

ALREADY ACTED UPON ON DECEMBER 13, 2010

**COMMITTEE OF THE WHOLE
CITY COUNCIL CHAMBERS
140 WEST PINE STREET
MISSOULA MONTANA
DECEMBER 8, 2010, 2:05 – 3:00 PM**

Members present: Ed Childers, President; Stacy Rye, Vice President; Dick Haines; Lyn Hellegaard; Roy Houseman; Bob Jaffe; Marilyn Marler; Renee Mitchell; Dave Strohmaier; Pam Walzer; and Jon Wilkins

Members absent: Jason Wiener

Others present: Keila Szpaller, Jim Nugent, Alan McCormick, John Hendrickson

I. Administrative Business

Minutes dated [November 15, 2010](#) were approved as submitted

II. Public Comment on items not listed on the agenda--None

III. Consent Agenda

- A. Authorize the Mayor to sign the Neighborhoods by Design, LLC Settlement Agreement pertaining to the litigation that Neighborhoods by Design, LLC filed against the City of Missoula. ([memo](#))—Regular Agenda (John Engen) (Referred to committee: 12/06/10)

MOTION: The committee recommends the City Council approve and authorize the Mayor to sign the Neighborhoods by Design, LLC settlement agreement pertaining to the litigation that Neighborhoods by Design, LLC filed against the City of Missoula.

Jim Nugent, City Attorney, explained the background of the litigation that Bob Brugh and the Neighborhood by Designs brought against the City of Missoula. This is the lawsuit regarding the Clark Fork Terrace No. 2 out beyond East Missoula which challenged 4 of the 36 conditions of the subdivision regulations. The four conditions involved were: the trail along the river; the Kim Williams Trail extension; public works department suggested since there were utilities in the common area that this should be a public area; and the building envelopes depicted and shown on the preliminary plat. Primarily, Judge McLean was concerned about removing the ability for the owners to exclude people from land and this land was not necessary for the park dedication. Under condition #12, Bob Brugh indicated to the judge he would be willing to have a conditional easement approach to the Kim Williams Trail extension. Pursuant to the proposed settlement that result and that the city retained it's going to be important also that we try to merge Clark Fork Terrace No. 1 and No. 2 into a single a single proposal and also recognized a time extension be granted because of the ongoing litigation. It was discussed between Mr. Brugh and Mayor Engen to recommend that the impact fees for the parks and for transportation that the city has be waived with the respect to the properties involved so that there would indirectly be damages. There wouldn't be a monetary payment directly but it would be indirectly accumulating when they sell and build on the lots. Alan McCormick and another associate worked on the case and submitted a claim of \$60,000 for attorney fees. After the court document is finalized then the city will have to 30 days to pay the claim. One note the Judge made note was there was not enough detail with the subdivision conditions and wasn't adequate facts cited in support of these conditions and/or law or no authority under the subdivision regulations actually required the trail along the river for example. Mayor is recommending this proposed settlement be approved and be authorized to proceed to wrap this litigation up.

Dave Strohmaier asked Mr. Nugent what the amount of impact fees that have been garnered from these lots. Mr. Nugent stated the Finance office has calculated this number and he mentioned it was in the memo.

Mr. Strohmaier also asked Alan McCormick from Garlington, Lohn and Robinson about what sort of damages does his client be contemplating if they were at a point of litigating further.

Mr. McCormick stated the amount of damages would come from a range of factors. Due to a variety of factors they were looking at hundreds of thousands of dollars of potential damages but the Mayor has asked due to the current budget climate if they could come up with a settlement without having a significant capital outlay. The attorney fees and court costs in the amount of \$60,000 and figured the impact fees would be another indirect way to cover the damages.

Pam Walzer asked if the city is still going to get the trails and waiving the development impact fees in the amount of \$131,350 is essentially purchasing the right of way. Alan McCormick responded that is not correct. Mr. Brugh has an obligation to put in the trails he promised to provide including the one along Deer Creek road. Mr. Brugh also spoke in court hearing and promised to provide the easement along the southern side of the property. The River Front trail would not be apart of it. The damages that Neighborhood by Design has incurred are the damages in the settlement and not to purchase anything in addition.

Bob Jaffe stated the bottom line here is the city lost. He appreciated the offer they have come up with to settle without cash out of pocket. Mr. Jaffe thinks the settlement is reasonable.

Ms. Rye motioned to approve and authorize the mayor to sign the Neighborhoods by Design, LLC Settlement Agreement pertaining to the litigation that Neighborhoods by Design, LLC filed against the City of Missoula and called for the question. The motion on the question passed.

The motion passed with one abstention (Mitchell) but she consented to have the motion appear on the consent agenda.

IV. Regular Agenda

- A. Authorize the Mayor to sign the Pleasant View Estates No. 5 Settlement Agreement pertaining to the litigation that Pleasant View Homes, Inc. filed against the City of Missoula. ([memo](#))—Regular Agenda (John Engen) (Referred to committee: 12/06/10)

MOTION: The committee recommends the City Council approve and authorize the Mayor to sign the Pleasant View Estates No. 5 settlement agreement pertaining to the litigation that Pleasant View Homes, Inc. filed against the City of Missoula.

