

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

## **February 23, 2004**

The Billings City Council met in regular session in the Council Chambers located on the second floor of the Police Facility, 220 North 27<sup>th</sup> Street, Billings, Montana. Mayor Charles F. Tooley called the meeting to order and served as the meeting's presiding officer. The Pledge of Allegiance was led by the Mayor, followed by the Invocation, which was given by Councilmember Jan Iverson.

**ROLL CALL** - Councilmembers present on roll call were: Gaghen, McDermott, Brewster, Brown, Ruegamer, Iverson, Boyer, Clark and Jones. Councilmember Poppler was excused.

**MINUTES – February 9, 2004.** Approved as printed.

**COURTESIES** - NONE

**PROCLAMATIONS – Mayor Tooley.** – NONE

### **BOARD & COMMISSION REPORTS**

#### **▪ Downtown Billings Partnership – Greg Krueger**

DBP Executive Director Greg Krueger thanked all participants in the recent Town Meeting sessions that were very productive. He said the DBP is committed to staying involved and working with the City staff in all areas of the downtown. He acknowledged the City's work on the TIF expansion and noted the groundbreaking for the Rocky Mountain Health Network construction, the first new building in the downtown area in a long time.

#### **▪ Yellowstone County Air Pollution Control – Russ Boschee**

Yellowstone County Air Pollution Control Director Russ Boschee gave a report of the agency's activities as of 2/13/04. He summarized the programs within the agency's jurisdiction including the Air Monitoring Program, the Source Compliance Program, the Open Burning Permit Program, and the Complaint Management Program. He noted the mission statement and purpose of the agency is to prevent, abate and control air pollution in Yellowstone County.

Mr. Boschee said the agency spends approximately 52% of its time and resources on City of Billings' issues, 46.5% on Yellowstone County issues and 1.5% on the City of Laurel's issues. He noted that the adopted 2003-2004 budget was included in the handout to the Council.

Councilmember Brown asked if the emissions measured in the City of Billings sandblasting complaints were above EPA standards. Mr. Boschee said they were below EPA standards. He added the monitoring at 15<sup>th</sup> Street and 6<sup>th</sup> Avenue were below EPA standards over a week's period of testing. Councilmember McDermott asked about the status of the new Interlocal Agreement. City Administrator Kristoff Bauer said it is in draft form with one piece still under review, a process on allocating the costs from the different agencies in order to prepare the budget on an annual basis. This will be presented to the Council, the Commissioners and other affected

cities in the near future. Councilmember Gaghen asked if the agency has been able to acquire office space in the Courthouse or City/County Health Department. Mr. Boscee said there is no space available presently at the Courthouse, but hopes this would be part of the Interlocal Agreement when space becomes available.

**ADMINISTRATOR REPORTS – Kristoff Bauer.**

- Mr. Bauer noted that anyone using an agenda that does not contain Item G as a Contract for Professional Services for program based budget for Parks/Recreation/Public Lands Dept. with FCS Group for \$28,885.00 has an inaccurate agenda.
- Mr. Bauer asked the Council to separate Item J so that the item may be amended to remove item #3 concerning Darrell, Kathy & Jeff Buszmann.
- He noted that a memo from the Financial Services Manager related to the City's financial report was distributed to the Council. In response to requests during Council Initiatives, he also distributed proposed language relating to the situation with the streetlight district in the downtown area.
- On a sad note, Mr. Bauer announced that former Financial Services Director Robert Keefe lost his long battle with cancer on Sunday, February 22<sup>nd</sup>. He also noted that 24-year-old Airport Police Officer Derek DeWitt was killed in a traffic accident this past weekend. Mr. Bauer extended sympathies to both families.

**PUBLIC COMMENT on “NON-PUBLIC HEARING” Agenda Items: #1, #13, #14, #15 and #16 ONLY. Speaker sign-in required.** (Comments offered here are limited to 1 minute per speaker.

*(NOTE: For Items not on this agenda, public comment will be taken at the end of the agenda. Please sign up on the clipboard located at the back of the room.)*

- STEVE FROST, 2107 38<sup>TH</sup> STREET WEST, said he objects to the City getting involved in the water dispensing station at Briarwood. He said the City should not use taxpayer money to compete with private enterprise. He does not think anyone living in the City would use the service.
- GREG KRUEGER said the contract with A & E Architects for the Library and Multi-Use Parking Garage at 4<sup>th</sup> and Broadway is an important piece of the revitalization plan for the downtown area. He said the DBP Board approval of tax increment dollar expenditures in the amount of \$300,000 for the Veder property is a statement to that effect. He said he looks forward to being a public input conduit on any project developed in downtown Billings, including this site. He said he supports the contract amendment.
- DALE STEINBRINCK, 723 SOUTH BILLINGS BOULEVARD, said the City of Billings should not get into the water business at the Briarwood dispensing station. He said the expensive facility should not have been built.
- JOHN KORTRIGHT, OWNER OF RELIABLE WATER SERVICE, said he has been in the water business for 25 years and is protesting the City operation of the water dispensing facility. He noted that he would not have built his present facility in 1999 if he knew the City would be building the dispensing facility near

Briarwood. He added that the RFP requirements were too restrictive to allow participation in this facility and to run his business at the same time.

- ED LORENZ, FISHER WATER SERVICE, said he cannot find out who authorized the construction of the Briarwood dispensing facility. He said he had to pay System Development Fees when he developed his facility and asked if the City paid those fees also. He noted that his trucks are unable to lease the facility, as the standpipe does not accommodate his vehicles.
- CONNIE WARDELL said the City of Billings should modify the contract for the Library and Multi-Use Garage to address Library issues only. She added she is concerned that parking is being considered for the area at 4<sup>th</sup> and Broadway. She said the downtown property owners have twice opposed a parking facility on this site and were not consulted about this current plan. She urged the Council to go back to the plans for the Library and “not be talking” about building a parking facility on 4<sup>th</sup> and Broadway.
- DOUG FRENCH, 2143 PUEBLO DRIVE, said he had worked for Reliable Water Service for 18 years. He noted that citizens of Billings would not be the users of the water dispensing facility at Briarwood, only persons living in the county. He said this part of his job, to deliver water to those county residents, would affect his livelihood. Mr. French said small businesses should not have to compete with the City.
- AARON MEYER, 2308 BLUE CREEK, said he is responsible for the 175 signatures on the petition to have the water dispensing facility available to the public. He said those interested parties are willing to pay for clean and safe water.
- BRUCE SIMON, 217 CLARK AVENUE, said the Council should separate the Library issues from the Multi-Use Parking Garage plan. He noted there is no support from the downtown property owners for the parking facility and the City should not expend that portion of the money. He also spoke on the consideration of a contract with RW Beck for Electrical Services Research. He said the City should not be expending tax dollars before asking the residents of the City for their input. He said public hearings should take place before the Council’s decision. He noted that he is appreciative of the recent meeting he had with City staff to bring a resolution to the concerns of property owners in the downtown streetlighting district.
- KIM OLSEN, DOWNTOWN BILLINGS PARTNERSHIP, said the project at 4<sup>th</sup> and Broadway is the key to redevelopment of the downtown area. She said many ideas have come forward about possibilities for this site. She said the DBP supported this redevelopment through the purchase of the site. Ms. Olsen said continued communication between the Partnership and the City is important in order to make the redevelopment efforts of the downtown move forward.
- TIM CRANSTON said he recently moved back to Billings. He urged the City to check with other cities about their similar experiences and what they have successfully done related to purchasing and operating utilities as is being considered in the contract with RW Beck. He said he hopes those results would be shared with the community and that community input would be encouraged.

- RAY RUNNION said he is concerned about the traffic through Blue Creek that will result from the City's operation of the water dispensing facility at Briarwood. He asked the Council to consider other options.
- TOM ZURBUCHEN, 1747 WICKS LANE, urged the Council to approve the ditch crossing permit to build a pedestrian bridge across the BBWA canal on the east side of Bench Boulevard. He said residents in the Heights have wanted this for a long time. He added that communities that operate their own power supply do not have inexpensive rates. Mr. Zurbuchen said it takes expertise to run an electric company and he is concerned that the Council does not have that expertise.

**CHANGE IN ORDER OF AGENDA:**

Councilmember Clark moved to move Item #14 Modification of City's FY 2005-2008 CIP to Item #16, seconded by Councilmember Jones. Councilmember McDermott noted that tonight's outcome of Item #16 could impact Item #14 and therefore it would be better to consider Item #14 last. She said she supports this motion. On a voice vote, the motion was unanimously approved.

**CONSENT AGENDA:**

**1. A. Mayor's Appointments:**

	Name	Board/Commission	Term	
			Begins	Ends
1.	Donna Forbes*	Yellowstone Board of Planning (Ward III)	01/01/04	12/31/04
2.	Lloyd Mickelson**	Library Board	01/01/04	06/30/05

\* Filling the unexpired term of Earl Guss.

