

Minutes

DVD No. 103

The City Council of the City of Leawood, Kansas, met in regular session in the Council Chambers, 4800 Town Center Drive, at 7:30 P.M., on Monday, June 21, 2004. Mayor Peggy Dunn presided.

Councilmembers present: Jim Rawlings, Debra Filla, Louis Rasmussen, Scott E. Gullede, Gregory Peppes, Gary Bussing and James E. Taylor, Sr.

Councilmembers absent: Mike Gill.

Staff present :

Scott Lambers, City Administrator
Ben Florance, Chief, Fire Dept.
Sid Mitchell, Chief, Police Dept.
Karl Weinfurter, Info Systems Specialist
Jeff Cantrell, Neighborhood Serv. Admin.
Deb Harper, City Clerk
Emily Gleasure, Deputy City Clerk

Shannon Marcano, Assistant City Attorney
Joe Johnson, Public Works Director
Chris Claxton, Parks & Rec Director
Colleen Browne, Human Resources Dir.
Kathy Rogers, Finance Director
Diane Binckley, Planning Director
Becky Craig, Admin. Assistant, Fire Dept.

- 1 1. **PLEDGE OF ALLEGIANCE**

- 105 2. **APPROVAL OF AGENDA**
Mayor Dunn noted that Councilmember Rasmussen would have a report under Item “9,” Councilmembers’ Report. Councilmember Gullede made a motion to approve the amended Agenda. Councilmember Rasmussen seconded the motion, and the motion was approved unanimously, 7-0-0.

- 134 3. **CITIZEN COMMENTS**
G. Gordon Thomas, 10516 Mohawk Lane, spoke on the necessity of the homes associations and the City to work together for the betterment of all.

- 553 4. **PROCLAMATIONS - None**

555 **5. PRESENTATIONS/RECOGNITIONS – Retirement of Training Chief Gary Bottoms; 28 years of service**

Mayor Dunn presented a plaque to Training Chief Gary Bottoms for 28 years of service on the occasion of his retirement from the Leawood Fire Department. Chief Ben Florance presented an additional plaque from the Fire Department recognizing his friendship and service to the Department. Training Chief Bottoms introduced his family members who were in attendance, and thanked those present for allowing him to serve the City of Leawood for so many years with so many dedicated individuals.

1151 **6. SPECIAL BUSINESS**

A. PUBLIC HEARING: Proposed Assessments for the 133rd Street [between Mission Road and Roe Avenue] Improvement Project [CIP # 179]

Mayor Dunn declared the Public Hearing open. There was no one present to speak on the issue. Councilmember Rasmussen made a motion to close the Public Hearing. Councilmember Taylor seconded the motion, and the motion was approved unanimously, 7-0-0.

1248 **B. Ordinance No. 2064, levying assessments on lots, pieces and parcels of property located in the City of Leawood, Kansas, for the purpose of paying for the cost of improvements to 133rd Street between Mission Road and Roe Avenue [CIP # 179] [Roll Call Vote]**

Councilmember Taylor made a motion to pass the Ordinance. Councilmember Rawlings seconded the motion, and the motion was passed unanimously with a Roll Call vote, 7-0-0.

1338 **C. Presentation by the Arts Council of art pieces by Tom Corbin, to be located at Ironhorse Centre, 151st Street and Nall Avenue**

Arts Council Committee Chair Mary Tearney and Public Art – Arts Council/Selection Panel Chair Dr. Ann Kenney discussed the donation of art from the Merrill family, to be installed on the grounds of the Ironhorse Centre. The sculptures by Tom Corbin will be completely funded by the Merrill family, who will also pay the associated impact fee.

Councilmember Rasmussen confirmed with Ms. Tearney that the Merrill family would own and maintain the sculptures that would be installed in the development in August 2004. Councilmember Bussing confirmed that each sculpture would be up lit from the ground.

Mayor Dunn thanked the Merrill family for donating the artwork for the citizens of Leawood.

