

**APPROVED  
REGULAR COUNCIL MEETING  
September 8, 2009  
6:30 PM**

Mayor Dion Avello presiding.

ROLL CALL:

WARD I  
WARD II  
WARD III  
WARD IV

COUNCIL MEMBERS PRESENT:

Jim Craig, Jim Meidinger  
Heath Horyna, Vaughn Nun  
Chuck Warren, Cheryl Bannon  
Tom Haynes, Mark Staats

Flag salute was led by Council President Mark Staats. The invocation was led by Pastor Brad Beets, Pleasantview Baptist Church.

**CONSIDERATION OF  
MINUTES**

Minutes of the August 11, 2009, Regular Council Meeting.

MOTION: Craig moved to approve minutes of August 11, 2009 Regular Council Meeting. Haynes seconded.

VOTE: Motion carried 8-0.

**PUBLIC FORUM**

**Charlie Cadwell**, Lions Club International explained there is a new noon Lions Club that is being formed in Derby. Lions are made up of community minded individuals who want to serve their community and make their community a better place to live. There has been a Lion's club in Derby since the early '50's but it's an older club that meets in the evening and they want to reach some of the younger folks and people who have other commitments in the evening. They started the noon Derby Lions Club in August and have had two organizational meetings so far. They are meeting again at 12:00 tomorrow on the 9<sup>th</sup> and on September 23<sup>rd</sup>, the 2<sup>nd</sup> and 4<sup>th</sup> Wednesdays at Dillon's Marketplace, they have a meeting room back in the pharmacy area. Their goal is to get a club going here and provide more services to the community. Lions have youth programs, sight programs collecting and providing eye glasses, etc. Lions is the world's largest service organization and there are many great people who have become Lions. We have a couple of folks from the city that are actively involved in the club already and they have sent out a community needs assessment in order to determine some things the community needs that we can help with.

**Heath Horyna** thanked everyone who participated in getting Summer Fest put together. It was a wonderful outing for him and his family.

**Kathy Sexton**, City Manager stated at the last meeting the council had some discussion regarding special event permits and having an ordinance to allow alcohol to be served at such events located at several publicly owned facilities, namely the Derby Recreation Commission, the Community Room at the new library and High Park. The council requested staff to hurry up and move that along a little faster. We did check in with the DRC, they were planning to address it in October but we asked them to address it at their meeting tonight. They considered that request and decided they did not want to address that issue at all. Her understanding is that the DRC has decided they will not address the issue of alcohol. We already have recommendations from the library board and the park board both indicating they would rather not see special events allow alcohol. She recommended to the council that we discontinue working on this issue and at the next council meeting on September 22<sup>nd</sup>, the priority list will be updated that no longer includes that item and your vote on that list at that time can be the official action to remove it from the priority list. It seems pretty clear the advisory boards have spoken, either by not addressing it or advising against it.

**Council Member Staats** agreed with Mr. Horyna regarding Summer Fest. He thanked everyone for all of the hard work.

**Council Member Craig** read a statement regarding the alcohol ordinance: With all due respect to my fellow council members I believe that closure on the item of “special permitted” alcohol on public property and/or facilities is required.

During the close of the last Derby City Council meeting this ordinance was discussed and Councilman Meidinger attempted to put this item to bed. A significant amount of dialog was heard about letting the process continue to a conclusive ending. The city manager along with Councilman Warren were most insistent in letting the item continue through the process and inferred that it would finalize itself when the proposed “alcohol ordinance” was presented to the council for a vote.

What is now being proposed is to let the item “die” an unnatural-disappearing death without direct action from the council. Let it drop off the list and it will “disappear”. In other words the council will not have to take a position or vote on the matter because it is no longer on the priority list. The facts are that four entities (Park & Urban Forestry board, Library board, Economic Development Board, and Derby Recreation Commission (DRC) Board) were asked to make their input/position about participating in special permitted alcohol. Those inputs are now a matter of record and each Board has made their decision known as “not wanting to participate.” That in itself is a strong message on the proposed ordinance. The Assistant City Manager has spent many hours attending meetings to present the draft ordinance and briefing the individual boards on the importance of their input to the process of moving the ordinance forward. The Ordinance Review Advisory Board spent several meetings dealing with various drafts of the ordinance and fielding questions from several concerned citizens. I feel the council has an obligation to support the unanimous positions of the four boards to “not wanting to participate.” Those boards spent valuable time working on their decisions for input to the Ordinance Review Advisory Board and the City Council.

Personally, I was opposed to this alcohol on public property ordinance when it first appeared on the city manager's list of priorities. I have been very open and upfront about my position on the issue, and if my memory serves me correctly I am the only council member that took a firm position, from the very beginning, on the matter while others didn't know, needed more information, or wanted input from their constituents (which they certainly received – as documented at the last meeting, the call ratio was 63 against and 2 for the ordinance- that was my input and it was agreed to by several others on the council). During the recent pre-election candidate forum, I again stated my opposition to the alcohol ordinance initiative while others chose a "wait & see" position. The boards have made their input, constituents have an overwhelming "negative" and I hope that by now individual council members have made up their minds about this ordinance.

**Motion:** Craig moved that the council support the collective decisions of the Park & Urban Forestry Board, Library Board, Economic Development Board and Derby Recreation Commission board, each wanting not to participate in special permitted alcohol on public property/facilities and hereby direct the city manager to officially remove the item from council's list of priorities, thus putting the "alcohol ordinance" to bed. (motion dies for lack of a second)

**Mayor Avello** asked if, during public forum, they can entertain a motion to take a vote.

**Phil Alexander**, City attorney advised that the public forum is not a venue for taking action. He also added that council policy requires a vote to take up an off-agenda item.

**Council Member Craig** advised he did not offer an off-agenda item, he just made a motion.

**Mr. Alexander** pointed out it is not on the agenda as far as he knows.

**Council Member Meidinger** stated he thinks we need to act officially on this after all of the work that has been put on this item and take an official stance and let other council members in the future know how we addressed this and why we took the action we did. If we can't take action tonight can we get it on our next council agenda?

**Council Member Warren** suggested we delay this action to later in the meeting and if one of the council members wants to bring up an off-agenda item we can go through that procedure at that point.

**Mayor Avello** agreed it can be addressed later in the meeting.

## **LAND ACQUISITION & RELOCATION ASSISTANCE**

**Stephanie Knebel**, Assistant City Manager presented the staff report.

### **Background:**

- The City of Derby is using state or federal grants for construction of three capital projects: (1) Southeast Sewer Interceptor, (2) Phase 6 Bike Path, and (3) Extending Madison Avenue west to Water Street.
- The Kansas Department of Transportation (KDOT) will actively monitor these three projects to ensure all activities are done in accordance with federal and state regulations. Activities include the management, appraisal, acquisition, relocation assistance, title and closing, condemnation and property management for the required permanent and temporary easements, as well as any other agreements required for construction and maintenance activities.
- Because of the type of funding being used for the sewer interceptor project, the Kansas Department of Health and Environment (KDHE) and the Environmental Protection Agency (EPA) may also conduct project audits.
- Records and documentation for all aspects of land acquisition must be made available for inspection by KDOT, KDHE, and EPA even after the project is complete. The records that must be minimally retained include:
 

Correspondence (phone, e-mail, letter)	Title Documents
Design Summary Information and Plat	Appraisals and Review Appraisals
Negotiator's Notes	Administrative Settlement
Signed Contracts	Conveyance and Closing Documents
Relocation Forms	Relocation Agent's Notes
Condemnation Documents (if used)	Proof of Payment
- The City Attorney has recommended that the federal acquisition process be followed for a fourth project, the reconstruction of Buckner from Kay to the south city limits, primarily to ensure consistency in both the treatment of citizens and the overall acquisition process.
- The City is subject to losing grants for any of the three projects if the acquisition process is not followed correctly.
- Due to the expertise needed to follow state and federal land acquisition and relocation requirements and to the work load of Engineering staff, it became apparent that assistance is needed. Generally, the scope of work for each temporary and permanent easement includes:
  - Recommending an acquisition strategy that meets state and federal guidelines as well as the city's project budget.
  - Implementing the acquisition strategy.
  - Documenting each individual parcel that meets all state and federal requirements.
- The land acquisition firm will contact 42 property owners to acquire 20 permanent easements and 30 temporary easements.
- A request for proposals (RFP) for professional land acquisition services was issued June 8, 2009. The RFP was posted on the City's web site, notification letters sent to companies listed on KDOT's list of approved consultants, and an informational e-mail sent to the Wichita Area Association of Realtors.
- The City received four proposals on July 8.
- The review committee, which included Assistant City Manager Stephanie Knebel, Community Development Director Charlie Brown, and Budget Analyst Eddie Sheppard, reviewed proposals and selected three firms to interview.

