kidd said the federal court issued a remand to the state court. He said there was nothing pending in state court that had been perfected. Technically there was a remand, but there was no assignment.

Councilman Suttles asked why they had not followed through on it. Mr. Kidd said that prior management had discussions going with several different haulers and also due to the federal lawsuit. He said when the case was cleared and was not moving forward in September, staff started conducting meetings to get everyone on board to do enforcement or follow ups. He noted that there were still some ongoing violations.

Councilman Hanna said that they passed an ordinance and he appreciated the companies that were in compliance. He said that if they were expecting the City to fall into the same category as the private haulers, then they should also be in compliance.

He suggested enforcing the ordinance and getting everyone together to make changes if needed and get everyone in compliance. Councilman Blair said that if they did not want to play based on the rules established they did not have to. He said they did not have to do business in the City of Prescott. Councilman Hanna said that was not to say that the City of

Prescott was right. He noted that the City was a little bit off course with the tow truck situation and they got it straightened out when they all got together to talk about it.

Mayor Kuykendall said that the City was charging the Solid Waste Department five percent and moving it to the General Fund. He asked if that was being done once a year or monthly. He asked if they should make a motion to bring everyone into compliance and bring the folks together who had a grievance and talk about it.

Councilman Hanna said if they were not willing to sit down then they should not be in that position. He said they needed to come up with something that was acceptable that would be a happy medium and beneficial to everyone involved. He asked if it was easier to do it once a month or once a year. Councilman Blair said that there should be two options, monthly or quarterly. Mr. Woodfill said they would comply with whatever the code was.

Mr. McConnell said the City could enforce but not ensure compliance. He said that he felt the ordinance needed to be addressed to clearly indicate how the City was to be treated under the ordinance. He said that if the City was going to pay and “in lieu” fee, it needed to be stated. He noted that other provisions of the ordinance were inherently conflicting. He said they had to remove any conflicts about the City policing itself.

Councilwoman Suttles asked if there would be late fees since they were starting again from that day. Councilman Hanna said there was one company that had been paying the entire time and the money would have to be reimbursed.

Mayor Kuykendall said there was an effective date on this ordinance and it was important enough to pass with the emergency clause and the vote was unanimous. He said it would be fair to waive late charges, but if there were no reports, they would not know what those were.

Mr. McConnell said they would have to see if the waiving of fees had been contemplated. He said that it may turn out that in order to do that the Council would have to modify the ordinance.

Councilman Scamardo said that they were not talking about a huge amount of money. He thought it was about \$200,000 of total revenue and five percent would be \$8,000 to \$10,000. He said that he would be in favor of whatever the ordinance was.

Mr. McConnell said that they might suggest discussing an effective date and waive the penalties. He said that it may be appropriate for the Council to provide some direction about enforceability, but to be brought back with a certain period of time, shorter than 60 days. Mr. Kidd said that if the Council felt they wanted to direct the manager to enforce the ordinance, they could make the motion.

Les Baker said that he had been in the trash business for 32 years. He said that he had been in discussion with local haulers. He said they asked him to mention a couple of concerns. He said that he understood the issue of the lawsuit and tardiness of payments.

He said the three concerns were similar for all companies. The first was that no one disputed the right to make sure the roads of the City were protected. He said that some haulers felt the five percent was discriminatory. He noted that oftentimes the discussion had been around beer trucks and that the sales tax was two percent.

He noted that outside of the City 50,000+ residents had no choice and must pay the City. He said the Enterprise Fund was self supporting and without the revenue stream, it would not exist. He said he hoped the City would ponder the question of the City of Prescott coming outside where the private haulers had to compete with each other for the revenue.

He said the last thing was determined by the City that when the new law was passed in July and some companies chose to come into the commercial steel bin business, a lot of it was put off limits because the City is calling three year contracts with apartment complexes, residential. He said that he had been asked by some of the haulers to talk about forming an association and retain some lobbying. He said that they did not really want to waste the money and time to do that. He said they would like to work out a level playing field and ethical compliance.

He summed up the three items as competitive restrictions, competing outside the City of Prescott and what exactly was the definition of commercial.

Councilman Blair said the definition of commercial went back to the City's Zoning Code.

Mr. McConnell said the ordinance was quite specific regarding residential solid waste generators. He said it included single family dwellings, multifamily, duplexes, etc. He said he understood comment to be about the type of agreement being signed for service. Perhaps that could be addressed by entitling the agreement "A Residential Service Agreement – Multi-Family".

Councilman Hanna asked if the City was collecting commercial or residential waste when they went outside the City limits. Mr. McDowell said they collected both. Councilman Hanna asked if they were picking up residential solid waste from only those that the City supplied water and sewer to. Mr. McDowell said they had, for most part, for residential.

Jay Ebey said that he would like to have dialogue before they enforced what had already been done because they had comments and thoughts about the ordinance.

