

REGULAR MEETING OF THE BILLINGS CITY COUNCIL TUESDAY, OCTOBER 10, 2000

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 Tooley called the meeting to order and served as the meeting's presiding officer. The Pledge of Allegiance was led by Mayor Tooley, followed by the Invocation, which was given by Councilmember Iverson.

ROLL CALL – Councilmembers present on roll call were: Bradley, McDermott, McDanel Kennedy, Iverson, Ohnstad, Johnson and Elison. Councilmember Larson was excused. Councilmember Deisz was unexcused. Mayor Tooley indicated that the BMCC states that in order for a Councilmember to be excused from the meeting he/she must contact either the Mayor or the City Clerk. Councilmember Deisz has not done that. Mayor Tooley said that until he is contacted by a legal representative for Councilmember Deisz, Mr. Deisz would no longer be excused from the meetings.

MINUTES – September 25. The Minutes were approved as corrected.

COURTESIES – Airport.

1. Mr. Larry Cox, Chairman of the Board of Directors of the American Association of Airport Executives (AAAE) presented Aviation and Transit Director Bruce Putnam with the Association's annual Distinguished Service Award for his exemplary service. The Distinguished Service Award is one the Associations most prestigious honors bestowed only on those individuals who have served the aviation industry in an exemplary fashion for at least 25 years and have been an accredited airport executive for at least 12 years. Mr. Cox said that Mr. Putnam easily meets those standards and much more. He said Bruce has spent virtually his entire career in the aviation industry; a career filled with numerous awards and honors. Bruce has served as chairman of AAAE for 1991-1992, past president of AAAE Northwest Chapter of the Montana Airport Manager's Association, recipient of AAAE Chairman Award recognizing special contributions to the aviation industry, recipient of the Northwest Chapter Executive of the Year Award for 2000 and the Mayor and City Council CARE Award for outstanding performance.

2. Mayor Tooley recognized former Councilmember Ralph Stone in the audience.

PROCLAMATIONS – Mayor Tooley

1. World Population Awareness Week – October 22nd – October 28th, 2000
2. National Breast Cancer Awareness Month – October 2000
3. National Mammography Day – October 20, 2000
4. Fire Prevention Week – October 8th – October 14th, 2000

BOARD & COMMISSION REPORTS – There were no Board or Commission reports.

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ADMINISTRATOR REPORTS – Dennis Taylor. Mr. Taylor said the various fire stations would be holding open houses during Fire Prevention Week and he encouraged everyone to attend. Mr. Taylor also noted some of the information available on the City's web site and encouraged everyone to visit the site.

CONSENT AGENDA:

1. A. Mayor's Appointments

- (1) Eric Hoffman (reappointment), Exchange City Golf Commission.
- (2) Kevin Walsh, Animal Control Board.

B. Bid Awards:

- (1) **Sale of Recyclable Metals Pile for Solid Waste Division.** (Opened 9/26/00). Recommend Central Wyoming Recycling, \$5.20/ton.
- (2) **Hallowell Lane Sanitary Sewer SID 1344.** (Opened 9/26/00). Recommend COP Construction, \$454,659.
- (3) **300 Gallon Plastic Refuse Containers for Solid Waste Division.** (Opened 10/10/00). Recommend delaying award to 10/23/00.

C. Change Order #1, W.O. 99-02, Contract #3, Miscellaneous and Developer Related Project, Rock Pile Construction, \$51,929.84 increase and 20 days.

D. Final Change Order #2, Billings Logan International Airport Water Improvement 2000, COP Construction, \$19,229.75 decrease and 0 days.

E. Amendment to Building Lease with the State of Montana Department of Natural Resources and Conservation, \$1,268.88 first year, adjusted by CIP-U each subsequent year.

F. Amendment of Lease Term to Commercial Aviation Ground Lease with Jon Marchi/Big Sky Airlines, extend term additional 5 years.

G. Assignment and Transfer of the King Management Executive Hangar ownership/lease to First Interstate Bancsystems, Inc.

H. Services Agreement for cleaning services for the parking garages with Billings Remodel and Paint Inc., \$25,980, 1-year term.