- ◆ The Committee interviewed The DAN Group (\$33,706), Land Acquisitions, Inc. (\$46,000) and Right of Way Acquisition (\$34,400). The fourth firm (Gates, Shields & Ferguson) was not interviewed due to cost (\$73,600).
- ◆ In addition to understanding the content, qualifications, and experience of the proposals, the review committee concentrated on two key areas:
  - 1) Approach/customer service to ensure that property owners are treated with respect and patience as the acquisition process is explained to them.
  - 2) The potential need to hire another company to provide appraisal services.
- ◆ Land Acquisitions, Inc. clearly provided the strongest proposal in both of these key areas.
- ◆ Based on current knowledge about the scope of work, Land Acquisitions believes they will need a formal appraisal for only one property, the cost of which will be which identified through a separate RFP process targeting local certified appraisers.
- ◆ During the interview process, the two other firms stated they would require formal appraisals to be completed on all parcels before beginning their acquisition process. Based on the experience of other local governments that acquire easements on a regular basis, an additional \$66,000 for up to 44 parcels could be added to the cost of acquiring property.

**Financial/Sustainability Considerations:**

- The approved Capital Improvement Plan provides funding for the four projects, which is sufficient to cover this expenditure.

**Legal Considerations:**

- The City Council is empowered to enter into contracts for professional services.

**Policy Considerations:**

- The solicitation and selection of this consultant was accomplished in accordance with applicable City policies and procedures.

DISCUSSION:

**Council Member Meidinger** asked if the extension of Madison was partly state funded.

**Mrs. Knebel** advised it is partially funded with state economic development dollars.

**Council Member Meidinger** asked if we had that money yet.

**Mrs. Knebel** advised we have.

**Council Member Meidinger** asked if the properties that have to be worked over are on Buckner Street.

**Mrs. Knebel** explained it's for all four of the projects; there are 42 property owners involved.

**Council Member Meidinger** stated we have already started construction on Buckner Street, why are we worrying about land acquisition on Buckner Street.

**Mrs. Knebel** advised it's a different project, this project hasn't been started at all; this one is on south Buckner.

**Council Member Meidinger** stated that if we have the money from the state already on the extension of Madison, the people on Buckner didn't really like what we did on Buckner, paying \$46,000 isn't going to make the people on south Buckner any happier. We did it once with our engineering staff; we should do it again with our engineering staff. Where is this in the budget? Was this in this year's budget?

**Mrs. Knebel** explained that the cost of land acquisition and this consultant can be paid out of each of these four projects. Each project budget has the ability to pay for this consultant plus the money it takes to do the acquisition itself. It's spread out over all four, there's not one lump sum shown anywhere in the budget.

**Council Member Meidinger** asked if the City of Derby were to have some budgetary concerns, like every other government agency has and for some reason we decide not to do one of these projects, do we still pay the \$46,000?

**Mrs. Knebel** advised we would only pay for the work that we have them do for us; there is a cost per parcel involved.

**Ms. Sexton** responded to the question of why in-house staff can't do this work. It is truly a matter of a lot of projects going on a very limited staff. As you know, our city engineer is very busy and yes, we did handle internally the acquisitions on Buckner and the lesson we learned was how much time and effort that took and how much that put some of these projects and other projects behind schedule. Some of you know that you have been waiting for some of these projects for a good amount of time. It's fair to say every one of them is late; they are beyond the original schedule. She asks Charlie occasionally why things are late and they honestly don't have the staff. During this past budget process she seriously considered coming to the council and asking for another engineer or other professional person to add to the staff in community development but she did not think that wise. What she thought was wiser, and she challenged Charlie and the department to think of things that could be outsourced on a project-by-project basis as opposed to adding the overhead of full-time staff and then running into a problem where things slow down. Some things we can predict, like our own CIP. Other things we can't predict, like the pace of the economy and how many people come to us wanting streets and water systems. Sometimes these projects just have to slip, and these specific projects have slipped for quite a while and you all know we have residents on south Buckner waiting for their street to be repaired. We get calls every month on Phase 6 of the bike path—why isn't this project done yet? They have been promised that project for some time, and you all know there are other projects that she keeps saying "we have to slip that one", so certainly we could slip it all some more but this is a financially responsible way of handling it.

**Council Member Horyna** asked if we have identified a liaison for the city that will deal directly with Land Acquisition, Inc.

**Mrs. Knebel** advised it would be her.

**Council Member Bannon** asked if the appraisals are a prepared written appraisal.

**Mrs. Knebel** stated that one of the strengths the team brings with them is a good working knowledge about the real estate market in the area. They are not from out of town, they know the ground rules. The other piece of information that really struck the review committee was how long they have been doing this work. They are very comfortable in understanding a permanent or temporary easement is a very uncomplicated piece of right-of-way to get, and KDHE and the federal government lay out a process if it's an uncomplicated purchase or acquisition. With Land Acquisitions's knowledge of the current market, plus knowing all the details about how the federal acquisition process will work they are able to do a lot of things in house that the other consultants were just not comfortable doing for one reason or another.

**Gary Cane** advised that under the federal guidelines for the appraisal process, the value we reasonably believe is under \$10,000, we do that as part of our acquisition process instead of bringing in an outside appraisal. We have stacks of data on property sales in Sedgwick County as well as surrounding counties. Typically, condemnation-style appraisals, which are different from what most people are familiar with, tend to be very expensive. When we deal with an acquisition that we are going to go out and pay a property owner \$500 to \$1,000 for a small piece of property it doesn't make sense to spend the taxpayer's money up to \$2,000 for a complete before and after appraisal. We do those in house with the data we already have on hand.

**Council Member Bannon** asked if they were a written or verbal appraisal.

**Mr. Cane** explained they do not meet the definition of an appraisal under the uniform standards for professional appraisal practices.

**Council Member Bannon** clarified it is a written opinion of the value of the property.

**Mr. Cane** agreed.

**Council Member Bannon** stated that as a homeowner, Land Acquisitions is coming to her as a negotiator and the person assessing the value of the property, do you find that to be a problem?

**Mr. Cane** advised that when you talk about negotiation, when you go into someone's house they have that defense shield up. They are expecting to be low balled; there are all the things that go with a normal negotiation process. One of the first things to do is establish trust, we do that by showing sales from the area and ask if there are any in the area they might have missed, therefore opening that area for dialog and encourage people to go out and look on their own and often assist them in that process. It's human nature to be resistant to the process and you just have to work with the people. Generally over the course of 30-60 days you can develop that trust.

**Council Member Bannon** since we are not buying full pieces of property but smaller easements, is there very much data for prices for easements paid?

**Mr. Cane** advised that if we talk about land, hypothetically having the price of \$1.00 a square foot. What does the easement impose on the property? Some easements impose very little burden on the property. If we are running a telephone cable under your front yard you will never have any impact on your property. However, a permanent easement for highway right of way robs you of all the value of the land; you aren't going to do much once we start driving cars across it. We look at the type of easement being acquired and the rights we are acquiring; therefore you have to make some judgments. As far as the sale of individual easements, the valuation of eminent domain relies more on the value of the entire property before the acquisition and what's the value of the entire property after the acquisition and the net result would be just compensation. From a practical standpoint that's not always easy to do and there is some subjective judgment in that.

**Council Member Bannon** reminded Mr. Cane to keep the city's pocketbooks in mind when appraising the properties.

**Council Member Craig** advised that the third party is an advantage in that it removes staff from being made out to be the bad guy.

**Council Member Warren** stated that it is not inexpensive to hire someone to do this in house. It's pretty obvious that trying to do this with the staff we have would be a burden. We would be looking at hiring somebody and with the economy the way it is right now and the ebb and flow, one year we may have lots of work and another year we may not have many so the aspect of going to an independent contractor on an as needed basis, at least for now is the proper way to go. If at some point in the future we are finding we are going to need this kind of work on a regular basis then we may want to rethink it at that point. At this point he thinks this makes the most sense.

MOTION: Warren moved to authorize the City Manager to execute a contract with Land Acquisitions, Inc. for \$46,000 for land acquisition and relocation services. Nun seconded.

VOTE: Motion carried 8-0.

## **FINAL PLAT OF RENBERGER'S ADDITION**

**Charlie Brown**, Director of Community Development presented the staff report.

### **Background:**

- This site is 23.42 acres in size, consists of nine lots and is located approximately one mile east of Rock Road on 87<sup>th</sup> Street South. A large portion of this property was previously platted as Wolf's Lair and consisted of four lots, each 4.5 acres in size.