\*\* Filling the unexpired term of Julie Brown.

**B. Bid Awards:**

**(1) Thermal Imager Cameras for Fire Dept.** (Opened 1/27/04). (Delayed from 2/9/04). Recommend Wheatland Fire Equipment for two helmet-mount Thermal Imager cameras, \$24,512.20; and LN Curtis & Sons for two hand-held Thermal Imager cameras, \$19,800.00.

**(2) Highland Park Sprayground and Playground.** (Opened 2/10/04). Recommend A.M.E, Inc., \$161,950.00.

**(3) 2600 Gallon Aluminum Water Tank for Fire Dept.** (Opened 2/17/04). Recommendation to be made at meeting.

**C. C.O. #3, W.O. 02-15: Billings Operations Center,** Hardy Construction, \$64,344.00.

**D. Amendment #9 to Professional Services Contract, Staples Pump Station,** Morrison-Maierle, \$17,030.00 and 0 calendar days.

**E. W.O. 04-13: Professional Services Contract,** HDR Engineering, Inc.,

\$997,960.00.

**F. W.O. 04-14: Professional Services Contract**, HDR Engineering, Inc., \$385,500.00.

**G. Contract for Professional Services**, program based (i.e. zero-based) budget for Parks/Recreation/Public Lands Dept., FCS Group, \$28,885.00.

**H. Ditch Crossing Permit** to Billings Bench Water Association (BBWA) to build a pedestrian bridge across the BBWA lateral canal on east side of Bench Blvd, north of Anchor Ave, \$136.00.

**I. Briarwood Water Vending Station Lease:** reject sole proposal and authorize city operation of water dispensing facility at Briarwood pump station.

**J. Revolving Loans:**

- (1) Fagg Family Properties, \$65,000.00 for remodel of property at 114 N. 27<sup>th</sup> St, fka Insty Print Building.
- (2) CSKT, Inc., dba Montana Brewing Company, \$250,000.00 to finance a portion of the remodeling and equipping of a high-end sports bar adjacent to the existing bar/restaurant.
- (3) ~~Darrell, Kathy & Jeff Buszmann, \$250,000.00 to finance a portion of their purchase and improvement of The Terrace apartment building at 300 N. 25<sup>th</sup> St.~~

**K. Subordination of Housing Rehabilitation Loan:** Gregory & Debra King, 2440 Miles Ave., \$10,000.

**L. Grant Application** submittal and finalization: Safe and Drug-Free Schools Grant from the Montana Board of Crime Control; grant amount = \$60,328; City's match is \$18,099.00 from drug forfeiture fund.

**M. Grant Application** submittal and finalization: Stop Violence against Women Act Grant from the Montana Board of Crime Control for domestic violence training; grant amount = \$13,053; City's match is \$2,600.00.

**N. Street Closures for special Events:**

- (1) HRDC St. Patrick's Day Celtic Celebration, March 13, 2004, closure of N. 28<sup>th</sup> between 1<sup>st</sup> Ave N and 3<sup>rd</sup> Ave. N.
- (2) HRDC St. Patrick's Day Parade, March 13, 2004, closure of established parade route

**O. Resolution of Intention 04-18091** to Create SILMD 286 in Chrysalis Acres Sub., and setting a public hearing date for 3/22/04.

**P. Second reading ordinance 04-5266** amending BMCC Section 8-333 providing conditions when family members may be buried or memorialized on a veteran's grave.

**Q. Adoption** of FY05 Council Goals.

**R. Bills and Payroll.**

**(Action:** approval or disapproval of Consent Agenda.)

Councilmember Boyer separated Item C from the Consent Agenda. Councilmember McDermott separated Items G, I, and J from the Consent Agenda. Councilmember Brewster separated Item H. Councilmember Brown separated Item B3. Councilmember Clark separated Item Q.

Councilmember McDermott moved for approval of the Consent Agenda with the exceptions of Items B3, C, G, H, I, J and Q, seconded by Councilmember Brewster. On a voice vote, the motion was unanimously approved.

Councilmember McDermott moved for approval of Item B3 of the Consent Agenda, seconded by Councilmember Iverson. Councilmember Brown asked if there is an estimated cost of the water tank. Fire Chief Marv Jochem said there is only one provider of this type of tank and the Fire Department is currently assessing the bid process. He said there is no recommendation as yet. Councilmember Brown made a substitute motion to delay the recommendation to 3/8/04, seconded by Councilmember Brewster. On a voice vote, the motion was unanimously approved.

Councilmember McDermott moved for approval of Item C of the Consent Agenda, seconded by Councilmember Iverson. Councilmember Boyer asked if the error in the architectural drawings changed the bid in any way. She said she is concerned about the process that this has taken. City Administrator Kristoff Bauer said there have been discussions to reduce the cost through negotiations, due to the error. He said the amount of the change order is basically the bid price because of savings in other parts of the project. Councilmember Jones said he is comfortable with what the City has negotiated and supports this change order. On a voice vote, the motion was unanimously approved.

Councilmember McDermott moved for approval of Item G of the Consent Agenda, seconded by Councilmember Iverson. Councilmember McDermott asked if there could be the same amount of contact with the City Council during this contract as was proposed in the other proposal. Mr. Bauer said this contract would include a similar amount of contact with the Council, only in a more concentrated framework, as was included with the other proposal. It would be difficult to ask the FCS Group to adopt HDR's methodology because they operate differently. Councilmember Jones asked if there could be a meeting with the Council in the beginning. Mr. Bauer said that would not be a problem. On a voice vote, the motion was unanimously approved.

Councilmember McDermott moved for approval of Item H of the Consent Agenda, seconded by Councilmember Iverson. Councilmember Brewster commented that the crossing is currently very narrow on Bench Boulevard and residents of the Heights are looking forward to completion of this project to restore safety to that crossing. On a voice vote, the motion was unanimously approved.

Councilmember Brewster moved for approval of Item I of the Consent Agenda, seconded by Councilmember Iverson. Councilmember Clark said he heard from several bidders that the requirements in the RFP were too confining and they were unable to submit a proposal. He asked if the RFP could be re-advertised with more open ended requirements. He added that he did not think the City of Billings should be “in the water business”. City Administrator Kristoff Bauer noted that the City Council was involved in the development of the RFP and it was not considered too restrictive at that time. The sole proposal that was received was so far removed from the concept that the City of Billings had for this water dispensing facility, that Staff is recommending rejection of that proposal. He said he is open to any direction the Council wishes to take. Councilmember McDermott agreed that it is a mistake for the City of Billings to open and operate the water dispensing facility. She said there was no Council input for the construction of the facility. She added that the policy decision to sell water to County residents did not come before the Council. She said she would like to reconsider other options at a later time, but does not want the City to be involved in the water dispensing business. Councilmember Gaghen said she can see two sides to this issue. On the one hand, it is a convenience for the residents in the area, but there are safety issues that make operation of the facility hazardous. She said the entrance into the water dispensing operation by the City is “murky at best” and does not support this measure.

City Administrator Kristoff Bauer said the Council should consider this action in two parts. The first portion would be to approve or disapprove the recommendation regarding rejection of the sole proposal. The second portion would be to consider the operation of the facility by the City of Billings and if not, then a re-advertisement of the RFP for new proposals, if that is the Council’s desire.

Councilmember Clark made a substitute motion to 1) reject the sole proposal, and 2) direct Staff to prepare a new Request for Proposal including the stipulation that the City of Billings not open or operate the water dispensing facility, seconded by Councilmember McDermott. Councilmember Brewster moved to amend the motion to divide the issues and consider them separately, seconded by Councilmember McDermott. On a voice vote for the amendment, the motion was unanimously approved. On a voice vote for part one of the substitute motion to reject the sole proposal, the motion was unanimously approved.

Councilmember Brewster said he is concerned that re-advertising the RFP would not bring a different result. The only thing different is that the people selling water want to keep the facility closed. He said it is a responsibility of the Council to try and reclaim some of the costs of the facility. Councilmember Brown said a ten-year contract is a long time to tie up one business. He also expressed concern for the hefty requirements of the liability policy that the City of Billings is requesting, noting they are unreasonably high for a business to absorb. On a roll call vote for part two of the substitute motion, the motion was approved 7-3 with Councilmembers Gaghen, McDermott, Brown, Ruegamer, Boyer, Clark and Jones voting “yes” and Councilmembers Brewster, Iverson, and Mayor Tooley voting “no”.

Councilmember McDermott moved for approval of Item J of the Consent Agenda with part #3 removed, seconded by Councilmember Iverson. Councilmember Brown asked why the City is loaning money to people who really don’t need it. He said he does not support this item. Councilmember Boyer said that financial means is not a criteria of the Revolving Loan Fund. It is designed to assist businesses in redevelopment and growth.