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D. Ordinance No. 2065 granting to Southwestern Bell Telephone, L.P., a Franchise to construct, operate and maintain a Telecommunications System in the City of Leawood, Kansas, prescribing the terms of said Franchise, and repealing Ordinance No. 1794 [Roll Call Vote]

Chris Carroll of Southwestern Bell Communications (SBC) discussed negotiations over the past year between SBC and several cities locally, including Leawood. He stated that K.S.A. 12-2001(d) permits the City to require a telecommunications local exchange service provider that intends to provide local exchange service in that city to enter into a valid contract franchise ordinance. This ordinance must be mutually agreeable to all parties. On January 14, 2004 negotiations ended with an agreed upon document that was before the Governing Body tonight. The existing franchise agreement expires July 3, 2004. Mr. Carroll suggested that the document be approved in its current form so that other business contingent upon this document could be completed later tonight.

Councilmember Bussing confirmed with Scott Lambers that Staff would accept either document (the original or the one amended by Councilmember Rasmussen). He advised that SBC was not in agreement with the two proposed changes by Councilmember Rasmussen.

Councilmember Rasmussen discussed the changes he made to the agreement. He stated that historically license fees were updated to be applicable to current day costs. He suggested increasing the application fee as changed in Section "4g" [*Unless previously paid, within sixty (60) days of the effective date of this Contract franchise, Grantee shall pay to the City a one-time application fee of One Thousand Five Hundred Dollars (\$1500.00). The parties agree that such fee reimburses the City for its reasonable, actual and verifiable costs of reviewing and approving this Contract franchise.*] He added SBC had stated that they had only paid a \$1000.00 fee to other area cities. Councilmember Rasmussen felt the fees should be recovered from the applicant and not the taxpayers. Additionally, he felt that utilities occupying a right-of-way (ROW) should pay the franchise fee. Councilmember Rasmussen suggested there may come a time when hard-wired telephone communications developed into a totally wireless system, and the telephone companies would decide not to pay the franchise fees even though their equipment remained in the City's ROW. His wording change to cover this possible occurrence was in Section "7": [*Within a reasonable time after revocation of this franchise, Grantee shall remove at its expense any and all of its Facilities within the City, or transfer its facilities to another entity authorized to place Facilities within the City. In the case Grantee abandons its facilities, they shall become the property of the City. It shall be the duty of Grantee immediately upon such removal to restore all property from which said Facilities were removed to as good a condition as the same were before said removal was effected. If there is a lapse in time between revocation of this franchise and removal of facilities, Grantee agrees to continue to pay franchise fees in accordance with this agreement until such removal is completed.*]

Mayor Dunn asked Councilmember Rasmussen to explain his choice of wording in Section "7", specifically "*reasonable time*" and "*lapse in time.*" He stated a reasonable length of time would be 60 days, with the time being purposefully left vague. Mr. Carroll stated that SBC would not be willing to pay more than the \$1000 franchise fee. He stated there was no authority under Kansas law that would permit the City to unilaterally impose a term or condition on SBC without their agreement. Absent a franchise contract ordinance, there was no obligation for the utility to pay a franchise fee. If the franchise were terminated, revoked or expired, SBC's obligation to pay those franchise fees would cease. Mr. Carroll did agree that there had been a shift from wire line to wireless service. However, he stated the hard wire needed to be in the ground to perform their broadband service. This being the case, the franchise fee would continue to be paid. In response to Mayor Dunn's questioning as to whether SBC had ever stopped using equipment and subsequently left it unattended in a ROW, Mr. Carroll stated to his knowledge, it had never been done in the thirteen states SBC serviced.

Councilmember Bussing confirmed with Shannon Marcano that the amended franchise agreement was to be utilized as a standard agreement to negotiate with all other franchisees in the future. According to Kansas law, all providers must be treated similarly; therefore, Staff asked that the amended agreement be the model for all franchisees to enter into. Mr. Carroll stated the original document was the one that had been entered into by SBC with other cities that requested no changes.

