

February 22, 2010

Rogers Waterworks and Sewer Commission

Minutes

The Rogers Waterworks and Sewer Commission held its regularly scheduled monthly meeting at 4:00 PM, Monday, February 22, 2010, in the Commission Room of the new Rogers Water Utilities administration building. Commissioners present were Lon Pepple, Guy Cable, Jene` Huffman-Gilreath, Don Kendall, and Travis Greene. Rogers Water utilities staff in attendance included Tom McAlister, Mark Johnson, Joyce Johnson, William Evans, Mike Lawrence, Johnny Lunsford, and Earl Rausch. Others at the meeting were Robert Frazier and Alan Wooten. Chairman Greene called the meeting to order at 4:02 PM.

The first order of business was to reappoint Travis Greene to another term as Commissioner. There was a motion by Cable, second by Pepple, to approve the appointment, subject to confirmation by Roger City Council. All in favor, motion carried.

There was a motion by Cable, second by Kendall, to approve the January minutes as submitted. All in favor, motion carried.

Greene recognized Joyce Johnson, Utilities Controller. Johnson presented the Commission with financial statements for January 2010. Johnson noted that today, February 22, was the first day that the new office expansion had been open for business. She noted that several meter reading routes had to be estimated due to the inclement weather in December and January. Johnson said that water consumption was up slightly over the same period last year. Johnson said that the water department operated at a loss (about \$52,000) last month. Johnson said that the sewer department was still operating at a small profit.

Continuing, Johnson noted that Northwest Group (the group of investors that owned the Holiday Inn and Staybridge Suites on S. 52nd St. near the bypass) had entered into a new forbearance contract to pay the amount owed for the construction of sewer and water facilities in the area of Stoney Brook and Horse Barn Roads. She said that a monthly installment had been received.

Cable asked if the installment would show up as revenue. Johnson said that the book entry would be an offset against capital expenditure. She said the total amount was booked as a receivable in the water department and the sewer department.

Greene asked Johnson if the other cities in Northwest Arkansas were performing financially about the same level as RWU. Johnson said that she wasn't sure how other cities were profiting in the economic downturn, but could inquire and report at the next meeting.

Greene recognized Mark Johnson, Utilities Engineer. Johnson presented the Commission with a spreadsheet detailing the status of the several projects still pending in which the Commission had a pecuniary interest. Someone asked about the water line relocation project between Olive and Rozell Streets. Johnson said that the project was to realign a 24-inch water transmission main that was being unearthed by a large drainage ditch in the area. Huffman-Gilreath asked if the relocation project was an emergency. Johnson said no, that RWU had been keeping tabs on the water main for awhile, and decided it was time to do something to protect the main line.

Cable asked Johnson about the old sewer collection system assessment? Johnson said that he hoped to have something to show the Commission by the next meeting. Someone asked if the water distribution system was in similar straits? Johnson said no, that most of the older water pipe was constructed of cast iron, which had a long life span. He noted that most galvanized pipe in the system had been replaced already.

Greene recognized Alan Wooten of Warner, Smith, and Harris, attorneys for the Commission. Wooten reminded the Commission that it had passed a resolution in 2004 adopting what were then called "hookup" fees and access" fees for the purpose of more fairly apportioning the cost for capital improvements necessitated by growth. In 2007, the Arkansas state legislature passed a law that redefined impact fees, and made the law retroactive to 2004. Almost immediately, the City of Rogers and the Rogers Waterworks and Sewer Commission were sued for exacting an illegal tax. After a couple of false starts in which the lawsuits were thrown out for a lack of jurisdiction or a lack of standing by a plaintiff, the lawyers found a plaintiff that actually had paid the access fees and hookup fees, and the lawsuit was allowed to continue. After some procedural wrangling by Warner, Smith, and Harris, a court ruled that the fees paid before June 26, 2008 (the date the current lawsuit was filed with Bill Burkhart as plaintiff) were paid voluntarily, and could not be subject to the lawsuit. This had the effect of reducing the contingent liability of the lawsuit from over \$8 million to about \$1.5 million (the impact fees paid from June 26, 2008 to date). This ruling (which was being appealed) reduced the value of the suit to a point that the plaintiff's lawsuit was potentially worth considerably less, so the plaintiff's attorney asked for a mediation (which the Commission agreed to at the last meeting).

