

**APPROVED MINUTES
REGULAR COUNCIL MEETING
May 25, 2010
6:30 PM**

Mayor Dion Avello presiding.

ROLL CALL:

WARD I
WARD II
WARD III
WARD IV

COUNCIL MEMBERS PRESENT:

Jim Craig
Vaughn Nun
Chuck Warren, Cheryl Bannon
Tom Haynes

COUNCIL MEMBERS ABSENT:

WARD I
WARD II
WARD IV

Jim Meidinger
Heath Horyna
Mark Staats

Flag salute was led by Council President Nun. The invocation was led by Chaplain Cliff Short, McConnell AFB.

CONSIDERATION OF MINUTES

Minutes of the May 11, 2010 Regular Council Meeting.

MOTION: Nun moved to approve. Bannon seconded.
VOTE: Motion carried -5-0, Meidinger, Horyna and Staats absent.

PUBLIC FORUM:

Kathleen Avitt from the DRC stated that on Thursday, June 3rd at 9:00 a.m. they will be attempting to break a world's record by holding the worlds largest swim lesson. They are participating nationwide with a group that is using this as their forum to get kids to swim and to encourage swim lessons at the beginning of the summer. Anyone aged 4 and up is invited to Rock River Rapids for one free hour swim lesson. It will be a great time and we hope that we do break the world record We will find out with Guinness afterward.

Mayor Avello thanked everyone for the cards he has received after the passing of his mother. He also asked about the location of the light on Buckner by the post office. It appears to be in the middle of nowhere. He is not sure why it was placed there.

Kathy Sexton, City Manager, explained that is a pedestrian crossing. It's a safety issue and a matter of people being able to cross the street safely and being able to push the button so the light would turn red and they can cross at the crosswalk. There are residences on one side of the street and businesses across the street. A lot of people do walk back and forth to go get their groceries, etc. Also we are extending the bike path in that area so you will get more pedestrian and bike traffic on that bike path than what you used to get down there because there wasn't even a sidewalk there.

Mayor Avello indicated he had talked to Charlie and Reba Hubbard some time ago about their lot just south of McDonalds and suggested it might be a good area for the council to discuss a tractor trailer parking lot. Recently they have put a street in and have had some tractor trailers on that street. They have had some discussion with our zoning people about whether they can do that or not. Can we look into that to see if that might be a feasible option on that lot because it's hard to sell and not much can go on there? He's going to put a wall up and spend some money on that lot and he likes the idea of maybe doing it for the truckers. They come into town and have no place to park.

Ms. Sexton advised that if Mr. Hubbard hasn't talked to the city planner he can come into city hall and talk about whether it's zoned appropriately for that business.

PROCLAMATION:

Mayor Avello declared the anniversary of the Americans With Disabilities Act.

Jenny Thrush, Human Resources Coordinator, Judy Morris and Tina Dillon, ADA Advisory Board Members, accepted the proclamation.

Ms. Sexton explained there is a problem with the camera and electronic equipment this evening so there will be no close up shots of anyone speaking. She also advised that the agenda does not show an executive session for this evening, but one will be added at the end of the meeting.

SIGNAL IMPROVEMENTS AT THE INTERSECTION OF WOODLAWN BLVD. AND ENGLISH ST.

Dan Squires, City Engineer, presented the staff report.

Background:

- In response to concerns about the safety of Swaney Elementary students and others crossing Woodlawn Boulevard at English Street, the City requested a traffic study through the Traffic Engineering Assistance Program (TEAP) administered by the Kansas Department of Transportation (KDOT).
- The TEAP study recommended installation of a traffic signal at this location, along with related signing and pavement marking improvements.
- The signal recommendation was based on a lack of adequate traffic gaps for pedestrian movements crossing Woodlawn.
- In October 2009, the City Council voted to authorize design of the recommended improvements and to modify the City's Capital Improvement Plan (CIP) to include construction of the signal during the summer of 2010.
- Bids for construction of the traffic signal and related improvements were opened on Tuesday, May 18, 2010. The following bids were received by the City Engineer's office and witnessed by the City Clerk:

<u>Contractor</u>	<u>Bid</u>	
Sim's Electric	\$158,443.85	
Atlas Electric	132,536.52	
Phillips Southern Electric	115,091.50	
	Engineer's Estimate*	\$224,103.55

**Engineer's estimate prepared by TranSystems*

- The traffic signal is designed to maintain traffic flow on Woodlawn with interruptions only when pedestrians activate the signal or vehicles are present on English.
- The project includes revised signing and pavement markings delineating left turn lanes on Woodlawn.

Financial/Sustainability Considerations:

- The Capital Improvement Plan includes \$200,000 for design and construction of the project.
- The design fee for the project is \$14,950 leaving \$185,050 available for construction.
- The total cost of design and construction will be well within the amount budgeted.