Councilmember Gullledge confirmed with Mr. Carroll that should SBC stop using facilities in the City's ROW, it would not pay on those facilities that were not generating revenue, as stipulated in the agreement. Councilmember Peppes confirmed with Mr. Carroll that the contract read if the wire was there, was being used, and was generating income, the City of Leawood would get a franchise fee. Mr. Carroll added it was up to the cities to determine the fee to be charged, with Leawood applying a 5% gross receipts fee. The Governing Body would need to determine what the level of compensation to be collected from SBC would be.

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Mr. Lambers asked that should the primary source of telecommunications shift to wireless service and SBC based its fees on that service while retaining the underground hard line system for redundancy purposes should the system fail, would it be SBC's position that that redundancy service would not be providing revenue service to SBC, and therefore not pay for it. Mr. Carroll stated that was correct, unless revenue was being generated. He reiterated that it was in the statute that SBC was not required to pay on facilities not being used. Mr. Lambers replied he would argue that should the facilities be used as a backup measure, SBC would be utilizing it for revenue generating purposes and should be paying the franchise fee.

Councilmember Filla confirmed with Mr. Carroll that SBC had contracted with other cities for the \$1000 fee, and to raise it would be a precedent that SBC did not want to occur. Councilmember Bussing discussed the fee schedule, stating there were several fees set up in Leawood that were based upon reasonableness, and not upon their cost recovery. He also felt the possibility of what Councilmember Rasmussen thought might happen with the abandonment of facilities (Section "7") was not likely. Any additional fee assigned to SBC, he believed, would simply be passed on to the citizens, not as a tax levied by the City of Leawood, but a tax created by the City and billed by SBC.

Councilmember Bussing made a motion to pass the original Ordinance. Councilmember Gullede seconded the motion. Mr. Lambers advised that the Ordinance, if approved, would have a maximum useful life of four years and that the two issues brought forward tonight could be readdressed if necessary at a later date. Councilmember Rawlings confirmed with Mr. Lambers that tonight's Ordinance would approve a two-year term, with two (2) one-year extensions, if agreed upon by both parties. A Roll Call vote was taken. The 5-3-0 vote was as follows: Yea: Mayor Dunn, Councilmembers Rawlings, Gullede, Filla, and Bussing. Nay: Councilmembers Peppes, Taylor and Rasmussen.

For the record, Councilmember Peppes stated he found no fault in the \$1000 fee (Section "4g"), but felt that Councilmember Rasmussen's change to Section "7" was necessary. Councilmember Taylor concurred with the change to Section "7." Mayor Dunn voted for the original Ordinance as proposed by Councilmember Bussing, to allow for the simple majority vote to be achieved. The Ordinance passed.

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E. Resolution No. 2241 approving and authorizing the Mayor to execute a Public Lands Use Agreement between the City of Leawood and Southwestern Bell Telephone, L.P., pertaining to the installation and maintenance of communication facilities located within existing conduit.

Mayor Dunn stated this Resolution was for public land use, specifically parkland, and not for a ROW. Mr. Lambers confirmed this agreement would allow SBC to run their lines through the City's parkland located at College and Tomahawk Creek Parkway. Councilmember Rasmussen made a motion to approve the Resolution. Councilmember Gullede seconded the motion, and the motion was approved unanimously, 7-0-0.

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F. Resolution No. 2242 granting a Permanent Easement to Southwestern Bell Telephone, L.P., for the placement of an Equipment Station located at 9615 Lee Boulevard

Councilmember Rasmussen made a motion to approve the Resolution. Councilmember Rawlings seconded the motion, and the motion was approved unanimously, 7-0-0.

10732 7.

CONSENT AGENDA

Consent agenda items have been studied by the Governing Body and determined to be routine enough to be acted on in a single motion. If a Councilmember requests a separate discussion on an item, it can be removed from the consent agenda for further consideration.