I. Agreement with Billings Housing Authority to provide one (1) officer in a

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community-policing role for Housing Authority's housing complexes, \$61,040.00. Term: 9/1/2000 through 8/30/2001.

J. Right-of-Way Agreements for SID 1344 sewer improvements serving properties along Hallowell Drive, Arden Avenue, Bruce Avenue and Clevenger Avenue, \$700.00.

- (1) South 20 ft of the west 154.8 feet of Lot 1, Balcher Acres, Pirtz Partnership Properties, \$200.00.
- (2) South 20 ft of the east 475 feet of Lot 1, Balcher Acres, Charles J. Netterberg, Jr., \$500.00.

K. Acceptance of Quit Claim Deed from Yellowstone County for Lots 2 & 3, Block 39, Lake Hills Subdivision, 13th filing.

L. Resolution of Intention #00-17624 to create SILMD 274: Wal-Mart Subdivision and setting a public hearing date for 11/13/00.

M. Resolution #00-17625 for use of Council Contingency funds to match Board of Crime Control Grant monies for misdemeanor supervision program, \$15,712.00.

N. Preliminary approval of resolutions respreading assessments:

- (1) **Res. 00-17626:** SID 1326 - Pemberton Lane sanitary sewer; (split tax code)
- (2) **Res. 00-17627:** SID 1327 - Cenex Park Sub. improvements, (combine tax code)
- (3) **Res. 00-17628:** SW#9504 - W.O. 94-02, #2: Yegen's Addition Miscellaneous Sidewalk; (combine tax code)

and setting a public hearing date for 10/13/00.

O. Preliminary Minor Plat of Rush Subdivision, 7th filing (generally located at north side of Parkhill Drive, west of Shiloh Road bordered on the north by the Big Ditch).

P. Preliminary Minor Plat of Broadwater S.V. Medical and Health Park Subdivision (generally located at north side of the 2000 Block of Broadwater Avenue).

Q. Final Plat of Parkland West Subdivision, 1st filing (generally located at Monad Road and 36th Street West).

R. Bills and Payroll.

(Action: approval or disapproval of Consent Agenda.)

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There were no separations from the Consent Agenda. Councilmember McDanel moved for approval of the Consent Agenda, seconded by Councilmember Johnson. On a voice vote, the motion was unanimously approved.

REGULAR AGENDA:

2. PUBLIC HEARING AND SECOND READING ORDINANCE #00-5132 extending the boundaries of Ward IV to include recently annexed property: Lot 1, Block 7, Rush Subdivision, 3rd filing, Annex #00-03. Staff recommends approval. (Action: approval or disapproval of ordinance on second reading.)

The public hearing was opened. There were no speakers from the audience. The public hearing was closed. Councilmember Kennedy moved for approval of the ordinance on second reading, seconded by Councilmember Iverson. On a voice vote, the motion was unanimously approved.

3. PUBLIC HEARING AND FINAL APPROVAL OF 2000 ANNUAL ASSESSMENTS:

- (1) RES. 00-17611: Park Maintenance
- (2) RES. 00-17612: Fire Hydrant Maintenance (i.e. Property Safety Water Supply)
- (3) RES. 00-17613: Demolition
- (4) RES. 00-17614: Encroachments, Encumbrances, etc.
- (5) RES. 00-17615: Light Maintenance Districts
- (6) RES. 00-17616: Storm Sewer Maintenance
- (7) RES. 00-17617: Tree/Limb Removal Program #3001
- (8) RES. 00-17618: Weed Cutting and Removal

Staff recommends final approval of resolutions. (Action: approval or disapproval of staff recommendation.)

The public hearing was opened. There being no speakers from the audience, the public hearing was closed. Councilmember Iverson moved for approval of staff recommendation, seconded by Councilmember Johnson. On a voice vote, the motion was unanimously approved.

4. FIRST READING ORDINANCE providing that the Billings Montana City Code be amended to manage the use of the public rights-of-way by owners and operators of communications facilities and providers of telecommunications and other utility services within the City and setting a public hearing date for 10/23/00. Staff recommends approval. (Action: approval or disapproval of ordinance on first reading.)