Legal Considerations:

- To the extent financially feasible, traffic signals should be installed when warranted by an appropriate engineering study.

Policy Considerations:

- The purpose of this project is to improve safety for students and other pedestrians crossing Woodlawn, based on the results of an engineering study identifying the need at this location.

MOTION: Bannon moved to authorize execution of a contract with Phillips Southern Electric Company, Inc. in the amount of \$115,091.50 for construction of signal improvements at the intersection of Woodlawn Boulevard and English Street. Haynes seconded.

VOTE: Motion carried 5-0, Meidinger, Horyna and Staats absent.

AT&T KANSAS FRANCHISE EXTENSION

Kathy Sexton, City Manager, presented the staff report.

Background:

- One of the City's primary responsibilities is to ensure residents are provided with access to utilities, including electric, gas, water, sewer, cable and telephone service.
- In lieu of the City itself directly providing utilities, the City has the purview to grant non-exclusive, competitively neutral privileges to private companies to use public right-of-way to provide services to citizens.
 - These privileges are conveyed through franchise agreements which allow utility companies to locate their infrastructure in the public right-of-way to provide service to Derby customers.
 - In exchange, utility companies provide the City with payment via franchise fees, which are typically passed along to their customers in the City.
- The City's current franchise agreement with AT&T Kansas (Ordinance No. 1891) was granted May 22, 2007 and expires May 31, 2010.

- An extension to this contract through June 1, 2011 is recommended to continue the current terms for a one-year period, which will provide the City an opportunity to consider an increase in the franchise fee using a process defined in state law.
- Negotiations for a new agreement began several months ago and were progressing well until just this past week.
 - On Tuesday, AT&T informed the City that while it is amenable to the concept of a one-year extension of the agreement, it does not intend to remit the franchise fee until the City requires Cox Communications Kansas to remit the fee as well.
 - On Thursday, AT&T proposed a new two-year franchise agreement, with \$0.00 per access line. The proposal included no explanatory comments, and AT&T staff could not be reached for discussion prior to the agenda deadline. City staff will continue to attempt to communicate with AT&T and may have additional information to share at the Council meeting.
- The City is working to get telephone franchise agreements with companies identified as telephone service providers by the Kansas Corporation Commission (KCC). These providers include small carriers such as Birch/Ionex, Matrix, McLeodUSA/Paetec, Nuvox, and Sage.
- The City's franchise agreement with Cox Communications covers video and cable services. It is our understanding that the KCC has not identified Cox as one of the companies with which the City of Derby should get a telephone franchise.
 - When AT&T first raised the Cox issue in March, the City informed AT&T that we use the list of companies identified by the KCC. By law, the KCC approves local service providers.
 - Last week, the City contacted the KCC to learn whether Cox had been added to the list, and it has not.

Financial/Sustainability Considerations:

- Utility franchise fees are an important source of revenue for the City. Franchise fees total \$1.5 million in the 2009 budget, which is 7.5% of total general fund revenue.
- Specifically regarding revenue from AT&T Kansas, at the current rate of \$2.00 per access line (per month), the City is estimated to collect \$85,378 in franchise fees in 2010. Historically, the City has collected the following telephone franchise fees from AT&T:

<i>Year</i>	<i>Revenue</i>	<i>Difference</i>
2004	\$93,329 (\$1.50 franchise fee)	-----
2005	\$112,414	\$19,085
2006	\$117,684	\$5,270
2007	\$127,220 (\$2.00 franchise fee)	\$9,536
2008	\$128,478	\$1,258
2009	\$106,871	(\$21,607)
2010 (est.)	\$85,378	(\$21,493)

- As the table shows, revenue to the City is decreasing regardless of the franchise fee. The reduction is caused by the number of access lines decreasing each year.
- In preparing for the future, the City should expect the number of access lines to continue to decrease due to increasing cellular phone usage and the use of voice over

internet protocol (VoIP) technology, neither of which relies on traditional telephone access lines. Historically, the number of access lines has decreased every year since 2006:

<i>Year</i>	<i>Avg. Number/Access Lines</i>	<i>Decrease</i>
2006	9,429	-----
2007	7,493	(1,936)
2008	5,353	(2,140)
2009	4,452	(901)
2010 (est.)	3,557	(895)

Legal Considerations:

- The City Council is empowered to enter into franchise agreements and franchise extensions for use of the public rights-of-way in conducting telecommunications businesses.
- On June 8, 2008, the City passed Ordinance no. 1941 pursuant to K.S.A. 12-2001. This ordinance:
 - Requires local exchange service providers to obtain a franchise to provide telecommunications services within the City; and
 - Imposes an occupation tax equal to 5% of gross receipts from local exchange service but exempts providers operating pursuant to a franchise granted by the City.
- If AT&T chooses not to pay the franchise fee during this one-year extension period, then it would be required to remit the 5% occupation tax.
- If AT&T chooses not to pay the tax, it would be subject to fines of \$500-\$2,500 for each day of operation in violation of the ordinance.
- The City’s Right-of-Way Ordinance #1871, adopted by the City Council on December 12, 2006, adequately addresses right-of-way maintenance issues with all utility companies, including AT&T Kansas, that locate infrastructure in the public right-of-way.
- In the future, the City may increase the franchise fee payable by local exchange service providers, but must follow the procedure prescribed in K.S.A. 12-2001(m):
 - Notice of the new fee must be given at a regular city council meeting;
 - Notice of the new fee must be published for two consecutive weeks; and
 - If, during a 60-day protest period, a valid petition requesting a popular vote is signed by 20% of qualified voters is filed, the city must call for a vote at the next general election.

Policy Considerations:

- Franchise fees spread the public finance burden more broadly than property tax, since all customers, including those operating from tax-exempt property, pay the fee.
 - K.S.A. 12-2001(j) grants cities the ability to charge access fees to a maximum of \$2.25 per access line (per month) beginning in 2006; a maximum of \$2.50 in 2009 and a maximum of \$2.75 in 2012 and thereafter.
 - Derby’s fee has been \$2.00 since 2007. In 2004, Derby increased its telephone franchise fee from \$1.04 to \$1.50. In 2007, it increased to \$2.00.
 - According to K.S.A. 12-2001 (l), cities cannot raise access line fees more than once every 36 months. Based on this requirement and the dates that previous

franchise fees were approved, and assuming that franchise fees would increase in 2011, Derby could not consider increasing the fee to the amount allowed by law (\$2.75) until 2014.

- Staff estimates that based on current projections, if the franchise fee increases to \$2.50 in June 2011, the City will still only receive a total of \$77,326 due to the continuing trend of lower demand for land line phone service.
 - Increasing the franchise fee to \$2.50 would likely cost an AT&T customer approximately \$.50 per month.
- Late in 2010, staff will most likely recommend the Council consider an increase of \$.50 per access line (per month). Following the requirements of state law for a fee increase, such a recommendation would be timed to provide the required notice, publication, and protest period in time for a vote at the April 2011 general election. The new fee would take effect on June 1, 2011 when a revised AT&T Kansas franchise agreement would take effect.
- New franchise agreements that are in process of development with five small carriers are being developed with a fee of \$2.50 and will be presented for Council approval at upcoming meetings as soon as details are worked out with each company's representatives.

DISCUSSION:

Council Member Bannon asked how much the 5% occupation tax would be for AT&T.

Stephanie Knebel, Assistant City Manager, stated that Mr. Depperschmidt, in previous conversations had indicated it would be somewhere around \$14,000 a quarter. It would be less than what we are getting from the access fee. We now get approximately \$20,000 a quarter from AT&T on the per access line.

Ms. Sexton clarified it would be \$56,000 compared to an estimate of \$85,000 for the access line fee.

Les Depperschmidt, AT&T, read from the letter Ms. Sexton referred to that was dated July 24th, 2006. He stated that in his business today, AT&T is no longer a dominant provider. Across the State of Kansas, across the country and in Derby, they no longer serve the majority of customers. When he mentions how important this is, it gets down to the consumers; our customers, your constituents and the paying public. As Kathy mentioned our customers are required to pay a \$2.00 per line fee, per month which he thinks is a pretty fair amount. Our competitors are required to pay nothing at this point. Our major competitor believes they should not have to pay it. Our legal staff has taken this as high as the FCC staff. The City of Wichita legal department has done the same. Both of our legal staffs are in agreement that they are required to pay this. We have finally just come to the point where it's a very critical issue to our company. We think it's not only unfair, it's against the law for us to be required to pay and our competitors not pay. That is why we are taking the stand that we are taking, he thinks cities should have franchise agreements with AT&T, he thinks they should have it with all of them. Money is the issue in most cases and it's a major issue in this case. The other item in the contract ordinances that he thinks is important to everyone is dealing with annexation of new property. As the cities do that

our contract ordinance requires them to send us notification of that and there are guidelines as to what information is needed so we can get that on our maps and in our records so when someone moves into the city, in a new area we have that information when they hook up telephone service with us and we collect that franchise fee from them. The way existing law states, we are all or none required to do it. Everybody is to be treated equally, including our cable friends. They may not agree with that but there is a lot of disagreement with them.

Council Member Craig understands the position. It appears the disconnect is at the state. The City of Derby is following one set of rules and other people are following another set of rules. If this were to come about where the franchise fee of \$2 per line goes down does that mean the customer's basic rate would go down \$2?

Mr. Depperschmidt advised it would. He passed out a proposed 1 year extension to the council.

