REGULAR MEETING DES MOINES CITY COUNCIL

MINUTES June 2, 2005

At 7:20 p.m. Assistant City Attorney Brown announced that the Executive Session is expected to last another 45 minutes and the regular meeting may start around 7:45 p.m.

At 7:45 p.m. Assistant City Attorney Brown announced that the Executive Session is expected to last approximately another 10 minutes.

The regular study session of the Des Moines City Council was called to order by Mayor Sheckler at 7:58 p.m. in the City Council Chambers, 21630 11th Avenue South, #B.

PLEDGE OF ALLEGIANCE to the flag was led by Councilmember Sherman.

ROLL CALL - Present: Mayor Bob Sheckler, Mayor Pro Tem Scott Thomasson, Councilmembers Richard Benjamin, Gary Petersen, Dan Sherman and Maggie Steenrod. Absent: Councilmember Susan White. Also in attendance were City Manager Tony Piasecki, City Attorney Linda Marousek, Finance Director Paula Henderson and City Clerk Denis Staab.

> **MOTION** was made by Councilmember Petersen, seconded and passed unanimously, to excuse Councilmember White.

COMMENTS FROM THE PUBLIC

Jerry Bergman, 620 South 239th Street - Discussion Item #1

> Mr. Bergman noted that sometimes miss-steps and mistakes are made by elected officials and it is the expensive ones that are the ones remembered. He noted that the citizens elected the Council who are here to look out for the interests of the Des Moines' citizens. He reminded Council not to forget who elected them and the promises and the pledges that were made to protect all the citizens.

Donald Gorlick, 23641 7th Avenue South - Discussion Item #1

> Mr. Gorlick reminded Council that he represents Council's constituency, that voted them in to look out for them. If citizens do not make themselves heard, Councilmembers get to do what they think citizens want. He felt that what has happened about a project that he and others were really opposed to, makes him feel he has been "ridden hard and put away wet". He noted that the developer is not a resident. He reminded Council they need to look out for Des Moines' citizens and to not be frightened or threatened into making a decision. He noted the citizens are worried and concerned and he would like to see the same worry, concern and dedication from Council towards the citizens.

DISCUSSION ITEMS

Potential Settlement: White vs. City of Des Moines - Draft Resolution No. 04-091 ***[ASSIGNED RESOLUTION NO. 992]***

> City Attorney Marousek stated that before Council tonight is a draft resolution and a proposed settlement agreement of the case of Alex White versus the City of Des Moines and Councilmembers Thomasson and Benjamin.

City Attorney Marousek advised that Councilmembers Thomasson and Benjamin are entitled to participate in the discussion and to vote on the matter for two reasons:

1. The decision as to whether or not to approve a settlement is a legislative decision by the City Council. It is not an Appearance of Fairness Issue.
2. There is no conflict of interest for either Councilmember in connection with this matter because the City is defending both of them and will indemnify and hold them harmless in the event any monetary damages are ever granted in this case if it continues and is not settled tonight. Neither one of them has anything at risk or to gain by settling or not settling this law suit.

City Attorney Marousek reported that the proposal before Council is a resolution to approve a settlement of the White case. [ED Note: City Attorney noted copies are being prepared for citizens in the audience to review.] She gave a background on the events noting that Council rejected an application to build 8 residential units and a store, Mr. White then filed a Land Use Petition Act appeal and after a number of starts and stops, the brief from Mr. White was filed on May 16th. She noted the City's brief is due on June 7th. She advised that the City's consultant on this matter is Mr. Mike Walter, who is a land use lawyer from Keating, Bucklin & McCormick. She noted that Mr. Walter and herself have analyzed the brief, the legal arguments under the Land Use Petition Act, the state of the City's record and came to the conclusion that the City has probably not more than a 10% of prevailing in this litigation. For that reason they entered into settlement discussions with Mr. White's lawyer, Howard Jensen. She informed Council that the proposed settlement is for 4 residential units with one commercial unit, a mixed use as was proposed. The proposed settlement adopts the City Council's SEPA decision and SEPA limitations. The proposed settlement will grant an Unclassified Use Permit to Mr. White and allows him a slope exception to build on the previously disturbed areas of that slope. The proposed settlement does not allow him to start building or bulldozing tomorrow. She advised he will be required under the implicit terms of the proposed settlement agreement to apply for a demolition permit, a land clearing and grading permit, to go through City Design Review and civil plan review, before he can start building on the property. In exchange for those agreements from the City all the law suits will be dismissed including the claims against the individual Councilmembers. She further noted that Mr. White is not asking for attorney's fees or damages, and he will also dismiss his Federal Damages Civil Rights Claims against the City and its Councilmembers. She concluded by informing Council that the City Attorney's office, Keating, Bucklin and McCormack and Mike Walters strongly recommend that this settlement be adopted.