- The area surrounding this property is either being used for agricultural purposes or for rural residential. This addition abuts Quail Run Addition, a 300-lot residential PUD platted in 2007, along its northern boundary line.
- The subject property is currently zoned as R-R Rural Residential by Sedgwick County, which is the appropriate zoning for this development.
- The City of Derby is not likely to extend sewer and water services into this area for several years, so these nine lots will be required to be served by individual sewage disposal systems as approved by the County Code Enforcement Department and the Rural Water District, or private wells until city services are available.
- Although the subject property is separated from the existing City Boundary and will remain in the county for the time being, it is subject to City of Derby Subdivision Regulations.
- The Certificate of Ownership on this plat contains a waiver of protest to future annexation of this property by the City of Derby.
- Final Plat for this addition was approved by the Derby Planning Commission on June 4, 2009, by a vote of 8-0.
- On July 14, 2009, this request was presented to the City Council for approval but was returned to the Planning Commission for re-consideration of two issues. The first issue was access between Webb Road and the adjoining forty-acre parcel to the east. The second issue was access to Lot 4.
- During the Planning Commission's meeting on August 6, 2009, these two issues were discussed with the following results:

Issue #1 – Access across the subject property connecting Webb Road with the vacant parcel to the east.

Determination – The Planning Commission received a development sketch for the area to the east of Renberger's Addition, which included two access points to 87<sup>th</sup> Street, one access point through Quail Run Addition to the north, and a fourth access point from the property yet to the east. Derby Fire & Rescue Department reviewed this layout and determined that it would provide sufficient access to the area. The Planning Commission is therefore recommending that an east-west roadway from Webb Road across Renberger's Addition not be required.

Issue #2 – Access to Lot 4.

Determination – Lot 4, as platted, has direct access to 87<sup>th</sup> Street. This lot is called a "flag lot" with the building site some distance from the street, with a 40' wide strip of land (between lots 7 & 8) connecting to 87<sup>th</sup> Street. Lot 4's driveway will be located in the 40' strip. No other access easements are shown or required.

- Following discussion of these items, the Planning Commission voted 7-0 to return this plat to the City Council with the recommendation that the plat be reconsidered for approval after consideration of the evidence presented to support their decision.

#### **Financial/Sustainability Considerations:**

- As required by the Derby Subdivision Regulations, the developer has submitted petitions as guarantees for construction of required future sanitary sewer, water mains and street improvements. The estimated cost of these improvements is \$185,000. The entire amount will be paid by the benefit district with no obligation by the city-at-large.
- These petitions will be held until such time as larger, overall infrastructure projects are initiated in the area.

**Legal Considerations:**

- The Planning Commission complied with Kansas law and City Subdivision Regulations in reviewing and approving the final plat.
- This final plat should be approved by the Council unless it is determined that the plat does not conform to the Subdivision Regulations.

**Policy Considerations:**

- The applicant complied with all requirements of the Subdivision Regulations including execution of a Developer's Agreement.
- Upon Council's approval of the petitions as submitted, staff will submit them to Gilmore & Bell for preparation of resolutions for Council consideration in the future.

MOTION: Warren moved to approve the Final Plat of Renberger's Addition and authorize the Mayor to sign the plat and Developer's Agreement; approve the petitions submitted as security for construction of required improvements; and instruct staff to record the Developer's Agreement, Certificate of Petitions, Drainage Agreement, Restrictive Covenant and Final Plat. (Council approval requires 6 affirmative votes.) Haynes seconded.

**Council Member Bannon** stated that last time they weren't aware that was a flag lot; it was kind of questionable where the access was going to be. In looking down the road, 87<sup>th</sup> will probably be a main street because we are not going to finish out Webb. If you have that driveway that's five driveways, or at least three in a very short area, what's the likelihood that those two lots on either side of that flagpole would take their drives off of there instead of off of 87<sup>th</sup>?

**Mr. Brown** advised that's possible. A document by the developer would be required to provide legal access for lots 7 or 8 to combine into one driveway.

**Council Member Bannon** pointed out that once we develop 87<sup>th</sup>, that's an awful lot of turn offs in a very short time.

**Mr. Brown** stated it's a possibility but it would be up to them whether they want to do that or not.

**Council Member Haynes** agreed that is something we need to look at. We don't want a driveway every 100 feet, if they could share that driveway we would probably be better off.

**Council Member Bannon** asked if the developer would be okay with that.

**Mr. Renberger** agreed. They had already talked about that.

**Council Member Bannon** asked for an amended motion to include the developer prepare a cross lot access agreement.

AMENDMENT: Warren moved to approve the final plat of Renberger's Addition subject to staff comments and a cross-lot access agreement, and authorize the applicant to proceed with preparation of the final plat tracing. Craig seconded.

**Council Member Craig** asked the developer how he is going to develop the land.

**Gary Renberger** said he and his brother own lots 8 & 9 as well as the acreage east of the property discussed last time. He and his wife own the seven lots on the west side of the property. They went through the process of platting and their understanding was through this process they would be allowed on entrance per lot either on to Webb or 87<sup>th</sup> Street. There are two houses on the north end of this plat already in place and the three lots on the north end will share a common entrance. They understand the process and know the benefits of sharing the cost between multiple homeowners, so at this point he wouldn't have a problem with either suggesting that or making it a requirement for those three lots to have a common entrance. That is the way he understood they would need to present it to potential buyers but considering at some point we think 87<sup>th</sup> will be paved and we may want to pave an entrance into the property it would make a lot of sense to have that cost shared by multiple parties. At this point we do not have plans to develop any of the additional 42 acres that's left east of this property but we do have people that are ready to purchase lots at this point off of the current 9 lots.

**Council Member Craig** indicted if he were going to be interested in one of these lots, that one entrance at the flag pole would provide a private access in to the property as much as you have on the north side where you have an entrance coming in servicing three lots.

**Mr. Renberger** advised it makes sense but they didn't know if it was their place to require that or suggest that.

**Council Member Craig** stated he is not sure we take away options that are available in the present way it's platted. If you have that under consideration, cost sharing and reduction of cost is probably more beneficial to the potential buyer.

**Council Member Warren** asked if the amendment were to go through, what does that do to this process in terms of approval. Does it need to go back to the planning commission or can it go forward as presented with the amendment.

**Mr. Brown** advised in his opinion it would be a simple requirement by the city council to require a cross-lot access easement. We would not take this plat to the courthouse to be recorded until we get that document so no other hearings or consideration would be needed.

**Council Member Craig** clarified that the developer is okay with the cross-lot access.

**Mr. Renberger** advised they were.

Vote on amendment: Motion carried 8-0.

Vote on amended motion: Motion carried 8-0.

**REQUEST FOR  
REZONING KERFOOT  
PROPERTY ON 55<sup>TH</sup> ST.  
SOUTH FROM R-1 TO B5**

**Charlie Brown**, Director of Community Development presented the staff report.

**Background:**

- The subject 20-acre site is the location of the Royce and Rowena Kerfoot residence and is approximately 0.7 of a mile east of Buckner Street on the south side of 55<sup>th</sup> Street South.
- Upon annexation into the city on October 22, 2008, this property was zoned R-1 per the City of Derby zoning regulations. Prior to being annexed, this property had been zoned Industrial Park – Airport by Sedgwick County. That zoning district is comparable to Derby’s B-5 zoning district, the requested zoning.
- Although this property is not located within the MAFB Accident Potential Zone (APZ), development of this property for residential uses would not be recommended given its close proximity to the APZ and the noise exposure as outlined in the MAFB AICUZ study. The uses allowed in the B-5 zoning are the most appropriate for this location.
- The Zone Change request requires a Public Hearing which was advertised in the Derby Informer on July 15, 2009, and conducted on August 6, 2009. Notices were also sent to neighboring property owners as prescribed by state law. The official ownership list is on file at City Hall. There were no comments presented at the Public Hearing and staff has received only one inquiry regarding the boundaries of the subject property but has received no verbal or written comments concerning this case.
- This rezoning request was approved by the Planning Commission on August 6, 2009, by a vote of 7-0.
- The proposed zoning of the property is subject to platting within one year. During the platting process, proper rights-of-way, easements, utilities, drainage and public improvement requirements will be determined.

**Financial/Sustainability Considerations:**

- Approval of the requested zone change will not result in any expenditures by the city.
- If the zoning request is approved, commercial development could result in an increase to the city’s tax base.

**Legal Considerations:**

- All conditions precedent to consideration of this proposed zone change by the Council have been met.

**Policy Considerations:**

- Derby’s adopted Comprehensive Plan calls for all property located in or near the McConnell AFB Accident Potential Zone to be zoned B-5.
- The Planning Commission’s policy has been to allow only the B-5 zoning in or near the MAFB Accident Potential Zone.
- The B-5 District allows uses that are compatible with the MAFB Joint Land Use Study (JLUS).