Council Member Craig advised when the \$2 was discussed in 2007 it was obvious it would be passed on to the customer. The numbers don't look that good as far as the reduction in customers year after year. Last year you lost about 900 and the previous year lost about 900. That has a lot to do with the technology that is available and people opting out of land lines and going with cell phones. He asked which law trumps all of these and says "this is what has to happen." It appears to him that Derby is on the sideline. We have had an agreement with AT&T and it appears to him that some law should take precedence over another law and if what you read is true, that it's required by someone other than Derby, then he would say that AT&T's legal team should be talking to those folks. We are just on the sideline looking at this. Last time we raised it to \$2 and kept it below the maximum and it's passed on to the customer. The competitive market is razor sharp right now so he understands being able to lower rates, even by \$2. Which law trumps which law? Once we know that, that's who the initiative should be made to straighten this out. There is a major disconnect at the top, not at our city level.

Mr. Depperschmidt stated that the existing statute answers that question. It says that a city "may require", it's up to the city if they want to have a contract ordinance and have a franchise fee. To him that puts the city as the lead person if you will. If they decide they want to implement the franchise fee then it's their duty to determine who all the local providers are. The KCC maintains some information. He calls his competitors to see what type of service they have and if they charge a franchise fee. The answer is no. To him that answers his question. You can send our competitors a certified letter from the city attorney requesting that same information and wait for their response. He thinks the city is the lead organization. If they decide to do that then all providers should be treated equally.

Council Member Bannon asked if AT&T intended to pay the occupation tax.

Mr. Depperschmidt advised he hoped we don't get to that point. He doesn't know, they have not had a discussion on the occupation tax.

Council Member Bannon asked about AT&T's planned expansion. U-Verse has just opened in the Derby area, do you plan to continue expanding in Derby?

Mr. Depperschmidt indicated they did plan to expand, just last month they added some more territory. He explained there are two opportunities for cities to generate revenue. One is for local service telephone providers and the other is for video, which we also have an agreement with the city that our customers pay 5%. We are paying both and we prefer that everybody does that.

Council Member Bannon clarified that the approved list of local providers is determined by the KCC correct? According to that list we are currently in negotiation on franchise agreements with everyone on that list?

Ms. Sexton advised that was correct. We have identified that there are five on that list that do business in Derby and we have communicated with all of them. Some of them are further along but basically we will have agreements with them.

Council Member Bannon clarified that the one that Mr. Depperschmidt is referring to and has issue with is not on the approved list, correct?

Ms. Sexton advised that was correct.

Council Member Bannon stated that as she understands it there are three different types of providers: landline, cable and wireless, and they each have their own set of guidelines so to speak. We are going by those guidelines as far as our collection of fees?

Ms. Sexton advised that regarding the earlier question of which law takes precedent, Mr. Depperschmidt answered it well from AT&T's perspective but the other perspective would be that there are federal communication laws that take precedent over the state law. There are all these arguments that can't be figured out in this room and certainly not tonight. It's more of a court of law type thing. She is not sure if that is the intent of what is happening here is to get us into a court of law or what. She asked Mr. Depperschmidt about U-Verse, if you are paying the video franchise fee on U-Verse, are you also paying the telephone franchise fee?

Mr. Depperschmidt indicated they are paying both.

Council Member Bannon clarified that if she was a U-Verse customer she would be paying the video fee and the hard line access fee of \$2, correct?

Mr. Depperschmidt explained that one of the new ways to communicate is VoIP. Today, and it may change in the next few months if the FCC has their way, presently VoIP or the internet itself is classified as an information service as opposed to a telephone or telecommunications service. Being an information service that is regulated by the FCC, they trump the state law. The question is, from a consumer standpoint we have customers who have U-Verse but choose to have local switched telephone service which would apply to our \$2 per month access line fee. Our competitors can do the same thing. He won't speak for his competitors, but there are some that would say that "we provide VoIP services." His question would be, do you provide VoIP services to all of your cable customers that have telephone service?

Council Member Bannon clarified that if she were a U-Verse customer she would be paying the video fee and the access fee and AT&T intends to collect those fees and pay that to the City of Derby, yet you don't want to pay us the \$2 per line access fee in the franchise agreement.

Mr. Depperschmidt agreed. If we have a U-Verse customer that has our video services, you don't necessarily have VoIP voice.

Council Member Bannon clarified that as a U-Verse customer AT&T is collecting those two fees and passing it on to the City of Derby, correct?

Mr. Depperschmidt agreed.

Council Member Bannon stated that if she is simply an AT&T phone customer, you are going to collect the \$2 and not pass it on to the City of Derby.

Mr. Depperschmidt stated, not based on the agreement. That suggested ordinance says that we want to suspend collecting and remitting.