- A. Approval of Appropriation Ordinance No. 1001
- B. Accept Minutes of the June 7, 2004, Governing Body meeting
- C. Accept Minutes of the May 11, 2004, Historic Commission meeting
- D. Accept Minutes of the May 11, 2004, Parks and Recreation Advisory Board meeting
- E. Renewal of Cereal Malt Beverage [CMB] License for Zipz Convenience Store, located at 4821 W. 135th Street
- F. Renewal of Retail Liquor Store License for Zipz! Spiritz, located at 4821 West 135th Street
- G. Renewal of Cereal Malt Beverage [CMB] License for Price Chopper # 500, located at 13351 Mission Road
- H. Approve purchase in the amount of \$20,645.00, from Video Analyst, pertaining to the purchase of a Video Analyst System, in connection with the approved Federal Police Byrne Grant
- I. Approve purchase in the amount of \$20,686.32, from Motorola, Inc., pertaining to the purchase of police radios, in connection with the approved Federal Police Byrne Grant
- J. Approve Change Order No. 3, in the amount of \$25,344.99, to Miles Construction Company, pertaining to the JB-04-008 SMAC Project, Lee Boulevard to State Line and 103 Street to I-435 Highway
- K. Approve Change Order No. 21, in the amount of \$1,847.57, to Vanum Construction, Inc., pertaining to the Ironwoods Park Project, 14701 Mission Road [CIP # 116]
- L. **Resolution No. 2243** approving and authorizing the Mayor to execute Supplemental Agreement No. 1, to that certain Inter-local Agreement between the City and Kansas Department of Transportation [KDOT] pertaining to the Roe Avenue Improvement Project [between 124th Street and 135th Street] [CIP # 110]
- M. **Resolution No. 2244** approving and authorizing the Mayor to execute a Construction Agreement between the City and Seal-O-Matic Paving Co., Inc., in the amount of \$1,193,280.00, pertaining to the 2004 Mill & Overlay Program
- N. **Resolution No. 2245** consenting to the enlargement of Consolidated Main Sewer District of Johnson County, Kansas, [JCUWD] by the Board of County Commissioners of Johnson County, Kansas [BOCC], pursuant to Johnson County Charter Resolution No. 29-92, for property located in the vicinity of 145th Terrace and Kenneth Road
- O. **Resolution No. 2246** accepting Temporary Construction and Permanent Drainage Easements located at 8424 Ensley Lane, from Philip Wang, for stormwater drainage improvements pertaining to the Dykes Branch SMAC DB-04-024 Project; 83 Street & Wenonga south to 86 & Cherokee

- P. **Resolution No. 2247** accepting Temporary Construction and Permanent Drainage Easements located at 8610 Meadow Lane, from Charles L. Jones, for stormwater drainage improvements pertaining to the Dykes Branch SMAC DB-04-024 Project; 83 Street & Wenonga south to 86 & Cherokee
- Q. **Resolution No. 2248** approving the Final Site Plan and Final Plat for Nall Valley located on the northeast corner of 151st Street and Nall Avenue [*from the June 8, 2004, Planning Commission meeting*]
- R. Police Department Monthly Report
- S. Fire Department Monthly Report
- T. Municipal Court Monthly Report

Councilmember Rasmussen made a motion to approve the Consent Agenda. Councilmember Peppes seconded the motion, and the motion was approved unanimously, 7-0-0.

10814 **8. MAYOR'S REPORT**

- A. Attended the United Community Services State of Caring Summit Awards Ceremony. The National Bank of Kansas City, located in Ranchmart, received the United Way Small Business Leader Award. They will be the Event Sponsor for the Leawood Rotary's Annual Auction to be held October 16, 2004.
- B. Congratulated Kevin Jeffries of the Leawood Chamber of Commerce, Chris Claxton and the Parks Department, and Chief Mitchell and the Leawood Police for their efforts in making A Taste Of Leawood on June 12th so successful. Councilmembers Rawlings and Rasmussen attended.
- C. A park bench was dedicated by the Leawood Lions Club at the site of their memorial fountain. The bench was a gift from the Iva Groebe Memorial Fund.
- D. The Leawood Foundation's Brick Campaign has kicked off, with the opportunity for everyone to purchase a brick to be installed in the courtyard.
- E. The Leawood Stage Company will present *Annie Jr.*, in the Oak Room on June 25-27.
- F. A concert will be held June 27th in Ironwoods Park. Some Like It Hot will be featured.
- G. A reminder was made of the Budget Hearings to be held June 28-July 1.