Councilmember Ohnstad moved for approval of the ordinance on first reading,

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seconded by Councilmember Iverson. Councilmember Kennedy asked if Council has the right to increase the current 4% rate charged for the monopoly providers of sewer, water and solid waste to 5%. He said there had been some mention that some people may not be able to afford that increase. Increasing the rate for monopoly providers would require those people to pay for the increase since there are no other providers. Ms. Herrera said it is much easier to defend the City's decision to charge a rental fee on the grounds that it is non-discriminatory if it is the same rate for everyone. She said if there is some precedent under law that the City could charge water, sewer and solid waste a lower percentage then the City could assert their right to do so. The fact the water facilities are municipally owned will present a more difficult argument. Councilmember Kennedy asked if the rate increase from 4% to 5% includes a profit margin. Ms. Herrera said the City is looking at fair market value of the ROW rather than what the profit margin would be. She said the City is trying to establish a fair and equitable rate and because the cable provider currently pays 5% it makes sense to charge that same rate to all providers. She stated that it is very complicated to calculate what the City actually spends on ROW management. It is expensive to conduct a study to see just how much time and money is spent on ROW management.

Councilmember Bradley asked if the fee could be passed onto the consumer through the Montana PSC rules and regulations. Ms. Herrera said the extent the fee could be passed on as a cost of a regulated service would be like any other office rent. Whatever rules the Montana PSC has for passing on office lease/rent costs to customers, would also apply to the ROW fee. Mr. Taylor said that when looking across the country at the cable television franchise fee in place in many areas, it almost invariably shows up on the bill. That has been the industry's response to the franchise license fee being adopted. People are more likely to be charged what the market charges for that service, especially with all the competition from other cable-wide services. "In a deregulated market, even though it may show up on your bill, the overall cost of the service is going to be predicted more by the market pressure rather than the fee charged by jurisdictions," he said. Initially those utility companies are going to say the fee will be reflected on the consumer's bill.

Councilmember Bradley said the deregulation of telecommunications, electricity and gas are just a precursor of what is yet to come. One problem the state of Montana faces is the lack of customers to have the necessary competition. He said most telecommunication companies start on a whim and he does not believe it is right for those people to take benefitted public ROW for profit. Councilmember McDanel said it is his understanding that fees charged directly are for service, funds earmarked specifically to support that service and that the revenue and expenditures are balanced in some way to ensure there is not overcharging. He asked if some of the restrictions were eliminated by charging rental rather than charging a fee. Mr. Taylor said that the plan is to keep it as a general revenue like any other rents the City receives, similar to water, sewer and solid waste. The fee will go to the General Fund and then City Council as a governing body decides the best place to allocate those funds. He said fees, such as street maintenance fees, are dedicated to a specific use in a specific fund to cover the cost of street maintenance citywide. Mr. Taylor

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said the initial recommendation was to keep the rental as a general revenue like other rents and other service charges and have it go to the General Fund. He said there was nothing precluding Council from allocating the money to any fund deemed appropriate as part of the budget setting and appropriating process. "I don't think it is a good idea, as a matter of public policy, to earmark that to a particular use when the City's needs are dynamic and changing all the time, but that is Council's prerogative," he stated. Ms. Herrera said that a rental fee is recovering the City's costs but it is recovering the fair market value, so it is not just cost. Federal law permits cities to recover fair and reasonable compensation for use of the ROW. Under Montana law the distinction between a tax and a rental fee is the relationship to what is being regulated. "In this instance, if you do not use the ROW but you provide telecommunication services, you do not pay a fee. That is what distinguishes it as a 'rent'. You only pay it if you use the space. If it were a tax it would apply to everybody who provides facilities regardless of the use of ROW or any other means," Ms. Herrera stated.