Council Member Bannon stated that AT&T will collect and remit for U-Verse customers but not AT&T phone customers.

Mr. Depperschmidt advised it is two separate contracts. We have an agreement for video and an agreement for local telephone service.

Council Member Bannon clarified that AT&T will pay the telephone and video access fee on U-Verse but not the telephone access fee on the telephone.

Mr. Depperschmidt agreed, it is totally separate from U-Verse, this is only for local telephone service.

Council Member Warren stated that when it comes to taxes/fees he thinks there should be an even playing field. He asked if AT&T will continue to charge its customers the franchise fee if we were to pass our ordinance and AT&T chose not to pay. Would you continue to charge customers the \$2 fee during that period?

Mr. Depperschmidt indicated that decision had not been made.

Council Member Warren restated the question, if AT&T chooses not to pay the fee, would the customers continue to be charged?

Mr. Depperschmidt advised they would not.

Council Member Warren stated that he doesn't think that Derby is the only city AT&T is having these issues with. He asked if AT&T intends to follow through on this policy with all the cities that have cable service and have similar situations where there is an unfair advantage to one company over another?

Mr. Depperschmidt advised they are doing that. He has been in front of this, particularly with the City of Wichita. As they come due that is when we are dealing with this issue. We don't want to sue anybody; we don't want to be sued. We are just asking to be treated like we believe the law says we should be treated. In 2007 our customers were being penalized for being our customers. Two dollars a month for a residence is \$24 a year, not a lot of money to some people, more to others. A business that has 5-6 lines is \$10 a month, \$120 a year. It's a competitive issue as much as an unfair or illegal issue. Regarding Mrs. Bannon's question of whether or not they would pay the occupation tax, he quoted a section from Ordinance 1941. If this were enforced and they all went to what was addressed in the ordinance, they would pay it for as long as our customers are required to pay what our competitors' customers are required to pay.

Council Member Bannon agreed that Ms. Sexton is probably right that this may be a matter for the courts to decide, not us and certainly not this evening. It sounds like a lot of it might be semantics. What stands out to her is that we receive franchise agreements from those on the approved list provided by the KCC. She hates to see that AT&T customers, residents, constituents, tax payer dollars may have to be used to get the money owed the City of Derby.

MOTION: Bannon moved to authorize an extension of the current franchise agreement until July 1, 2011. Craig seconded.

Council Member Craig stated that obviously the customer base is eroding. Over the last four years there was a loss of 62% in the number of lines. That is an incredible reduction. When we looked at this back in 2007 there were a couple thousand lost and that seemed large then. Now when you look at it you've lost 62% in the number of lines. He asked if there was the same type of charge on internet service. If you have phone, internet and TV, are all those in line for this franchise agreement?

Mr. Depperschmidt advised it is spelled out in the statute. Not all of the features fall under this jurisdiction.

Council Member Bannon withdrew her motion. Craig withdrew his second.

MOTION: Bannon moved to authorize an extension of the franchise ordinance until June 1, 2011. Craig seconded.

Ms. Sexton advised that one of the things in the version that was presented at 3:30 today was an error in our version that was in the agenda packet in the name of the company. We will fix that piece. The one that Mr. Depperschmidt passed out tonight is the last one we received and has the name change in it and in the "now therefore" clause, there is one addition there that basically adds in "except section 3 thereof...". The motion does refer to the one in the agenda packet with the change in the name of the company.

Council Member Bannon clarified that her motion was to recommend the one that staff has recommended in their report which is our current franchise agreement, to extend that for one year.

Council Member Warren advised that this issue is way over his head. We are dealing with federal rules and regulations, state rules and regulations and jurisdictions. He is going to vote in favor of the motion because it is an extension of an agreement we have had in the past. Until he understands what he wants to change he will go with what we've had in the past. He does understand AT&T's argument and the aspect of a fair, level playing field is paramount to any kind of fee or tax. His vote may change in the future but for now he will go with what we've had.

Mayor Avello asked if we go ahead and pass this and AT&T says they aren't paying, what have we accomplished?

Ms. Sexton explained that this is an extension agreement. It is a one page, simple document for both parties to sign. With your authorization tonight, as a body that meets twice a month for a deal that ends in less than a week that we just found out that this was a problem so to speak. We were just presented with new language at 3:30 today. It's not a comfortable environment in which to make big decisions or to do business to be presented with something at the last minute. The reason she recommends this action is because you meet twice a month and it expires next week. We certainly haven't had a chance to think through all the options but we think this would at least give AT&T one more week to think through the options and discuss some things with us. The option of what they presented today really doesn't do anything for us. She doesn't see any advantage to the city and the taxpayers of the community to pass anything but this one. This is at least the action you can take and give staff the authority to see if there is anything we can work out with AT&T or pursue other things.

