

REGULAR MEETING OF THE BILLINGS CITY COUNCIL

October 9, 2001

The Billings City Council met in regular session in the Council Chambers located on the second floor of the Police Facility, 220 North 27th Street, Billings, Montana. Mayor 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 the Mayor.

ROLL CALL – Councilmembers present on roll call were: Bradley, McDermott, Brewster, Kennedy, Iverson, Ohnstad, Johnson, Larson and Elison. Councilmember McDanel was excused.

MINUTES – September 24th. Approved as printed.

COURTESIES -- None.

PROCLAMATIONS – Mayor Tooley.

- Mayor Tooley proclaimed the month of October 2001 as National Breast Cancer Awareness Month and October 19, 2001 as National Mammography Day in the City of Billings.

BOARD & COMMISSION REPORTS --None.

ADMINISTRATOR REPORTS – Dennis Taylor.

- City Administrator Dennis Taylor formally introduced David Mumford as the new Public Works Director. He gave a brief summary of Mr. Mumford's education and work background and commented that he brings a great deal of experience with him from his former position in the growing and changing city of Anchorage, Alaska.

- Mr. Taylor reviewed past discussions with the legal team and the City Council regarding the Rights-of-Way issue. He stated that the adoption of the Rights-of-Way maintenance and franchise fee ordinance was considered a little over a year ago. At that time Mr. Taylor emphasized the importance of this policy decision for the community and pointed out the major concerns as 1) how best to manage the public's right-of-way, 2) how to price the use of the Rights-of-Way in a competitive market (what is a reasonable rent structure), and 3) who should share the burden of funding municipal services. He noted that the City knew that the subject would be controversial, costly and contentious and possibly would lead to a Montana Supreme Court decision, regardless of the outcome of the District Court decision and the vote of the citizens in November.

He summarized the decision and the legal options from the legal advisors, stating that the City has full authority to manage and control the public rights-of-way including the power to require 1) franchises or licenses to operate within the public rights-of-way, 2) proper liability insurance and construction bonds, 3) work permits for construction, 4) maps specifying the location of facilities within the public rights-of-way, and 5) application and permit fees to recover at least the City's administrative costs. He said that "the

District Court upheld nearly 20 pages of the 21-page ordinance that dealt with the City's obligation and right to manage the public's Rights-of-Way." He added that the District Court denied the City the power to set the rent for use of the public rights-of-way because "1) a rent must be negotiated, not set by ordinance, 2) a regulatory fee must be earmarked for a specific purpose and not created to raise general fund revenues, and 3) ignored "rent" as a distinct revenue category, opting instead to divide all revenues into taxes or cost-based regulatory fees."

The legal advisors' analysis concluded that the decision relied on flawed legal arguments and did not address the City's central home rule arguments. He noted that the Court ignored the fact that the City currently rents public property in return for a percentage of gross revenues. He cited A T & T Broadband Cable, 5% of gross revenue, Billings Water Company, 4%, Par 3 Golf Course, 1/3 of revenues, Cobb Field, a per ticket percentage, Airport rental car agencies, billboard advertising, concessions, gifts shops, and pay phone companies, 8% to 77%. The Court did not address why it is permissible to charge rent to the cable and water companies, but not to the phone, gas, and electric companies. The Court ignored the fact that renters receive a specific benefit that the general public does not receive – namely the right to permanently occupy: 460 miles of public streets, and 120 miles of alleys all of which are paved, curbed, lighted, patrolled, have snow removal at the public taxpayer's expense. The Court also ignored the City's self-governing authority to raise revenue to fund City services through the home rule authority.

Mr. Taylor also commented that the Court rejected the Montana Supreme Court's 1932 decision upholding the authority of cities to charge gross-revenue based rent to gas companies because 1) this holding was not in effect in 1932, and 2) the Court misapplied home rule which strengthens, not limits, self governing authority. The Montana Supreme Court held that a city had authority to charge rent prior to home rule, then the District Court should have held that Billings has the right to continue to charge rent under home rule.