She said she supports the motion. Councilmember McDermott said this is designed to level the playing field and supports the motion. On a voice vote, the motion was approved with Councilmember Brown voting "no".

Councilmember McDermott moved for approval of Item Q, seconded by Councilmember Iverson. Councilmember Clark said he supports the motion but would like to see a different process with less Staff input. On a voice vote, the motion was approved with Councilmember Brown voting "no".

## **REGULAR AGENDA:**

### **2. PUBLIC HEARING AND RESOLUTION 04-18092 adopting a 5% Water Franchise Fee, a 5% Wastewater Franchise Fee, a 5% Solid Waste Franchise Fee and authorizing the levying of a 3% Convenience Fee for water/wastewater credit/debit/charge card transactions. Staff recommends approval. (Action: approval or disapproval of Staff recommendation.)**

Deputy City Administrator Bruce McCandless said the Undesignated Fund Balance has been declining since 2003 and is estimated to meet and decline below the Minimum Recommended Fund Balance in 2005. He said the City Council asked the Staff to prepare some revenue initiatives for consideration. The first initiative was to consider \$305,000 in additional revenue from a 1% increase in the franchise fees. He said raising the franchise fees to 5% would have the effect of producing about \$1.6 Million that would go into the General Fund. Mr. McCandless said if the Council does not approve the 1% increase and eliminates the current 4% franchise fee it would create a 10% reduction in the General Fund and 5% in the Public Safety Fund, which could result in the following: eliminating 40 FTE General Fund employees, five police officers, two 911 center operators and reducing firefighter overtime, reducing Fire Department/911 Center building and equipment maintenance, changing City-wide training, reducing Code Enforcement by 25%, eliminating support for Task Force mailings, reducing funding for City newsletter, reducing City Hall maintenance, reducing travel and training for Mayor, Council, Administration and Parks, withdrawing from MLCT and NLC, closing Athletic Pool, reducing park maintenance and repair by 20%, closing wading pools, reducing operational support for the Municipal Court and reducing financial services support.

Mr. McCandless said the franchise fees impact new housing costs with regard to System Development Fees and construction fees. In 2003, System Development Fees produced \$37,200 and construction fees produced \$93,200 for a total of \$130,400. These fees were paid to the General Fund. If the additional 1% is adopted the System Development Fees would generate an additional \$9,300 and the constructions fees would generate an additional \$23,300 for a total of \$32,600. These fees at 5% would affect housing costs by \$239.00 per single and duplex family residence. This does not include multi-family dwellings or commercial permits which would reduce that figure.

Councilmember Brown said this is not a 1% increase but a 25% increase because it is 1% of 4%. Councilmember McDermott said she thought the number of FTEs that would be eliminated did not equate to the \$1.6 Million. Mr. McCandless said this is only one scenario to consider. Mr. Bauer noted that a number of police officers are supported in part by Federal funding affecting the number of police officers that have to be

eliminated to get to the net amount. Many of the employees eliminated would be junior employees with smaller salaries.

Councilmember Boyer asked the City Attorney to elaborate on the legality of these fees. City Attorney Brent Brooks noted that the Supreme Court has said that franchise laws in Montana are largely undeveloped. He noted his February 13<sup>th</sup> memo to the Council is the best "snapshot" he could provide the Council.

Councilmember McDermott asked that the Task Force mailing not be considered for elimination and to look elsewhere for funds to keep that program. These are neighborhood groups that are donating their time to make their neighborhoods a better place to live.

Councilmember Brown said when franchise fees go into the General Fund rather than into the funds that generated the revenue they are, in his understanding, considered an illegal tax.

Councilmember Brewster asked the City Attorney to outline why the precedent the Court set with the other utility franchise fee does or does not apply in this case. Mr. Brooks said the Court limited its ruling to revenue generated on unrelated non-governmental utilities. He said the City is not dealing with a privately owned utility that is a non-governmental utility. This is why there is not much direction from case law. He said the Court did not really venture into the franchise area. Councilmember Brewster restated that this fee is negotiated with ourselves and therefore the City can adopt a fee under those standards. Mr. Brooks said because the City is a self-governing entity, if the statutes are silent or reasonable doubt arises the ruling is in favor of the self-governing entity exercising that power. Mr. Bauer noted that the State has delegated the Council "plenary authority" to establish rates and fees in the operation and maintenance of the utilities that are managed by the Council. There is a different relationship between the utilities that are being assessed here and those discussed in the court case.

Councilmember Brown re-emphasized the funds that are raised from this franchise fee are not used for managing the utility but for General Fund use.

Mayor Tooley called for a five-minute recess at 7:52 P.M.

Mayor Tooley reconvened the meeting at 8:00 P.M.

The public hearing was opened. BRUCE SIMON, 217 CLARK AVENUE, said the presentation was an interesting presentation about the City's budget problems, but that is not the issue before the Council tonight. He said he believes the franchise fee is a sales tax therefore is illegal. If the revenue stayed in the Utility Department and did not go into the General Fund he would not consider it a sales tax. He said this is the same path taken with the earlier franchise fee. He urged the Council not to use the budget problems to confuse the issue. He asked where the 3% convenience fee for credit card processing goes. The answer to that should be revealed before the Council makes their decision, he added. He said the people that pay by cash may be subsidizing the people who pay with credit cards. He urged the Council to take a good look at the 3% fee as it may create slow payments or more delinquency and those costs may be greater than the 3% fee.

CLAYTON FISCUS, 1111 MAIN STREET, said he speaks against the "5% sales tax" on the water, wastewater and solid waste operations. He said "this is what Judge

Baugh called it when it is applied to the gas, phone and electric utilities". He read "this Court has held that a government demands for money for the purpose of raising revenue is a tax". This is from the Supreme Court decision. He said the City cannot implement a sales tax. He said if the Council approves the Staff's recommendation, they would be, in his opinion ignoring the Montana Supreme Court, Judge Baugh and overturning the vote of the people who voted against it on the other three utilities. He said this should be put to a vote of the people.

There were no other speakers. The public hearing was closed. Councilmember Brewster moved for approval of the 3% Convenience Fee for water/wastewater credit/debit/charge card transactions, seconded by Councilmember Jones. Councilmember McDermott asked Staff to answer Mr. Simon's questions about what the 3% fee is comprised of and where it would go. Mr. Bauer said the City does not currently accept debit or credit card payments for utility charges. Automatic transfers are accepted and that practice would not be impacted by the levy of this fee. He said this is the best estimate for passing along the fees that are charged by credit card companies to the City for using their services to collect the funds and retransmit them to the City - through the public's use of credit/debit and charge cards. These funds would go to the Utility Division to reimburse them for the reduction in the amount that is taken by the credit card companies as their fees to process these transactions. Mr. Bauer said 10% of the customers are asking for this service. Councilmember Ruegamer asked what the cost is of processing NSF checks. Mr. Bauer said a collection agency that levies their own fees is used to handle all of the City's NSF checks and there is a high recovery rate of collection. He said the City does not have documentation of the cost of staff time involved in referring NSF checks to the collection agency. The City is responding to requests from citizens who would like the convenience of using an alternative payment method. This convenience has a cost involved with it. He added that 3% is the best estimate of those costs. These fees will be monitored over time and adjusted as needed. On a voice vote, the motion was unanimously approved.

Councilmember Brewster moved for adoption of the 5% Water Franchise Fee and the 5% Wastewater Franchise Fee excluding System Development Fees and Construction Fees from the 1% increase, seconded by Councilmember Gaghen. Councilmember Jones said this is increasing the franchise fee by 25% of the current franchise fee. He said the City is doing this unilaterally and he is concerned with that issue. He said the method is fair, but he would like to see this go to a vote of the public before the Council approves it. On a roll call vote, the motion failed on a tie vote with Councilmembers Gaghen, Brewster, Iverson, Boyer and Mayor Tooley voting "yes" and Councilmembers McDermott, Brown, Ruegamer, Clark and Jones voting "no".

Councilmember Brewster moved for adoption of the 5% Solid Waste Franchise Fee, seconded by Councilmember Iverson. Councilmember Jones said his previous comments pertain to this motion as well. Councilmember Clark asked for verification that a negative vote for these motions would only be disapproving the 1% fee and the current 4% franchise fee remains in place. Mayor Tooley verified that was correct. On a roll call vote, the motion failed 4-6 with Councilmembers Gaghen, Iverson, Boyer, and Mayor Tooley voting "yes" and Councilmembers McDermott, Brewster, Brown, Ruegamer, Clark, and Jones voting "no".