Council Member Craig advised last year we had another issue that had to do with data transfer and something came up right at the last minute. He would hope people grab a hold of their senses on this. This is only a week old. Not many people have had a chance to digest this and make a proper evaluation. It put us in a position of shooting from the hip and he doesn't want to do that and he doesn't want AT&T to do that again.

Mr. Depperschmidt stated it is a big deal to them. Our customers are being disadvantaged. They have been disadvantaged for a long time and it has impacted our numbers and will continue to do so. He is asking for a temporary break based on what the law says, the agreement says up to a year or before. If we get these other providers in agreement call him. We are ready to work through it. The extension is there and he thinks they have been very patient.

VOTE: Motion carried 4-1, Warren abstain, Meidinger, Horyna and Staats absent.

REGULATION OF TRUCK OPERATIONS ON STREETS AND HIGHWAYS

Robert Lee, Chief of Police, presented the staff report.

Background:

- In an effort to reduce the volume of truck traffic causing a nuisance in residential areas, an ordinance is proposed to designate truck routes through the city.
- The ordinance would regulate the operation of trucks in excess of 20,000 pounds (gross vehicle weight). The truck routes are as follows (see attached map):
 1. Highway K-15 from the north city boundary to the south city boundary
 2. Rock Road from the north city boundary to the south city boundary
 3. Patriot Avenue from the west city boundary to the east city boundary
 4. Market Street from Highway K-15 to the west city boundary.
- The ordinance would not apply to trucks used to provide services or make intra-city deliveries when driven by the most direct route between origin and destination, using truck routes whenever possible.
- Trucks making multiple deliveries and servicing multiple locations may use the most direct route when traveling between stops or back to a truck route. The ordinance does not apply to trucks owned by a public agency when used for official business.

Financial/Sustainability Considerations:

- Reducing truck traffic on residential streets, which are not designed to the standards of collector and arterial streets, should reduce maintenance costs over time.
- Production and installation of signs designating the routes will require nominal cost.

Legal Considerations:

- Regulation of truck traffic on City streets is within the general police power of the City.
- Violations of this ordinance would be prosecuted as traffic offenses in Municipal Court.

Policy Considerations:

- The ordinance was reviewed by the City Attorney and recommended by the Ordinance Review Advisory Board (ORAB) on 4/20/10.
- It is common policy for cities to designate truck routes. Such signage is helpful to truck drivers who look for the most direct route with the most favorable conditions (speed limit, pavement quality, etc.) through a city, especially a city with which they are unfamiliar.

MOTION: Craig moved to direct staff to schedule approval of an ordinance regulating operation of trucks on public streets and highways in the City for the June 8 Council meeting. Nun seconded.

VOTE: Motion carried 5-0, Meidinger, Horyna and Staats absent.

AMENDMENTS TO ARTICLES 2, 4, 6 & 9 OF THE ZONING ORDINANCE

Bud Newberry, City Planner, presented the staff report.

Background:

- The current Derby Zoning Ordinance was established on December 3, 1991, with adoption of Ordinance 1414 by the Derby City Council.
 - The Planning Commission is authorized to implement the Zoning Ordinance by KSA 12-736 and 12-741 seq.
 - One of the duties of the Commission is to recommend amendments to the City Council from time to time.

- After the required notice and public hearing, the Planning Commission by a vote of 7-0 recommended approval of the proposed amendments to Articles 2, 4, and 6 but disapproval of the amendment to Article 9.
- City staff recommends all of the proposed amendments be approved by the City Council.
- The City Attorney drafted amendments to Article 9 as a separate ordinance for the City Council’s consideration because, unless it is referred back to the Planning Commission, approval would require a minimum of six affirmative votes.

Proposed Amendments:

- **Article 2, Section 200, G. – Vesting of Development Rights:** Changes the language to follow requirements of state statute.
 - The recently amended statute provides that for all residential developments, vesting will occur upon recording of the plat and the developer will have 10 years to begin construction.
 - For all other properties, vesting will occur with the issuance of permits, and the developer will have 10 years to complete “substantial work.”
- **Article 4, Sections 401-406, new subsection F or G – Use Limitations:** Adds new subsection restricting the square footage and height of additions to existing principal structures. The proposed amendment was prompted by several complaints about large additions made in a couple neighborhoods that did not fit in with the character of the structures in those neighborhoods.
 - The square footage would be limited to 50% of the original structure’s floor area.
 - The height would be limited to the height of the principal structure.
 - An addition greater than 100 square feet would have to be accessible through an interior doorway in addition to any access provided from the outside.
- **Article 6, Section 600, C – Bulk Regulations:** Limits height of accessory structures built on residentially zoned properties to 20 feet, rather than the current 15 feet.
 - This proposed amendment was prompted by several complaints that the current code would not allow a two-car garage that is 24 feet wide because the roof pitch would be 18 feet high. This is a fairly common size of garage for which requests were denied at the staff level and then some proceeded to the Board of Zoning Appeals. In some cases, the BZA approved the construction.
 - Amending the ordinance would result in more consistency, a more reasonable code, and a less cumbersome approval process for applicants.
- **Article 9, Section 901, A – Zoning Permits:** Clarifies the types of structure which may be located on or within a platted or recorded public easement or an existing utility installation.
 - Current code allows buildings (like storage sheds) to be built in the easement as long as they are “movable” so as not to impede City access to repair a sewer line or other utility work. Generally, such buildings are built on skids and may be 10’ x 10’ in size. Over time, the skids sink into the dirt and become rather unmovable due to weight and inability for equipment to access them. As a practical matter, such buildings can rarely