Councilmember Sherman questioned what might be the consequences should Council not accept the proposed settlement, it proceeds to Court and the City does not prevail.

City Attorney Marousek responded that there are two possibilities that the Court could require.

1. The Court might send the matter back to us, saying "you did it all wrong, do it over again".
2. If Court finds the record so poor and that the evidence argued by the other side is so strong that there is not a possibility of giving Mr. White a fair hearing, the Court can order the relief requested. In other words, 8 residential plus the commercial and he gets to develop exactly as planned, including all sketches presented.

City Attorney Marousek noted that with only a 10% chance of prevailing it seems to the City Attorney's office, it would be in the City's best interest if the Council would like to consider whether 4 units might be a better deal, than 8 units.

Mayor Sheckler questioned whether any Councilmember may wish to make changes to the draft agreement.

Councilmember Steenrod noted possible changes to the settlement agreement were suggested during the Executive Session.

City Attorney Marousek agreed with Councilmember Steenrod and noted on the top paragraph on Page 5 of the agreement where Mr. White agrees to dismiss his litigation, a clerical change should include the word "further" litigation before the City Manager is authorized to sign.

Councilmember Steenrod noted that this process has gone on for the last several years. She noted that if it had been her choice she would prefer to see that entire area zoned single family. However as legal counsel has pointed out, Council must deal with the situation as it exists. She stated that since zoning is as it is, and Mr. White came forward with a request and has taken the City to Court, she is forced to look at what is the least damaging outcome. She felt this settlement will ensure an outcome that we can live with, rather than risk ending up with something that is definitely what the neighbors did not want.

Councilmember Benjamin noted that the City Attorney gave two outcomes should we proceed to Court. He felt that there is a third option and that is that the Court could find, as he would expect, that Council acted justly in its official capacity as elected officials. He expressed that he is extremely disappointed in that he feels the system is failing the citizens. He noted that when he ran for office he swore that he would look out for all the citizens and the City as a whole. He felt Council's original decision was looking out for the citizens.

Councilmember Sherman acknowledged the citizens requests asking Council to be aware of their concerns and that Council represents them. He noted that Council clearly was representing them in what was felt to be in the best interests of the City by denying the original project. He noted it is very clear, now that there are several law suits, that Council has continued to be firm in its position. However, he noted, Council must follow the laws and we are being told the case against the City is very good. He advised that he believes the right zoning should be single family, but he cannot break the law to do that and he has been told by legal staff that the law is not on his side. He concluded that with a strong possibility of winding up with 8 units plus commercial, he will opt for the less dense outcome. He wanted it stated clearly that Council has fought this development "tooth and nail", but must follow the law.

MOTION was made by Councilmember Sherman, seconded by Councilmember Steenrod, to approve Draft Resolution No. 04-091, including the word "further" in the top paragraph on Page 5 of the Settlement Agreement.