**3. TRACT 123 SUNNY COVE FRUIT FARMS:**

**(A) PUBLIC HEARING AND RESOLUTION expanding the Urban Planning Area to include an area generally described as: Tract 123 Sunny Cove Fruit Farms and approving the Urban Planning Study.** Staff recommends approval. (Action: approval or disapproval of Staff recommendation.)

**(B) ACKNOWLEDGE RECEIPT OF PETITION TO ANNEX Tracts 101, 123 & 124 of Sunny Cove Fruit Farms, generally located at the northwest corner of Grand Avenue and 58<sup>th</sup> Street West and setting a public hearing date for 3/8/04.**

Planning Manager Candi Beaudry said this expansion of the Urban Planning Area includes the western most property (Tract 123). She said the property is approximately 10 acres and is zoned Agricultural-Open Space with no existing land use. The original proposed land use was for single and multi-family residential. She said there is new information that suggests multi-family may not be part of the plan. There are three concurrent proposals with this request. They are annexation, zone change and a subdivision proposal. Ms. Beaudry said an Urban Planning Study accompanies this extension request. This study includes a plan for annexation within the next 10 years and considers the impacts on City services and facilities. The study considers the compliance with the West Billings Plan. She noted that the Planning Board is recommending approval of the expansion of the Urban Planning Area with a vote of 6 in favor and 2 opposed.

Ms. Beaudry spoke about the elements of the study and noted that the soils previously stated as loam and sandy clay are soft and compressible and may require some alteration of the typical foundation design. The effects on agriculture, historic site and wildlife were minimal or none and the effects of services were generally acceptable. The park land would be cash-in-lieu of park land going to the community park (Cottonwood). There would be minor effects on transportation and those would be identified and mitigated through the subdivision process. She said the study states an increase in population as 1,040, but may be revised due to information received today.

Ms. Beaudry said the proposal conforms with the West Billings Plan regarding the extension of utilities from arterials to support urban density. The proposal conforms to the Annexation Policy in that it is in the sphere of influence, is at least 10 acres and uses existing infrastructure. It does not comply because it is not contiguous to the City limits, creating irregular stair-step boundaries and won't cure deficient public facilities.

Ms. Beaudry said the Planning Board recommends approval of the expansion of the Urban Planning Area because: 1) the annexation is likely to occur within 10 years, 2) it is a small expansion of the existing planning area, and 3) there are adjacent City water and sewer lines that have been recently installed. The public hearing for the expansion is tonight. The entire 30-acre development would come to the Council for a decision on the annexation at the March 8<sup>th</sup> meeting. Because of the recent change in the zoning the initial Zoning Commission meeting will be postponed until the first part of April and that would postpone the subdivision proposal to the last council meeting in April.

Councilmember Brewster asked what the zoning would be when it is annexed. Ms. Beaudry said it would come in automatically as Residential 9,600 but a concurrent zone change application would ask the Council to act on a zone change very quickly.

Councilmember Brown asked about the protests that were placed on the councilmember's desks. Ms. Beaudry said the Councilmembers have a protest petition with 109 signatures in opposition to the expansion of the Urban Planning Area and

annexation of this area. There are also two letters of protest from William and Barbara Woolsey and Lauren Pluhar that opposed the expansion of the Urban Planning Area and the zone change. Two geotechnical reports in opposition to annexation and the zone change were also received from Mr. And Mrs. Lohrenz.

Councilmember Iverson asked if the Council should proceed with this when there are recent revisions in the zoning request. Ms. Beaudry said the zone change and subdivision will be contingent on the whether the property is annexed into the City. What the Council decides tonight will start the procedure for further annexation and possible consideration of the zone change and the subdivision. Councilmember Gaghen asked how this proposal has changed from the previous Council discussions of it. Ms. Beaudry said this came before the Council about a year ago and at that time the size of the property was smaller and did not conform to the Annexation Policy. The density proposal was similar. Mr. Bauer clarified that the protests that the Councilmembers have on their desks relate to the zone change. Ms. Beaudry said two types of protests have been received, one for the zone change and one for the expansion of the Urban Planning Area.

Councilmember McDermott asked if approval of the expansion of the Urban Planning Area gives the assumption that the Council would accept annexation, as one usually follows the other. Ms. Beaudry said that was correct but it does give the Council the opportunity to hold a public hearing on the annexation. Mr. Bauer said is it important to remember that the criteria for expanding the Urban Planning Area is to identify areas that may be annexed within 10 years and to which services can be provided. In answer to Councilmember Clark's question, Ms. Beaudry noted that 20 of the total 30 acres is already in the Urban Planning Area (Tracts 101 and 124). Councilmember Clark asked about the availability of sewer and water. Ms. Beaudry said sewer lines go from Grand Avenue up 58<sup>th</sup> Street and water is extended to 58<sup>th</sup> Street.

Councilmember Boyer asked how this fits with the West Billings Plan when it is leap-frog development and there is a lot of other land between the City and this area that could be good in-fill development. Ms. Beaudry said the Plan calls for higher density along the arterials and this would be consistent with that idea. Mr. Bauer noted that when a significant investment in infrastructure has been made in the area, it is reasonable to try and recover costs through annexation. There is also a policy that anything that develops within 500 feet of infrastructure should be required to annex into the City and be required to develop to City standards. He said future work sessions can be devoted to discussion about any Council concerns with annexation of this property. Councilmember Boyer said expanding the Urban Planning Area to include this property is sending a clear signal that this type of annexation is okay. Councilmember McDermott asked if it was the original plan for City services to go along 58<sup>th</sup> Street or to the Yellowstone Country Club. Public Works Director Dave Mumford said this section of infrastructure would have gone in that direction no matter what, adding that it serves Augusta Ranch, Ironwood and several developments that are occurring.

The public hearing was opened. RICK LEUTHOLD, ENGINEERING, INC. said he represents the applicant Mark Kennedy of Kenmark Corporation who is proposing this development. He said this is the first step of a process that asks if this area can be served in the next 10 years. He said the easterly 20 acres is already in the Urban Planning Area and the applicant will continue to pursue annexation and subdivision of that even if the additional 10 acres is not included. Because there is water and sewer extended into this

area, the Council has placed it in the path of appreciation. He said this property is about one mile from the Yellowstone Country Club and one and one-half miles from 43<sup>rd</sup> Street where the current city limits are. He said several of the large property owners between 43<sup>rd</sup> and 58<sup>th</sup> Street are not currently pursuing development, so this is the only area that currently has that type of activity. There are 450 acres in this general vicinity that are in various stages of coming before the Council for annexation and development in the next several months. Mr. Leuthold said that Mr. Kennedy has had discussions with the surrounding residents and has declined to pursue the multi-family development and will pursue only single-family and duplex units on the property. A plat is coming to the Planning Board with those revisions in place. This is to comply with the neighbor's wishes. He reminded the Council that the question is simply can the City provide service to the 10-acre property on Grand Avenue and is it reasonable to expect that in the next 10 years. Annexation concerns can be addressed at a later date.

DON LOHRENZ, 2010 16<sup>TH</sup> STREET WEST, said he is the owner of Tract 102, Sunny Cove Fruit Farms. He said there are two protests, one in opposition to the expansion of Tract 123 of Sunny Cove Fruit Farms into the Urban Planning Area and one in opposition of the annexation of Tracts 101, 123 and 124 of Sunny Cove Fruit Farms. The other petition is in opposition to Zone Change #729. He said the Zoning Commission has those protests and petitions and copies were distributed to the Council. There are 109 residents that will be affected by the subdivision as it was submitted. He said the inclusion of Tract 123 of Sunny Cove Fruit Farm should not occur at this time as it is an inclusion of convenience and not truly an expansion of the Urban Planning Area. The only purpose is for annexation, subdivision and zone change. He said the proposed multi-family development is not compatible with the properties in the area or properties that are in the planning stages. He said he objects to the proposed inclusion, annexation, zone changes and subdivision as was presented to the City of Billings.

DAN SLOAN, 3351 RACQUET DRIVE, said he owns Lots 91 & 92, north of the proposed Foxtail Subdivision. He disagreed that the lots in the proposal are not being used for agriculture as Lot 101 was seeded in barley last year and in beets the year before. The proposal to reimburse parents for transporting children to school due to no bus service would involve added tax dollars. Mr. Sloan said 1,000 additional residents in that area would be a traffic burden at Grand Avenue, 56<sup>th</sup> Street and Central Avenue. There is a lot of agricultural equipment traveling on those roads. He said most of the signatures on the petitions are from residents that live on Grand Avenue and 56<sup>th</sup> Street who are all against this proposal.