ORDINANCE NO. 1993

AN ORDINANCE REZONING REAL PROPERTY LOCATED WITHIN THE CITY OF DERBY, KANSAS, FROM R-1 “SINGLE FAMILY RESIDENTIAL DISTRICT” TO B-5 “RESTRICTED COMMERCIAL, WAREHOUSING AND LIMITED MANUFACTURING DISTRICT;” AND AMENDING THE OFFICIAL ZONING MAP OR MAPS OF THE CITY TO REFLECT SUCH AMENDMENT, ALL PURSUANT TO THE ZONING REGULATIONS OF THE CITY.

MOTION: Bannon moved to approve an Ordinance for rezoning of the unplatted 20-acre tract located at 6101 E. 55<sup>th</sup> Street South, from R-1 “Single Family Residential” to B-5 “Restricted Commercial, Warehousing and Limited Manufacturing District”, based on the Findings of Fact presented by the Planning Commission, subject to platting said property within one year, and authorize publication of said ordinance upon recording of the plat. Horyna seconded.

DISCUSSION:

**Council Member Craig** stated it’s his understanding that at the end of that one year, if they do not plat then it returns back to the original zoning.

**Mr. Brown** advised that was correct. They would either have to file a new case or they can file an extension that could be granted by the planning commission and the council.

VOTE: Motion carried 8-0.

**AMEND SECTIONS 411  
“B-3 DISTRICT” AND 413  
“B-5 DISTRICT” OF THE  
ZONING ORDINANCE**

**Charlie Brown**, Director of Community Development

**Background:**

- The McConnell Air Force Base Air Installation Compatible Use Zone Study identifies the recommended land uses that are compatible with the air base mission within the Clear Zone (CZ), Accident Potential Zone I, and Accident Potential Zone II (APZ).
- The City’s B-5 Restricted Commercial, Warehousing and Limited Manufacturing District was originally written to allow land uses and densities that would be compatible with the AICUZ.

- Approximately 325 acres of property within the Derby City Limits are platted and zoned B-5 “Restricted Commercial, Warehousing and Limited Manufacturing District” that have not been developed. There are also some lots located in the Old Ranch Commercial Addition that are zoned B-3 “General Business District” and are within the MAFB APZ II that have not been developed.
- These properties are identified in the City’s Comprehensive Plan as being acceptable for “General Commercial” use.
- A contract purchaser of several acres of the B-5 property has expressed a desire to develop some of this land in a more conventional shopping center configuration. Additionally, other parcels of property zoned B-5 have been considered for development, but there have been concerns expressed by developers and realtors with the language in the current regulations.
- Most, if not all of the land use/employee densities noted in our B-5 district are no longer used by the Department of Defense (DOD). Instead, Floor Area Ratios (FAR) are now used by the DOD as guidelines for development density. The FAR is defined as the gross area of the building footprint divided by the gross area of land (i.e., lot coverage).
- Because local governments have sole responsibility for the approval and extent of developments in the APZ, City staff feels that a standard level of development should be defined for all properties located within the APZ based on the FAR criteria.
- On October 2, 2008, the Planning Commission discussed establishing a FAR of 20% for all retail uses when proposed within the APZ II. By a vote of 6-0 (2 abstentions and 2 absences), the commission approved the recommendation and directed staff to initiate the process of amending the B-5 District to reflect this policy.
- The following is a brief description of the proposed changes to the B-5 District regulations.
  1. An FAR (Floor Area Ratio) or percentage of lot coverage has been established for each different type of use proposed for either the APZ I or APZ II.
  2. Additional criteria have been added to clarify the requirements for the establishment of retail uses in the APZ II area. Retail will not be allowed in the APZ I.
  3. Restrictions on the number of employees permitted per shift, acre, etc. for the various uses have been removed and replaced with FAR requirements.
  4. Construction Contractor Equipment Storage Yards has been added to the list of approved uses but with a greatly reduced FAR requirement than other allowed uses.
- A Public Hearing is required to amend the Zoning Ordinance per Article 11 of the Zoning Regulations.
  - The Notice of Public Hearing for proposed amendments to the B-5 District was published in the official city newspaper on June 17, 2009 and the notice for proposed amendments to the B-3 District was published on July 8, 2009.
  - A public hearing for the changes to the B-5 District was conducted during the Planning Commission meeting held on July 16, 2009, with no comments being presented by the public. A public hearing for changes to the B-3 District was held

during the meeting on August 6, 2009, with no comments presented. No additional verbal or written comments have been received concerning either case.

- Following a short discussion of the proposed changes to the B-5 District, the commission voted 7-0 for approval. Approval was also given for the changes to the B-3 District by a vote of 7-0.

**Financial/Sustainability Considerations:**

- Establishing regulations that are more easily understood in regard to where and how uses can be established in the B-3 and B-5 Districts should encourage greater interest from developers to consider these areas for development which will provide additional valuation and tax revenues for the city.

**Legal Considerations:**

- This proposed amendment to the City’s zoning regulations is a permissible exercise of the Governing Body’s authority.
- The Governing Body has the same options available to it as with any other zoning amendment.

**Policy Considerations:**

- The City of Derby prides itself that it has always been and will continue to be a staunch supporter of the missions of MAFB. To that end, proposals for changes in development regulations within MAFB’s APZ should be taken seriously and investigated thoroughly.
- Telephone conversations with the Air Force’s AICUZ Administrator at the Pentagon indicated that development in this area “probably would not affect a base closure.”
- Ultimately, the responsibility for determining the appropriate level of development falls to the City Council through zoning regulations, and with the Planning Commission through the Site Plan Review process.

ORDINANCE NO. 1994

AN ORDINANCE AMENDING SECTIONS 411 AND 413 OF THE ZONING ORDINANCE OF THE CITY OF DERBY, KANSAS, ESTABLISHING REGULATIONS FOR THE CITY’S GENERAL BUSINESS DISTRICT AND RESTRICTED COMMERCIAL, WAREHOUSING AND LIMITED MANUFACTURING DISTRICTS, RESPECTIVELY; AND REPEALING ORIDINAL SECTIONS 411 AND 413 OF SAID ZONING ORDINANCE, AS THE SAME HAVE BEEN FROM TIME TO TIME AMENDED.

DISCUSSION:

**Council Member Warren** advised he understands changing the language to make it easier for a developer to understand. He has always had a concern for protection of private property rights, in making this switch from an old system that is difficult to understand to a system that you can apply a slide rule to, have we made this more restrictive, less restrictive or about the same? Quite often we take someone’s land by virtue of how we zone it and he hopes that we are being neutral in switching from one system to another and not making the land any less desirable or useful.

**Mr. Brown** advised he is not sure how you can go from the old system and really do a comparison. It is so convoluted as to how many people are in Lowe's on an hourly basis, calculate that and divide by how many acres they have. He thinks what we have come up with is very reasonable. We are allowing shopping centers that weren't allowed before even though it's going to be 20% land area coverage versus the 28% that Lowe's and Kohls went in with. The developer and the contract buyer of that property were very involved in this negotiation with the planning commission and they were very happy with that and felt they could make that work.

**Council Member Bannon** advised in reading this, if she wanted to build a shopping center, an amusement center, a dental office, etc., she could still go over that 20%.

**Mr. Brown** advised that was correct.

**Council Member Bannon** commented that we are not adhering to the 20% then.

**Mr. Brown** explained the 20% is for retail.

**Council Member Bannon** stated we could still yet have, for example the Newton shopping mall that at one time had a movie theater, an indoor activity center and other retail so it took up more than 20% of the lot square footage yet you are saying they could get 80% coverage on the lot as long as only 20% is retail, we are fine with that?

**Mr. Brown** explained that in APZ II, 20% of retail with 60% maximum. There are other uses that are 28%, some 22% and some other numbers. We worked with a lady at the Pentagon and worked these numbers out.

**Council Member Bannon** clarified that they feel okay with the 60%.

**Mr. Brown** advised they do. That's for warehousing and uses where you aren't going to have many employees.

**Council Member Bannon** advised that when you read section 411, B-3, to her she can pick and choose and put a bunch of those together so there is no real limit on square footage on the entire lot. She wonders if we need to put in there some type of limit so you can't pick and choose and put all of them together and exceed the 20%. On line 23, retail businesses, in Mr. Brown's mind that reads that all of those items are retail businesses. If a realtor were reading this they would think they could put a retail business, amusement center, animal hospital in there. If they are all considered retail businesses shouldn't that be a big bold thing at the top that you can't exceed the 20% if you are a retail business.

