CITY OF MILWAUKIE

CITY COUNCIL MEETING
DECEMBER 20, 2005

CALL TO ORDER

Mayor Bernard called the 1972nd meeting of the Milwaukie City Council to order at 7:00 p.m. in the City Hall Council Chambers. The following Councilors were present:

Council President Deborah Barnes
Joe Loomis
Susan Stone
Carlotta Collette

Staff present:

Mike Swanson, City Manager
John Gessner, Planning Director
Bill Monahan, City Attorney
Paul Shirey, Engineering Director
JoAnn Herrigel, Community Services Director

PLEDGE OF ALLEGIANCE

PROCLAMATIONS, COMMENDATION, SPECIAL REPORTS AND AWARDS

Councilor Barnes read the Winter Solstice Event Proclamation expressing the Council's ongoing support.

CONSENT AGENDA

It was moved by Councilor Collette and seconded by Councilor Barnes to approve the consent agenda. Motion passed unanimously. [5:0]

A. City Council Minutes
   1. Work Session November 1, 2005
   2. Regular Session November 1, 2005
   3. Special Session November 8, 2005
   4. Work Session November 15, 2005
   5. Regular Session November 15, 2005

B. Resolution No. 55-2005: A resolution of the City Council of the City of Milwaukie, Oregon, designating the first and third Tuesdays of each month as the regular City Council meeting date, establishing the times of the said meetings, and repealing Resolution No. 37-2004.

C. National Pollutant Discharge Elimination System (NPDES) Interim Report Contract Award.

AUDIENCE PARTICIPATION

Mayor Bernard announced he would limit comments to three minutes. He called on Les Poole as the first speaker.

Councilor Stone had a point of order as to why the comments were limited to three minutes when the usual procedure was five.

Mayor Bernard replied that was his determination as the presiding officer.

Mr. Swanson said the Code did allow the Mayor to set time limits. It also provided that a motion and second of the Council could be made to review any of those rulings. The Mayor in the first instance did set the time limits. If the Council wished and there was a motion to that effect and a second, then that could be taken up.

It was moved by Councilor Stone and seconded by Councilor Loomis to keep the timeline to five minutes as per Council procedure. Motion passed 4:0 with Councilors Barnes, Collette, Loomis, and Stone voting 'aye."

- **Les Poole, 15115 SE Lee, Oak Grove.**

Mr. Poole noted everyone had been through tough times dealing with the situation at the transit center and anxiously awaiting to hear what Mr. Dietrich was planning up the street. Obviously, the parking problem still existed, and some development was being seen. We needed to take care of the parking problem. The buses were still downtown. Part of the reason the buses were still downtown was either because he was a hero or a goat depending on which side of the fence a person was on. He wanted to clarify a couple of things. Last summer he read an interesting article in the *Clackamas Review* about protecting our greenspace. JoAnn Herrigel was interviewed in it, and he kept thinking about the park. He went down there the next day and noticed the greenspace. Why would they have purchased this greenspace that would be useless if it had not been contiguous to the park he had always heard about. He went home and googled "Kellogg Creek Park" which was mentioned in the article by Ms. Herrigel. Nothing came up. He tried Kellogg Lake Park, and he found it. Interestingly, the 3.5-acres down there was designed as a park in 1992. He wanted to clarify a couple of things. He wrote this letter – soap box -- in September 2004 after he realized it was a park. While he was not one to withhold information, he sat back and waited until the opportunity to discuss that presented itself. Because Phil Selinger was coming in to discuss the Wal-Mart site and some other issues he spent a few minutes on the 18th of October requesting City records because it was obvious to him that it was a park. Now it is a park, and we were going to move on to find a good location for the transit center. He certainly was not there to endorse Southgate. It might surprise the Council, but he could be of value in its search. His concerns were twofold. He had not seen any motion to drop option 2.5, and he was certainly not there to demand it. He thought it needed to be on our radar soon. Secondly, he wanted to clarify something he said because he always tried to be real accurate. During our testimony on November 1 he mentioned that Kronberg Park was going to be condemned possibly by the City Council. He mentioned the Planning Commission had denied an application by the property owner and the developer. That was incorrect. Actually, the developer's application had a preliminary conditional approval. It was a minor correction, but he always tried to be real accurate in what he told the Council. The point being that the condemnation of that property was for a park,

and that 3.5-acre park existed and had existed for a long time. That 3.5-acre park was the identical piece of property out of the original purchases that was Kellogg Lake Park. We needed to work on turning Kellogg Lake Park into Kronberg Park. He hoped Carolyn Tomei and some of the other folks that brought up the obvious issues with that intersection would continue to work towards that. If we could fix that intersection it would provide access to Island Station, see some redevelopment down there, and at the same time coincidentally create access to our park. In the future, he hoped he would not be talking about the park any more. There should be a sign up there as was part of the agreement with North Clackamas Parks. Obviously some time after the first of the year, he would like to see that. In closing after he realized it was a park, he interviewed several people on the Council, a former Council member, and a number of people on the Planning Commission. None of them knew it was a park, so obviously we all moved forward, and he understood that. He asked them in hindsight had they known it was a park, would they indeed have moved forward. He got the same answer every time. Obviously, Carlotta was not on the Council at the time. Councilor Loomis – he asked his opinion frankly. He was curious – he had not talked with Councilor Barnes. He asked her if she had any indication it was a park until late October, early November.

Councilor Barnes replied she had not.

Mr. Poole just wanted to know because famous last words – had we known we wouldn't be here. We wouldn't have been here. Let's move forward.

Councilor Collette asked Mr. Poole for the record if he lived in the City of Milwaukie.

Mr. Poole replied he lived at 15115 SE Lee, Oak Grove 97267. Obviously, his family made a $22,000 contribution on the project, so he certainly had standing and appreciated the question. He did not live in Milwaukie, but he was influenced by it.

- **Ed Zumwalt, 10888 SE 29th Avenue.**

Mr. Zumwalt spoke for the Historic Milwaukie Neighborhood Association. Several months ago through efforts of the vice chair, Dion Shepard, the NDA adopted Kellogg Lake Park soon to be re-christened Kronberg Park. Subsequently, they conducted two park cleanups. Mayor Bernard indicated in an interview in *The Oregonian* that he hoped someone would step up and put money in the park so Dena Swanson could realize her dream as the City was strapped financially. The Neighborhood was stepping up. It would apply for a Nature in the Neighborhoods grant through Metro for starters and follow up with other grant applications in the future. They would also pursue other fundraising avenues. Lake Road NDA already assured Historic Milwaukie of its assistance. At the same time, he hoped the City would assist with the Metro grant and others. After all, the City has been derelict in its responsibilities in that area for almost 14 years. He hoped the decision on that site was put to rest and all could go forward with a new sense of harmony.

- **Rosemary Crites, 4917 SE Aldercrest Road, County resident**

Ms. Crites did not live within the voting boundaries of Milwaukie but lived as close to City Hall as many members of the Council. Her family lived at that address for 55 years. With that in mind, she did have a vested interest in the future of the City and how others perceived it in the metropolitan area. She was at this meeting to speak with

Councilwoman Deborah Barnes. In the November 8 meeting, Mayor Bernard moved that the Council authorize the City Manager, Mike Swanson, to discuss with Dena Swanson her intent as to the letter from Dan Bartlett to her that she countersigned and whether she wished to clarify or amend what was stated in the letter. This letter had to do with her wishes to have the property presently known as the Kellogg Lake site to be made into a park and named after he deceased husband Mr. Kronberg. She asked Councilor Barnes if she seconded the motion.

Councilor Barnes believed she had.

Ms. Crites continued. With the seconded motion, it was moved and seconded that the Council authorize the City Manager, Mike Swanson, to discuss with Dena Swanson her intent as to the letter from Dan Bartlett to her that she countersigned and whether she wished to clarify or amend what was stated in the letter, and if appropriate given her response to enter into a written agreement consistent with Ms. Swanson's response. Councilor Loomis did not like that motion and asked that a meeting be set up which would include witnesses to this interaction. Suggested attendees would be Mayor Bernard, Milwaukie City Manager Mike Swanson and/or a designated staff representative, and Councilor Stone to accurately inform her of the history of the siting of the transit center. The purpose of the meeting would not be to propose any thoughts or ideas to develop this property. The sole purpose would be to give Mrs. Swanson all sides of the issue for and against the siting of the transit center on Kellogg Lake. Councilor Collette had stated it was not the Council members' role to negotiate on behalf of the City and to meet on this type of issue. It was staff's role and generally the City Manager's role; therefore, she could not support Councilor Loomis's amendment.

In response to Councilor Collette's statement, Councilor Loomis repeated his amendment and added no other Council member should contact Mrs. Swanson or encourage anyone to contact her. The parties in this amendment should only meet once unless Mrs. Swanson requested further meetings of the group. The City Manager and staff would conduct all negotiations and report back to Council with their recommendations, but he did not see that was necessary – what he was trying to do was to add that as part of the first motion. He wanted to clarify that to Councilor Collette. Councilor Loomis repeated the motion prior to Council's voting. The motion on Councilor Loomis's amendment failed 2 – 3 with the following vote: Councilors Loomis and Stone voting 'aye' and Mayor Bernard and Councilors Barnes and Collette voted 'no.' With the vote, it was agreed by the majority of the Council that only City Manager Mike Swanson would talk with Mrs. Swanson.

Ms. Crites had two questions for Councilor Barnes. After Mike Swanson talked with Mrs. Swanson, did she contact her...after Mike Swanson had a meeting with her.

Councilor Barnes replied she did not at any time after that. No. Never. No e-mails. Nothing. No phone calls. No contact with her whatsoever.

Ms. Crites said okay and said to Councilor Barnes that this was a very small town. She could not go back and forth here.

Councilor Barnes asked Ms. Crites why she was asking that.

Ms. Crites said it was because of the fact she had seen many times when Councilor Barnes questioned people's ethics and protocol.

Councilor Barnes asked Ms. Crites if she was questioning hers.

Ms. Crites said she was.

Councilor Barnes asked Ms. Crites for the proof that she made some contacts because that was what she was insinuating.

Ms. Crites replied she was insinuating that.

Councilor Barnes asked for proof that she had contacted Ms. Swanson at any time. She asked that Ms. Crites give her the proof.

Ms. Crites said the proof – did she have it here this evening? She said she would present it at the next meeting if that was what Councilor Barnes wanted.

Councilor Barnes said to present it as soon as she could because she had not made contact with Ms. Swanson in whatever way, shape, or form after that meeting.

Ms. Crites said okay and indicated she had said what she wanted to say.