BOB KIND, 6350 COLTON BOULEVARD, said he is a resident of Sunny Cove Fruit Farms. Sunny Cove has been a subdivision since 1910. He said his lot is only 1,500 feet from the proposed expansion and he is very disturbed that it will change the nature of the area. He said he does not understand why the sewer was installed in 58<sup>th</sup> Street when 54<sup>th</sup> Street is the route to the Yellowstone Country Club and Augusta Ranch. Mr. Kind said the City was already planning this addition and did not allow input from the affected neighbors. He said the residents of Sunny Cove are happy with their surroundings and want it to stay that way.

HERB ANDERSON, 2530 66<sup>TH</sup> WEST, said he and his wife built a house in Sunny Cove Fruit Farms 10 years ago. The proposed subdivision is totally incongruous to what

the area is like now – it is all farm ground. To put a subdivision in the midst of that is enhancing sprawl.

TAMMY COSGROVE, 58<sup>TH</sup> STREET, said she questions the proposed density of 1,040 as a minor effect. She is also concerned about the safety issues with having an elementary school in the area

DOUG KRAMER, said he owns property east of the proposed subdivision. He noted that traffic currently is a problem with the farm machinery using the roads. At 60 MPH speeds the increased traffic would be hazardous. He said he is against this proposal.

JERRY HAGER, 1800 60<sup>TH</sup> STREET WEST, said he lives in Sunny Cove Subdivision. He said his biggest concern is for safety. He said he is a physician and sees many victims of traffic accidents and knows what increased traffic at high speeds can cause. He noted that traffic using Grand Avenue would be entering the area at 60 MPH. This is not good for a high density development. He added that the roads are not in good enough condition to handle the increased traffic. The study is flawed regarding the school situation. Dr. Hager said there are a lot of issues that need to be addressed before this action takes place. He said it should be re-evaluated, revised and considered at a later time.

DAVE NYE, YELLOWSTONE COUNTRY CLUB RESIDENT, said he owns one of the tracts. He said he is also a physician and agrees with Dr. Hager that they see quite a few accidents in this area of the West End. Those intersections have created a lot of accidents and deaths, with the injured often requiring helicopter transport because of the distance. Dr. Nye said the City should provide safe, contiguous roads so that services can be provided to the residents that will live there.

KIM LOHRENZ, 2010 16<sup>TH</sup> STREET WEST, said she owns one of the tracts that is adjacent to the proposed annexation. She said the engineering study states that the residents have 20-40 acre tracts, when in fact they actually have 5 and 10-acre tracts, with only one 20-acre tract in the immediate area. She said the 1,040 density figure in the study is a conservative figure if the multi-family housing proposal is preserved. Ms. Lohrenz said an apartment manager advised her that 1,450 new residents was a more reasonable estimate of the future density with multi-family housing. This area is not set up for that influx of people, she said.

BOB LAWSON, 56<sup>TH</sup> STREET WEST, said he lives south and east of the proposed expansion. He said he has heard a lot of people speak with good reasons not to proceed with this expansion, but he has not heard one good reason to “put it there”. He said it does not make sense to put over 1,000 people on 30 acres.

DENNIS THETIC, 2403 66<sup>TH</sup> STREET WEST, said he lives on Lot 43 of Sunny Cove Fruit Farm. He said this is annexation for one developer - a very minor portion. The city limits are almost two miles away. He said he understands that annexation may come some day because of the proximity to City utilities, but it should be done in a systematic and planned method, not in small pieces.

DAN GALL, 3110 E. MACDONALD, said he thinks this expansion does not meet the requirements of the Growth Policy. He noted that most speakers have said that goal number one has not been met – land use decisions that are consistent with the neighborhood character and land use patterns. The subdivision is also contrary to

preserving the neighborhood integrity and empowering the neighborhood groups. He said this sort of density is not appropriate for the surrounding area.

BRIAN MONAHAN, 62<sup>ND</sup> STREET WEST, said he has lived out there for six years. The area is only agricultural and the residents like it the way it is. He said he is against any "complex" of this kind.

TOM ZURBUCHAN, 1747 WICKS LANE, said he pays City taxes. He said he understands that this is an expansion issue, not a permit to allow someone to build 400 apartments. He said there is more to City services than just water and sewer. Streets, fire and police protection are services that the residents require. He asked if the City can realistically get all City services to these people within 10 years without charging the rest of the taxpayers a sizable amount on their tax bill to pay for it. Why should the City expand at the expense of the taxpayers?

There were no other speakers. The public hearing was closed. Councilmember Brown moved for disapproval of the expansion of the Urban Planning Area to include Tract 123 Sunny Cove Fruit Farms, seconded by Councilmember Brewster. Councilmember Jones said he does not plan to vote for annexation of this area. He is concerned that the traffic issues from increased density would create hazardous conditions. Police and Fire service demands in the area would increase. On a voice vote, the motion to disapprove was unanimously approved.

Mayor Tooley asked City Attorney Brent Brooks if the Council must proceed with acknowledgement of the petition to annex with the expansion being disapproved. Mr. Brooks said the Council should acknowledge the receipt of the petition even though the Council's decision has rendered this petition moot. Councilmember Clark asked about the requirement for a public hearing on the annexation. Mr. Brooks said a public hearing is already scheduled for the area that is presently in the Urban Planning Area. Mr. Bauer noted that this should be considered by the Council as it is a past practice and notifies the petitioner of the timing of the next step in the process and provides for a public hearing. Councilmember Brown moved to acknowledge receipt of the petition to annex Tracts 101, 123 & 124 of Sunny Cove Fruit Farms and setting a public hearing on 3/8/04, seconded by Councilmember Iverson. On a voice vote, the motion was approved with Councilmembers Brown, McDermott, and Jones voting "no".

**4. PUBLIC HEARING AND FIRST READING ORDINANCE modifying the boundaries of Ward I to EXCLUDE recently de-annexed properties described as: Tract 2B, C/S 2218, Amended Tract 2 (Annex #03-10). Staff recommends approval. (Action: approval or disapproval of Staff recommendation.)**

There was no staff report. The public hearing was opened. There were no speakers. The public hearing was closed. Councilmember Ruegamer moved for approval of the Staff recommendation, seconded by Councilmember Gaghen. Mr. Bauer noted that this property was recently annexed and then de-annexed. On a voice vote, the motion was unanimously approved.

**5. PUBLIC HEARING AND RESOLUTION 04-18093 approving the Capital Replacement Fund, SID Revolving Fund, Council Contingency, Nondepartmental and General Fund budget amendments for FY 03-04. Staff recommends approval. (Action: approval or disapproval of Staff recommendation.)**

There was no staff report. The public hearing was opened. There were no speakers. The public hearing was closed. Councilmember Iverson moved for approval of the Staff recommendation, seconded Councilmember Gaghen. On a voice vote, the motion was approved with Councilmember Brown voting "no".

**6. PUBLIC HEARING AND SPECIAL REVIEW #748: A special review to allow the location of an all beverage liquor license and an outdoor patio in the Central Business District zone on a portion of the Burlington Northern/Santa Fe Railroad right-of-way generally situated between North 25<sup>th</sup> Street and North 26<sup>th</sup> Street along the south side of Montana Avenue. The subject property is located at 2526 Montana Avenue. Michael Schaer, owner; Sean Lynch and Ann Kosempa, agents. Zoning Commission recommends conditional approval. (Action: approval or disapproval of Zoning Commission recommendation.)**

Zoning Coordinator Jeff Bollman said this special review contains two requests, one for an all beverage liquor license and the other for an outdoor patio in the Central Business District. The property is located on the southside of Montana Avenue between North 25<sup>th</sup> and North 26<sup>th</sup> Streets. He said the Zoning Commission is recommending conditional approval with one condition: there shall be no amplified music allowed on the proposed outdoor patio. Because this review is within the Central Business District it does not have to meet the 600 foot separation rule.

The public hearing was opened. ANN KOSEMPA, 712 N. 23<sup>RD</sup> STREET, said she is one of the owners of the 11 Café. She said she is excited about this opportunity. The fare is mostly "Montana" and all products would be Montana-made or made on the premises. There were no other speakers. The public hearing was closed. Councilmember Boyer moved for approval of the Zoning Commission recommendation, seconded by Councilmember Iverson. On a voice vote, the motion was unanimously approved.

**7. PUBLIC HEARING AND SPECIAL REVIEW #749: A special review to allow the location of a Restaurant Beer and Wine license in the Central Business District zone on a portion of Lot 8, Block 111 of Billings Original Town. The subject property is located at 2515 Montana Avenue. Computers Unlimited, owner; Don Charleson, agent. The Zoning Commission recommends approval. (Action: approval or disapproval of Zoning Commission recommendation.)**

Zoning Coordinator Jeff Bollman said the location of this application is across Montana Avenue from Special Review #748. The request is to allow a beer and wine license in a business in the Central Business District located at 2515 Montana Avenue. He said the Zoning Commission is recommending approval.