Wooten said that he thought the Commission had done no wrong, and the lawsuit was of dubious merit; but, from a risk management standpoint, the Commission should consider a settlement. He listed the main points conditionally agreed to at the mediation:

1. Only those fees paid after the effective date of the current lawsuit would be subject to the settlement.

2. The Commission would advertise for a period not to exceed 120 days for those who paid the impact fees after the effective date.
3. Those who paid the fees as stipulated above could receive a voucher, equal to 53% of the fees actually paid, to be used within five years for like payments only to RWU for impact fees.
4. That the vouchers would be transferable.
5. That the Commission recommends a reduced fee schedule for low cost housing (a sixty percent reduction) to the Council for adoption. A low cost house was set at \$120,000.
6. The plaintiff agreed to dismiss the lawsuit with prejudice.
7. The Commission would agree to pay plaintiff's lawyers \$200,000 in attorney's fees.

Wooten said that the Council and the court would all have to agree, and that the matter would probably take several months to settle at court. He estimated the total contingent liability at about \$1 million, much less that the \$8 to \$10 million with plaintiff's attorneys fees, plus defense attorney's fees (for the worst outcome possible).

There followed a lot of comments and questions from the Commissioners. Does this settlement protect the Commission from future lawsuits? Wooten said that, while anyone can sue at any time, the value of a future lawsuit was greatly diminished by this settlement. Wooten characterized the settlement offer as "fair".

Pepple described the settlement offer as "extortion". Wooten said that he would call the matter a legally valid dispute. However, he would be willing to defend the lawsuit at court, if the Commission so chose. Kendall said that there was an element of risk going forward with the defense. Pepple reiterated that the Commission had done nothing wrong or illegal. Greene wondered if the matter might be tabled. Wooten counseled against waiting, as the fees were continuing to be collected, increasing the contingent liability. Kendall agreed, and made a motion to accept the terms of the settlement as noted, pursuant to approval by Rogers City Council and the Court. Cable seconded the motion. All in favor, motion carried.

Green recognized Mark Johnson again. Johnson presented the Commission with a bid tabulation and a recommendation for the replacement of approximately 1800 linear feet of 4-inch water main in N. "C" St. between Locust St. and Union St. He explained that the City had planned to use Community Development Block Grant (CDBG) money to improve streets and drainage in the area. He said the existing water main would conflict with the route of the proposed underground drainage. Johnson said the low bidder was also the City's contractor (Fotchman Enterprises of Fayetteville). Fotchman's bid was \$139,370. He said the four-inch main would be replaced by an eight-inch main for fire protection. There was a motion by Pepple, second by Huffman-Gilreath, to approve the low bid. All in favor, motion carried.

Continuing, Johnson presented the Commission with a bid tab and a recommendation for the relocation of a 24-inch transmission main between Olive and Rozell St. As explained earlier, the drainage ditch in the area had uncovered some of the pipe, and the pipe needed to be lowered and realigned to prevent the problem from recurring in the future. The low bid was from Ground Zero Construction, for \$116,330.10. Johnson said that Ground Zero was a qualified bidder, and recommended the low bid. There was a motion by Cable, second by Pepple, to approve the low bid from Ground Zero. All in favor, motion carried.

Greene recognized William Evans, Water Distribution Team Leader. Evans presented the Commission with a bid tab for a valve exercise machine. Evans said the low bid was from E.H. Wachs Co. for \$46,880. He said that the machine was trailer-mounted, and had the capacity to locate and clean out valve boxes, and open and close valves. He said that the machine was equipped with GPS to aid in system mapping. There was a motion by Huffman-Gilreath, second by Cable, to approve the low bid. All in favor, motion carried.

The meeting adjourned at 5:05 PM.

Respectfully submitted,

Tom S. McAlister, Acting Secretary

Rogers Waterworks and Sewer Commission

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