- **Larry Lancaster, 10505 SE 55th Avenue.**

Mr. Lancaster was happy to see the two minutes added back. It was very important. He labored long and hard on whether to come before the City Council tonight. Even as he sat at the back of the room, he did not turn in his green card. He knew the rules as he continued to think whether he really wanted to do this or not. At the end, he decided because of after watching – he attended of course the recent public hearing and the subsequent special session – after watching it on tape he felt compelled to come before the City Council and ask a few questions. As he mentioned before in the public hearing – if the City Council recalled his comments it was not so much about the decision of Kellogg Lake but about doing the right thing and the conduct of the Council. He really only had seven questions, and he wanted to hear the answers. He wanted to hear them specifically from Mayor Bernard and Councilor Collette and Councilor Barnes.

First, what was the purpose of a public hearing? He wanted to hear the definition of that.

Mayor Bernard did not intend to be questioned tonight on this issue. He would be happy to answer the questions in the form of a letter.

Mr. Lancaster asked if Mayor Bernard was not willing to make a public response to all of his questions or just this question.

Mayor Bernard replied any of Mr. Lancaster's questions. He and Councilors Collette and Barnes were not on trial.

Mr. Lancaster was not a judge, and he was not creating a trial. He thought this Council was very accountable to the citizens. The fact that Mayor Bernard refused to answer any questions was very telling – and not in a very positive way, by the way.

Councilor Barnes said the purpose of a public hearing was to gather information from the public.

Councilor Collette agreed, but there were also different kinds of public hearings. She suggested early on in setting the first agenda, that that issue not be a public hearing because most people assumed a specific process around a public hearing. They assumed a land use issue with the particular rules and regulations that went with a statewide land use issue. This was not that kind of hearing. She did think the purpose of a public hearing in any case was to hear from the public – take information and comments.

Mr. Lancaster said since Mayor Bernard was not going to answer his questions, so he just put them out there. He wanted to find out why Mayor Bernard chose to deviate from a long-standing tradition of five minutes for public comment and restrict it to three minutes. That was one of the questions he wanted answered.

Did any of you after the discussion of contacting Mrs. Swanson – the instructions were made to the city manager not to contact Mrs. Swanson. Did any of you have a conversation with the city attorney regarding whether it was legal for them to contact Mrs. Swanson.

Councilors Barnes and **Councilor Collette** replied they had not.

Mr. Lancaster said regarding the special session did any of you communicate with each other in any manner prior to that meeting -- whether by telephone, by meeting personally, or by e-mail.

Councilor Barnes and **Councilor Collette** replied that they had.

Mr. Lancaster asked if there was any deliberation regarding the outcome of that meeting ahead of time.

Councilor Barnes and **Councilor Collette** replied there had not. **Councilor Collette** added it was just a question of whether there was going to be a meeting. She thought she might have gone overboard by notifying the neighborhood leadership that there was a proposed meeting.

Mr. Lancaster had another question for the Mayor Bernard for him to submit in writing if that was what he chose. Why did you suddenly at the special session out of the clear blue sky suddenly decide to invoke a whole new set of administrative rules regarding the conduct of the meeting that actually in effect made it more difficult for the Council to communicate? He really wanted some understanding around that.

Mr. Lancaster's last question for all Councilors was that after the decision was made, as he understood it from Dena Swanson that the property was to remain a park, have any of you contacted her after the fact for any reason.

Councilor Barnes said she had not.

Councilor Collette said she had. She called Dena after she heard the final decision and said she was glad she felt good or however she felt and if there was any chance to meet and discuss it further. Ms. Swanson said there was not, and Councilor Collette said that was fine.

Mr. Lancaster asked for a ballpark time when Mayor Bernard would respond.

Mayor Bernard asked Mr. Lancaster to give the questions to the city recorder, and he would likely respond the first week of January.

Mr. Swanson discussed what had occurred after the special meeting. He said, based on the vote in that meeting, he did initiate discussions with Ms. Swanson. They met on November 17, and he provided her with the information she requested. She requested that she have time to talk with her son-in-law who is an attorney and her son who is a stockbroker. Mr. Swanson agreed, and they decided to touch base again after the holiday. They did contact each other the week after Thanksgiving, and she told Mr. Swanson that she would like to meet with him along with her son and son-in-law. They met the Monday of the following week at which time she informed him she wished the provisions of the 1991 letter to be met in full. That meant the entire parcel would be maintained as a park, and the City would proceed with the renaming process. When he met with her, Mr. Swanson felt that his direction from the City Council was not to lobby her but to get a decision from her so they could proceed to the next steps in the whole transit center process. Shortly after that he asked Ms. Herrigel to contact Ms. Swanson and begin the naming process. At the same time Mr. Swanson and Ms. Swanson's son-in-law had been working on two documents. One was a covenant that would basically restate what was in the letter in a form that could be recorded. If anyone looked in the future, then it would show up in the real property records along with the 1992 deed. The second document would be a simple letter from Ms. Swanson stating her decision to implement the full terms of the 1991 letter. He just heard from her son-in-law, and he thought they had the covenant and the language of the letter that would basically foreclose any option of using the property as a transit center. That meant that under the Charter he could execute the covenant and have it recorded. He would also prepare a resolution on January 3 that would basically rescind the October 2004 resolution that dealt with the Kellogg Lake site. The locally preferred alternative (LPA) had not changed and was as it had been adopted by the Metro Council in 2004. Basically the action on January 3 would return the situation back to the LPA, and they would work from there on the transit center issue. He wanted to make it clear in his dealings with Ms. Swanson that he did not feel as if the Council had said in any way that that was the only result he should obtain. It was clear to him that was the decision she wanted to make. She made her decision free and clear, and it did not surprise him after she talked to an attorney. The covenant would be recorded so there was notice to the world. He would get the letter from her, and he would prepare a resolution for Council consideration on January 3.

Mayor Bernard said one of his concerns was that the previous letter was not attached to the title, and that Council had not known about it. He asked if he could have his signature on the document, so that Council actually knew about it in the future.

Mr. Swanson said the problem when checking the real property records was that the only thing that showed up was the deed. It said absolutely nothing about any restrictions. He understood at the time the document was recorded, it would not have been acceptable to also record just a simple letter between two parties. He would put this document in a form that was acceptable for recording. When it was recorded with the book and page number, then he would give each member of Council and Ms.

Swanson a copy. Any time anyone went to the files in the County Clerk's Office, the document would show up along with the deed that was recorded in 1992.

Mayor Bernard said one Councilor requested that all e-mails go to the city recorder, but he had not seen any e-mails from that Councilor. Was it not true that those should be produced?

Mr. Swanson believed it was either under the public records law or the section of the Code that allowed Councilors to ask. He would close that loop tomorrow.

Councilor Stone asked Mayor Bernard what he was specifically referring to.

Mayor Bernard said Councilor Stone requested other Council members' e-mails, but he had not seen any of hers.

Councilor Stone said her request did not specify her own e-mails. She got a request – she did not know if it was really a request – it was a statement made by Councilor Collette saying that if she was complying with her own request she would not mind seeing her e-mails. Councilor Stone did not take that as a request. When she got the e-mails, she looked through them and found one from Councilor Collette that specifically addressed that she did not really want to see Councilor Stone's e-mails. Councilor Collette just wanted her to go through the angst of having to produce them. So she did not really take that as a formal request.

Mr. Swanson said he would take the e-mail he got as a formal request and do something about it tomorrow to close the loop.

Councilor Stone said that was fine.

PUBLIC HEARING

A. Findings and Conditions for Norm Scott Subdivision
AP-05-03 by Norm Scott
8555 SE 28th Avenue

It was moved by Mayor Bernard and seconded by Councilor Barnes to continue the hearing on the Norm Scott Subdivision to January 17, 2006. Motion passed unanimously. [5:0]

B. Zoning Ordinance Amendment ZA-05-01, Limitations on Repeat Submissions of Applications – Ordinance

Mayor Bernard called the public hearing to order at 7:32 p.m.

This was a legislative hearing on a Zoning Ordinance amendment initiated by the City. The purpose of the hearing was to consider proposed amendments to the Zoning Ordinance by making clear rules that limited resubmission of denied applications. The City Council decision would be the final decision of the City. All testimony and evidence was to be directed toward the applicable substantive criteria. Failure to address a criterion or raise any issue with sufficient detail would preclude an appeal based on that criterion or issue. Any party with standing could appeal the decision of the City Council to the State Land Use Board of Appeals according to the rules adopted by that Board. Persons with standing are those who submitted written comments or testified and signed the attendance sign-up sheet.

Conflicts of Interest

No potential or actual conflicts of interest were declared. There were no challenges to the Council member's ability to participate.

Staff Report

Mr. Gessner reported the Planning Commission adopted a motion on November 22, 2005 to recommend this amendment to the City Council. No public comments either written or oral were submitted on the proposed amendment. The intent was to prevent the abuse of the land use application and to create certainty for neighborhoods and applicants as to the requirements to perfect the application.

Mayor Bernard recessed the meeting and reconvened at approximately 8:00 p.m.

Mr. Gessner continued. If an application were denied and not appealed, then the applicant would not be entitled to another crack at an application process. The effect of the application was to restrict the resubmission of denied applications unless there were some very specific circumstances including that the application was modified to meet regulations such that it could be approved; that the Code had changed such that an application could be approved; or two years had elapsed. The Planning Commission reviewed the application on November 22, 2005 with a formal recommendation that the City Council adopt the ordinance. The proposed ordinance was discussed at a City Council work session on December 6 for direction. He believed the application complied with all approval criteria for zoning ordinance amendments, and staff requested approval.

For the record, **Mayor Bernard** noted his consent for Councilor Barnes to leave the meeting.

Correspondence: None.

Public Testimony in support, in opposition, or neutral testimony: None.

Close Public Hearing

I was moved by Councilor Stone and seconded by Councilor Collette to close the public hearing. Motion passed unanimously among the members present. [4:0]

Mayor Bernard closed the hearing at 8:06 p.m.

Council Discussion: None.

Council Decision

"It was moved by Councilor Stone and seconded by Councilor Collette for the first and second reading by title only and the adoption of an ordinance amending the Milwaukie Zoning Ordinance (ZA-05-01). Motion passed unanimously among the members present. [4:0]

Mr. Swanson read the ordinance two times by title only.

The Council was polled with the following vote: Councilors Collette, Loomis, and Stone and Mayor Bernard 'aye.' [4:0]

ORDINANCE NO. 1954:

AN ORDINANCE OF THE CITY OF MILWAUKIE, OREGON, AMENDMING THE MILWAUKIE ZONING ORDINANCE BY ADDING A NEW SECTION LIMITING THE RESUBMISSION OF ZONING INTERPRETATIONS AND LAND USE APPLICATIONS WHEN DENIED AND NOT APPEALED.

The Mayor and Council expressed their appreciation to Mr. Gessner for his service to the community as planning director.

C. Code Amendments and Granting Franchises for Solid Waste Management Services – Ordinance and Resolution

Mayor Bernard called the public hearing on code changes related to collection of solid waste and recycling and granting non-exclusive franchises to order at 8:12 p.m. The purpose of the hearing was to consider public comment on the proposed amendments and the franchise.