Mayor Pro Tem Thomasson remarked that this was a difficult issue, with citizens arguing whether this property was properly zoned as neighborhood commercial. He noted that this zoning has been on this property after Council was told by former City staff it had to be zoned this way in order to comply with the Growth Management Act. He noted that Mr. White could apply for a building permit application under the existing zoning code and it would not come before Council. He stated that when Mr. White applied for a mixed use on this site, in his mind, it was not a compatible use and Council did not have the ability to negotiate. He noted he is not sure what the building will look like if it meets the language of the proposed settlement agreement, however, it does say it will meet all requirements of the Zoning Code, including landscaping and parking requirements. He noted that the original application was for townhomes, and the draft agreement is not clear, so it could be more boxier. He advised that he wished the property was zoned single family, but it is not. He felt from a City-government perspective, an outcome from a lawsuit could be devastating to the neighborhood. He noted this is a tough choice to make as an elected official.

Mayor Sheckler commented that during his 10 years serving on the Council, that he has not ever seen a single piece of property that has been so hotly contested or debated. He noted there is a lot of people that have an interest in this issue. He stated that he felt Council has done a good of a job as any human could be asked to do. He noted that approval of the motion will allow four residential units and one commercial unit on that property. If the motion is rejected it could lead to having eight residential units and one commercial unit.

Councilmember Benjamin reiterated his stance that a judge could uphold Council decision. He noted as a body, it was decided that the proposal was not in keeping with the neighborhood, therefore he will stand with his original decision and reject a settlement.

Councilmember Steenrod acknowledged that she does not always agree with legal counsel, but when Council is advised there is only a 10% chance of winning a court case, and after reading the brief, she felt she must make the best decision and uphold the law, and will support the settlement.

Mayor Pro Tem Thomasson reminded everyone that the structure that will be allowed is not the same one Council reviewed. He encouraged staff to follow the City's Code in reviewing this application. He also encouraged citizens to review the City's Code and if they have any questions on whether the Code is being followed to please bring that to Council's attention.

Councilmember Petersen noted that the Council held strong on the issues and respected the neighbors wishes. He hopes the settlement agreement will bring a more suitable building to the site.

VOTE ON MOTION: Motion passed 4 to 2 with Councilmember Benjamin opposed and Mayor Pro Tem Thomasson abstaining.

Fire District Merger

Fire District #26 Chief Polhamus reviewed the background and information material that was presented to Council at the April 28, 2005 meeting regarding the potential merger with the Federal Way Fire District. He then proceeded to present the following information:

- The Boundary Review Board approved Notice of Intention on April 14, 2005. An election can be held 60 days from this date.
- May 25, 2005 the Board of Commissioners of both fire districts passed concurrent resolutions approving the following items: a merger plan which details the organizational chart, personnel assignments, apparatus staffing, and a new name for the merged department, a new collective bargaining agreement for the union represented employees,

a new employee hand book for the administrative employees, a call for an election on the September 20, 2005 ballot and, if successful, an effective date of January 1, 2006.

- The new name will be South King County Fire and Rescue, pending approval of the King County Council.
- On June 7, 2005 District 26 Commissioners will review a resolution to place the issue on the September ballot. The vote will only occur in District 26, Federal Way citizens will not vote.

Chief Polhamus informed Council that both Districts believe this is a logical move that will improve service to the communities. He noted that consolidating delivery of special services in an urban area meets the goals of the Growth Management Act and several King County planning policies.

Chief Polhamus noted that Fire Marshall Ron Biesold will still be located at the Des Moines station 4 or 5 days a week. He advised that once the Fire Departments merge that will bring a total number of fire marshall personnel to seven that will bring more in-house specialties for the Des Moines' Building Department, which will save time and money in not having to use outside contractors.

Upon questioning, Chief Polhamus advised that there will be no changes in taxes as both Fire Departments have the same tax rate.

Councilmember Sherman noted that a Fire District #26 Commissioner had been opposed to the merger and he requested hearing from him.

Fire District #26 Commissioner Harris informed Council that he had concerns that Federal Way, with a larger voting population, will have control over Des Moines, including where the fire boat goes, which is currently located at the Des Moines Marina.

Mayor Pro Tem Thomasson stated he would be very cautious to endorse this potential merger.