be relocated without substantial damage and cost. In some drainage easements, structures can re-route or dam up the flow of surface water, causing neighbors to voice concerns.

- The purpose of the proposed amendment is to keep structures from being built in easements so as to avoid conflicts between the City and property owners that result in loss of property to residents. Under the proposed ordinance, certain fences and signs would continue to be allowed in easements, and property owners would continue to assume the risk and liability for any reconstruction or replacement necessary if utility maintenance is required in the easement.

Financial/Sustainability Considerations:

- Approval of these amendments will not result in any city expenditures.

Legal Considerations:

- The proposed amendments to the City’s zoning regulations are a permissible exercise of the City’s police power.
- All conditions precedent to consideration and approval of these proposed amendments to the zoning ordinance by the Council have been satisfied.
- The Governing Body has the same options available to it as with any other zoning amendment.

Policy Considerations:

- Article 1 of the Derby Zoning Ordinance states that one of its purposes is to “regulate and restrict the height, number of stories and size of buildings and structures” within the city to (1) promote uniformity and (2) limit the construction of unorthodox or abnormal structures that are not in character with most residential neighborhoods.”
- Discouraging placement of structures or other valuable improvements over a public utility easement or utility installation is a matter of good public policy which should reduce future conflicts.

ORDINANCE NO. 2021

AN ORDINANCE AMENDING SECTIONS 200, 401, 402, 403, 404, 405, 406, AND 600 OF THE ZONING ORDINANCE OF THE CITY OF DERBY, KANSAS, REGULATING LAND USE WITHIN THE CITY; AND REPEALING ORIGINAL SECTIONS 200, 401, 402, 403, 404, 405, 406, AND 600 OF SAID ORDINANCE.

DISCUSSION:

Council Member Warren indicated he lives on a cul-de-sac which means he has a very small back yard. If this ordinance goes into place and he wanted to put a shed in his back yard he would have to put the shed in the middle of his yard. He understands where staff is coming from in the desire to have access to our easements. As it stands now there is an appeal process through the Board of Zoning Appeals. He wants to make sure we have wording in our ordinance, or someplace, so if someone were to go to a Board of Zoning Appeals they would understand this is a possibility and that we in fact placed it there so there might be times when

we actually would approve of something like this. When you allow people to put something in, it's fine for the person that puts it in, but when they sell that home the new homeowner doesn't know about the agreement and the city comes in and almost destroys the shed to get into the easement and they say "no one told me." It's the same problem we run into on special assessments. He asked there be some wording required to be posted on or near the building advising it is in an easement and the city has the right to remove it if necessary and the cost would belong to the homeowner.

MOTION: Warren moved to send Article 9 of the Derby Zoning Ordinance back to the Planning Commission. Craig seconded.

Mayor Avello clarified that Mr. Warren is only making a motion on Section 9.

Council Member Warren agreed.

Council Member Craig asked how many instances have we had where this occurred.

Ms. Sexton advised it does not happen often. Typically our crews find ways to get around that.

Council Member Craig agrees with Mr. Warren. There are some easements we have that have nothing in them. Why would you want to have a hard and fast restriction when there is nothing in the easement and probably never will be because the development is complete.

Council Member Bannon advised there is a reason to make a hard and fast rule. Once you get something on skids it takes a really big piece of equipment to move a fully loaded 10 x 10 shed and you have to have access to get that piece of equipment back there. There are places where there is no easement and there are places like Mr. Warren's backyard. There needs to be a method to get them there, that's what the BZA is for. She agrees with Mr. Warren that the sign is a good idea. Anything that communicates information to future homeowners is a good idea. She agrees it should go back to Planning Commission but hopes it comes back with a recommendation to pass it as no moveable sheds in the easements. We do have methods around that if need be but otherwise we need to do this.

VOTE: Motion carried 5-0, Meidinger, Horyna and Staats absent.

MOTION: Craig moved to approve an ordinance amending Articles 2, 4, and 6 of the Derby Zoning Ordinance as presented. Bannon seconded.