Staff Report

Ms. Herrigel requested that the City Council take two actions. The first was to adopt an ordinance amending Municipal Code Chapter 13.24 regarding management and collection of solid waste and recycling. The second was to approve a resolution granting non-exclusive franchises for solid waste management services. The City granted the franchises to the seven haulers in 1994, and the original term of those franchises ended October 2004. The Council extended those terms three times so negotiations could be completed and the administrative rules were finalized.

The proposed code amendment formalized practices used in day-to-day operations and updated language to recognize current technology. Ms. Herrigel explained this was a ten-year franchise that was reviewed at year five. If at that time, it was determined an extension was desirable, then five years were added meaning it as a ten-year rolling franchise. There were provisions to terminate the franchise with or without cause. The language also included reference to Down to Earth Day, established the administrative rule process, set a target operating margin of 8% to 12%, and established the franchise fee at 5%. She noted that the city manager approved the administrative rules, so those were not before the City Council.

Correspondence: None.

Audience Testimony

- **Dave White, Oregon Refuse and Recycling Association.**

Mr. White clarified the length of the negotiating period was not a result of controversy but rather that the existing document worked but needed to be clarified. The parties were seeking an approach that protected the City, the customers, and the haulers while creating a document that had a life of its own. Several Milwaukie haulers were present and introduced themselves.

Questions of Clarification: None.

Close Public Hearing: **Mayor Bernard** closed the public hearing at 8:20 p.m.

Council Discussion: None.

Council Decision

It was moved by Councilor Collette and seconded by Councilor Loomis for the first and second readings by title only and the adoption of an ordinance amending the Milwaukie Municipal Code Chapter 13.24 and declaring an emergency. Motion passed unanimously among the members present. [4:0]

Councilor Stone referred to 13.24.050 – adoption and revision of rules. She noticed in the old document it said the "rules and regulations and any amendments thereto, may be approved by the city council, after hearing, following said thirty-day period." Was that no longer included because by Charter the city manager was doing it?

Ms. Herrigel replied certain rule changes, such as accepting plastic tubs but not Styrofoam, would be onerous on the City Council and the haulers. This change would allow the city manager to make change administratively with adequate notice to the public.

Councilor Stone noticed some of the ordinance references were crossed out in places.

Ms. Herrigel replied they were crossed out because they referred to the original ordinance that adopted the code language. The ordinance history was in the code rather than the adopting ordinance.

Mr. Swanson read the ordinance two times by title only.

The Council was polled: Councilors Collette, Loomis, and Stone and Mayor Bernard voting 'aye.' [4:0]

ORDINANCE NO. 1955:

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MILWAUKIE, OREGON, AMENDING CHAPTER 13.24 OF THE MILWAUKIE MUNICIPAL CODE REGARDING MANAGEMENT AND COLLECTION OF SOLID WASTE AND RECYCLING AND DECLARING AN EMERGENCY.

It was moved by Mayor Bernard and seconded by Councilor Stone to adopt the resolution granting non-exclusive franchises for solid waste management services. Motion passed unanimously among the members present. [4:0]

RESOLUTION NO. 56-2005:

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MILWAUKIE, OREGON, GRANTING NON-EXCLUSIVE FRANCHISES FOR SOLID WASTE MANAGEMENT SERVICES.

OTHER BUSINESS

A. Time Warner Franchise – Ordinance

Ms. Herrigel requested that the City Council adopt an ordinance granting a ten-year franchise to Time Warner Telecom of Oregon LLC (TWTC) to operate as a telecommunications provider within the City of Milwaukie and authorizing the City Manager to sign a franchise agreement. TWTC actually took over some existing

infrastructure in the right-of-way from AT&T several years ago but had not been using it. When TWTC decided to move some of the wires, it was determined the provider did not have a franchise. The proposed franchise had a term of ten-years, and the City would get a franchise fee of either 5% of the revenue generated by TWTC in Milwaukie or $1,000 per quarter whichever was greater. There was a requirement for a $25,000 bond and insurance, so the parties were ready to move forward once the franchise was approved by the City Council.

Councilor Stone noted the staff report said that TWTC neglected to purchase a franchise at the time it took over this infrastructure. Was that subject to penalty?

Ms. Herrigel replied it was subject to penalty, and a settlement agreement was negotiated in which TWTC would pay the City a lump sum for back payments of the franchise fees.

Mr. Swanson added he just signed that today.

Councilor Collette asked who or what TWTC was serving.

Ms. Herrigel said it was serving a company called Advantus on Main Street. TWTC provided phone service, data transfer, and Internet service.

It was moved by Mayor Bernard and seconded by Councilor Stone for the first and second readings by title only and the adoption of an ordinance granting a 10-year, non-exclusive franchise to Time Warner Telecom of Oregon LLC to operate as a telecommunications provider within the City of Milwaukie and authorizing the city manager to sign a franchise agreement. Motion passed unanimously among the members present. [4:0]

Mr. Swanson read the ordinance two times by title only.

The Council was polled: Councilors Collette, Loomis, and Stone and Mayor Bernard voting 'aye.' [4:0]

ORDINANCE 1956:

AN ORDINANCE OF THE CITY OF MILWAUKIE, OREGON GRANTING TIME WARNER OF OREGON LLC. A NON-EXCLUSIVE FRANCHISE FOR TEN (10) YEARS TO OPERATE AS A TELECOMMUNICATIONS PROVIDER WITHIN THE CITY OF MILWAUKIE AND AUTHORIZING THE CITY MANAGER TO SIGN A FRANCHISE AGREEMENT WITH TIME WARNER OF OREGON LLC. IN SUBSTANTIALLY THE FORM OF EXHIBIT A.

B. Council Reports

- **Councilor Loomis** thanked Ms. Herrigel and the Community Services Department and the Park and Recreation Board for their work on the Winter Solstice Event.
- **Councilor Collette** attended the Regional Water Suppliers Consortium and discussed the annual membership fee and services received.
- **Councilor Stone** wanted to look at a date or start thinking about discussing the e-mails. She sent everyone e-mail that morning. She did not know if it should be done in a special session, but she did want to do it as a group and talk about where

the Council was. She thought it was important to do it to foster some team building and have an open and honest discussion about the content. She did not know if the Council wanted to do it on a Saturday. Was there going to be a Council coffee starting in January? She thought it was something to think about – a date. Mr. Swanson noted the second Saturday of January was a long weekend.

Councilor Stone asked if that time would be used to talk about the e-mails or would another time be chosen. She just wanted to get some dates.

Mayor Bernard did not personally care to talk about the e-mails. As far as he was concerned he had no intention to set a date to talk about the e-mails. He knew what the Council's obligations were. Maybe because they were volunteers, they did no quite understand and sometimes strayed beyond that. He was comfortable that the information was provided and did not care to discuss it – and certainly not take extra time to do it.

Councilor Collette made some notes, as she was reasonably upset. She appreciated and encouraged the involvement and interest of all the citizens of Milwaukie in the processes the Council went through. That included people who lived and worked here and had businesses, but she was tired of hearing from people who did not live in this community that took a tremendous amount of time and only seemed to be what once were called outside agitators. She thought the whole deal with the e-mails was a continuation of a very unfortunate process. The sooner they put it behind them the better as a City they would be. The more likely they would be able to build a team and function as a City Council. If Councilor Stone wanted to go forward, then Councilor Collette would do so only after she saw Councilor Stone's e-mails. It was an onerous process that exposed not just the people on the Council but also the people Councilors communicated with who trusted them and assumed, probably wrongly, that their communications would be private. For her it was like being presented with people's diaries. That was why she had no interest in seeing Councilor Stone's or anyone else's. She thought it was unfortunate that this issue was being pushed. She thought the City Council had a huge number of really big and exciting projects that were begun last year, and she wanted to move forward on them. She was tired of going back over old ground and all those clichés, beating a dead horse. She wanted the community to move forward. She agreed it would take team building, but she did not think it meant exposing people in the community and the e-mails they had written to any more public rancor. She wanted the City to work for itself and not have a lot of other people coming in and pushing it back and slapping the City Council. The members were all volunteers who were not paid to do this. It was hard work, and members spent a lot of time doing it. None were doing it with any interest other than to further this City and to build it into the most wonderful community one could live in. She was sick and tired of people who had no interest other than to come in and knock it down over and over again.

Mayor Bernard wished everyone a Merry Christmas and those who lived small lives and kept dragging this on. Councilor Barnes and the other members volunteer. To sit here and accuse her of something that, if she did which she said she did not, she did not do it intentionally was disgusting as far as he was concerned. As Council members they really had to do things on the up and up. He would be happy to tell

Mr. Lancaster that he had talked with Dena Swanson twice. She called and asked him if there was something on the property, and he told her he would call the city manager. The second time she said she had not heard from the city manager, so Mayor Bernard followed up to make sure he called. Those were the two times he spoke with Dena Swanson. It disgusted him that after all the progress that had been made, that the small people who evidently had nothing better to do came to the meetings and accused the Council of improprieties. He was disgusted by it. He loved this community, and he was not going to back away. If they wanted to come and fight him, then he was ready.

Mr. Swanson had been in this business for 33 years. He believed it was Councilor Loomis who asked if anything like this had occurred before, and he replied it had not. Someone he cared about having a reaction or whatever happened. What he saw – he did not see any silos or people not trying to help stabilize the situation. He believed perhaps this was not the night to get into it, and he was a little late. Secondly, he suggested that there were issues to talk about that probably needed to be considered at a different time. He certainly felt differently at the close of this meeting than he normally did. He thought the issues did need to be defined because there were still transit center matters to resolve. The City was faced with a big issue on Clearwater along with many, many other issues. He would rather see the City respond to those in a caring way as opposed to how things had happened in the past. He would share whatever responsibility he had in doing that, but he suggested deferring – but not forgetting – because there were things that needed to be dealt with. He felt there might be a better time. It was not about delay. It was about hoping to set things up to be more successful that they would be if the group tried to wrestle with times and definitions of issues tonight. There were issues that needed to be defined and dealt with.

Councilor Stone was not suggesting a discussion at this meeting. She did think that one needed to happen. One thing they needed to remember was that each was a public official and needed to be accountable. When people came before the Council, she never viewed anyone – she did not care if they were on the side of an issue that she agreed with or not – she never viewed them as being small, as being irritating, as being in any negative way because they were the public regardless of if they lived in the City boundaries or out. Some of the people the Council heard from tonight had families that donated land. She certainly did not think it was appropriate to be putting anyone of our citizens down. The people that elected the Council held them accountable. If they had questions they would come forward sometimes. Unfortunately, that happened.

Mayor Bernard asked if there was a motion to adjourn.

Councilor Loomis agreed with Mr. Swanson and Councilor Stone in respect to the City's having some big issues coming before it. The only way to work together was to address an issue. There were a couple of rules that he read before coming to Council, and he wanted to share one of them. "Think before you speak or act. Your actions reflect on the whole Council and the City of Milwaukie." With that Councilor Loomis seconded the motion to adjourn.