The public hearing was opened. DON CHARLESON, 1111 CLARK AVENUE, said he was available for questions from the Council. There were no other speakers. The public hearing was closed. Councilmember Clark moved for approval of the Zoning Commission recommendation, seconded by Councilmember Brewster. On a voice vote, the motion was unanimously approved.

**8. PUBLIC HEARING AND SPECIAL REVIEW #750: A special review to allow a change from one nonconforming use (financial office) to another nonconforming**

**use (general offices as allowed in the Residential Professional zone) in a Residential-6,000 zone on the west 50' of Lot 3, Block 4 of Billings Heights Subdivision. The subject property is located at 1707 – 8<sup>th</sup> Street West. Morty and Phyllis Forney, owners. The Zoning Commission forwards no recommendation on this application. (Action: approval or disapproval of Special Review.)**

Zoning Coordinator Jeff Bollman said this special review request is to change from one non-conforming use to another. Zoning regulations do allow a non-conforming use change without approval by the City Council. The property is located on the northeast corner of 8<sup>th</sup> Street West and Avenue D. He said this property was before the Council in 2002 with a similar request, which was denied. He noted the zoning in the area is Residential 6,000 to the east and south, Residential Multi-Family Restricted to the north, Residential 6,000 further to the north and Residential Multi-Family to the west including an apartment complex. The closest commercial zoning is along Grand Avenue and 8<sup>th</sup> Street West.

Mr. Bollman said there is a duplex on the property with the office building located on the north end of the property. The office building was a drycleaners in the early 1990's. A change was granted in the mid 1990's to the current non-conforming use, which is a financial office. There are criteria that must be considered when allowing a non-conforming use. He said the Zoning Commission held a public hearing and did not give a recommendation because of a tie vote. The concerns that were raised included a lack of off-street parking, and the number and types of office uses that could be permitted if the application were approved. Mr. Bollman said the Staff is recommending conditional approval with the following conditions:

1. Approval of this Special Review is only for the building currently addressed as 1707 – 8<sup>th</sup> Street West and is not intended to allow any commercial use in the duplex located on the same lot.
2. A proposed office use must receive written approval by the Zoning Coordinator prior to its location in the office building.
3. The following uses are prohibited to be located on the subject property: Medical or Dental Offices and Banks or Credit Unions.
4. Office hours in which the subject building is open to the general public shall be limited to between 8 a.m. and 6 p.m. Monday through Friday.
5. There shall be no vehicle(s) associated with the property, structure or offices parked on the north side of the building along the alley.

Mr. Bollman said these conditions were intended to mitigate any impacts that could occur if the Special Review were granted, such as limitations on uses and hours of operation. Councilmember Ruegamer asked if a tattoo parlor would be an acceptable use of this office space. Mr. Bollman replied "no". Councilmember Boyer asked for examples of the type of use that would be permitted. Mr. Bollman said it would be similar to the current use such as financial related offices, civil engineers, general contractor or plumber that wanted office space without supply storage. Councilmember Boyer asked if businesses with trucks would impact the area. Mr. Bollman said the Staff review recommendations included some restrictions on the use such as prohibiting medical offices, banks, or credit unions that are far above the "trip generation" rate that occurs with a general office use. Mayor Tooley noted that condition #2 requires written approval of the use by the Zoning Coordinator prior to its location in the office building. This is an added

protection for the neighborhood. Mr. Bollman said the site does not lend itself to businesses that have a high demand for parking.

The public hearing was opening. MORT FORNEY, 921 AVENUE F, said he is the owner of the office building. He noted that one neighbor has written hundreds of letters against his property. He said he wants to expand from the existing use of a financial office to allow any type of general business office. The tenant that he has in mind is a promoter of musical events and fund raisers. He said he will use one office and the other two offices would be dedicated to storage of music equipment and production facilities. The facility would not create noise because this is done by computer with the use of headphones. The hours of business will be limited and parking in the alley would not be allowed.

MATT BROSOVICH, 1550 POLY DRIVE, said he is concerned about the duplex on the property that could become part of the general offices. This would create more parking concerns for the adjacent development that he owns that features a California style development without garages. There will be 12 single-family and 32 patio homes and 20-25 townhomes included in the development. Those residents would have to rely on on-street parking themselves. He urged the Council to "look down the road" at what may happen.

There were no other speakers. The public hearing was closed. Mr. Bauer noted that the first condition in the special review states that the review is not intended to allow any commercial use in the duplex located on the same lot. This can be included in the motion to approve. Councilmember Jones moved for approval of the Staff recommendation with conditions and with a change in the language of condition #2 to include written approval by the City Administrator or his designee, seconded by Councilmember Gaghen. Councilmember McDermott asked that the City Administrator listen to the neighbor's concerns when approving the use that will be permitted. In answer to Councilmember Clark's question, Mr. Bollman said he has not researched the current use that Mr. Forney is proposing. Councilmember Clark asked if the former use of a home improvement/contractor that has trucks in their business would be allowed with this special review. Mr. Bollman said the former office use was a concern because of the amount of storage needed for the associated equipment. This would be reviewed in compliance with condition #2. Mr. Bauer said there are some limitations on the parking demands that would be made on the office building. There is always some risk when businesses encroach on residential areas, but the City is trying to achieve a balance with some flexibility on both sides. Councilmember Boyer asked if the zoning would be the same if the property was sold. Mr. Bauer said the zoning stays with the property. On a voice vote, the motion was approved with Councilmembers Brown, McDermott and Clark voting "no".

**9. PUBLIC HEARING AND SPECIAL REVIEW #751: A special review to allow the location of a Church in a Residential-9,600 zone on an unplatted portion of NW<sup>1</sup>/<sub>4</sub>NW<sup>1</sup>/<sub>4</sub> of Section 12 T.1S. R.25E., less Emerick Subdivision and Certificate of Survey No. 1702. The subject property is generally located on the southeast corner of 32<sup>nd</sup> Street West and Central Avenue (proposed Lot 1 of Summer Ridge Subdivision). The Estate of Pauline and Dennis Emerick, owner; Collaborative Design Architects, agent. Zoning Commission recommends conditional approval. (Action: approval or disapproval of Zoning Commission recommendation.)**

Zoning Coordinator Jeff Bollman said this special review is a request to allow a church in a Residential 9,600 zone located on the southeast corner of Central Avenue and 32<sup>nd</sup> Street West. A recent zone change altered the zoning to the east and the south to Residential Multi-Family Restricted and Residential 7,000. He said the Zoning Commission is recommending conditional approval with the following conditions:

1. The vacant lot area must be maintained with turf or native grasses and mowed regularly during the growing season.
2. The hours of operation for any outdoor facilities, including an amphitheater and play fields, shall be limited to between 8 a.m. and 10 p.m.

The public hearing was opened. BILL COLE, 3733 TOMMY ARMOUR, said he represents the applicant - Faith Evangelical Church. He offered to answer any Council questions. There were no questions from Council. There were no other speakers. The public hearing was closed. Councilmember Gaghen moved for approval of the Zoning Commission recommendation, seconded by Councilmember Clark. Councilmember Clark said he attends this church and would abstain from discussion and voting. On a voice vote, the motion was approved. Councilmember Clark abstained.

**10. PUBLIC HEARING AND FIRST READING ORDINANCE FOR ZONE CHANGE #726: A zone change from Residential Manufactured Home to Highway Commercial on Lots 3 and 10, Block 4 of Superior Homes Subdivision. The subject property is located at 525 Jerrie Lane. Northwest Development, LLC, owner. Zoning Commission recommends approval. (Action: approval or disapproval of Zoning Commission recommendation.)**

Zoning Coordinator Jeff Bollman said this zone change is generally located between Jerrie and Kathy Lanes between Main Street and Lake Elmo Drive in the Billings Heights. Properties to the east are zoned Highway Commercial, to the west are Residential Manufactured Homes, and along Lake Elmo is Residential 6,000. He said the Zoning Commission is recommending approval based on the 12 criteria in the staff report.

The public hearing was opened. RON RUBY, 3226 ROSEMONT WAY, said he is the manager for Northwest Development and available for any questions. He said their goal is to beautify the neighborhood. There were no other speakers. The public hearing was closed. Councilmember McDermott moved for approval of the Zoning Commission recommendation, seconded by Councilmember Iverson. Councilmember Brewster said these people have cleaned up a stretch of Main Street that has looked bad for a long time. On a voice vote, the motion was unanimously approved.

**11. PUBLIC HEARING AND RESOLUTION 04-18094 EXPANDING PMD #4009 for boulevard maintenance in Aspen Grove Subdivision, 4<sup>th</sup> filing. Staff recommends approval. (Action: approval or disapproval of Staff recommendation.)**

There was no staff report. The public hearing was opened. There were no speakers. The public hearing was closed. Councilmember Brewster moved for approval of the Staff recommendation, seconded by Councilmember Iverson. On a voice vote, the motion was unanimously approved.