**Mr. Brown** explained this particular section being looked at is in the B-3 district. Any retail in APZ II is limited to 20% floor area ratio whether it's in a shopping center or standalone, it's 20%. In APZ I, retail is not allowed at all. If you have a specific use in here with a different ratio then he would use that ratio, but retail is kind of a general term.

**Council Member Bannon** stated we want to maintain our area with McConnell and keep everybody happy, why don't we state retail? When she gets down to the permitted uses section and sees item #1 is amusement centers and item #23 is retail businesses, to her those might be construed as two different things. You aren't saying that the amusement center is retail.

**Mr. Brown** advised it is not retail.

**Council Member Bannon** stated that you can then have an amusement center, dog grooming and a candy store, as long as the candy store didn't take up more than 20% and the total of all three of those businesses can't take up more than 60%.

**Mr. Brown** advised he believes that is correct.

**Council Member Bannon** asked if that were stipulated very plainly in here.

**Mr. Brown** stated he thinks it is but if there is an issue about the language and verbiage we will entertain an edit. The land use restrictions are usually not at the front but we could put something up there to get their attention. There are specific sections in the zoning ordinance that have use limitations.

**Council Member Bannon** clarified we are just taking parts of the ordinance out instead of looking at all of it.

**Mr. Brown** advised that was correct.

**Council Member Craig** advised this has been a cooperative effort between all the agencies to come up with a more specific equation that can be mapped out for values. He believes it deserves an operational definition instead of a generalization of retail, he sees retail as someone selling goods. Is that a correct definition? Is the entertainment center a retail business?

**Mr. Brown** advised it was not. They may have a gift shop or something that would be an accessory to the main use but it would not be considered a retail operation.

**Council Member Craig** advised that is where the differentiation comes in, when you say retail you are selling goods.

**Mr. Brown** advised it is easier to calculate, not just on our part but any prospective owner, buyer, or developer will understand exactly what they can and cannot do.

**Council Member Craig** stated previously there were times the Department of Defense made the determination whether something was acceptable or not.

**Mr. Brown** advised they always tell us that the local agency is responsible but we try to follow their guidelines. They haven't officially adopted all of these percentages yet. The lady at the Pentagon that we've talked to has given us these numbers and it's the best information we have available at this point. Someday when they officially adopt them we may be coming back to

adjust them slightly based on what they officially adopt. Right now this is in conformance with their guidelines. They are passing the buck to us; the local authority has the responsibility of making these decisions.

**Council Member Meidinger** asked if the local authority is McConnell.

**Mr. Brown** advised local authority is the city council.

**Council Member Meidinger** asked if McConnell has signed off on this program.

**Mr. Brown** advised they have been involved in all of these meetings, they don't officially sign off on anything. They will give us their guidance and opinion on things. We do have a letter in the file where they have advised us our public works yard is an acceptable use in the APZ I district. They don't give us a rubber stamp blessing but they have been involved from the get go.

**Council Member Meidinger** was hoping McConnell would think this was the greatest thing since sliced bread and give us the blessing because what happens if we decide this is a good program and the Pentagon says you really shouldn't be building those things there because of these conditions. What happens then? It puts us in a difficult position doesn't it?

**Council Member Warren** advised McConnell has been very good to us and given us the best information they can, but they will not endorse. They will not say "we approve this." The reason is, they don't want to be in the position to dictate to local governments, individuals and entities what they want because that could come back to bite them down the line. If they approved it then they have liability. They will talk to us, give us the information we need and we try to follow that the best we can to protect the interest we have in McConnell because we want to see that remain viable for as long as we possibly can. That becomes tougher and tougher every time around. This is as close to an endorsement as we are going to get.

**Mr. Brown** added that prior to this change the old B-5 district as it was originally written was used by Mike McKay at McConnell as a model ordinance to use around the country with cities that have air bases. We are making it better and if he used it prior he is assuming he'll use it again.

**Council Member Staats** said, for example, if a pet grooming shop went out of business and another business wants to come in, is the developer going to be pinned in as to what kind of business comes in, for example a Hallmark Store. Would there be stipulations as to what comes and goes years down the road?

**Mr. Brown** indicated that happens occasionally. Generally they are required to meet the zoning regulations. A good example is Bristol Square where it's basically a shopping center but you have a chiropractor in there. Is that retail, not really but it's considered a retail center. When you develop a Bristol Square up in this area we are going to assume its all retail. It's going to be more restrictive if we assume retail to start with than these other uses. When the other uses come in you're not going to add on to the buildings typically with a shopping center. He thinks we have it covered, retail is one of the most restrictive we've added to this language and when

you change uses you are probably not going to have a use that is more restrictive than the retail percentage.

**Council Member Staats** advised we have always been in a good position as far as McConnell and he doesn't want that to change. We can restrict what businesses come in when one leaves correct?

**Mr. Brown** advised that's correct. The people at the Pentagon say that changing this and even with a little more retail development along 63<sup>rd</sup> Street will probably not affect any base closing operations or committee analysis they may have in the future.

**Council Member Craig** indicated the military would like Derby to run their business and we have been very compatible. He doesn't see any problem with this and called for the question.

MOTION: Warren moved to approve an Ordinance to amend Sections 411 and 413 of Article 4 of the Derby Zoning Ordinance, as presented. Staats seconded.

VOTE: Motion carried 8-0.

#### **AMENDMENT TO POLICY FOR REDUCING/ RELEASING DEVELOPER'S FINANCIAL GUARANTEES**

**Charlie Brown**, Director of Community Development

#### **Background:**

- The City's policy that guides the financing of public improvement projects is established by Resolution 40-2007, which was last amended in 2007.
- Included in the resolution are provisions for reducing and or releasing the developer's financial guarantee (letter of credit) upon development (construction and occupancy permit) of lots within the project's benefit district.
- The resolution currently provides for a reduction in the letter of credit when 35% of the lots are developed and a release when 75% of the lots are developed.
  - This process was written for and works well for projects in residential areas, where the special assessments are divided equally per lot.
  - In commercial areas, however, the special assessments are typically divided based on the size of the lot, with larger lots paying a larger share of assessments.
- The proposed amendment would replace the letter-of-credit reduction and release procedure based on the number of lots with a new procedure based on the percentage of special assessments obligated to developed lots.
  - This new procedure would function essentially the same for residential developments and would be a more equitable formula to use for commercial developments.
  - Example:  
Derby Marketplace 2<sup>nd</sup> Addition Water Line (Resolution No. 32-2007)

<u>Benefit District</u>	<u>Developed?</u>	<u>% of Total Assessments</u>
Lot 1	No	7.46
Lot 2	Yes (Wild Wings)	5.44
Lot 3	No	4.32
Lot 4	Yes (Verizon)	6.64
Lot 5	No	12.15
Lot 6	Yes (Target)	31.89
Lot 7	Yes (Petco)	32.10

Under present policy, the developer would be eligible for a *reduction* in the letter of credit because 4 of 7 (57%) lots are developed. Under the proposed policy, 76.07% (5.44 + 6.64 + 31.89 + 32.10) of all special assessments for the project are levied on developed lots, and the developer would be eligible for *release* of the letter of credit.

**Financial/Sustainability Considerations:**

- This policy does not affect the City’s annual revenues or expenditures. The policy reflects the City’s willingness to work with business people to encourage responsible and sustainable growth of the community.
- The City may make demand against the issuer of the letter of credit when special assessments become delinquent. The risk of having delinquent specials on developed lots is minimal.

**Legal Considerations:**

- Letters of credit or similar instruments are appropriate tools for securing the City’s investment in public improvement projects requested by developers.
- The City may prescribe the requirements for development-related letters of credit and may modify such terms from time to time.
- The proposed resolution will be applicable to both existing and future letters of credit.

**Policy Considerations:**

- With respect to public improvement projects financed under state law (K.S.A. 12-6a01 *et seq*), the City is essentially a secured creditor of the developer.
  - The City’s investment in a public improvement is secured first by the value of the property on which special assessments are levied and, second, by a letter of credit or bond.
  - As properties within a benefit district develop, two things occur which have the effect of enhancing the City’s secured position:
    - Property value increases
    - Ownership diversifies
- Because letters of credit tie up significant assets of a developer, they should be reduced or released when the City’s investment is otherwise adequately secured.
- All other provisions of the present policy for financing public improvements will remain unchanged.

RESOLUTION NO. 31-2009

A RESOLUTION ESTABLISHING POLICIES FOR MUNICIPAL FINANCING OF CERTAIN PUBLIC IMPROVEMENTS AND LEVYING OF SPECIAL ASSESSMENTS WITHIN THE CITY OF DERBY, KANSAS; AND REPEALING RESOLUTION NO. 40-2007 OF THE CITY.