VOTE: Motion carried 5-0, Meidinger, Horyna and Staats absent.

CONSENT AGENDA

Kathy Sexton, City Manager, presented the staff report.

MOTION: Bannon moved to remove the natural gas line item from the consent agenda. Warren seconded

VOTE: Motion carried 5-0, Meidinger, Horyna and Staats absent.

Council Member Bannon advised that in looking at the figures and the plat map, the City of Derby is paying approximately 1/3 of the cost of the line?

Phil Alexander, City Attorney, advised that was correct.

Council Member Bannon asked why that would be when there are numerous other lots up there and normally the cost for those items is divided out a little more equally.

Mr. Alexander advised one reason is that we have no way of knowing how the rest of the park is going to develop, other than our own site. It is platted one way but will develop according to the market so there may not be anywhere near that many different shares. Another reason is that we are the party that has the immediate need for the gas line. If it weren't for our site being improved Mr. Lusk would be able to install that pretty much at his convenience when his market dictated.

Ms. Sexton advised that other businesses when they come in will have to pay for hooking on to this line or other lines as well.

Mr. Alexander agreed.

Ms. Sexton explained the total given here is not the total for gas service to the entire park, it is just the one line required to reach us.

Resistance Equipment for High, Hand, Crane & English Parks

Background:

- The purchase of outdoor resistance equipment was planned in the 2010 Capital Improvement Plan to provide fitness opportunities for adults in four city parks. The plan is to locate the equipment near playgrounds so that adults supervising their kids can workout at the same time.
 - High Park – Cardio Stepper, Squat Press, and Chest Back Press
 - Hand, Crane & English Parks – Cardio Stepper at each
- Athco, LLC provided a quote for six pieces of Landscape Structures HealthBeat Station resistance equipment and installation for \$30,172. After Public Works searched the internet and playground equipment catalogs to find comparable hydraulic outdoor resistance equipment and found none, Athco was determined to be a sole source provider.
- The bid board approved the purchase on May 5.

Financial/Sustainability Considerations:

- This equipment was included in the approved 2010 budget for \$31,500.
- The \$30,172 quote includes purchase and installation.

Legal Considerations:

- The City's purchasing procedure was followed in soliciting quotes for this purchase.

Recommend a Motion to:

- Authorize the City Manager to execute a contract with Athco, LLC for \$30,172 to purchase outdoor resistance equipment for High, Hand, Crane & English Parks.

Agreement for Funding Natural Gas Line to Serve Public Works Facility

Background:

- The City acquired a site for its new Public Works Department facility, located in the Derby Corporate Park subdivision.
- As part of the consideration for the site, the City agreed to share the cost of infrastructure, to include the required natural gas service line.
- The facility will be completed in late summer or early fall of this year, and will need gas service at that time.
- Derby Corporate Park LLC has contracted with Gas Service Company to install the required gas line at a cost of \$86,177.75.
- The City and Derby Corporate Park LLC have negotiated the City’s share of the cost based on the size of the area served and the priority of the City’s need for service.
- The gas line will be completed in time for opening of the facility.

Financial/Sustainability Considerations:

- The City will pay \$29,062.50, its share of the cost of installing the required gas line, directly to Gas Service Company.
- There are sufficient funds in the project account to meet the City’s obligation under the agreement.

Legal Considerations:

- The agreement between the City and Derby Corporate Park LLC, by which the City acquired the site, calls for sharing of infrastructure costs equitably.

Recommend a Motion to:

- Approve an agreement with Derby Corporate Park LLC for sharing the cost of a gas line to serve the City’s new public works facility, at a cost of \$29,062.50.

MOTION: Warren moved to approve the consent agenda as amended. Bannon seconded.

VOTE: Motion carried 5-0, Meidinger, Horyna and Staats absent.

MOTION: Nun moved to approve an agreement with Derby Corporate Park LLC for sharing the cost of the gas line to serve the city’s new public works facility at a cost of \$29,062.50. Craig seconded.

VOTE: Motion carried 5-0, Meidinger, Horyna and Staats absent.

The council recessed at 7:50 p.m. for the El Paso Water Company Meeting.

The council returned at 7:51 p.m.

EXECUTIVE SESSION

MOTION: Nun moved to recess to executive session at 7:51 p.m. to discuss matters of attorney/client privilege for a period of 20 minutes, to return at 8:20 p.m. Haynes seconded.

VOTE: Motion carried 5-0, Meidinger, Horyna and Staats absent.

The council returned at 8:20 p.m., Council Member Nun advised no binding action was taken.

ADJOURNMENT:

MOTION: Craig moved to adjourn at 8:20 p.m. Haynes seconded.

VOTE: Motion carried 5-0, Meidinger, Horyna and Staats absent.

Dion P. Avello, Mayor

ATTEST:

Jean Epperson, City Clerk