The motion to adjourn passed unanimously among the members present. [4:0]

ADJOURNMENT

Mayor Bernard adjourned the regular session at 8: 44 p.m.

Pat DuVal

Pat DuVal, Recorder

AGENDA

MILWAUKIE CITY COUNCIL
DECEMBER 20, 2005

MILWAUKIE CITY HALL **1702ND MEETING**
10722 SE Main Street

REGULAR SESSION – 7:00 p.m.

I. CALL TO ORDER
Pledge of Allegiance

2. PROCLAMATIONS, COMMENDATIONS, SPECIAL REPORTS, AND AWARDS

3. CONSENT AGENDA *(These items are considered to be routine, and therefore, will not be allotted Council discussion time on the agenda. The items may be passed by the Council in one blanket motion. Any Council member may remove an item from the "Consent" portion of the agenda for discussion or questions by requesting such action prior to consideration of that portion of the agenda.)*

A. City Council Minutes
1. **Work Session November 1, 2005**
2. **Regular Session November 1, 2005**
3. **Special Session November 8, 2005**
4. **Work Session November 15, 2005**
5. **Regular Session November 15, 2005**

B. Resolution Establishing Council Meeting Dates for 2006
C. National Pollutant Discharge Elimination System (NPDES) Interim Report Contract Award

4. AUDIENCE PARTICIPATION *(The Mayor will call for statements from citizens regarding issues relating to the City. It is the intention that this portion of the agenda shall be limited to items of City business which are properly the object of Council consideration. Persons wishing to speak shall be allowed to do so only after registering on the comment card provided. The Council may limit the time allowed for presentation.)*

5. PUBLIC HEARING *(Public Comment will be allowed on items appearing on this portion of the agenda following a brief staff report presenting the item and action requested. The Mayor may limit testimony.)*

A. Findings and Conditions for Norm Scott Subdivision (John Gessner)
8555 SE 28th Avenue
Appeal File AP-05-03
This hearing will be continued to January 3, 2006

PUBLIC HEARINGS, continued

B. Zoning Ordinance Amendment ZA-05-01 (John Gessner) Limitations on Repeat Submission of Applications – Ordinance

C. Code Amendments and Granting Franchises for Solid Waste Management Services – Ordinance and Resolution (JoAnn Herrigel)

6. OTHER BUSINESS *(These items will be presented individually by staff or other appropriate individuals. A synopsis of each item together with a brief statement of the action being requested shall be made by those appearing on behalf of an agenda item.)*

Time Warner Franchise – Ordinance (JoAnn Herrigel)

7. INFORMATION

8. ADJOURNMENT

Public Information

- Executive Session: The Milwaukie City Council may go into Executive Session immediately following adjournment at pursuant to ORS 192.660(2).

  All discussions are confidential and those present may disclose nothing from the Session. Representatives of the news media are allowed to attend Executive Sessions as provided by ORS 192.660(3) but must not disclose any information discussed. No Executive Session may be held for the purpose of taking any final action or making any final decision. Executive Sessions are closed to the public.

- For assistance/service per the Americans with Disabilities Act (ADA), please dial TDD 503.786.7555

- The Council requests that all pagers and cell phones be either set on silent mode or turned off during the meeting.

MINUTES

MILWAUKIE CITY COUNCIL WORK SESSION
NOVEMBER 1, 2005

Mayor Bernard called the work session to order at 5:30 p.m. in the City Hall Conference Room.

Council Present: Councilors Barnes, Collette, Loomis, and Stone.

Staff Present: City Manager Mike Swanson, Community Development/Public Works Director Kenny Asher, and Engineering Director Paul Shirey.

Clackamas County Capital Improvement Plan Update

Shari Gilevich, Clackamas County Senior Planner, provided an overview of the County's biennial update of its Capital Improvement Program (CIP) and discussed those projects that would impact Milwaukie's transportation system. She discussed the point system that prioritized projects based on safety, capacity, economic development potential, coordination with other projects on the regional plan, and pedestrian/bike projects. The result was a list of projects based on near-, intermediate-, and long-term needs for the 20-year plan with the near-term projects programmed for the initial five years. There was little money this year for construction of new projects. Projects that would impact Milwaukie were Harmony Road, the West Sunnybrook Extension, and the Sunrise Corridor.

Mayor Bernard noted a number of years ago the City of Milwaukie requested that the Harmony Road project be removed because it took out two blocks of the Cedarcrest Neighborhood and put a bridge over the railroad tracks. The Linwood Neighborhood was very concerned about the project.

Ms. Gilevich did not know how it would impact the neighborhood, but it was a major project that moved a lot of traffic to Hwy 224. It had been removed from the project list for a time, but it was such a high need area that it was put forward for analysis.

Councilor Stone thought it was originally coordinated with light rail and development of a park-and-ride. That was a major assault on the neighborhood and would have taken a lot of land to build the park-and-ride.

Mr. Shirey recommended that the Linwood Neighborhood Association and staff be identified as stakeholders. It was a large pinch point, and there was a safety issue with the grade crossing. An over-crossing would take care of the problem but should not be at the expense of homes in Milwaukie.

Councilor Barnes commented on the school buses that had to stop at the railroad tracks and the amount of traffic generated by employees leaving work on International Way.

Ms. Gilevich understood the City Council felt the County's moving forward with an analysis was a good thing, and those present agreed.

Councilor Collette thought Clackamas Community College should be included in the list of stakeholders as that campus was significant in its long-term plans.

Ms. Gilevich discussed the Sunnybook extension that was funded by tax increment financing and would be coordinated with the Harmony Road improvements. She commented on paying off the bonds for the Sunnyside Road improvements.

Mr. Shirey suggested that the County project manager discuss the Sunrise Corridor and its impacts on Hwy 224 with the City Council.

Councilor Collette expressed concern for those downstream neighborhoods such as Historic Milwaukie and Hector Campbell that incurred the traffic impacts.

Mayor Bernard added the money secured by Congressman Blumenauer was to analyze the impacts along the corridor and specifically the trucking industry.

Councilor Collette noted some of the most congested industrial areas were not addressed by the Sunrise Plan and would fail a traffic analysis. She was mainly concerned about Hwy 224 and what it would unload on Milwaukie.

Mr. Shirey said the City was in the midst of trying to determine how Harrison, Oak, and Monroe Streets all worked with background increases and developability of land. The impacts needed to be adequately identified and analyzed.

Councilor Collette commented that it seemed like most of the County's CIP money was going to the Sunrise Corridor and thought other communities needed to get involved so all the funds did not go to that project.

Mayor Bernard said that issue was being discussed at the Joint Policy Advisory Committee on Transportation (JPACT) and Clackamas County Coordinating Committee (C4).

Ms. Gilevich would talk with County staff about Harmony Road and make sure the neighborhoods were included.

Information Sharing

Mayor Bernard recently attended a meeting of the Regional Partners on Economic Development. He understood at last week's Clackamas Cities Dinner that the Qwest issue had been resolved and asked that staff confirm that. He commented on the Homewood Park dedication in the Hector Campbell Neighborhood. He met with a developer who was willing to partner with Wal-Mart, TriMet, and Metro to develop the former Goodwill site.

Mayor Bernard adjourned the work session at 6:03 p.m.

_____

Pat DuVal, Recorder

CITY OF MILWAUKIE

CITY COUNCIL MEETING
NOVEMBER 1, 2005

CALL TO ORDER

Mayor Bernard called the 1969th meeting of the Milwaukie City Council to order at 7:00 p.m. in the City Hall Council Chambers. The following Councilors were present:

Council President Deborah Barnes	Joe Loomis
Susan Stone	Carlotta Collette

Staff present:

Mike Swanson, City Manager	Grady Wheeler, Information Coordinator
Gary Firestone, City Attorney	Paul Shirey, Engineering Director
Kenny Asher, Community Development/Public Works Director	Stewart Taylor, Finance Director
JoAnn Herrigel, Community Services Director	

PLEDGE OF ALLEGIANCE

PROCLAMATIONS, COMMENDATION, SPECIAL REPORTS AND AWARDS

A. ***Emergency Responder Appreciation Week Proclamation*** November 20, 2005 through November 26, 2005.

B. ***One Baby at a Time Proclamation*** Milwaukie Providence Hospital.

C. Metro Growth Projections

Metro Councilor Brian Newman discussed the most recent 2030 growth projections that indicated an additional 1.1 million people moving into the in the region in the next 25 years. At this time there were about 2 million people living in the four-county area. He discussed the 2040 Plan and the need to update it as well as the Regional Transportation Plan (RTP). The elements of the final growth management plan included urban growth boundary (UGB) expansions, more efficient use of land within the existing boundaries with a series of centers, and shifting more growth to neighboring cities.

The themes were a strong central city with Portland as the hub. Outside of that there were town and regional centers that were walkable, vibrant, mixed use areas that served as hubs to the surrounding neighborhoods. In most cases these were linked by transit. Other important themes were protection of industrial zoning, protection of rural areas to ensure green corridors, nature in the cities, and a balanced transportation

system. People would have more options to ride transit, bike, and walk. The Metro Council adopted the 2040 Plan in 1997, and the affected jurisdictions subsequently adopted theirs over the next five years. He reviewed the population conditions between 1970 and 2000 and noted the 2040 projections would be reached by 2020. The 2040 job numbers would be hit by 2015. While unemployment was high, jobs were growing and outpacing the rest of the country.

The question was would the region grow in the right direction. He indicated those areas added to the UGB in the past few years. There was also a lot of vacant land in urban areas that had been bypassed before, and development was a big concern for residents and neighborhoods. Some areas such as downtown Milwaukie where redevelopment was desirable, it made sense, but in the neighborhoods there was a concern about preserving character. He pointed out sites were the land was more valuable than the structures, so there were teardowns and redevelopment or where people would subdivide lots.

Councilor Newman discussed the UGB expansion and the hierarchical system under which it was done. After urban reserves, the first priority was non-resource land or rural residential areas like Damascus and Beavercreek before going to resource lands that were actually being farmed. Most of the exception land was what the state said had to be used before resource land was found in Clackamas County. He pointed out the boundary expansions that occurred incrementally along the edge for about two decades and the 2002 expansion to Damascus.

Based on growth projection, the Metro Council asked staff to come up with a likely scenario based on current state law and Metro policy. Most of the growth would occur on the southern tier of the region including the Stafford Basin, Pete's Mountain, Oregon City, and Boring. Most of the job growth would be in the crescent from Wilsonville, up I-5, and out to Hillsboro. The concern was that based on current policies and models was that most of the new housing would be in one part of the region and jobs in another part putting even more stress on the transportation infrastructure.

The Metro Council would update its Regional Growth Plan and RTP beginning in January as well as going to the legislature to ask for more tools for managing growth to avoid some of these implications. Questions were: how do we continue to create great communities within the UGB in places like Milwaukie? How do we pay for it and who pays for it. When we have to expand, where do we expand? Can we get more flexibility from the state to put more housing where the jobs were? Are there places where growth should be off limits under any scenario? He encouraged people to join in the process and noted he would make a presentation to the NDA leadership on November 14.