Another flawed legal argument, according to legal counsel, is that rent does not have to be negotiated. He noted that rent does not become a tax when a homeowner puts a house up for rent. The Court ignored the fact that the City may negotiate the form of rent paid by agreeing to give 1) credits for in-kind services such as wiring schools and government buildings, and 2) possible credits to offset impact on low income families. Additionally, the Court ignored the federal obligation to charge rent on a non-discriminatory and competitively neutral basis to all telecommunications companies. The City of Billings complied with federal law, in this case, and it should not make a difference that it was done by ordinance.

Finally, there is no evidence that the City will collect more in rental charges than the City currently spends to maintain the public rights-of-way. He stated that the City spends more than \$37 million every year to maintain the rights-of-way and under the best estimate would collect only \$6 million in rent from private companies for use and occupancy of those rights-of-way.

He gave two options for the City Council to consider regarding the effect of the November 6th referendum. The first option, if the right-of-way IS approved, the City will not charge anyone rent under that ordinance unless 1) the City Council amends the rental

fees to comply with the District Court decision, or 2) the Montana Supreme Court upholds the right-of-way rental fee. The second option is that the City will maintain authority to manage the public rights-of-way including 1) requiring City permission before streets are trenched, 2) coordinating "dig" projects to limit traffic disruption and inconvenience, 3) requiring subcontractors to be qualified, and 4) requiring maps for all buried and overhead facilities so the City can respond in emergencies and coordinate construction projects.

If the right-of-way IS NOT approved by the voters on November 6, the new right-of-way management requirement will not go into effect and the City will not be able to create or amend a new ordinance establishing a rental fee for two years that is different from the fees now in effect. He added that it is assumed that the older right-of-way management provisions and contract terms will stay in effect. This will require the City to continue to 1) charge the cable and water companies to use the public rights-of-way, but probably not charge the phone, electric, and gas companies for at least two years, and 2) be permitted to require maps and coordinate construction projects with the cable, electric, gas and water companies, but may not be able to require phone companies to comply with public safety coordination programs, including minimizing downtown trenching projects, for two years, without facing litigation. He commented that the exact impact of denial is "cloudy". He stated that the only sure way for the residents to protect the streets is to approve the referendum, otherwise, projects like the downtown trenching project may face significant challenges.

Mr. Taylor noted that the City could appeal the District Court decision to the Montana Supreme Court up until November 20, 2001. A decision is necessary that would clarify what rights the City has under home rule/self-governing power, regardless of whether rent will be charged in 2001 or 2003. This decision on home rule will also affect the other major cities in Montana. If the City DOES appeal, it can ask the Montana Supreme Court to confirm the authority of the home rule/self-governing power, which includes the right to charge rent. If the City DOES NOT appeal, it: 1) will have uncertainty as to whether the home rule/self-governing power includes the right to charge rent for the public rights-of-way, 2) can negotiate rent with private occupants, and 3) may have to litigate to enforce the right to charge rent if providers do not agree to pay.

Mr. Taylor summed up his recommendations with the following reasons why he believes the City should appeal the decision on the right-of-way ordinance. He stated that the ordinance was enacted because: 1) the City determined that it had home rule/self-government authority to do so, 2) the City needed the authority to apply right-of-way management regulations to ALL occupants of the public streets in order to maintain public safety and the long-term health of our roadway system, and 3) the City wanted private occupants to pay a fair share of the cost of maintaining the public property they use and the City services they enjoy. He added that if the City does not appeal now, the same issues will come up again, and unless later City Councils come to believe home rule, right-of-way management, and fair value for use of public property are no longer important, the City will likely be forced to litigate these same issues again.

He reported that several cities in Montana are monitoring the Right-Of-Way ordinance and the resulting litigation with interest. Those cities have agreed to take the matter back to their respective governing bodies to join in this effort and to help with the costs of the appeal.

Mr. Taylor's recommended the City defend its home rule authority and appeal the District Court decision to the Montana Supreme Court.