Councilmember Kennedy referred to the letter received from Geoffrey Feiss, General Manager of Montana Telecommunications Association. In Mr. Feiss' letter he requested that Council delay the ordinance 30 days allowing for written comment. Mr. Kennedy said the suggestion of possible legal discussions should be left for the courts. He said he feels Council is committed to looking at alternative revenue sources the committee brought forward years ago. "We were told 5 years ago there would be a court battle; we didn't take that step. I am glad we are doing it now." Councilmember Ellison said he wanted to remind Council that when the Alternative Revenue Committee initially proposed the ROW rental fee, the committee suggested that some portion of that money be earmarked for those people in lower income brackets who would have a difficult time facing any increases in monopolized services such as water, sewer and electricity that they must have. He said that is probably a good idea to keep in mind. He said aside from the revenue issue he is more concerned with what is taking place in the ROW. The ROW could become "stuffed" with material and prevent access to the sewer and water lines. He said the management of the ROW portion of the ordinance is incredibly important regardless of whether there is a 4% or 5% fee imposed. With regard to the revenue aspect, the amount of money spent in the public ROW goes way beyond the amount of revenue the rental will generate. "I can think of a whole lot of ways that the citizens of Billings could potentially benefit from having this funded money to fund street projects, lighting projects and curb, gutter and sidewalk currently assessed to property owners. We would see the benefit of proper management; they would see the benefit of some of those assessments perhaps being eliminated," he stated. Councilmember Iverson said she agreed with Councilmember Ellison. She said the management of the public right-of-way is good stewardship.

Councilmember McDermott said although she agrees that a rental should be charged on the public ROW, there also needs to be a commitment to protect the property owner. She would like to see a reduction in property taxes dependent on the money generated from rental fees.

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Councilmember Ohnstad asked if state law required all new development (i.e. cable) be buried. Mr. Taylor indicated that it is not state law but merely a suggestion. Councilmember Ohnstad said he would like some type of system where providers are required to use fiber optic cable that is already in place, whether by previous owner or current owner, to prevent continuous trenching to place new cable when there is currently new, unused cable already in place. Ms. Herrera said the ordinance specifically addresses those issues.

Councilmember Johnson said the management and protection of the public ROW is the important part of this ordinance. Councilmember Kennedy asked Ms. Herrera if she had found in her research on this issue other communities across the country that review the ordinance occasionally to make changes to the fee amount. Ms. Herrera responded, "yes". She said if the ordinance was in place and ROW rental was being charged, that revenue could be used to fund a survey to get a better assessment of the various costs, value, uses, incidental costs...related to use of the public ROW and then make necessary changes to the fee structure. Mr. Taylor said when staff reviewed this ordinance the question was raised whether a different rate could be charged for public utilities. The answer was yes - a 4% fee could be charged for the public utilities and 5% for other unregulated utilities. Mr. Taylor said the recommendation was to keep the rental fee easy to administer, uniform for everyone using the ROW, and based on the fair market value of the rent. However, he said, a distinction could be made. He said it is really a policy choice of Council and could be changed over time if better information is received. "If we survive litigation and it is established that you have home-rule authority to do this, that there is a reasonable basis for a rent structure, then you may decide to have a different rate for a regulated utility and a deregulated (for-profit) utility. Councilmember Kennedy said he wanted to see some type of provision included in the ordinance that would allow this Council or a new Council and new staff to revisit the ordinance and make appropriate changes. Ms. Herrera stated that fees could be separated in such a way that would not charge the fee on basic services. The tradeoffs are that it is more difficult to administer and those providers of other services would see it as unfair. She said that is why staff wanted to go with the approach that was simplest to administer and that applied to everyone equally. Councilmember Bradley asked how the fees would be charged. Ms. Herrera said the ordinance is structured currently so that the rental fee is based on the amount the utility reports to the PUC as its gross revenue. Councilmember McDermott said she is still very concerned about the burden on property tax payers. She said she could not support the ordinance until she has absolute assurance that there will be corresponding tax reductions.