CONSENT AGENDA

It was moved by Councilor Barnes and seconded by Councilor Collette to approve the Consent Agenda:

A. City Council Regular Session Minutes of October 4, 2005;
B. Amendment to IGA with Oak Lodge Sanitary District for the Provision of Internet Services;

C. **Resolution No. 51-2005: A Resolution in Support Clackamas County's Recommendations to Metro Related to the 2006 Regional Greenspaces Bond Measure; and**
D. **OLCC Application for J&J Little Store, 2936 SE Washington Street.**

Motion passed unanimously. [5:0]

AUDIENCE PARTICIPATION

None.

PUBLIC HEARING

Kellogg Lake Transit Center Site Deed Issue

Mayor Bernard said this was not a hearing about the transit center but about a commitment made by the City years ago that the City had not fulfilled. The decision was whether or not the City Manager should speak to the property owner.

Mr. Swanson did not go into the history leading to the designation of the Kellogg Lake site as the transit center. About three weeks ago Mayor Bernard informed him he had been contacted by Dena Swanson who requested information as to why the property that she and her husband Norman Swanson had conveyed to the City in 1991 was not named after her first her find husband Mr. Kronberg. At that point, he went to the real property file and found the bargain and sale deed that indicated the property was conveyed to the City, the "true and actual consideration…paid for this transfer stated in terms of dollars was $38,000, together with the payment of real property taxes in the amount of approximately $7,865.22 together with interest if any together with other property of value given or promised, all of which is the whole consideration." That was the document later recorded. The deal went into escrow pending a level 1 environmental assessment. It was placed in escrow and consummated March 1992 after the City approved the environmental assessment. In the real property file, he also found a letter dated December 27, 1991 to Mr. and Mrs. Norman E. Swanson which recounted in four paragraphs what the deed said which was the purchase price and the real estate taxes. That was followed by a sentence, "In addition, the City is purchasing the property for use as a public park and agrees to name the park to reflect the Kronberg name." That letter was signed by Dan Bartlett, City Manager, and by Norman Swanson and Dena Swanson with Dena Swanson being the person who executed the deed. He contacted the city attorney because he had concerns about the language regarding use as a public park and the effect that would have on the transit center. It was an intent expressed by the City and has used the property, in effect, as a park since 1992. Operations and maintenance was transferred to the North Clackamas Parks and Recreation Districts (NCPRD) pursuant to the agreement that transferred all City parks and open space to the District. The agreement with the District provided that "the City retains the deed." The agreement also provided that if the District wished to rename a park, it had to secure the approval of the City. The name of the park used in that instrument was Kellogg Lake Park. The name had not changed, and he knew through the transit center process that the name had also not been altered. The city attorney said at that time it was unclear that the language would create a deed restriction that would create an argument that the intent of the parties at the time was

that the property be used as a park. He had not been told that definitely created a restriction on the deed. More disturbing to him was the fact that the City had made a clear commitment to name the property and had not done so. He called Ms. Swanson at that time about the naming issue and apologized for what had happened because he felt it was clear in the language. He told her he would look into it and would prepare options for naming the property and would discuss it upon her return. They also discussed the use of the property of which she had become aware when she read a newspaper article about the transit center siting issue. He asked her at the time if that would be an issue they could discuss in the future, and she agreed. She talked about the efforts her husband had undertaken in downtown development, and she felt it was an issue that was in line with some of the things he had talked about. He did not talk about a specific proposal because the conversation revolved more around the naming issue.

Mr. Swanson discussed this potential with the City Council in executive session. One question was whether the City should continue to pursue the naming issue. That was a commitment he felt the City should follow through on. The other question had to do with the language regarding the property's use as a public park. It did throw something of a cloud over the property and its potential use as a transit center. It was not a deed restriction but did indicate the intent of the party. The City Council voted 3 – 2 in September 2004 that this was the recommended site. Because that site was recommended, should the City take action in talking to Ms. Swanson about conforming the intentions of the parties if she was amenable to a use that would allow it to be considered for the transit center. Ms. Swanson called him today and touched on the use issue and indicated she was amenable to discussing that. He was seeking direction on what to do with both the naming issue and the use of the property that would be consistent with the recommendation City Council made on September 21, 2004.

Mayor Bernard asked what the City got when it asked for a title search.

Mr. Swanson said if the City had asked for a title search, it would not have gotten the information back that was contained in the letter. The letter was not recorded, and he understood it was in instrument that could not have been recorded.

Mr. Firestone commented it was not in a form that anticipated it recording.

Public comment

- **Rep. Carolyn Tomei, 11907 SE 19th Avenue, Milwaukie**

Rep. Tomei was upset when she read the article in *The Oregonian*, so she called Ms. Swanson and had a very nice conversation. She obviously knew about the transit center and talked at length about her husband being in business in Milwaukie and owning property in and around the Milwaukie area. She was also incensed that there were comments about the fill at the Kellogg Lake site being bad fill. Some people had even said there were even refrigerators there, and Ms. Swanson said that was completely untrue. At one time they had tried to sell the property for some kind of development before the agreement with the City. The fill was found to be adequate for development on the site. She knew about the transit center and said the article was not true and that she was not opposed to the transit center going in at that site. She said if

her husband were alive, he would be happy with the development that would probably be caused in downtown Milwaukie. Her main concern was that something be named after Mr. Kronberg. He owned a car dealership on the property the City eventually owned. Ms. Swanson was apparently aware of the bridge that would be built from the Kellogg Lake transit center to downtown Milwaukie and commented that bridge could bear his name. She made it clear that she was not opposed to the transit center or would her former husband have been.

- **Ed Zumwalt, 10888 SE 29th Avenue.**

Mr. Zumwalt was puzzled by something Mr. Selinger said in his transit center update two weeks ago. Councilor Stone asked him why the buses at the City Hall transit center could not be moved to Southgate temporarily. He replied the buses would be too heavy for the surface and that he had also applied for a park-and-ride grant only. It would not be used even for a temporary transit center. Mr. Zumwalt called Mr. Selinger on October 19 to ask specifically why he had applied for a park-and-ride grant when the locally preferred alternative was still officially Southgate – not Kellogg Lake. The environmental and engineering studies had not even begun at Kellogg Lake, so it seemed the cart was before the horse. He did state the South Corridor Steering Committee could change the locally preferred alternative (LPA), but he did not think that would happen in light of recent developments. He asked for the paperwork on the grant request that Mr. Selinger agreed to send, but Mr. Zumwalt had not received it yet. He also asked for an educated guess about light rail coming to Milwaukie, and Mr. Selinger said it would be 9 – 10 years. He was wiling to guess even that would not be met. That would mean all the beautiful promises and all the blue sky scheduled for Phase II was still light years away. Council action to pursue the LPA for Kellogg Lake chewed up two more years, and there would be at least two more before Phase I was done if even then. All that time the transit center would still be around City Hall. That was not helping development in any way. Now we have a new legal, ethical, and moral dilemma. How this angst-laden situation came about escaped him. There were only two ways this could have happened -- lack of due diligence or with full knowledge and intent to deceive. He did not think the later could happen. It was time to walk away to realize this was not meant to be. It was dedicated and intended to be a park. It is a park and would remain a park and be developed. To pursue the site as a transit center now would be unconscionable to say nothing of a huge scam on the people of this town. He was weary of being angry and tilting at windmills. He was not the only one with those feelings, but people were not going to leave it alone. It was time to do some soul searching and doing the right thing – to move forward with an open attitude pressing for a transit center at Southgate preferably but without ignoring the ODOT site. He thanked the Council for making him feel so at home – no one listens to him there either.

- **Larry Lancaster, 10505 SE 55th Avenue.**

Mr. Lancaster hoped to make a number of cogent comments addressing the futility of pursuing the Kellogg Lake site because of issues related to TriMet. He understood the City Council did not wish to hear comments about the transit center but on the deed issue.

Mayor Bernard said there needed to be an environmental analysis before this was considered further, and the South Corridor group had not adopted it. The issue at this meeting was whether the City Manager should speak with Ms. Swanson.

Mr. Lancaster said there was a lot of information as to why pursuing it was futile because TriMet would not be able to deliver on the Kellogg Lake site. He reviewed the 90-page Council handout, and there were a lot of important issues regarding the whole transit matter. Specifically this deed and whole situation was extraordinarily troubling. The City made this commitment nearly 15 years ago. He still did not have a clear understanding as to why this restriction – which should have been a deed restriction – was never recorded or why the letter was never recorded. It was either incompetence or negligence. For the City to only discover it now, he recalled in his testimony in the decision-making process for the siting at Kellogg Lake that he had heard there was a problem with the property and a requirement that it remain a park. He did not have the documentation, but now it was here. How could the City not have both a legal and moral obligation to execute on the agreement and make this a park and name it Kronberg Park?

He had a great deal of respect for the City Attorney Mr. Firestone, and he provided very clear information. Mr. Lancaster read from page 28. The general rule in real estate property law was that negotiations be merged into the deed. This should have merged into the deed and become a restriction. The attorney said Oregon allows the parties to go beyond the deed and look into the intent. Was there any question at all as to what the intent was? It was a park – not a transit center. He assumed that Mr. Swanson was deceased. Did his intent not count when this agreement was entered into? He hoped the City would not add to its list of mistakes a disregard and disrespect for the deceased. He questioned whether or not Ms. Swanson had a legal standing. It was not about what her wishes were now or how the City could convince her differently. It was about the City's failure to execute. Because of that, as the City Manager pointed out, it would create a cloud on this property. If one knew anything about federal funding, and TriMet certainly did because that was where all the money came from, then the feds would not authorize an expenditure on a piece of property that had a cloud on it. The people living on Kellogg Lake hired an attorney early on in the process. If ever he saw a solid place for a lawsuit this would be it. Did the City budget money for a protracted lawsuit over this real estate transaction? It seemed that if the City failed to do the right thing on this property there would be far-reaching, deleterious ramifications for the City. If the City did not execute on this agreement, how could any resident in Milwaukie or the regional partners ever trust the City again. The City's word meant nothing. The City would just twist it and make it mean something else later on when it suited. The City worked very hard for the last several years to regain the trust of its citizens. His biggest fear was that if the City did not do the right thing and honor the agreement and create a park, the it would irrevocably damage the credibility of this Council and many Councils to come. That would put the City right back to square one – right when the City was trying to develop the downtown and create economic vitality. Mr. Lancaster could tell the Council with certainty that developers with the big money were not going to invest in a community that was in political turmoil. This issue would not go away. It was clear it was not going to stop any time soon. This all assumed that TriMet could deliver on the

Kellogg Lake site. There was a plethora of information that was new since the decision was made a year ago that spoke clearly that this was not doable.