CONSENT AGENDA:

1. A. Mayor's appointments:

- (1) Kathleen Gilluly to Community Development Board (Low-Mod. Area)
- (2) Mark Kennedy, Council Liaison to Community Housing Resource Board (CHRB).

B. Bid Awards:

(1) **MET Re-roof.** (Opened 9/18/01). Recommend Empire Heating and Cooling, \$49,852.00.

(2) **One New Current Model 2002, 4-Wheel Mechanical Broom High Dump Sweeper.** (Opened 9/18/01). Recommend Western Plains Machinery, \$147,949.00.

(3) **\$815,000 Special Sidewalk, Curb, Gutter and Alley Approach Bonds, Series 2001D,** (2001 Miscellaneous and Developer Related Improvements and Broadwater Subdivision Improvements, Phase III). (Opens 10/9/01). Recommendation to be made at meeting.

(4) **SID 1359 Construction.** (Opens 10/9/01). Recommend delaying to 10/22/01.

C. C.O. #1 and #2, SID 1355, Schedule I: sanitary sewer improvements to Greenbriar Road, Western Municipal Construction, C.O. #1: \$5,586.00 and 0 days; C.O. #2: \$977.00 and 0 days.

D. C. O. #1, South 27th Parking Lot, Flack 'N Flack Construction, Inc., \$17,734.00 and 30 days.

E. C.O. #2, Contract XIII, Water Plant Improvements – Intake Project, COP Construction, \$40,515.12 and 0 days.

F. C.O. #2, Contract XII, Wastewater Plant Improvements – Secondary Pump Station Addition, COP Construction, \$36,585.49 and 0 days.

G. Assignment of Ground Lease for Steven A. Vold's west end hangar to First Interstate Bank for a financing arrangement, \$0.00.

H. Amendment #1, Engineering Services Agreement, AIP #21, Morrison – Maierle, Inc., \$333,034.00, (City's share: \$33,303.00).

I. Amendment #3, Engineering Services Agreement, HDR Engineering, \$452,524.00.

J. Agreement with MDOT for development and construction of the Bench Boulevard – 6th Avenue Project, \$927,993.00 local funding.

K. Maintenance, Operation and Ownership Agreement with Big Ditch Company, \$250.00. (re: W.O. 95-08, Phase II Shiloh Bike/Ped Underpass STPE 1031(1)).

L. Communications Use Lease with Bureau of Land Management for use and access to the radio/communication facility and tower site in the Sacrifice Cliff area, on a parcel in T1S-R26E-S2: SWSENE, \$0.00.

M. Acknowledging receipt of petition to annex #01-16: Tract 1, C/S 2099 and T1S-R25E-S13: NWSWSWNW EXCEPT C/S 2206, C/S 2252, C/S 2155, Corrected C/S 1907, C/S 1445, C/S 2548, C/S 2099 and that part reserved for the main canal of Billings land and Irrigation Co. by WD recorded in Book V, Page 107; Bottrell Family Investment LLP, petitioner and setting a public hearing date for 10/22/01.

N. Acknowledging receipt of petition to annex #01-18: Tract 3A-1, Block 1, Rockwood Subdivision, 2nd filing, Bristlecone, Inc., petitioner and setting a public hearing date for 10/22/01.

O. First reading ordinance amending Section 22-804 BMCC establishing storm sewer assessment rates for property within various zoning districts and creating an Entryway Light Industrial zone classification, and setting a public hearing date for 10/22/01.

P. Preliminary Major Plat of Greenfield Subdivision, generally located between Broadwater and Terry Avenues and 35th and 36th Streets West.

Q. Bills and payroll.

(Action: approval or disapproval of Consent Agenda.)

Councilmember Brewster separated Item J. Councilmember Bradley separated Item I and Councilmember Elison separated Item P. Councilmember Larson moved for approval of the Consent Agenda with the exceptions of Item J, Item I and Item P, seconded by Councilmember Kennedy. On a voice vote, the motion was unanimously approved.