Councilmember McDanel asked if it is required that the public hearing be held on October 23, 2000 or if it was possible to postpone that public hearing to November 13, 2000. Mr. Taylor said there would not be any problems, just a change in advertising for the public hearing. He said the public hearing could be held on October 23rd and continued to November 13th if Council decides that at the October 23rd meeting. Councilmember McDanel said that he is concerned that some of the telecom providers were not aware of the ordinance until a few days ago. He went on to say that many alternative revenue

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sources have been researched. The ROW rental fee is the most logical choice to pursue at this time. Council is continuing to explore other alternative sources and will continue to do well into the future whether or not the ROW rental fee is approved. He said the ROW rental fee is not his first choice and three years ago he indicated that he would not support a ROW fee, and now he is speaking in favor of it. Councilmember Kennedy said this issue has been discussed for quite some time and a couple weeks will not allow the telecom industry any more time to present any new articles for discussion. Councilmember Johnson said he also opposed delay of the ordinance. Mr. Taylor said he did not feel the timing made a big difference. He said they have made every effort to work with the various stakeholders and have kept them apprised of the scheduling of the ordinance and many have probably made arrangements to attend the public hearing on October 23rd. He said it may be more prudent to have the public hearing on October 23rd and continue the public hearing and discussion on November 13th. Mr. Taylor said the ordinance becomes effective 30 days after it is approved on second reading. He said it is important to make sure the effective date of the ordinance is before the Legislature convenes in January. Councilmember McDanel made an amendment to the main motion to approve the ordinance on first reading and to hold a public hearing at the 10/23/00 council meeting and continue that public hearing to the 11/13/00 meeting, seconded by Councilmember Bradley. On a voice vote, the amendment failed. Councilmember McDanel voted "yes". On a voice vote on the main motion to approve the ordinance on first reading, the motion was approved. Councilmember McDermott voted "no".

5. CONSIDERATION OF MONTANA LEAGUE OF CITIES AND TOWNS (MLCT) RESOLUTIONS #1 - #22, 2000-2001. (Action: approval or disapproval of resolutions.)

Councilmember Kennedy separated Resolutions #3, #10, #11, #13 and #17. Councilmember Johnson separated Resolution #6. Mayor Tooley indicated that this is Council's instruction to the delegation that would be attending the Montana League of Cities and Towns meeting this week to vote on issues. Councilmember Johnson moved for endorsement of the resolutions EXCEPT Resolution #3, #6, #10, #11, #13 and #17, seconded by Councilmember Elison. On a voice vote, the motion was unanimously approved. Councilmember Johnson moved for endorsement of Resolution #3, seconded by Councilmember Elison. Councilmember Kennedy said with regard to the funds from state transfer and reimbursement payments that he believed in singling out the revenue strings and pointing them to a specific direction so that it can be better communicated to constituents where those monies are going. Mr. Taylor said many of the cities have urged that revenues received as reimbursement (\$50 million this past year) be tagged as a percentage of income tax. The committee is recommending that instead of tagging it to the income tax generated in any given year to tie it to the five-year average increase in personal income and state gross product. Mr. Taylor said there is no guarantee that the state payments would continue. The primary focus of the committee is to get on record the idea that the loss of revenue will be recovered. Councilmember Kennedy made a

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substitute motion to remain neutral on the subject, seconded by Councilmember Johnson. On a voice vote on the substitute motion, the motion was unanimously approved.

Councilmember Johnson moved for endorsement of Resolution #6, seconded by Councilmember Kennedy. Councilmember McDermott asked why the resolution was limited to utility franchise and ROW fees and did not include fire maintenance district fees and hotel/motel fees. Mr. Taylor offered clarification from the Legislative Committee for the MLCT. He said home-rule jurisdictions, those who have adopted self-governing powers, have the authority to adopt the utility franchise and ROW fee. It is not currently clear that the general power governments, who have not adopted self-government power, have the authority to establish a ROW fee without the expressed delegation of the Legislature. This resolution would have MLCT endorse the idea that not only home-rule jurisdictions but that every community have the right to impose a rent on the use of the ROW. On a voice vote, the motion was approved. Councilmember McDermott voted "no".