In conclusion, in his six years on Council, one of the most important things he learned was that the Council made decisions as leaders based on best information at the time. Over the course of time facts changed and conditions changed. It took true leaders to recognize when they needed to make appropriate corrective decisions under the circumstances for the greater good. He hoped this Council would have the courage and foresight to abandon the Kellogg Lake siting and pursue a more kindly and viable alternative like the ODOT site or back to the original charge of mitigating the LPA at Southgate. In the meantime, the City needed to get the buses out of downtown and down at Southgate until a decision could be made.

- **Dolly Macken-Hambright, 12258 SE Grove Loop.**

Ms. Macken-Hambright asked the City Council to recall discussions about the Milwaukie Pioneer Cemetery. It was deeded to the people of the City of Milwaukie as a cemetery. They collectively, with Mr. Swanson, squared away and got it back to the initial intent that it was deeded to the people of Milwaukie and it was set up with trustees. It was now back to the original intent. She saw no difference between the issue with the Kellogg Lake Park and the intent of the individuals that set it up as a park to begin with. She thought, as Mr. Lancaster said, that it was unconscionable not to follow through with the intent of the individual who set up the program to begin with.

- **Les Poole, 15115 SE Lee, Oak Grove.**

Mr. Poole handed out a packet to the Council.[1] He started with a small notebook on Kellogg Lake that had grown over time that was unfortunately also money. He endorsed Mr. Lancaster's comments. Today in *The Oregonian* there was an article about this situation. It indicated the City bought the property for $38,000. The terms and conditions clearly stated that the purchase price was $92,000 for lots 2800 and 3100 from the Kronberg family. In the document from the title insurance company dated March 13, 1992, it clearly said that a donation to the City of $44,965 was made by the property owner. Adjacent to that property were tax lots 3200 and 4500 that were owned by his [Poole] family. His family came to terms with the City and made a $22,000 donation on the same basis. The reason that $64,000 was donated to the City was not for a transit center. In fact, they all knew why the donation was made. Some of those involved, particularly Councilor Loomis, with the situation at North Clackamas Park, recalled that the deed restriction on the equestrian area became a point of contention because it was going to be removed as part of the Park improvements. In its place was to be a soccer field. Unfortunately in the process, they discovered the agreement had to be honored. Suddenly, they found themselves trying to place a soccer field in the back of the park, which was a sensitive environmental area. This was no different. The recent discovery of the failure to record the deed restriction in effect eliminated the site for the potential of being a transit center. The property law did not allow for any provision to disregard terms and conditions of a sale. He did not believe there was any confusion …[2] In 1991 prior to the City's purchasing the site, the owner submitted an

[1] Mr. Poole did not provide a copy for the record.
[2] Tape change; end of comment not recorded.

application to develop the property as Rep. Tomei indicated. The City wished to purchase the site. One would see in the documentation that the City was considering condemning. The only angle they had for condemning it was to use it as a park. He would continue his comments next week.

Councilor Stone wanted to listen to Mr. Poole's wrap up as what he said might be pertinent. This was a public hearing.

Mr. Lancaster made comments from the gallery regarding the length of testimony.

Mr. Poole said the city attorney prepared a memo regarding condemnation of the property for a specific purpose. The City Council was advised in executive session that if it wished to take position of the property it would have to declare that purpose. The court would grant immediate possession if it found the property would be acquired for public use. Everyone knew what that public use was and what it was to this day. Considering the time invested in this, there was no standing and no reasonable excuse or justification to request TriMet as the applicant and future owner of the property to take over this situation. He could not dream of TriMet taking over in light of what had happened.

Councilor Stone understood Mr. Poole to say that the City was trying to condemn that property and asked under what grounds that would have been done. Was it environmental?

Mr. Poole said at that time, which had changed under recent Supreme Court decision regarding condemnation, the property could only be condemned for a specific purpose such as a highway or park. The Planning Commission denied the application to develop the property and negotiated with the owner Ms. Swanson to go ahead and purchase it. Obviously, that was where this unrecorded letter entered into the equation. The concept prior to anything in the current agenda all along was to purchase the property as a park. That was why the parks department took over operations years ago.

- **Roger Cornell, 14805 SE Megan Way, Clackamas, former Milwaukie resident.**

Mr. Cornell said if the City Council had an ounce of honor, integrity decency, or conscience, then it needed to stand up and do what was right regarding the use of the land purchased from Mr. and Mrs. Norman E. Swanson. Putting aside your personal agenda and desires, there was but on ethical decision. Milwaukie entered into a binding agreement. The Council was obligated to honor the commitment the City of Milwaukie made to Mr. and Mrs. Norman E. Swanson agreeing to purchase their property for the use as a public park – not park-and-ride -- and to name the park to reflect the Kronberg name. The Council was also obligated to the citizens of Milwaukie who authorized it to spend tax dollars for this park.

Unethical behavior can never be defended. It's just flat out wrong. No matter how many ways you try to spin it, there was no justification to do anything other than what the City of Milwaukie agreed to do. There was no dilemma; there was a standing agreement. It was real and meant something. This property would never have been under consideration for anything other than a park had these documents been produced early on. Please do not let your pride cloud your good judgment.

- **Greg Seagler, 2244 SE Lake Road.**

Mr. Seagler distributed a letter to Council. He addressed new information. The recent discovery of the 1991 agreement between the City of Milwaukie and Ms. Dena Swanson was only the latest reason we should reconsider Kellogg Lake as Mil's transit center. Because the need to improve the dangerous intersections accessing the Island Station Neighborhood at McLoughlin, River Road, and Bluebird Street, and 22nd Avenue was used as a strong selling point to the citizens of Milwaukie, the Planning Commission, and City Council for selecting the Kellogg Lake site as the location of the transit center. We now know that ODOT has had plans in place for up to several years to reconfigure those intersections to improve traffic flow and pedestrian access with projects that would require no local funding and are expected to be completed in 2007. He included a reference (Rick Keene) where he got that information.

Because we now know the City agreed to preserve the space after Ms. Swanson's first husband, a local businessman Robert Kronberg, at the time it was purchased from them, he asked the City Council to reconsider the recommendation. He urged the Council to honor the spirit of Ms. Swanson's intent as well as the spirit of honor bestowed to our open spaces and waterways identified in Milwaukie's Comprehensive Plan, City Charter, Downtown and Riverfront Land Use Framework Plan, and Downtown Design Guidelines. Those all specifically referred to not building transit centers on waterways.

He reiterated what he had told the City Council before. He urged the Council to honor the spirit of Ms. Swanson's intent. The park should be named after he late husband Mr. Kronberg. Milwaukie's Comprehensive Plan, Charter, Downtown and Riverfront Land Use Framework Plan, and Downtown Design Guidelines all specifically referred to not building transit centers on waterways. He was a strong supporter of public transportation and especially of light rail. He was encouraged to see the things happening in downtown Milwaukie and would actively work toward the goal of improving Milwaukie's transportation options because he agreed they were a vital part of a strong community and local economy. He simply believed the choices needed to be more environmentally sensitive than this one. As the Comprehensive Plan stated, the wise use and management of those resources were particularly important in Milwaukie because the City was almost completely developed, and few areas remained in a natural state. The protection of these natural resources was essential if residents were to experience the pleasures and amenities that could only be enjoyed when nature was close at hand.

He believed this was Ms. Swanson's intent when she sold her land to the City was to provide a place where nature would be close at hand. He asked that the Council reconsider building a transit center on Kellogg Lake.

- **Ray Bryan, 11416 SE 27th Avenue.**

Mr. Bryan said those who voted to make Kellogg Lake the LPA made a difficult decision. Many of the reasons that the Council and the Working Group based those decisions on were no longer valid. Recently we learned that the intersection at River Road and McLoughlin Boulevard had already been redesigned and would be built in

2007. TriMet's last presentation to Council reveals that the timeline for Phase I was vague, and the funding of the environmental impact study was incomplete.

One of the main reasons he opposed the Kellogg Lake location was because of the traffic it would bring through the neighborhood. It has several schools. Much of the traffic destined for a parking garage would be the same time as the kids were walking and driving to school. Given recent weather, that was not a good mix.

Last week he was doing research on the Internet and came across the anticipated transit times it would take to ride light rail into downtown Portland. It was predicted that Clackamas Town Center to Pioneer Courthouse Square would take 38 minutes. Milwaukie to Lincoln Station near PSU would take 18 minutes.

Suppose you were one of the thousands of potential new residents in the City of Damascus. You plan to ride light rail into downtown. In the near future, you would hop on the Sunrise Corridor Freeway. As you near I-205, you would have to decide whether to board light rail at the Town Center or to drive into Milwaukie and cut the train ride by half. For this reason he believed there needed to be a more convenient location for a transit center and parking garage, one that is north of Hwy 224 and is easily accessed by those arriving from the east. A transit center north of town will also bring people and potential customers through downtown Milwaukie who may stop and purchase goods and services on their way home.

Mr. Bryan asked the Council to consider leaving the Kellogg Lake location a park, Kronberg Park and direct focus for a transit center and parking garage to the north.

- **Terri Darling, 10987 SE 28th Avenue #B.**

Ms. Darling said the City was at a crossroads. What was decided about the Kronberg purchase and donation agreement would reflect to the larger community what Milwaukie is all about, whether we keep our word and honor our agreements. This decision would also determine if others would donate property or money for our Riverfront Park and other projects in the future.

This decision would determine how others view Milwaukie's government, its integrity, and reputation. This was an opportunity to change the reputation from a community at odds with each other to a community that works together to solve problems and honors their commitments.

She urged that the Council make the right decision. Honor the agreements made in 1991 and all other agreements pending. Let Milwaukie be known as a community that strives for resolutions that work for everyone, is responsible with the dedicated gifts entrusted to the City, and respects the decisions made by its predecessors. In doing so Milwaukie would continue to be a pleasant and beautiful place to live for future generations.

- **Davis Aschenbrenner, 11505 SE Home Avenue.**

Mr. Aschenbrenner thought naming the Kellogg Lake site should be done immediately. The second question Mr. Swanson asked should be pursued, and that he should have discussions with the former property owner and talk about the issue of a transit center on the site. He did not believe at the time the property was sold that there was even a

concept of the need for a transit center or its location on this particular site. He was a member of the citizens group that considered the options and put forward what it thought was the best option. There could be a park and a transit center on that site. The transit facility would be approximately two acres and the total site was 5 acres. The site provided the money to build the park, put in the trails, restore the riverbank, and plant the trees. He felt the decision from Council should be to name the park and to continue discussions with the former property owner.