Councilmember Larson moved to approve Item I, seconded by Councilmember Johnson. Councilmember Bradley asked what the term "feasible pipe layout" meant, as it was stated in the Amendment. Assistant Public Utilities Director Alan Towleron responded that the term applies to the filtration system and where the physical layout of the pipes would fit into the existing gallery of piping. Councilmember Bradley asked if the construction services of the beds were going to be provided. Mr. Towleron verified that a certain portion of the beds is now being constructed. There was no further discussion. On a voice vote, the motion was unanimously approved.

Councilmember Larson moved to approve Item J, seconded by Councilmember

Bradley. Councilmember Brewster raised concerns about the development of Bench Blvd. down to Sixth Avenue not addressing the problem of eggressing the Heights from the secondary area, leaving Airport Road the only outlet that has a reasonable expectation of handling any overflow that results from an accident at the Bench Blvd. and 6th Avenue intersection. He expressed the desire that Airport Road be upgraded to a four-lane road to provide a reasonable alternative. There was no further discussion. On a voice vote, the motion was unanimously approved.

Councilmember Larson moved to approve Item P, seconded by Councilmember Bradley. Councilmember Elison moved to amend Item P to add the development requirement that a condition of the plat be the installation of curb and gutter on the south side of Terry Avenue, seconded by Councilmember Bradley. Councilmember Elison commented that this same requirement was suggested on a previous attempt to develop this piece of property because residents on the south side of Terry Avenue have concerns about water runoff created by the development reaching the drain located on the south side of Terry Avenue. Councilmember Iverson questioned whether it would be better for the developers to come before the Council and explain their concerns. Councilmember Johnson voiced his agreement with Councilmember Iverson and commented that it was fair and reasonable to delay or postpone this issue to give the developers an opportunity to state their position. City Administrator Dennis Taylor said that, on conferring with legal council, this requirement is not a pertinent action for the Council to consider and recommended that the Council give the requested conditions to staff to negotiate with the developers. Councilmember Larson asked whether Item P would require a public hearing and Council approval at a later date before construction of homes begin. Planning Director Ramona Mattix responded that the only other Council action on this item will be approval of the final plat, after all of the designs on the plat have been completed, which would appear on the Consent Agenda.

Councilmember Elison voiced his concern about the precedent that is being set by approving this item when it was previously before the Council and at that time the Council voted unanimously to require the previous developer to provide curb and gutter. If the Council approves the item, as is, it sets the precedent where a different developer can change the name of a subdivision and resubmit the same plan thereby avoiding requirements imposed by the Council. He reminded the Council that this issue has been examined on a previous application of this subdivision and decided that it was appropriate and necessary to have the curb and gutter on the south side of Terry Avenue. Councilmember Kennedy asked if there was a development agreement that was previously negotiated. Mr. Taylor responded that it was a decision on the floor that was not negotiated with the parties involved and was imposed as a condition of approval which normally is not the desired method. This condition led to the decision by the previous developer to dispose of the property. He commented that the amendment being discussed could lead to the same result and more disastrously, litigation that challenges the Council's authority to make these requirements without negotiating with the parties. The City traditionally does not require the developer to pay for the improvements on the opposite side of the street and he does not encourage the Council to take such an action.

Councilmember Kennedy asked for clarification of Mr. Taylor's recommendation of postponement of the item so that staff can negotiate with the developers and bring the

revised plat before the Council rather than turning it down. Mr. Taylor restated his recommendation that the Council articulate their conditions to staff, let staff resolve the issues with the pertinent parties and resubmit the revised preliminary plat to the Council. He also stated that he still supports the present staff recommendation and adoption of the proposal as presented. He emphasized that the plat approval should **not** be conditioned by the amendment proposed by Councilmember Elison. City Attorney Brent Brooks voiced his concern that this may be a technical issue that has alternatives that can be explored by staff and the interested parties, and therefore concurs with the City Administrator that a postponement would be an appropriate action so that the issues can be fully explored and discussed.