DISCUSSION:

**Council Member Haynes** asked about section 7 on page 5. He asked if the word “shall” gives the city the option not to. He reads that as we have to. Do we want to back ourselves into the corner that way?

**Ms. Sexton** advised that is absolutely the intent. The intent is that this council passes a policy and staff enforces and lives by this policy everyday.

**Council Member Meidinger** asked if this were a policy strictly for Marketplace.

**Mr. Brown** advised it would be city wide.

**Council Member Meidinger** stated that if we allow this to happen we are reducing the incentive for any more development out there. The longer we hold that letter of credit, that’s incentive to get some more buildings out there, isn’t it? We don’t want a bunch of vacant lots out there and since that’s the cornerstone of our retail operation and all of a sudden there are weeds growing up and nobody’s too concerned about putting another building out there. Right now in this particular time of financial concerns on a national basis, this wouldn’t be a real good time to start reducing financial obligations.

**Ms. Sexton** explained that this policy is less about incentivizing development than it is about securing our risk. This is about the streets, water lines and infrastructure that the city puts in on behalf of the developer. As long as we are getting made whole and paid the specials each year then we are happy. It’s not intended to be something hanging over their head to make sure they develop. Folks who have invested in the properties want to develop it. The letter of credit, if anything is more of a financial reign on them that restricts what they are able to do in this or other projects because they have this hanging over their head for no good reason. At the beginning we have a very good reason but as it develops it’s not a good reason anymore. She does not think it would have that effect. This is the policy that we apply equally to all developments, all businesses. The example was Marketplace because that is one that has come up already but we fully expect to deal with this on other commercial properties over the next 1-2 years. That’s why we knew we needed to make an amendment to the actual policy, not an exception for one business.

**Council Member Meidinger** advised he understood it would be for everybody. The red flag that was thrown up immediately is when the developer asked for a reduction in the letter of credit. Obviously they want their money back so they can use it somewhere else. Put some more buildings in there, and you can get it back.

**Ms. Sexton** explained that it's routine for them to ask. Any housing developer, anybody, they always ask when they get their letter of credit back, they know we have this policy so they ask routinely for that. It wasn't something special on this case.

**Council Member Warren** advised it would be totally inappropriate for us to use this as hostage. It was required to put up for the very reason Mr. Brown talked about to protect the city. We have had times in the past when we have been concerned that the city might get stuck with the cost of special assessments because the developer went in, improvements were put in and no development was taking place and the city might be looking at footing the bill. We actually had that happen years ago and that is why this policy was put in place. If we were to change the reason that we do this it would be a huge incentive for businesses not to come to Derby in the future because of what he would consider to be a very restrictive policy on how free enterprise and private business works. It might be an incentive for the current developer to speed things along. The problem with speeding things along is sometimes you get bad business, they start accepting anything that comes down the pike so they can get their money back rather than waiting for the best business. A great example of that was the old Dillon's. There were many opportunities to split that thing up into smaller pieces of land, and the developers chose to wait until they got the right business, and the original Dillon's at Madison and Rock Road was a great business for a long time. It would be a very bad policy to change that. This is a fair way to deal with special assessments to protect the city and at the same time encourage development.

**Council Member Bannon** advised whether you are a commercial or residential developer your profit is at the end, that's their incentive. This isn't going to incentivize them one way or another but will free up money to where they could build again. They won't get their profit until they build those last few buildings.

MOTION: Bannon moved to approve a resolution modifying the City's Public Improvement Finance Policy as presented. Staats seconded.

**Council Member Craig** clarified that this will change both residential and commercial.

**Mr. Brown** explained it doesn't really change the way we do residential.

**Council Member Craig** advised that instead of a ratio of lots it is now a ratio of assessments.

**Ms. Sexton** advised it is very fair to say that the Marketplace development is doing a fine job and the people in Derby should be proud of the way they have handled things. There is speculative building of strip centers way out east and west Wichita that people are putting up and they don't have any tenants at all. Marketplace developers didn't build a building until they had 40% to 60% occupancy. They are pretty full out there now. She and Jean use them when they talk to bond rating agencies, retail gets pretty hard in a recession and for them to open up as many as they have is a good sign. There is only a handful of empty storefronts you can see out there now, every month something new opens. She personally knows of a couple of contracts being negotiated that haven't been announced yet, let alone the ones that have been announced that are in the process of remodeling. They are at 95% capacity out there and they just built the thing. You can find lots of other examples in the Wichita market of strip centers that are sitting

empty. They have a conservative business approach, they do have plans to build additional buildings but they will get leases and make sure it's going to work before they invest in that. This is nothing indicative of a problem at all.

**Mr. Brown** stated that when we put the 75% development in the original resolution we did a fairly extensive comparison to other cities and what they require. The City of Wichita allows the letters of credit to be released at 50% development. We are actually requiring a little more development before we release our letters of credit. We are a little more restrictive than they are still on this policy.

**Council Member Craig** advised this change abates the risk the city takes in the investments in streets and curbs and everything else that goes with that. It's a wise move and becomes equitable for both commercial and residential development. The risk is what is being abated and they should appreciate that.

**Council Member Meidinger** stated that if it was a good deal when it was signed, it should be a good deal now. If it was not a good deal then we should have addressed it then because now it appears that we are changing the rules in the middle of the development and he didn't want people to get that impression.

**Mayor Avello** advised times were different and it was a different city then. We are not the city we were then, we are changing. Mayor Brewer publicly addressed a statement by some individual about Derby. He said he wished Wichita was like Derby, one of the most progressive cities in the country. He looks to us and points to us on almost everything they do in that city. We don't have to take it over, we already have it.

VOTE: Motion carried 8-0.

## **REVIEW OF PETITION CONCERNING COLLECTION OF REFUSE**

**Phil Alexander**, City Attorney presented the staff report.

### **Background:**

- In late March 2009, the Council passed ordinance #1980 which, among other things, authorized the City to collect or contract for collection of residential refuse and recyclables.
- When ordinance #1980 was adopted, four firms were collecting residential refuse in Derby.
- Simultaneously with consideration of ordinance #1980, the City solicited proposals for city-wide collection of residential refuse and recyclables by a single firm.
- Multiple proposals were received and evaluated. Each firm submitting a proposal was interviewed by the Recycling/Trash Advisory Board ("Board").
- On April 14, 2009, after thorough analysis of the several proposals, the Board recommended selection of Waste Connections of Kansas, Inc.

- On April 28, the Council selected Waste Connections and directed preparation of a contract.
- After extensive negotiations, a contract was presented to and approved by the Council on July 28.
- On August 13, a petition was submitted to the city clerk.
  - The petition itself is ambiguous but public comment by supporters indicates it is intended to request repeal of ordinance #1980 or, in the alternative, submission of a repealer ordinance to the electorate.
  - The petition purports to have been submitted pursuant to K.S.A. 12-3013, a state law that authorizes initiative and referendum in some circumstances.
  - The petition was forwarded to the Sedgwick County Election Commissioner, who has determined that the number of valid signatures exceeds that which is required by K.S.A. 12-3013.
- After analyzing the petition carefully, staff has concluded that the petition is not valid under K.S.A. 12-3013 and that the Council is not required to take action based on it.

**Financial/Sustainability Considerations:**

- Waste Connections, having entered into an exclusive contract with the City for exclusive collection of residential refuse and recyclables, is purchasing equipment and making other preparations to undertake performance on December 1, 2009. It will incur substantial expense in so doing.
- The City’s contract with Waste Connections provides for payment of a franchise fee equal to 5% of gross revenue derived from the contract. This anticipated revenue has been incorporated into the 2010 budget.
- The contract with Waste Connections, which includes collection of recyclables as well as refuse, establishes rates below those currently paid by most city residents and only slightly higher than the lowest reported rates enjoyed by one neighborhood.

**Legal Considerations:**

- State law expressly authorizes the City’s governing body to provide for refuse collection through City forces or by contract, and to prohibit collection by firms not under contract with the City.
- If a valid initiative petition is submitted, the City must either adopt the proposed ordinance or put it on the ballot a city-wide election (“referendum”).
- The initiative and referendum procedure is available for ordinances that are legislative in nature but may not be used for ordinances that are primarily administrative.
- Thorough analysis of the proposed ordinance, relevant precedents and other authorities leads to the conclusion that because the proposed ordinance is administrative in character, K.S.A. 12-3013 does not require the Council to act on the petition.