**12. PUBLIC HEARING AND RESOLUTION 04-18095 CREATING PMD #4022 creating a maintenance district for Lutheran Park – located in Block 2, Vista**

**Heights Subdivision. Staff recommends approval. (Action: approval or disapproval of Staff recommendation.)**

There was no staff report. The public hearing was opened. There were no speakers. The public hearing was closed. Councilmember Brown moved for approval of the Staff recommendation, seconded by Councilmember Brewster. Councilmember Brewster restated his concern for the cost of these park maintenance districts and reminded the Staff that he would like to see an accounting after a year of operation. On a voice vote, the motion was unanimously approved.

Mayor Tooley called for a five minute recess at 9:57 P.M.

Mayor Tooley reconvened the meeting at 10:05 P.M.

**13. CONTRACT with RW Beck for Electrical Services Research. Staff recommends approval. (Action: approval or disapproval of Staff recommendation.)**

City Administrator Kristoff Bauer said the Staff is requesting Council direction for two issues, action on the proposed contract tonight and consensus about future participation with the five cities that are working on this issue. There are three tasks in the contract. The first two tasks support the analysis of the participating cities regarding the feasibility of placing an offer for the purchase of Northwestern Energy's facilities. He said the cost of this is \$9,000. Task Three is to provide Billings with specific electrical service information at a cost of \$6,000. Mr. Bauer said this is a unique opportunity to gain information about the Billings' service area because R. W. Beck was involved in the same process several years ago and has that past bid data that is a valuable source of data. He said there is no alternative to that source of information. If the City looks at power supply options in the future this information is invaluable for those discussions. Mr. Bauer said if the legislature changes the way the City buys electricity, this would help the City estimate that impact. This could also help in any local option tax or other revenue that includes utilities for analysis of the impacts of those alternatives and what is available to the City.

Mr. Bauer noted there have been a lot of problems with getting basic service from Northwestern Energy during the bankruptcy process. There are pole relocations that have been delayed causing City projects to not progress. He added that there are a significant number of change orders because those relocations are not occurring. There are problems with the Street Light Maintenance District downtown. He also noted that Northwestern Energy is not paying for the permits they are obtaining from the City.

Mr. Bauer said there is discussion that the Northwestern Energy facilities are not for sale. He affirmed that it is not for sale but in bankruptcy. However, Montana Dakota Utilities thinks that it is worth moving forward and making a bid. He said it would come down to the creditors that would make the decision of what is the best thing to do with the assets to cover the debts in the bankruptcy process. MDU and Northwestern Energy are currently trading stock for debt. The City's bid may be the only cash offer that is received. He noted that Billings' decision would not stop the process, as the other five cities are going forward whether Billings participates or not. He said those cities are putting together a governance structure to anticipate a successful offer. The governance structure would include representation from the participating communities. If Billings does not participate it

could impact our representation. He said the Staff recommendation is to authorize the Mayor to execute the proposed agreement with R W. Beck for \$15,000.

Councilmember McDermott asked if the City of Billings would not have representation on the governance committee if it does not contribute the \$15,000.

She noted that the City has paid over \$200,000 of taxpayer dollars in the previous bid attempt and feels that this should be sufficient to reserve a place on the governance committee for Billings. Mayor Tooley said a non-profit corporation was formed to make a bid on Montana Power Company transmission and distribution lines in the previous bid attempt. When the bid failed, the non-profit corporation was dissolved and no longer exists. Councilmember McDermott said the City bought the data that is now available for \$15,000, and we should own that data. Mr. Bauer said the cities are looking for interest to be expressed by this Council to participate in this new bid process. We could make the argument that we have already participated and our status should be considered valid, but this is an opportunity for the Council to show the same level of commitment that the other five cities have shown.

Councilmember Boyer said the City needs to get this data. We may not want to go into the utility business, but it would be very foolish for the largest city in two states to sit out of this process at this time. She said she supports moving forward with this contract. Councilmember Ruegamer asked if our portion is based on a per capita basis. Mr. Bauer replied "yes". He said because we are paying a proportional cost, the City would have proportional representation on the eventual board that will develop a governance structure that would be advantageous to the City.

Councilmember Brown asked what part the Montana League of Cities and Towns plays in this action and what is the benefit of the \$175,000 sitting with MLCT. Mr. Bauer said this action is not an initiative by the entire MLCT. It is an initiative by five cities involved in the MLCT association and Billings' involvement would make it six. He reaffirmed that this is being spearheaded and contributed to by the six largest cities. They are proposing to split the costs on a per capita basis and the population of those six self-governing cities. Mr. Bauer said the bid would be for the current assets of Northwestern Energy including the transmission and distribution of energy. This would include some areas outside the urban boundaries of the cities that are involved. Those rural areas that are served by cooperatives would not be affected by this action. Mr. Bauer added that the \$175,000 settlement funds are currently being held in trust by MLCT and are likely to be distributed in the next month.

Councilmember McDermott asked if there will be more requests for additional funds and is there an estimate of the bid amount. Mayor Tooley noted that the previous bid was \$1 Billion and the facilities sold for \$1.1 Billion. Mr. Bauer said this contract would provide the recommendation of a bid amount (unknown at this time) and any other costs that could arise due to legal advice that is not covered within this contract with RW Beck. These legal representation costs would be also shared with the six cities on a per capita basis.

Councilmember Boyer asked if the data from this contract is valuable in creating other options for the City. Mr. Bauer said the specific option is aggregation for power supply. This is a possibility even if the City does not get into the power supply business. The City could be involved in default supply for the community here. We would have the information we need for that option through the contract with RW Beck.

Councilmember Ruegamer moved for approval of the staff recommendation, seconded by Councilmember Iverson. Councilmember Brewster said he would abstain because his employer is Northwestern Energy. Councilmember Ruegamer said he supports this motion because it sends a message to other power companies that the City will not “sit still and do nothing” about being taken advantage of regarding power rates. He said he normally would vote against the public sector competing with the private sector, but there is no competition in this market. Councilmember Boyer said she agrees with Councilmember Ruegamer and noted that the City should be pro-active in handling this power issue. Councilmember Jones said this \$15,000 is the beginning of a big bill. He said he is concerned that the City is getting into something that it has no expertise in and that could bankrupt the City just like Northwestern Energy. This issue is not a role of the City. Councilmember Gaghen asked if any further outlays of money would come before the Council for approval first. Mr. Bauer replied “yes”. Councilmember Brown said he does not want to encourage the City getting into the power business. It belongs on the free market. On a roll call vote, the motion was approved 6-3 with Councilmembers Gaghen, Ruegamer, Iverson, Boyer, Clark and Mayor Tooley voting “yes” and Councilmember McDermott, Brown, and Jones voting “no”. Councilmember Brewster abstained.

**14. FIRST READING ORDINANCE expanding the boundaries of Ward IV to include recently annexed properties described as: Tracts 2A-1, 2A-2 and 3A-1, Amended C/S 1876 -- (Annex #04-01). (Public hearing held 2/9/04; action delayed from 2/9/04). Staff recommends approval. (Action: approval or disapproval of Staff recommendation.)**

There was no staff report. Councilmember Clark asked for verification that the correct ward has been identified. Mr. Bauer said this annexation is contiguous to Ward IV and is being placed there. Councilmember Boyer moved for approval of the Staff recommendation, seconded by Councilmember Iverson. On a voice vote, the motion was unanimously approved.

**15. DISCUSSION AND PROPOSED MODIFICATION of Architectural Services Contract with A & E Architects for the Library and Multi-Use Parking Garage Project at 4<sup>th</sup> & Broadway, \$349,680.00. Staff recommends approval of a contract amendment. (Action: approval or disapproval of Staff recommendation.)**

City Administrator Kristoff Bauer said the first and second priorities on parking projects established by the Parking Advisory Board (and adopted by the Council) were Park II expansion and 4<sup>th</sup> and Broadway. Both projects are prominent downtown properties in the CIP and utilize TIF resources. Park II is just parking whereas 4<sup>th</sup> and Broadway has a history of failed projects and no consensus. It is adjacent to the Library building and so different approaches were used in formulating plans and designs.

Mr. Bauer said there is a pre-design on the Library building. There is significant public involvement on the 4<sup>th</sup> and Broadway project with concerns from a number of stakeholders. The proposal includes a significant public involvement process. He said tasks one and two that focused on the Library building are nearing completion. Task three that focused on 4<sup>th</sup> and Broadway is the public process and the first forum is about to begin. This is where this contract has stalled, waiting for Council approval. He said there

are many people who want to have input on this process and are unable to do so. There are some who do not want a public process. The goal of the City staff was to have an informed open public dialogue that explored the current concerns and interests of everyone and to achieve a consensus of what should happen at 4<sup>th</sup> and Broadway.