Councilmember Elison asked Ms. Mattix if the developers would be required to pave 35th, 36th and Terry Avenue and provide curb and gutter for the full circumference of the development. Ms. Mattix responded that the developers would be required to pave and provide curb and gutter on the development's side of the street. Councilmember McDermott asked if there was an estimated cost of the improvements that were being required of the last developer. Councilmember Kennedy responded that it apparently caused the previous developer not to develop the property and doesn't believe the amendment is appropriate. Councilmember Elison disagreed with this statement. Councilmember Larson commented that it was inappropriate for the Council to impose these conditions on the developer. Councilmember Elison stated that it is not out of line to ask the developers to not cause a water run-off problem for existing homes. Councilmember Kennedy moved the previous question, seconded by Councilmember Larson. On a voice vote, the motion to stop debate on Item P was unanimously approved. On a voice vote for the amendment by Councilmember Elison, the motion failed. There was no further discussion on the original motion to approve Item P. On a voice vote the motion was approved with Councilmembers McDermott and Elison voting "no".

REGULAR AGENDA:

2. RIGHT-OF-WAY FEE ITEM: Decision as to whether or not to appeal the recent District Court opinion, which held that the City's right-of-way ordinance was an unlawful local sales tax. (Action: approval or disapproval of appeal decision.)

Councilmember Elison moved to appeal the District Court opinion, seconded by Councilmember Larson. Councilmember Larson commented on the right-of-way issue that was before the Council six years ago. He said that every revenue option that comes before the Council is based on the square footage of someone's property. He stated that many times citizens would ask if there wasn't some other option for City revenue, some other source rather than personal property and business property. Councilmember Larson stated that he is not so much interested in an increase in how much money the City of Billings has as he is interested in seeing a different mix and involving more people in the "revenue pie". He says that the Local Option Tax does not seem to have a prayer in the legislature and he has lost faith in that avenue. He stated

that he wants to be absolutely sure that the right-of-way ordinance is or is not a legal and fair option for revenue and would like to know what "home rule" really means and how much authority the City actually has to operate in the way it deems appropriate. If this court case can answer these questions, then he said he feels it has great value. He stated that every home in this city has an SID waiting for it and when that bill comes due most homeowners would be very interested in alternate forms of revenue. He reiterated that he looks forward to the day when the City can bring a new source of revenue to the table when new development occurs. The only way that can happen is if something new is brought "into the mix". If the Council fails to move forward on the rights-of way issue the conversation will stop tonight. Councilmember Larson stated that he would vote tonight to pursue the answers to the question of the City's rights regarding Home Rule and what can and cannot be done.

Councilmember Kennedy spoke in support of Councilmember Larson's views. He stated that this issue is not about the revenue but will put to rest the questions of where the Council's authority lays when it comes to raising revenue and how the community raises revenue or sells the services that the community needs. Trying to raise revenue for public safety is a very difficult issue. The step that is being contemplated will also help to affirm the charter that was written back in the 1970's. If the right-of-way issue is not upheld, then the Council will understand that there is another problem - the Charter, and how it affects the Council, and whether the Council has any authority at all. He also stated that tax reform is past due and that the property tax well is drying up. The City received approximately 19 or 20 cents of each property tax dollar paid by members of this community, however there are many individuals in this community who don't contribute. The City provides public safety services in certain areas that do not help contribute to the cost of the services. There needs to be an equitable participation in the funding of public safety for the citizens of Billings. The right-of-way fee structure makes a lot of sense in that everyone will participate. His advice is to get this issue to the Supreme Court to ascertain whether the Council has the ability to make these kinds of decisions for this community. He intends to see this issue through and vote in favor of the appeal.

Councilmember Elison said that the appeal is a critical aspect at this point. He felt that the District Court decision was a case of "splitting hairs" rather than dealing with the Council's decision to run the City. "What we have to know, regardless of what the voters will say in the coming election, is whether or not this City has authority to govern itself with regard to the home rule powers granted the City in the State Constitution which includes the City Charter. If the Council does not have the authority to govern the City of Billings then the Charter becomes an ineffective and meaningless document and we will have the restrictions granted by the Charter but will not have the authority to self govern, therefore the government will become irrelevant," he stated. Councilmember Elison said he would like to know from the Supreme Court, whether or not the State Constitution that grants home rule to cities with a charter is meaningful. It is critical to go to the Supreme Court and get a legal opinion, regardless of what the voters decide, to know whether the Council has authority to govern the City.