In conclusion, Chief Polhamus advised Council that the Fire Districts will be holding future information meetings for the public including Huntington Park Retirement Village, North Hill Community Club, Rotary, etc.

9:35 p.m. Mayor Sheckler called for a 10 minute break.

Draft Ordinance No. 05-105 ***[ASSIGNED ORDINANCE NO. 1365]*** 2005 Budget Amendments - 1st Reading

Mayor Sheckler introduced the subject.

[ED Note: Councilmember Benjamin left the Council meeting.]

Finance Director Henderson briefly reviewed the budget amendments as listed in the draft ordinance.

Upon questioning, Finance Director Henderson stated that the Police Emergency Management Consultant was approved and funded in the 2004 budget, however it was not expended and the Police are now requesting it be a new appropriation. Mayor Pro Tem Thomasson stated that if this is a new appropriation he felt it should have to compete for funding. Finance Director Henderson noted that since the Police never started the project, then she cannot assume the money was spent. She noted this is a one time expense and it is anticipated that the City will be receiving quite a bit of one-time money this year.

Upon questioning concerning the Hotel Motel Tax Fund, City Manager Piasecki advised that the tax will not start being collected until July 1st. He noted that the Committee is still working on recommendations to bring to the full Council on how to spend this money.

In regards to the Municipal Capital Improvement Fund amount of $246,875 revenue, City Manager Piasecki informed Council that this amount was placed in the State budget, with a match requirement the City would need to meet in order to move the Senior Center. He noted with the move of the Senior Center up to the Activity Center, we are now able to put the paper work together to get that funding. It is simply reimbursing the MCI and can now be used for almost anything.

In regards to the MCI Fund and the Des Moines Creek Trail, Mayor Pro Tem Thomasson questioned since the Marine View Drive Bridge Project is paying for building the trail, could the City use some of the monies for shot-crete for the Bridge Project.

Finance Director Henderson concluded review of the expenditure and revenue adjustments.

MOTION was made by Councilmember Sherman, seconded by Mayor Pro Tem Thomasson, to suspend Council Rule 26(b) to consider Draft Ordinance No. 05-105 on first reading. Motion passed unanimously 5 to 0.

MOTION was made by Councilmember Sherman, seconded by Councilmember Petersen, to adopt Draft Ordinance No. 05-105 relating to municipal finance, amending the 1005 budget adopted in Ordinance No. 1356, as amended by Ordinance No. 1359.

At the suggestion of Mayor Pro Tem Thomasson, City Attorney Marousek stated she will amend the "Passed By" language to show the ordinance was passed by a majority of the whole, plus one, which is required for a budget amendment.

Upon questioning, Finance Director Henderson noted that the ordinance will be correcting carry-forwards for capital projects, some over sights that were not included in the 2005 budget, studies that are in progress that were not appropriated for, and new State appropriations. She advised that this is primarily increasing the total City wide budget by about $1,538,107.

City Manager Piasecki stated that this amount includes $550,000 of new revenue from the State on the MCI side, and about $500,000 to $600,000 being spent on the Bridge Project.

Councilmembers Steenrod and Sherman requested that in any future budget amendments, it should be made clearer how much is really new revenue and how much is new expenditure.

VOTE ON MOTION: Motion passed 5 to 0.

Re-Subdivision of Pre 1937 and Pre 1969 Plats

MOTION was made by Mayor Pro Tem Thomasson, seconded by Councilmember Steenrod, to continue this subject to a date to be determined by the Mayor. Motion passed 4 to 1 with Councilmember Sherman opposed.

NEXT MEETING DATE

Mayor Sheckler noted the next regular meeting will be June 9, 2005.

ADJOURNMENT

At 10:19 p.m. **MOTION** was made by Mayor Pro Tem Thomasson, seconded by Councilmember Steenrod, to adjourn. Motion passed 4 to 1 with Councilmember Sherman opposed.

Respectfully submitted,

Denis Staab
City Clerk