Councilman Scamardo said that would be modifying. He said that in order to push both side to get together, the opinion of the Council was to direct City staff to enforce the ordinance with a willingness to modify it.

Councilman Hanna said that they only had one hauler in compliance and asked if it was fair to them to penalize them for being in compliance. Mr. Ebey said that person should be reimbursed if the ordinance was modified. Councilman Lamerson said that as a taxpayer, he was also in compliance. Councilman Hanna said that was why he thought everyone should be brought up to compliance and then move on from there.

Billy Taylor, Sales Manager for Best Pick Disposal, said they were concerned with the City hauling in the outside of the City limits. He noted that he competed against the other private haulers everyday and in one day, he had to go up against the sanitation department of the City of Prescott.

He said that the ordinance said that an apartment or duplex was residential, but all of the paperwork said it was commercial. He said that anyone in the business knew that it was commercial. Councilman Scamardo said there was a big difference between commercial retail industrial and multifamily and apartment. He noted that in communities all over the country, multifamily was considered residential. He said the ordinance was designed to parallel with zoning codes.

Mayor Kuykendall said that he was not aware that there was a state statute talking about outside the City. He said that he only remembered talking about supplying service to those who the City supplied water and sewer.

Mr. Kidd said that during the original discussions on the ordinance there was some discussion that A.R.S. §9-511.03 pertained to cities that collected trash outside of city boundaries. That statute had some exceptions however, if the City did not fall within all three exceptions, they would be required to pay appropriate taxes to the state. He noted that one

of the haulers brought that issue up. He said that those taxes had to be paid if they going to operate extra territorial. He said they would be able to operate extra territorial if the General Plan area were outside the City and if it was within three miles of the City boundaries. He said the statute also required that it be a county of two million or more, which they would not qualify for a city or town with a population to 2,500 or less.

He said that general law said that when government started operating in a proprietary capacity, nongovernmental, they were competing with the private sector and taxes and other statutes may apply. He said that if they were not in compliance, they would have to come in compliance with state law.

Mr. McDowell said that they filed their taxes last year. Councilman Scamardo said they would have to pay the same amount of taxes as the private haulers.

Mr. McDowell said that Diana Fister filed the taxes last year and he contacted the Director of Arizona Department of Environmental Quality (ADEQ) to make sure they were compliant with the recycle fund. He said there was no current ADEQ fund. He said the only fee that they were not paying was the Department of Motor Vehicles (DMV), that the Cities were exempt from paying.

Councilman Lamerson noted that in subsection 5 it said, *“ensure that no city or town taxes, fees or revenues are used to subsidize the waste or garbage collection and disposal services outside the city and town.”* He said that he thought “subsidized” would include vehicles, equipment, maintenance and labor force costs that were paid for by the citizens of Prescott to go outside the City limits. He said he would defer that to the City attorney.

Mr. Kidd said that the way he read the statute was that the City could not use a truck for free, there had to be a cost allocation so that the City was getting all of its costs back. Councilman Lamerson said there would have to be a surcharge to collect outside the City limits. He said that the City could not charge a lesser rate than they were actually paying for their fixed costs.

Mayor Kuykendall asked if the department was being subsidized from the General Fund. Mr. McDowell said no. Mayor Kuykendall asked if it made a distinction that he got money from the Enterprise Fund and not the General Fund.

Mr. McConnell said that he agreed with Mr. Kidd's interpretation. He said that statute was specific and said to, "*keep all records of the services separate from all other city or town municipal records.*" He said that if the City engaged in trash collection outside of the city limits, the City had manpower, equipment and materials that it used to provide that services and trucks it back to a transfer station. He noted that any and all costs on a pro rata basis would have to be identified and broken out so that the records were separate. He said that all applicable taxes including in lieu property taxes and registration fees were accounted for in a way that it could be demonstrated (in a court) that there was zero subsidy. He said that it was a pretty complicated enterprise to set all of that up.

Mayor Kuykendall asked if he thought the City should get out of the business outside of the City of Prescott.

Mr. McConnell said that if the City was going to continue outside the City limits, they would need to do a detailed cost benefit of continuing those services. He said he thought the Council would recognize the private haulers could demand compliance with what the statutes said.

Mayor Kuykendall asked how many sales opportunities would open up if the City put their customers on notice outside of the city limits that the City was discontinuing service. Mr. McDowell said there would be roughly 256 customers.

Councilwoman Suttles asked how long the City had been taking care of those customers. He said that once the private haulers started coming into the City, they went out of the City. He said they tried to keep the rate as low as possible inside the City limits. He said that he would have to raise the rates inside the City to cover the loss if they stopped going outside the City.

Mr. McConnell asked how many accounts they had inside the City. Mr. McDowell said there were 17,000. Mr. McConnell said there would not be a huge difference in rates on the customers within the City if he lost 256 clients outside of the City.