Councilmember Johnson moved for endorsement of Resolution #10, seconded by Councilmember Elison. Councilmember Kennedy asked where the 11% park land dedication or cash equivalent for minor subdivisions requirement originated. Mr. Taylor said that state law currently requires that percentage for major subdivisions. He said in the reform of the subdivision laws the requirement for minor subdivisions was inadvertently deleted. This resolution would allow minor subdivisions the same proportionate opportunity that major subdivisions have. Most likely the smaller divisions would probably give money rather than donation of a small portion of land. All of that adds up to the ability to do some park land improvements and park land expansion. Councilmember Kennedy said, "I think what we will start to see in the smaller subdivisions is that we can incent that individual who is developing to make it more beneficial to give cash instead of land. If there is some way to work that incentive into this resolution, let's do that." Councilmember Johnson said he agreed with Councilmember Kennedy. On a voice vote, the motion was unanimously approved.

Councilmember Johnson moved for endorsement of Resolution #11, seconded by Councilmember Elison. Councilmember Kennedy asked Mr. Taylor to define "administrative action" as it was used in the resolution. Mr. Taylor said it would, by Legislative action, delegate the chief building official to adopt building codes as they are adopted by the international body. Currently, Uniform Building Codes, Uniform Fire Codes...are not adopted until the Department of Commerce authorizes their adoption, which sometimes can be a year or longer. Communities don't benefit from adopting a more recent code. Mr. Kennedy said he feels there is a strong public interest in building codes. He said he would vote against the resolution and wants to continue to see those items come before Council. Councilmember Elison said that he felt the resolution should read, "adopt state approved building codes by administrative action." "I fully agree that we do not want to have random building codes arbitrarily approved by administrative action, but those that come down to us from the state that we have no choice on, it makes no sense to hold public hearings when we have no decision we can make," he stated. Mayor Tooley said Council would assume that is the position of the resolution. Councilmember

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McDermott said she agreed with Councilmember Kennedy in that there is an increasing interest in the building code as various parts of the city are being revitalized. Mr. Taylor indicated that the reason it is stated that the codes are of little interest is because the codes have already been adopted by the state and no real decisions/changes can be made to them. On a voice vote, the motion was unanimously approved.

Councilmember Johnson moved for endorsement of Resolution #13, seconded by Councilmember Kennedy. Councilmember Kennedy said he thought there had already been lengthy discussion and a decision had been made about privatization of ambulance services. Mr. Taylor said this resolution is coming from Kalispell and the proposed \$40/year per household charge is similar to what is being done in Oregon and is similar to the City's insurance charge to people to cover the cost of repair of waterlines between the water main and the house. This is a way to insure those people who may have to use emergency services. The fee is paid and regardless of the number of ambulance trips, there would be no additional costs to the jurisdiction. He said it is a revenue enhancement for smaller jurisdictions that are struggling with providing ambulance services. Councilmember Kennedy suggested to Mr. Taylor to use that resolution as a bargaining chip for those communities that do not want to support the hotel/motel tax. Councilmember Kennedy made a substitute motion to remain neutral on the item and allow the delegation to negotiate what seems to be the most advantageous position for the City of Billings, seconded by Councilmember McDermott. On a voice vote, the motion was unanimously approved.

Councilmember Johnson moved for endorsement of Resolution #17, seconded by Councilmember Kennedy. Councilmember Kennedy said he understood the resolution dealt with partial tax payment for buildings that do not meet the deadline of the tax year so they are not taxed fully until the following year and this would allow an opportunity to prorate the taxes. Councilmember Johnson asked if the tax would be quarterly. Mr. Taylor said because taxes are collected twice a year it would just allow for a building that might be completed after the beginning of the year but would be able to be put on the tax notices for the second part of the year. On a voice vote, the motion was unanimously approved.

Councilmember Kennedy said he was concerned that he did not see a resolution that dealt with empowerment zones and upgrading areas in the community that were in disrepair and help to subsidize some of that infrastructure. Mr. Taylor indicated that the committee had decided to include a general resolution that would include the issue of affordable housing, economic development and empowerment zones. He said he would find out why that resolution was not included and will ensure that such a resolution is crafted and put before the MLCT body. Councilmember Elison said he wanted to remind the delegation that Council had discussed the issue of asking for empowerment to enact certain taxes including local option taxes, accommodation taxes, etc. as opposed to simply asking for a confirmation of home rule authority to deal with those issues. He reminded the delegation to keep that in mind when considering many of the MLCT resolutions asking for separate authorities for different taxes.