- **Lisa Batey, 11912 SE 19th Avenue, Island Station Neighborhood Association Chair.**

Ms. Batey addressed the comments about ODOT's rebuilding River Road/McLoughlin Boulevard intersection. She received information from ODOT over the past months, and she expected a representative to speak to the Association at its November meeting. She understood the work would be a marginal realignment of the crosswalk and some safety issues would be addressed. A serious rebuilding of the intersection was not being planned as the Neighborhood had looked forward to for over a decade. ODOT had little money in 2007, and this was not the kind of change the Neighborhood wanted and supported when it voted in support of the transit center location. She endorsed Mr. Aschenbrenner's comments. She agreed with testimony to the fact that the City cannot ignore this letter even if it could legally because it was not the right thing to do. The right thing to do would be to clarify and discuss further with Ms. Swanson to determine if there could be some compromise use of the property that would fulfill her needs. Ms. Swanson was the widow and the suggestion that it was somehow improper to change the understandings because one of the donors died struck her as being very strange. The widow can act for the estate. She encouraged the City Council to ask staff to pursue the matter and move forward with the site.

Council Discussion

It was moved by Mayor Bernard and seconded by Councilor Collette to request that City Manager Swanson discuss the situation with the property owner.

Mayor Bernard agreed there was a moral obligation to get this matter resolved. He did have grave concerns and felt that if the property owner did not allow something else to be there, then the City should be responsible to that agreement.

Councilor Collette agreed. The conversation needed to be held and to shut down at this stage was inappropriate. The City needed clarification of Ms. Swanson's issues and concerns and how those might be satisfied.

Councilor Loomis thought the letter was clear. He took the testimony to heart. The only thing he differed with was that he thought staff did a great job in carrying out the process this City Council asked it to do. Unfortunately, this paper was not considered. There was eight months of hard work from staff, citizens, and business leaders. The only right thing to do was to honor the letter. He read e-mail that he received saying there was a responsibility to make amends with Ms. Swanson for the City's failure to keep the commitment, and she should not suffer any more discomfort over the City's mistake. If the City Council directed City Manager Swanson to talk to her about other alternatives … he knew there had already been two people who talked to her. He assumed she was elderly. He voted in favor of the Kellogg Lake site. If the contents of

the letter had been known at the time, he did not think that site would have been discussed. If he had known about the letter … he recalled asking questions about it at the time. If he had known, he would not have voted for it. He recommended naming it Kronberg Park. It was right back in Council's lap, and a decision needed to be made about the transit center. The Council had plenty of information, and it was the Council's responsibility to fix it.

Councilor Barnes was concerned with the use of words pride, ethics, ego, integrity, reputation, and keeping our word and keeping commitments to not only this community but also the partners throughout the region. When the City Council first learned about this, her first reaction was anger at the former city manager. She did not understand why he, as a City leader did not follow through on a commitment he should have made by putting it in writing and in the proper place. She felt he had an obligation to address the City Council and the City as to why that was not handled properly. The issue with renaming the site was of utmost importance because 14 years have gone by since that was decided. She believed that name should be on the site. When it came down to the actual decision of what to do, before the City Council made a decision again, she believed Ms. Swanson should be heard. Not only by the City Council but also the community. It seemed one answer was in the paper today where the reporter said she had made a final decision. There were different sets of circumstances when others talked to her. Until the City had a chance to find out what Ms. Swanson really wanted … which was more important than what others wanted Councilor Barnes wanted to hear it straight from her so she could make a final decision. Otherwise, she felt the City Council was shortchanging Ms. Swanson because it had not reached out to her to find out what she wanted for her husband's memory to best represent Milwaukie. She heard this woman's husband tried to make things happen and kept running into roadblocks. This was another roadblock for her. The City Council had not gotten a clear indication of what Ms. Swanson really wanted on behalf of her husband.

Councilor Stone said the issue before the City Council really had nothing to do with what Ms. Swanson thought now. The issue was an agreement – a binding agreement – that clearly states that the property was intended to be a park. It was gifted to the City. The City was not shortchanging Ms. Swanson in the least. But it was shortchanging the community and the citizens by not upholding that agreement. This was clearly a donation. There was no question in Councilor Stone's mind whatsoever when she read through the documents that the intent was crystal clear. It was meant to be a park. In fact, the City Council heard testimony tonight that Ms. Swanson's former husband Mr. Kronberg wanted to develop that site, and the City wanted to condemn it so it could be a park. The Council had an ethical dilemma before it and had a unique opportunity presented to it to act together – act unified and act as a team. The Council had not always done that, and tonight it had the opportunity to do the right thing – to stand up and say our word is good. It did not matter if it was 14 years ago, the Council should uphold it and do it together.

Many members of the Council voted to put the transit center on Kellogg Lake. The Council heard comments about putting agendas, egos, and so on aside. She took those comments to heart. She thought the Council needed to because the issue was bigger than that, and the Council was bigger than that. There was a chance to prove

that tonight. It was not like that was the only place that this transit center could go. There were a myriad of reasons why it should not go there. This one superceded them all. Councilor Loomis said it. If the Council had had this piece of documentation in front of it at the beginning of the process of trying to choose a site, then the Council never would have chosen it. She looked at this strictly as a business deal. If she were purchasing real estate as TriMet was supposedly going to do, if indeed it was going to be a transit center, then they would back away as she would because of the deed and letter of intent to keep the property as a park. It was called discovery. Whenever one made a real estate transaction, there was a discovery process. The City now discovered that it did indeed have a cloud over the site. She could not do anything but uphold that 1991 agreement, and she hoped the Council would do that together. It was the right thing to do. It spoke of integrity. It spoke of honor and the kind of people they are. She would vote against this motion. She did not think Ms. Swanson should enter into it. It was about what the citizens wanted. There was an opportunity to give them this park that was rightly theirs. It was rightly theirs.

Councilor Barnes asked the City Attorney if it was possible to postpone the vote.

Mr. Firestone replied it was always possible to continue a matter to a future meeting. The mover and the seconder could withdraw the motion, or there could be a general consensus that no one was going to call for the vote. The motion could be tabled to a future meeting.

Mayor Bernard would table the vote to the November 15 meeting but was not sure what would be accomplished by doing that. The City Manager would either talk to Ms. Swanson or not.

Mr. Firestone said it was a procedural matter ruled on by the chair, which was the Mayor. If any member of the Council disagreed, they could move to overrule the Mayor's procedural ruling that the matter was continued.

Councilor Stone asked Councilor Barnes her intent for holding the matter over.

Councilor Barnes replied she wanted some questions answered but not from Ms. Swanson.

Councilor Stone understood in terms of Council direction tonight, if the City Council chose to do that, she would like to deliberate this in a Council work session. It was something that had not been talked about. It was a very contentious issue that obviously divided the City and continued to fracture the community. If the Council was not going to make a decision, which she thought it should because people knew what the right thing to do, then she would like to have the opportunity to dialogue together about his situations. She would personally like to see the issue resolved so people could move on. The current LPA was Southgate, and the transit center site was fraught with problems. This was one more nail in its coffin. To not do the right thing spoke loud and clear that the Council did not have the courage to do it. She wanted to see the Council stand together for once and make the right decision and act with integrity.

Mayor Bernard heard the suggestion that the Council did not act with integrity. The Council did. It was not a simple decision. He agreed that the issue needed to be debated. He would be satisfied to set this aside and discuss the matter in a work

session. He had grave concerns about the matter, but to say the Council had not acted ethically or seriously considered the issue was totally wrong. It was a misconception Councilor Stone seemed to have. He was willing to talk about the matter more. He felt the City Manager still needed to talk with Ms. Swanson.

Councilor Stone had not implied that the Council did not act with integrity. The Council had a chance to do that publicly. In terms of talking to Ms. Swanson, the only reason for doing that was to change her mind and her intent. That was the crux of what was wrong. That was the heart of it. We do not under any circumstances need to change her mind. The intent was clear. Her husband's intent was obviously clear. He was no longer able to speak for himself, so she did not see how anybody could.

Councilor Barnes called for the question.

Councilor Stone thought the Council really needed to move on and do the right thing tonight.

Mayor Bernard said the motion was put aside unless someone wanted to make a motion otherwise.

Councilor Collette moved the have the vote at this meeting. The City was not asking for a decision for or against the transit center. The decision was in two parts. The first was the matter of naming something after Mr. Kronberg, which was easy. The City could sit down with Ms. Swanson and find out what she wanted named after him. The second question was if the City Manager should clarify her intent – what she wanted to see happen at that site. Her understanding was that Ms. Swanson was excited and would be fine with having the transit center there. It seemed that Mr. Kronberg had tried to deal repeatedly with the kind of opposition seen with the transit center site. She felt a certain amount of solidarity on the issue. This was not a vote on the transit center; that was done last year. This was a vote on whether to talk with Ms. Swanson to find out what she wanted from the situation. Fourteen years have gone by, and Mr. Bartlett set up the City in a bad situation. Councilor Stone and Councilor Loomis might be right that if the City had been aware of that document earlier, then the Working Group might have been directed otherwise. The fact was that after months of work the Working Group looked at nine alternatives and came up with what it felt was the best alternative. There was a consensus vote. The Planning Commission voted. The City Council voted. All that was being considered was the opportunity to go back to Ms. Swanson who sold the property and clarify her wishes on the site. She thought the City Council should be able to make that vote without postponing it. If it was voted down, then so be it. It was a decision the City Council could make. Her motion was to have the vote at this meeting.

Councilor Loomis seconded the motion.

Councilor Stone said it was not about Ms. Swanson but the donation made as a couple to the citizens. Don't forget that. Taxpayer dollars bought that park. In Milwaukie there were 78 acres of park space. There were 150 acres of private green space and 50 acres of school grounds space. That left Milwaukie with 278 acres and Metro said the City needed 450 acres. Where was the City going to get 122 more acres? Milwaukie was built out; it did not have it. Why would we want to challenge somebody's legal, binding agreement, a gift to our citizens. She would feel robbed as a

citizen if the Council did anything other than honor this agreement. Had the former City Manager done diligence, this conversation would not be happening. The transit center idea would have never gone south of the City. The Council needed to do the right thing. The document was found, and now the Council needed to act accordingly and step up to the plate together and honor the document and put the matter to rest. It was the right thing to do.

Councilor Loomis thought it was clear what Mr. and Mrs. Swanson wanted. It was in the letter. It did matter what she wanted, and he was sure she would be more than happy if it was a park and named after him. He did not think she would object or yell and scream at the Council. The decision was made in 1991. He thought of his father who was 85 and being pressed and lobbied from all sides. He did not think it was necessary. It was in the letter.

Councilor Stone added the Council should not put her through it.

Mr. Firestone understood there was a motion made to have the vote that essentially amended the first motion. The first thing to vote on was whether or not to decide the main motion at this meeting. The motion was made and seconded.

Mayor Bernard asked to see the additional information from Mr. Lancaster. He agreed with Councilor Loomis and Councilor Stone that if this had been available, he would never have looked at Kellogg Lake. That did not mean the City should not speak with Ms. Swanson who was an intelligent woman. In any case, he hoped a surviving spouse could talk about a donation. He wanted to hear from her and did not want to make a big effort to convince her otherwise.