Councilmember Brewster stated that it was important for all to know that he works for Montana Power, however he does not make policy decisions in his position

there, so he does not feel there is a conflict of interest. He disagreed with the comments stated so far. He stated that for the public to pay for a rental for a public utility in a public right-of-way really isn't a rental but a way of raising revenue which in turn really is a tax. His view is that it really is a sale-tax. He stated that the District Court judge, in his ruling, did reaffirm home rule power, he just disagreed on how the City would gain the revenue. He noted his opposition to the appeal and that he would vote against it.

Councilmember Johnson stated that he agrees with what has been previously said, with the exception of comments by Councilmember Brewster. His position is that the right-of way fees are a relatively new issue in the Northwest but not in this country. There are a growing number of states that incorporate right-of-way fees and are using them successfully. He feels that this is a legal right and proper revenue solution for Montana. He stated that the use of the rights-of-way for public service should be paid for by the users in whatever form that may be and he will join with Councilmembers Larson, Kennedy and Elison to vote for the appeal of the District Court decision.

Councilmember McDermott stated that four years ago when she ran for the Ward I Council position, she heard overwhelmingly from the constituents that a new revenue source was needed but they were opposed to this type of fee or tax particularly if it became a pass through. She does not believe she has been released from the promise to oppose this issue if it came up and therefore she intends to vote "no" on this issue tonight.

Councilmember Bradley stated that there is a controversy as to who is "in charge" and the only way he knows how to "score the game is by the fees." He took a political risk when he voted in favor of the right-of-way fee because he did not believe the Public Service Commission's complexity would change if it had stayed Democratic. He believed that particular fee would be voted down and therefore the City would be fighting on two fronts, in Judge Baugh's Court and at the Public Service Commission level as to whether it would be passed or not. In his experience and seeing what happens with sovereignty powers and how they are subjugated and removed by legislative and judicial action, he would vote in favor of the appeal. He stated that it is important to the City, and ultimately the citizens of the City, to understand that we cannot be pushed over by corporate rule.

Councilmember Iverson stated that to "go with" this ordinance is the responsible, honest and right thing to do and she will also vote in favor of the appeal.

Councilmember Brewster spoke to address the issue of "fair share". He asked if this is a pass through fee to the same pockets that pay the rest of the fees and taxes, how is it a fair share, particularly when you have companies that pay the lion's share of taxes in this county? He commented that it does not make sense.

Councilmember Ohnstad addressed Councilmember Brewster's comment by saying that when companies install blank cables for future expansion of internet usage it is a profit function and those companies are getting the City's right-of-way to use in their business to enhance their profits.

There was no further discussion. Mayor Tooley stated that if this ruling is not appealed and the District Court decision stands, that may have serious implication for future efforts by the people of Billings or any local governing body in this area. If the

MINUTES: 10/9/01

people decide to promote an initiative in the future, that initiative may be restricted or even disqualified due to this ruling. If in fact our constitutional guarantees are meaningless, then it is important for the City of Billings to know that so that we can make informed decisions. "We will be groping in the dark with regard to our future as a City if this court decision is not clarified. The appeal of the District Court decision addresses a much larger issue than this one ballot item in the November 6th election. Whatever the people of Billings decide about the right-of-way fees, that will stand. However the City must address home rule rights for the future, so that we know what the options are for governing the City." Stated the Mayor. On a voice vote, the motion to appeal was approved with Councilmember Brewster and Councilmember McDermott voting "no".

ADJOURN – With all business complete, the Mayor adjourned the meeting at 8:36 P.M.

THE CITY OF BILLINGS:

BY: _____
Charles F. Tooley MAYOR

ATTEST:

BY: _____
SUSAN SHUHLER DEPUTY CITY CLERK