Councilman Hanna said that if the private haulers wanted a level playing field, they would have to allow the City to go out of the City. A private hauler said that the City did not allow them to pick up residential within the City. He said the City picked up outside residential, but would not allow them to come in and pick up residential. Councilman Hanna said that was why he asked if the City picked up from other residences than the ones they supplied water and sewer to. Mr. McDowell said there were very few, but those were the places that they drove right by.

Councilman Scamardo asked if they were picking up commercial outside of the City. Mr. McDowell said they were, but they were not soliciting. Councilman Scamardo asked if part of the 256 customers were commercial accounts. Mr. McDowell said yes. Ms. King said the 255 were just residential clients and 2 commercial hotel accounts.

Councilman Hanna asked what percent of the residential accounts they provided another service to. Mr. McDowell said it was about 90 percent.

Mayor Kuykendall said that he would be giving up \$3584 per month or \$40,000 a year. He said the potential income was about \$10,000 per year. He noted that the private sector came out ahead.

Councilman Hanna said that he saw no problem with providing solid waste pickup to those that the City supplied at last one other utility to. Mayor Kuykendall asked if it was worth jumping through all of the hoops with the state to do that. Councilman Hanna said that if it were not cost effective, they should not do it.

Mayor Kuykendall asked why they were serving 256 clients water and sewer outside the City with as much as it cost the City for water. Mr. McDowell said they had submitted documents to the legal department to make sure that everything they did was legal. Councilman Hanna said that he thought Mr. McDowell had done a great job and they were not questioning that.

Councilwoman Suttles asked if they could get out of the two commercial accounts they had. Mr. Kidd said that was a policy issue that Council needed to decide. He said they would need to comply with contract obligations, provisions and agreements.

Councilman Blair said it made sense to pick up trash for customers they already had. He said it was inappropriate to solicit commercial accounts outside of the City. He said that he did not think the City of Prescott should pick up commercial garbage. Councilman Hanna asked if it was cost effective to do that. Councilman Lamerson asked if the citizen would benefit.

Mr. McConnell said that he did not see how it would pencil out with 255 customers. He said that it was not about the revenue, it was about the net. He asked if that would offset the annual audit charges. Mr. Woodfill said that it seemed like a lot of compliance for minimal clients. Mr. McConnell said that it was strictly a policy question for the Council. He said that government gets into a thing that become unbelievably complex and that was a classic example. He said that most of them would say it did not make sense.

Councilwoman Suttles said that out of the two choices, they could terminate the service or direct a financial analysis and asked what they were going to do. Councilman Lamerson said that they should make sure that they complied with their preexisting contracts. He said that when the contracts were due, they should be done with them. He noted that they should let the people know ahead of time and their intent was not to collect outside the City limits.

Mayor Kuykendall said that they were asking the private haulers to comply with an ordinance. He said the fastest they could get out of business outside of the corporate limits would be the best. Councilman Scamardo asked how long the contracts were for with people outside the City for water and sewer. Mr. McDowell said a residential was a month to month contract.

A representative from BPD asked if the two commercial businesses that the City serviced included the roll off business. Mr. McDowell said that they did not currently have any construction business. George from BPD said that he saw roll off trucks in Chino Valley all of the time. Mr. McDowell said that there was City owned property there that they serviced. He said they did six yard dumpsters on construction sites within the City limits. He said that he did not know about any outside sites.

COUNCILMAN LAMERSON MOVED TO DIRECT CITY STAFF TO TERMINATE SOLID WASTE COLLECTION SERVICES BY THE CITY OF PRESCOTT OUTSIDE ITS CITY LIMITS, EFFECTIVE NINETY (90) CALENDAR DAYS HEREAFTER, FOLLOWING REASONABLE NOTICE TO CURRENT CUSTOMERS AND PROVISION OF INFORMATION TO ASSIST THEM IN TRANSITIONING TO REPLACEMENT SERVICE, AND SUBJECT TO CITY COMPLETION OF ANY SPECIFIC CONTRACTUAL OBLIGATIONS WHICH MAY EXIST FOR THE EXISTING COMMERCIAL COLLECTION ACCOUNTS; SECONDED BY COUNCILMAN HANNA; PASSED UNANIMOUSLY.

II. ADJOURNMENT

There being no further business to be discussed, the Prescott City Council Special Meeting of November 17, 2011, adjourned at 4:33 p.m.

MARLIN D. KUYKENDALL, Mayor

ATTEST:

ELIZABETH A. BURKE, City Clerk

CERTIFICATION

I hereby certify that the foregoing minutes are a true and correct copy of the minutes of the Special Meeting of the City Council of the City of Prescott, Arizona held on the 17th day of November, 2011. I further certify the meeting was duly called and held and that a quorum was present.

Dated this ____ day of _____, 2011.

AFFIX
CITY SEAL

ELIZABETH A. BURKE, City Clerk