11412 **9. COUNCILMEMBERS' REPORT**

Councilmember Rasmussen thanked the Mayor, Staff and fellow Councilmembers for their thoughtfulness to his family after the death of his brother.

11448 **10. STAFF REPORT - None**

COMMITTEE RECOMMENDATIONS

11450 **11. PLANNING COMMISSION**

[from the May 11, 2004, Planning Commission meeting]

A. Ordinance No. 2066 approving a 20-year Special Use Permit [SUP] for a SBC/PRONTO DSL Box to be located at 9615 Lee Boulevard [Roll Call Vote]

Mayor Dunn asked Mr. Carroll if this box could be recessed, similar to the box located at 129th and Roe. Mr. Carroll advised that it had not been planned to be recessed; however, there would be extensive landscaping provided to conceal the box. He stated that a citizen, Joan McFadden, had expressed concerns about the cabinet and that SBC would be working with her on the landscaping.

Councilmember Peppes confirmed with Diane Binckley that the box would be placed on a compensated easement. Councilmember Bussing discussed the landscaping maintenance with Mr. Carroll. Mr. Carroll stated SBC would be maintaining the landscaping, and would replace it as needed or requested.

Councilmember Rasmussen made a motion to pass the Ordinance. Councilmember Taylor seconded the motion, and the motion was passed unanimously, 7-0-0, with a Roll Call vote.

[from the May 25, 2004, Planning Commission meeting]

12251 **B. Ordinance No. 2067 approving preliminary site plan for Cornerstone, Lot 5 - Ted's Montana Grill located at the southeast corner of 135th Street and Nall Avenue [Roll Call Vote]**

Councilmember Taylor recused himself from the discussion and vote, due to a conflict in interest. He left the Council Chambers at 8:53 P.M.

Jim Powell, JHA Architecture and Development, gave a presentation on Ted's Montana Grill, proposed to be located in the Cornerstone development.

Mayor Dunn asked Ms. Binckley about the colored green glass to be used in construction. Henry Klover, Klover Architects discussed the type of glass that would be used throughout the project. Councilmember Bussing confirmed with Ms. Binckley that this project did not change the plat originally approved by the Governing Body.

Mayor Dunn confirmed with Mr. Powell that the interior would be exactly like the photographs he presented. The exterior would be changed to a version of what was represented to satisfy the Planning Commission. Ms. Binckley stated the Planning Commission wanted the building to be more in line with the prairie style architecture of the development.

Councilmember Gullede made a motion to pass the Ordinance. Councilmember Rawlings seconded the motion, and the motion was passed 6-0-1 with a Roll Call vote, Councilmember Taylor recusing for reasons stated.

14059 **12. OLD BUSINESS - None**

14106 **13. NEW BUSINESS**

- A. **Ordinance No. 2068 authorizing and providing for the acquisition of lands or interests therein by condemnation for the improvement of Dykes Branch Channel Improvement Project [SMAC Project DB-04-024] between 83rd Street and Wenonga, south to 86th Street and Overhill Road [Roll Call Vote]**

Councilmember Taylor returned to the Council Chambers at 9:15 P.M.

Councilmember Filla confirmed with Joe Johnson that the same owner owned two lots without addresses. These lots were in the middle of the project surrounded by other lots without any access to them.

Councilmember Rasmussen confirmed with Mr. Lambers that the cost for the condemnation was still within the originally estimated cost.

Councilmember Peppes asked how many property owners were involved originally in the project. Mr. Johnson stated there were approximately 57 properties in the entire project, with 45 properties in the first phase. Currently, the City was working with the remaining four property owners, and was still in discussion with Ms. Hass so that condemnation might not need to occur on her property. Mayor Dunn expressed her appreciation for the negotiations that had taken place with the property owners on this project.

Councilmember Rawlings made a motion to pass the Ordinance. Councilmember Peppes seconded the motion, and the motion was passed unanimously with a Roll Call vote, 7-0-0.

14450 **14. OTHER BUSINESS - None**

ADJOURN

There being no further business, the meeting was adjourned at 9:18 P.M.

Debra Harper, City Clerk

Emily Gleasure
Recording Deputy City Clerk