Bob Jaffe asked if anyone remembered what the original estimates in lieu of payment on parkland should have been. Jim Nugent, City Attorney, stated they tried to go with the value of the land at the time they purchased the property which was more than 1 year earlier. Jackie Corday and the Parks Department wanted a current appraisal and it should be an appraisal as a lot in a subdivision. The state law is not specific although the city has tried to address in the subdivision regulations in recent years. They tried to offer \$36,800 but Jackie Corday and the Parks Department thought it should be much greater. They are not willing offer that much again due to the litigation costs. Part of the legal problem is the judge has issued two sets rulings which were not ruled in favor on the main issue of the parkland. The affidavit from Jackie Corday was stricken from the record because it did not go before the city council. The calculations were not in the public record anywhere. The first two phases were reviewed by the county commissioners and they approved the green corridor. The parks department was worried some of dedicated parkland were going into swales or run off water. In the first two phases, the county allowed these green corridors be counted as parkland dedication calculations. When phase 3 came along the city council also counted these green ways (alleys or utility corridors) as parkland dedication and in Phase 4 there was a huge park are set aside for parkland dedication and they were given get credit for phase 5. There was no discussion as far as the green corridors.

Mr. Nugent stated the mayor is recommending the city council approve the settlement agreement as the risk here is the city could end up with nothing. The city and county have approved the green corridors.

Mr. Jaffe stated the utility corridors were discussed in committee and were rejected as part of the parkland dedication. Mr. Nugent stated they argued in their brief but the judge wasn't convinced.

Mr. Jaffe stated he feels the interpretation of how the land should be valued. His understanding is not the raw land before you put something on the land as the legislature has changed to the subdivision value of the land.

Stacy Rye stated she feels they are winning this one but the terms of this settlement is negligible. In phase 4, they wanted the utility corridors counted as parkland as greenspace.

Dave Strohmaier asked Mr. Nugent what the legal vulnerability of the city is to pursue this litigation and the courts allowing Ms. Corday's affidavit. Mr. Nugent stated the risk is the city gets nothing as the court would rule there is adequate greenspace or common area as part of the parkland dedication. As far as Ms. Corday's affidavit being stricken, it points to more detail needs to be put in the public record in front of the city council.

Mr. Strohmaier asked what the significance of Judge Harkin's retirement if this litigation is not finished before the end of the year? Mr. Nugent state the new judge could start over or pick up the pieces from prior court hearings.

Pam Walzer asked for the public who live in the area to come and comment on this settlement. She motioned to approve and authorize the Mayor to sign the Pleasant View Estates No. 5 settlement agreement pertaining to the litigation that Pleasant View Homes, Inc. filed against the City of Missoula.

Motion passed with 3 nays and will appear on the committee reports.

V. Held in committee

1. Mayor's Update – Ongoing in Committee. (Mayor Engen)
2. Updates from Council representatives on the Health Board, Community Forum, Transportation Policy Coordinating Committee, other boards and commissions as necessary. – (Ongoing in Committee)
3. Joint meeting of the Mayor, City Council and County Commission; a facilitated quarterly OPG review as directed in the [Interlocal Agreement](#) (Agenda)—Ongoing (Mayor Engen)
4. Develop short and mid-term goals ([memo](#)).—Regular Agenda (Bob Jaffe) (Referred to committee: 4/23/07)
5. Joint meeting between the Missoula City Council and the Missoula County Public Schools' Board of Trustees ([memo](#)).—Regular Agenda (Dave Strohmaier) (Referred to committee: 09/17/07)
6. Examination of Office Planning and Grants ([memo](#))—Regular Agenda (Lyn Hellegaard) (Referred to committee: 09/08/08)
7. Review CIP funding mechanism, vehicle replacement policy, department vehicle use practices, specifically Police, Fire, and Parking Commission ([memo](#)).—Regular Agenda (Ed Childers) (Referred to committee: 11/10/08)
8. Attend the UM/City luncheon hosted by The University of Montana on October 27, 2010 at 12:00 noon at the University Center, rooms #326-327. ([memo](#))—Regular Agenda (Mayor Engen) (Referred to committee: 10/18/10)
9. Update on Public Schools Major Initiatives: 21st Century Schools, Graduation Matters Missoula, and Student Achievement with Alex Apostle. ([memo](#))—Regular Agenda (Ed Childers) (Referred to committee: 11/01/10)
10. Update and possible action on bills pending before the 2011 Montana State legislative session. ([memo](#))—Regular Agenda (Marty Rehbein) (Referred to committee: 12/06/10)

VI. Adjournment

The meeting adjourned at 3:00 PM.

Respectfully submitted,

Nikki Rogers

Deputy City Clerk