**Policy Considerations:**

- Ordinance #1980 and the exclusive contract for collection of residential refuse and recyclables include several features that will significantly improve solid waste management within the City:

- Lower – for the large majority of customers – rates that are uniform throughout the City.
- Single-stream, curbside recycling is available at no additional cost, and customers may earn RecycleBank points as an incentive to participate.
- Contractually established sanctions provide incentives for the contractor to maintain and improve customer service.
- Wear and tear on City streets will be significantly reduced by having only one collection vehicle, rather than four or more, on each residential street. In terms of the stress place on pavement, one truck is the equivalent of at least 5,000 automobiles.
- Because of the efficiencies derived from higher customer density, the Sedgwick County Solid Waste Management Plan Update (dated June 10, 2008) expressly encourages all cities in the County to franchise or contract for refuse collection, including provision for a program of curbside recycling and volume-based trash rates.

MOTION: Bannon moved to receive and file report and take no further action with respect to the petition submitted August 13, 2009. Craig seconded.

DISCUSSION:

**Council Member Warren** advised it has been a while since we talked about this and he doesn't know how much of it needs to be discussed in executive session. Depending on the action we take there is the risk that if the parties who put forth the petition don't agree with our assessment, that it is administrative versus legislative that they may want to take legal action.

**Mr. Alexander** agreed that is an important issue. Occasionally folks disagree about how a petition should be characterized and one of three things happens: nothing, the city seeks judicial recognition of its action, or, more commonly, the petitioners go to court and challenge the city's determination. Any one of those can happen, and he wouldn't want to predict what action others may take in this instance.

**Council Member Warren** advised that everything he has looked at indicates that we have a strong case and are on solid ground. If we were not able to prevail....Mr. Warren advised he would hold his questions until executive session.

VOTE: Motion carried 8-0.

**PRIMARY ELECTIONS**

**Stephanie Knebel**, Assistant City Manager presented the staff report.

**Background:**

- During the 2008 Legislative Session, the law governing primary elections was amended in an attempt to reduce the number of primaries. A primary election is now held if more than three candidates run for city office. In Derby, two candidates advance to the general election.

- Some cities interpreted the law to mean that if there is a primary election, then 3 people would go through to the general election. Derby did not interpret it this way.
- Other cities (including Wichita) chartered out of the new law to ensure that three candidates don't split the vote in a general election enabling a winner who does not receive a majority of the votes.
- Legislation proposed in 2009 (SB 103) would have taken the local primary election law back to pre-2008 changes and return city elections to the traditional primary where only 2 candidates would proceed to the general election.
- Because state election laws are non-uniform, the use of a charter ordinance is available to the City of Derby if the council wants to (a) have 2 candidates on the ballot for a single elected position at a general election, or (b) have a primary election if 3 or more candidates run for office.

**Financial/Sustainability Considerations:**

- None.

**Legal Considerations:**

- None.

**Policy Considerations:**

- Where once two candidates went head-to-head in the general election, state law now allows up to three candidates. It only takes two viable candidates taking votes from each other to hand the election to the third candidate who may not receive a majority of the votes.

CHARTER ORDINANCE

A CHARTER ORDINANCE EXEMPTING THE CITY OF DERBY, KANSAS, FROM THE PROVISIONS OF K.S.A. 25-2008a, RELATING TO PRIMARY ELECTIONS, AND PROVIDING SUBSTITUTE AND ADDITIONAL PROVISIONS ON THE SAME SUBJECT.

MOTION: Warren moved to approve a charter ordinance to return the City to the previous primary election process to ensure no more than two candidates for a single elected position are on the general election ballot. Horyna seconded.

DISCUSSION:

**Council Member Bannon** advised she is against this. Three or four months ago Mr. Warren campaigned council members very hard and won, by a consensus of votes that a stipend for council members based partially on the fact that we need younger members on the council and that there is a lot of time and cost involved. If you have to run a primary election and a general, you are talking big bucks. The \$100 a month stipend is not going to cover it. This is just the opposite of what was done 3-4 months ago. She wants everyone in the audience to understand that the person with the most votes wins, which is really what the democracy idea of the United States is, he with the most votes wins. Some people like to think that if you have three people, you have two who are typically the most popular and you pull votes from each other and the

third less popular may win. The fact is he with the most votes is going to win. She is totally against this because if you want more people to run for office, then give them the chance to do it. Not many people are going to spend the bucks it takes to run a primary and a general not knowing they are going to win thinking they will get the \$100 later.

**Council Member Meidinger** agreed. If we want to get candidates to run for public office we should make it as easy as possible. It's a recipe to discourage people to run for office. Our last election was just as it had been before, no one was really interested. If we as incumbents want to make it as difficult as possible for people to run than I suppose you will support this, I will not. Just because we have always done it that way doesn't mean the old way is the best way. If businesses are still doing business the way they did 10-20 years ago, or even a year ago they may no longer be in business. Maybe we need to change with the times. He doesn't know the intent of the legislature when they allowed three people to go to a general election; he would suspect it was because it is difficult to get candidates to run.

**Council Member Warren** (inaudible, no microphone)...there are two things that trump that issue that are more important than the cost factor that comes in. In a crowded field the general belief is that an incumbent has the advantage, so if we want to make it as viable for a challenger to have a chance to beat the incumbent, we need to do what we can to reduce that crowded field which means we get down to two candidates. The incumbent has the advantage of name recognition. Occasionally incumbents because of the decisions they make, it's throw the rascal out. Incumbency is not always an advantage but at least the name recognition is there. We actually give challengers more of an opportunity to challenge and we give voters the opportunity for change if we limit it to two candidates rather than three. If you have two candidates that are coming in and they split the vote then you end up with the incumbent back in office when quite frankly the majority of people were after change but the change candidates split the vote and allowed the incumbent to come in. That in and of itself is a more important factor than the cost factor it takes to run. The first time he ran there were three candidates; he won the primary with 58-59% of the vote. It got down to two candidates and a strong race was run against him. Even though his total votes increased in the general election his percentage decreased, he won with 54-55% of the total vote. There can be a change in ideas from the primary to the general election and for that reason it would be a terrible step backwards that would allow maybe the person with most votes, although he's not who the majority of the people want, to win.

**Council Member Staats** sees both sides of the issue. Running a campaign is a very humbling experience, but its part of the process. When he filed 2.5 years ago he was really glad a third person didn't come on board. If that had happened he would have moved forward and went to a primary campaign and hopefully past that. An incumbent always has the advantage even if they have made some mistakes. If we start splitting up the votes you can have two very solid candidates run against an incumbent who has made some pretty bad mistakes and if half the people voted for candidate A and half the people voted for candidate B, then the incumbent might take those votes and he's back in office again. There is a movement to vote out incumbents across the United States. While people are pleased with most of their elected officials it does happen that they want new blood. He doesn't see this ordinance as a big problem.

**Council Member Haynes** advised he suggested a month ago that we spend some time on this because it's going to affect not only everyone on the city council but anyone that wishes to run. One of the problems we have had in the past is getting people to stand up and say they want to be involved. We need to give everyone equal opportunity. That's why he suggested we spend a lot of time on this; send it to the Ordinance Review Advisory Board. It's a decision we don't need to take lightly, he can see arguments for both sides but as city council members we have to make that decision.

**Council Member Craig** advised he benefited from the fact in the last election that there were three candidates in Ward I, which allowed all three to run in the general election. The fact is that a lot of folks want to have it both ways but that's not possible. He has shared his experiences with the other council members regarding his election experience, it was costly, there is no doubt about it. He does not consider three people a crowded field. The deal about incumbents, yes you might have the ability to have some advantage; however he is proof the incumbent doesn't always win. He encouraged people to run and thinks this is a way to get folks to a general election and if there is more than three obviously there will be a primary. He doesn't see the advantage of trying to predict an outcome by saying three candidates will end up with the wrong person in the particular seat. Voter plurality has basically been the rule for years, the person with the most votes wins. He supports that for three candidates and thinks the legislature had in mind reducing the cost of primary elections but also reducing the cost for people who want to run for office. He thinks having a three-person general election has real merit.

**Council Member Horyna** advised that since he joined the council he has learned many things, including the fact that it's a privilege to be up here. He has not had the luxury of running a campaign so he doesn't have that point of view. He does believe that our previous charter ordinance would give us what's best for Derby. He or she with the most votes is still going to win.

**Council Member Nun** advised he has spent some time looking at this and there are actually very few elections that are limited to two people. Most of those are municipal elections. Once you get past the municipality part of it most of them are open to independent candidates. You can have an election for the president, the governor, and have more than two candidates. This is not an unusual situation to have three candidates. He does not see that we achieve anything by limiting it to two. The legislature, when it changed the law, was trying to do away with primary elections, one for the expense, two, we have such low turnout for municipal elections it even gets lower once you get to the general side of it or past the primary. We are not really achieving anything and he believes it would make it easier for people to run for office if we don't put a limit on it at two and go with the three the way the state legislature passed it. He will vote against the motion that's made.