Mr. Bauer said the City would be liable for the cost of service provided to date if task three of the contract is cancelled as an option that Councilmember Clark has suggested. The other tasks are nearing completion and most of that work is done. That would give the City most of the information it needs for the Library. There is no direction for any type of project at 4<sup>th</sup> and Broadway. Another option would be to construct a surface lot at 4<sup>th</sup> and Broadway with an estimated cost of \$125,000 to \$175,000 in addition to the money spent to acquire the property. This could include an additional 40 spaces in addition to the parking adjacent to the site.

Mr. Bauer said the Staff recommendation is to amend the contract that would break Task three into five pieces. This would include four public forums and the fifth step as significant architectural analysis with designs and estimates. The contract could be monitored and cancelled after each of the public forums and the City would not be obligated for the entire amount as before. This will give the Council tighter control on how the money is expended and still allow some process to move forward to develop a consensus for a use of that property. Mr. Bauer noted that reports to Council are included after the third and fourth public forums, but he said he would commit to presentations after each public forum with a vote on continuing the process. Councilmember Iverson expressed concern about possible ethical considerations when the Council has already approved this contract and is now "taking it back". Mr. Bauer said all contracts include the option to terminate. This option would include paying the contractor for services provided to the date of the termination.

Councilmember Clark asked what part of the Task three has been done. Mr. Bauer said they have done some work toward the first phase of task three. If the contract is cancelled the City would owe for work performed on Tasks one and two and a small portion of Task three. He added that the contractor actually drafted the amendment to the contract and wants to be responsive to the Council and community as well.

Councilmember Boyer said it is very important to approach this project carefully and to be cautious of what is done. It would be a mistake to walk away and do nothing because there has been a lot of money spent on it. Mr. Bauer noted that the Downtown Billings Partnership has been anxious to provide input on the 4<sup>th</sup> and Broadway issue. He said if the Council cancels the contract, there would not be an opportunity to do that.

Councilmember Clark moved to disapprove the Staff recommendation and to cancel the 4<sup>th</sup> and Broadway portion of the contract, keeping the Library portion, seconded by Councilmember Brown. Councilmember Brewster said he supported this project because of feedback at work sessions noting that public input was desired. There is indecision about what should be done at 4<sup>th</sup> and Broadway, but maybe a true public process might bring us to a successful conclusion. Since the City is already obligated for some money "why not get some public input and cancel the contract when more information is available", asked Councilmember Brewster. Councilmember Jones said this amendment is a great compromise of breaking Task three into phases to see if the City is headed in the right direction at the end of each phase. He said in his opinion, A & E Architects is the best firm to do this work and understands this was a controversial issue.

He said he supports the Staff recommendation. Councilmember Jones made a substitute motion to approve the Staff recommendation with the provision that Staff will report to Council after completion of each phase, seconded by Councilmember Gaghen. Councilmember Boyer asked if the City would be partnering with the Downtown Billings Partnership on this process. Mr. Bauer said the DBP wants to partner with the City to involve citizens in the process and the City is committed to do this. Councilmember Ruegamer said the phased process is a good compromise, but he may want to stop the process if he feels it is appropriate. He said he wants to see the DBP heavily involved in this process. Councilmember Brewster said he agrees with Councilmember Ruegamer and thinks we are proceeding the right way with public input in phases. Councilmember McDermott said she would like to see the City not be the major property owner in the downtown area. She said she would like to see a decision on this project that could create a tax base. On a voice vote, the motion was unanimously approved.

**16. MODIFICATION of the City's FY 2005-2008 Capital Improvement Program (CIP). (Public hearing held 2/9/04; action delayed from 2/9/04). Staff recommends approval of the amendments. (Action: approval or disapproval of Staff recommendation.)**

City Engineer Vern Heisler noted there is a change in the source of funding for the Central Park playground equipment under the Parks section. The CDBG funding application amount has changed from \$25,000 to \$45,000. This would increase the total cost of the project from \$75,000 to \$95,000. Councilmember Iverson moved for approval of Staff recommendation, seconded by Councilmember Boyer. Councilmember McDermott asked what the effect of the Parking Division portion would be on the CIP that allocates \$4 Million for the assumption that there would be a parking garage at 4<sup>th</sup> and Broadway. She also noted there is money in the CIP for a surface parking site not yet determined in the downtown area for \$325,000. There appears to be a conflict, she said. Mr. Bauer said the additional surface lot is part of the priorities in the parking study that identifies it as a lot with the location to be determined. The 4<sup>th</sup> and Broadway project's only funding source for improvements on this property are from the Parking Division. This does not mean it is just parking, just that there must be another source of funds to do anything other than parking. He said this would be determined through the public involvement process. He said the Council can change the amount in the CIP or change the direction of the project. He added that just because the funding is there does not mean the Staff would go forward with the process if the Council stopped the project at any of the phases. He recommended leaving this in the CIP until the Council has a clear decision to do something different.

Councilmember Brewster noted the CIP is only a planning document. Before anything is built, the Council must approve the item in the 2005 budget. Mr. Bauer added that the Council would have to approve the contracts for final design, demolition or construction on any project. Councilmember Clark asked that language be added that the parking garage project is subject to the outcome of the public process. He asked if that would be part of the motion. Mayor Tooley said the City Administrator has "taken that under advisement". On a voice vote, the motion was unanimously approved.

**17. PUBLIC COMMENT on Non-Agenda Items -**

TOM ZURBUCHAN, 1747 WICKS LANE, said he represents the residents of Wicks Lane urging the Council to enforce the conditions of the Subdivision Improvement Agreement with Cherry Creek Development regarding the installation and closure of the emergency gate access to Wicks Lane. He said this is not an access point.

MAGGIE LOUGH, 15 GRAND AVENUE, CHAIRWOMAN OF THE YELLOWSTONE VALLEY CITIZENS COUNCIL, said they are a grassroots organization committed to creating a healthy, livable, sustainable community in the Yellowstone Valley. She thanked the Council for approving the Neighborhood Planner position and she urged the Council to consider encouraging design standards and possible mixed-use zoning. Ms. Lough said a feeling of traditional neighborhoods with a sense of community contributes to the overall wellbeing of the City. She said their organization is committed to working with the City "to create Billings as the grandest version of what it can be".

### **Council Initiatives**

COUNCILMEMBER BOYER: Councilmember Boyer said the contract for operation of Streetlight District #97 between the City and the successor in interest to Montana Power Company - Northwestern Energy Corporation (NEC), expires on May 23, 2004. The contract will be automatically renewed for a term of two years eleven months unless it is cancelled. Cancellation is effected by giving sixty (60) days written notice to the utility, so that any notice must be given on or before March 23, 2004. Councilmember Boyer moved to direct the City Administrator and City staff to explore the possibility of 1) negotiating a purchase by the City of the equipment in all street light districts now being operated and maintained by NEC so that all street light districts in the City of Billings become municipally owned and operated; 2) the feasibility of giving timely notice of cancellation of the contract with NEC for the operation of Street Light District #97 and the provision of alternate street light district operations and maintenance, at the same level of service, by 5/23/04; or 3) renewing the current contract with NEC for a shortened term of six months or one year while negotiations concerning transfer of ownership of the equipment continue, seconded by Councilmember McDermott. Councilmember Brewster noted that he would not participate in the discussion or voting because he is employed by Northwestern Energy. Councilmember Brown asked how the City would estimate the value of this. Mr. Bauer said the City would discuss the appreciated value of the assets. He said his biggest fear is that the bankruptcy of Northwestern Energy will prevent the City from engaging them in a dialogue for negotiation of price. If the City moves forward with cancellation this could lead the City to a downtown without service for a significant period of time that would be needed to replace this system with a new system. In discussions with Greg Krueger of the DBP, it was agreed that getting a memo out to all the downtown property owners was necessary to acquire feedback for options to move forward. Mr. Bauer said the memo would include different options and some of the risks involved in the options. This would happen fairly quickly. Councilmember Brown asked what department would oversee the streetlight maintenance districts. Public Works Director Dave Mumford said that half the City has

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streetlight maintenance districts that are currently handled by the Street/Traffic Division. Councilmember Clark noted that Northwestern Energy could not sell this district to the City without going through the courts. On a voice vote, the motion was unanimously approved. Councilmember Brewster abstained from voting.

**ADJOURN** —With all business complete, the Mayor adjourned the meeting at 11:31 P.M.

THE CITY OF BILLINGS:

By: \_\_\_\_\_  
Charles F. Tooley    MAYOR

ATTEST:

BY: \_\_\_\_\_  
Susan Shuhler, Deputy City Clerk