**Mayor Avello** advised he has been in all these situations. Elections are costly and that's part of it. If you really want to be sitting up here that's part of the process. To have as many people as you want running in a race with no money, to him is not from the heart or the head. He wants to see people up here that really want to be here and are going to put some things out to get here. We used to have trouble getting people on the boards but we don't have trouble anymore. If he has to break a tie he would vote in favor to two people running in the general.

**Council Member Craig** asked how many candidates are in the mayor's race, is there a primary for that also if there is more than two.

**Ms. Sexton** explained the same rules apply to everybody. Right now, under the current law, if there are more than three there is a primary. If we pass the charter ordinance then if there are three people who run for mayor next time there would be a primary to pull it down to two.

**Council Member Craig** advised Mr. Nun brought up an interesting point, they have Democratic and Republican primaries to get down to a single candidate but when they enter that final race a Libertarian can run, an Independent can run and you can have a write-in candidate. You can also authorize a write-in candidate if two people are running for mayor, is that correct? This argument is pretty much moot as far as he is concerned. You can always have three candidates if somebody really wants to do that.

**Council Member Meidinger** stated as he commented earlier, there were five positions available and there was one race. On the other hand when you want somebody to fill a position on a board, there are ample people because people don't want to go through the hassle of an election. If we bring up the primary and the general election, people won't want to do that and you will be back to one person and in some cases you have to appoint people because nobody is interested in that process of the big elections.

**Mayor Avello** advised he has had to appoint a lot of people here, probably more than any other mayor and he finds it a difficult thing to do. When he asks people why they don't run they say because the seat isn't open. Because the seat is open and you want to be appointed to it but you don't want to run, to him that's a negative. You really don't want to be there, you have a free opportunity to get a seat and not do anything.

**Council Member Meidinger** indicated he was talking about boards, not the council. There are ample people for the boards, not the council and that is the point he is trying to make.

VOTE: Motion failed 5-4, Meidinger, Nun, Bannon and Craig, nay.

**Mr. Alexander** explained that the motion fails because six votes are required to pass a charter ordinance.

## **CONSENT AGENDA**

**Kathy Sexton**, City Manager presented the staff report.

### **Homecoming Parade on October 15**

#### **Background:**

- The Derby High School Student Council requests use of street right-of-way to conduct its annual Homecoming Parade on Thursday, October 15, 2009 at 6:30 p.m.
- The time this year is a change as they want to make a strong effort to have the parade be more of a community-wide event.

- The parade would start at the corner of Market and Westview and go down Market Street to Georgie, turning right up to Madison, then down into the stadium parking lot. They will have a pep rally at the stadium at the conclusion of the parade to build excitement and school spirit for the Homecoming football game the following night.

**Financial/Sustainability Considerations:**

- As with any parade, the City will supply police patrol, barricades and traffic cones.

**Legal Considerations:**

- The Council is within its legal purview to allow usage of streets and public right-of-way for such uses.

**Recommendation:**

- Approve the request of Derby High School Student Council to use city street right-of-way to conduct the annual Homecoming Parade on Thursday, October 15, 2009 at 6:30 p.m.

**Amendments to Bond Agreement with Derby Hotel, Inc.**

**Background:**

- The City Council gave final approval to industrial revenue bond financing for Derby Hotel, Inc. on May 13, 2007. The bonds were issued on November 5, 2008.
- Since approval of the bonds, The State Bank of Kansas has requested four changes to the bond agreement. The changes affect the relationship between the bank and the borrower only. The City is not affected. The changes will accomplish the following:
  - Set a minimum interest rate.
  - Require the borrower to establish a credit card deposit account.
  - Agree upon reporting and disclosure requirements.
  - Establish a prepayment penalty in the event of refinancing with another institution.
- The guarantors of Derby Hotel, Inc. have agreed to the changes. The partners identified in the original Guaranty Agreement and the proposed Guaranty Agreement Amendment are Raju Sheth and Johnson Parmar.
- The bond amendment document contains five items:
  - Bond Resolution
  - Bond Agreement Amendment #1
  - Guaranty Amendment #1
  - Bond Document – Series A Term Bond 1
  - Bond Document – Series A Term Bond 2

**Financial Considerations/Sustainability Considerations:**

- The proposed changes will have no financial impact on the city. The amendments serve to modify the terms between the bank and the borrower to create an incentive for the borrower to comply with the bank's desired reporting and disclosure requirements.

**Legal Considerations:**

- The proposed amendments to the bond documents and the resolution authorizing the amendments were prepared and approved by the City's bond counsel.

**Recommendation:**

- Approve the resolution and authorize amendment of the bond agreement and guaranty agreement in connection with Taxable Industrial Revenue Bond (Derby Hotel, Inc.) Series A, 2008.

**Board and Commission Appointment**

**Background:**

- The Mayor would like to recommend the appointment of Shawn Kuntz to the Parks and Urban Forestry Board. Mr. Kuntz's board application is attached.

**Legal Considerations:**

- All appointments are made by the Mayor with the consent of the Council pursuant to the following ordinance and statute:
  - Parks & Urban Forestry Board – City Code 2.16.120

**Recommendation:**

- Approve the Mayor's appointment to the Parks and Urban Forestry Board.

**Agreement with Kansas Department of Transportation (KDOT) for Phase 8 Bike Path****Background:**

- Over the past several years, the City of Derby has constructed bicycle and pedestrian paths throughout the City with financial assistance from the Kansas Department of Transportation (KDOT), Kansas Department of Wildlife and Parks, and other sources.
- In October 2007, the City Council passed a resolution directing staff to apply for funding for Phase 8 of the pathway system.
- The City was subsequently awarded funding and the project is currently being designed.
- Phase 8 of the bike path system is on the south side of Madison Avenue from the existing bicycle and pedestrian path on the east side of Panther Stadium to the intersection of Madison Avenue and Woodlawn Boulevard.
- The agreement with KDOT outlines the responsibilities of each party.

**Financial/Sustainability Considerations:**

- Eligible construction costs will be paid 70% by KDOT and 30% by the City.
- The anticipated construction cost for the project is \$110,000. The City's share is \$33,000.
- In recognition of safety benefits offered by providing a wider pathway and separation between the proposed pathway and Madison Avenue, USD 260 has agreed to pay 50% of the City's share of construction cost (\$16,500).
- Funding for the city's portion is included in the 2009 Capital Improvements Plan.
- The KDOT portion of the construction cost is estimated to be \$77,000.

**Legal Considerations:**

- The agreement includes standard KDOT language laying out the parties' respective responsibilities for the project.
- A construction contract will be presented for Council approval at a later date.
- The City and the State are authorized to enter into agreements necessary to obtain state administered federal financial aid for construction of public improvements.

**Policy Considerations:**

- The project meets the objectives of Derby's Comprehensive Plan to provide bicycle and pedestrian paths along arterial streets.
- The project will provide enhanced safety for pedestrians and bicyclists along Madison Avenue and enhanced safety to students walking or riding to the sixth grade center and middle school.

**Recommendation:**

- Approve the proposed project agreement for the Phase 8 Bicycle and Pedestrian Path (Project No. 87 TE-0324-01) and authorize the Mayor to sign the agreement and related instruments.

MOTION: Horyna moved to approve Consent Agenda as presented. Craig seconded.  
VOTE: Motion carried 8-0.

**OFF-AGENDA ITEM**

MOTION: Bannon moved to take off-agenda item. Craig seconded.  
VOTE: Motion carried 8-0.

MOTION: Craig moved the council, by vote, support the collective decisions of the Park and Urban Forestry Board, Library Board, Economic Development and Derby Recreation Commission Board, each wanting to not participate or not deal with the special permitted alcohol on public property/facilities and hereby direct the city manager to officially remove the item from the council’s list of priorities, thus putting the alcohol ordinance to bed.  
 Meidinger seconded.  
VOTE: Motion carried 8-0.

**EXECUTIVE SESSION**

MOTION: Staats moved to recess to executive session at 8:50 for one hour to discuss several matters of attorney/client privilege and one issue concerning acquisition of real estate. Haynes seconded.  
VOTE: Motion carried 8-0.

The council took a five-minute break prior to executive session.

MOTION: Staats moved to extend the executive session for 25 minutes at 9:50 p.m..  
 Haynes seconded.  
VOTE: Motion carried 5-0. Meidinger, Nun and Bannon abstained.

The council returned at 10:22 p.m. and Staats advised there was no binding action taken.

**ADJOURNMENT**

MOTION: Warren moved to adjourn at 10:22 p.m. Craig seconded.  
VOTE: Motion carried 8-0.

Dion P. Avello, Mayor

ATTEST:

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Jean Epperson, City Clerk