Mr. Firestone said the motion on the table was whether to vote on the substance at this meeting. The motion made concerning substance was to talk with her. The City Council could consider bifurcating the original substantive motion into two motions – one relating to naming and the other as to whether there would be any discussion with her. He believed the City had a parks naming process, but given the circumstances it might be difficult to come up with a definitive name tonight. The Council could direct that the process be commenced to name it in the memory of Mr. Kronberg.

Councilor Barnes called for the question of whether or not to vote on the substantive issue at this meeting.

Motion passed 4 – 1 with the following vote: Mayor Bernard and Councilors Collette, Loomis, and Stone 'aye' and Councilor Barnes 'no.'

Mr. Firestone said the original motion had two parts, naming and having the discussion.

Mayor Bernard wanted to separate those.

Councilor Stone asked if there needed to be a motion to give direction about talking with Ms. Swanson.

Mr. Firestone said it was originally made and seconded. It was unclear to him whether it was formally withdrawn or not. He suggested the motion could be restated.

Mayor Bernard said the original motion was to direct the City Manager to talk with Ms. Swanson the former property owner. The motion was seconded by Councilor Barnes.

Mr. Firestone did not hear any objection to that so recommended proceeding with the vote.

Ms. DuVal read the original motion, which was to discuss the situation with the property owner.

Councilor Stone would like to add, if that indeed was something the City was going to do, she would like this entire Council and this audience present when Ms. Swanson came here to discuss because she heard Mayor Bernard use the word convince. That would be the sole purpose for having a conversation with Ms. Swanson – to merely convince her that the City could still dedicate something to the name of her first husband Mr. Kronberg. It might not be a park. It might be a park or a parking lot. She frankly had a real ethical dilemma where that was concerned. This was clearly in violation of the original intent of the letter and violated her deceased husband as well as it violated the citizens. This was a gift that citizens paid for. This was a park. the only reason the City would be talking with Ms. Swanson was to convince her otherwise and that it could still put her husband's name on something. She could not do that. If the City was going to talk with Ms. Swanson, then all should talk to her. You can't get her alone and manipulate the situation to convince her otherwise. She thought that was what was going on. Frankly, that did not speak well of the City or the Council. This was not acting with integrity. Acting with integrity was honoring the agreement signed on December 30, 1991. The City signed it for the citizens. The intent was absolutely crystal clear. It was supposed to be park.

Councilor Loomis could feel Councilor Stone's passion, but there was no way he would bring Ms. Swanson into this arena. He thought the City Manager would do a fine job; he just disagreed with doing it. He was not unethical and would not get her in a closed room. His decision was based on other things. He fully trusted Mr. Swanson to act professionally, but he did not want to put her though any more. It was time to make good on the promise. She did not need to go through any more. She did not need to be involved. This was the Council's fiasco and its responsibility.

Mayor Bernard would have to agree with Councilor Loomis's comments. This was a change of his opinion. He got the feeling that there were others on Council thinking similar things. He would never have looked at this site if the letter had been there. It was a tough decision to select that site. He would probably vote 'no,'

Councilor Loomis saw no reason to talk to her other than ask what kind of park she wanted and send a letter of apology and an indication of how to make it happen.

Mayor Bernard wanted people to understand this would go back to Southgate. He would represent the City at the South Corridor Committee, and he needed this resolved. He did not think it could be done in a timely fashion to satisfy Ms. Swanson or anyone else.

Councilor Barnes commented one talked about integrity, and her first passion was to the residents of Milwaukie. She made a commitment with her vote when she made her

decision on the transit center. It was very clear to her as it had been over and over again that the Council's word in this community meant nothing for a very long time to the outside world because of the infighting, the arguments, the ego, ethics, and this screaming in the center yard – they were adults. She gave complete respect and had not shouted them down when they came forward to speak. She asked for her two minutes. She would be voting to stay the course and ask Mr. Swanson to step forward. She made the decision a long time ago that this Working Group was right and that the Planning Commission was right. She spent thousand of hours researching this issue for a reason – to make the right decision. She knew Councilor Stone had also done that. She and Councilor Stone spent more time than many, and she was not going to give that up. Councilor Barnes's integrity and ethics were at stake. She made a decision based on fact. Not on gossip, not on cruelness, not on breaking ethics, not by going outside Council executive session to share information with others. She thought she knew what it took to be ethical. She was trying hard to remain that way because there was an issue of integrity for the City, and it was just put on the line. Right now from this point forward the people in Happy Valley and Clackamas County and Metro and TriMet will say, the City of Milwaukie hasn't changed. The Council was pressured into making a decision because a small group of very vocal people who did not represent the 21,000 residents had spoken too loudly tonight. That man's memory was just tarnished because everything he fought for according to his wife just came about again because of ten or twelve people who wanted to scream. That was the way she would vote.

Mayor Bernard said the President was fighting a war because of WMD, but none were found. The war was still being fought. As far as he was concerned, this issue was a WMD. The City needed to change the path, and he could still bring this process to a good conclusion that was beneficial to the City. He thought people needed to look at the first decision. There was a light rail station at 21st Avenue and Washington Street, and that was what he heard people say they wanted. He would fight at South Corridor to have that transit stop behind Milwaukie Lumber. He wished the Council had had this agreement a long time ago. He too blamed Mr. Bartlett and thought it might have been done outside of the Council meeting. There were no restrictions on the deed.

Councilor Collette said this had been a real trial for the whole community, and everyone weighed in for their various reasons. Those who worked on the Working Group believed then and believed now that the Kellogg Lake site was really the best site for the City for all the reasons discussed for the past couple of years. She first heard about the letter in the Council executive session. Her first thought was if this was the case, then the project would have to be moved. She would like to hear Ms. Swanson's feelings on the project. Councilor Collette understood Mr. Kronberg had been opposed over and over by the vocal minority. She understood Ms. Swanson would be happy to do something that resulted in progress for Milwaukie. With that understanding the Councilor wished to move forward and to have that conversation with Ms. Swanson and give her the opportunity to do what she intended which was to contribute something to the City. She was very sad that it did not sound as if the vote would allow that opportunity. On the other hand, this had been a nightmare and would continue to be a nightmare until and unless the site was developed. Councilor Collette would be happy to put the issue behind the Council and move forward although she did not think it was

the right thing to do. She would be content to let go of the project if that was what the people in this room wanted, and that appeared to be the case.

Mayor Bernard repeated the motion, which was to request that the City Manager speak with Ms. Swanson about clarifying the use of the site.

It was moved by Mayor Bernard and seconded by Councilor Loomis to request that the process commence to name the park to reflect the Kronberg name.

Councilor Stone understood it would be named Kronberg Park and that the four-letter word park would be in the motion. She understood that was the intent.

Councilor Loomis was not opposed to the City's talking with Ms. Swanson. He was opposed to talking to her about the transit center. He wanted to add to the motion that her input on this park and its naming should be sought.

Mayor Bernard accepted the amendment that was to talk with Ms. Swanson about the naming and use of the park.

Councilor Stone asked if it was specifically stated in the documents that it would be named Kronberg Park.

Mr. Firestone said the statement in the letter was that the City agreed to name the park to reflect the Kronberg name.

Councilor Stone said that was fine with her if that was stated in the motion. Councilor Stone seconded the motion. The motion passed unanimously. [5:0]

Councilor Stone asked if there was another motion pending. She asked if that took care of naming the site Kronberg Park.

Mr. Firestone said the City had a parks naming policy, and the motion was to direct the City to initiate the procedure to have the name Kronberg.

Councilor Stone asked if there needed to be a motion to not site the transit center on the Kellogg Lake site known in the future as the Kronberg Park site. That was her understanding of what the Council would do next.

Mr. Firestone thought it would be possible to make such a motion. Typically, a motion like that would be acted upon after more substantial input.

Councilor Stone moved, based on the documentation the Council received – the 1991 signed deed and agreement between the City and the Swanson's, to uphold the 1991 agreement and allocate the Kellogg Lake site as a park and to be named after the Kronberg name. Councilor Loomis seconded the motion.

Mayor Bernard would not vote in support of that motion as he thought it needed more discussion.

Councilor Stone asked how the City could uphold the agreement without allocating that site as a park. That was the intent of the agreement, and it was clearly stated it would be a park.

Mayor Bernard said the future discussions needed to include representatives from the North Industrial area.

Councilor Stone thought the Council was having this public hearing to clarify the use of the site and declare that site as a park.

Councilor Loomis thought the Council was meeting to decide what had already been decided. The idea of a work session was all right, but he was not prepared to vote on that motion. He thought the Council had done its work for this meeting and called for the vote.

Councilor Stone said the action requested by the City Manager in the staff report….

Mayor Bernard said Councilor Loomis had called for the vote.

Councilor Stone knew that was the procedure, but she still had a clarifying question. They were talking about the potential restriction, and that was what was being questioned. Was the document a restriction?

Mayor Bernard said Councilor Stone might make another motion, but there was a motion on the floor that had been seconded.

Motion failed 1 – 4 with the following vote: Councilor Stone voting 'aye' and Mayor Bernard and Councilors Barnes, Collette, and Loomis voting 'no.'.

Councilor Stone asked how it was the City could fulfill its duty at this meeting and consider how to proceed with this restriction. It was clearly stated in Oregon law that the companion document to the deed should be upheld. She was unclear why that was not being addressed.

Councilor Loomis was also unclear and thought there should be a work session to clarify the issues. The Council dealt with the business on the agenda, and it was time to move on to the next item.

Councilor Stone did not believe the Council did due diligence with this issue. What would be the plan from this point in terms of what the focus would be? Would it be at the next meeting?

Mayor Bernard said the matter would be scheduled for discussion at the next work session.

Councilor Stone asked what the potential action plan would be for the Council.

Councilor Loomis suggested communicating with the Mayor as he did not feel it needed to be discussed.

Councilor Stone asked if there was some reason why it could not be discussed at this time.

Councilor Loomis thought it was time to move on with the understanding it was not over. In his opinion it was done for this night.

Councilor Stone was happy to talk about the issue further, but she felt the Council did a piece of what the documentation addressed in terms of the naming of the park. She did not think the Council was fully addressing the issue. The Council should clarify what the use of the site would be.

Mayor Bernard felt there was consensus to move on to the next agenda item.

Councilor Stone did not agree.

Mayor Bernard called for a 5-minute recess.

OTHER BUSINESS

A. Tax Assessment

Mr. Swanson said the assessment issue had to do with the tax statements that were just mailed. Last week he noticed on the front page of the *Clackamas Review* an article about the increase in the City's tax rate based on annexation to the Fire District. The intention in proposing the annexation was that there be no increase in the tax rate. There was a point at which the City understood that the District's bonded debt would not be included. However, that was a mistake, and the assessor was correct. The City did make the commitment and would honor the commitment that taxes would not be raised. He was working on the problem but did not have any answers at this time. The message he wanted to leave was that the City knew there was an error for which he took responsibility. The City would find a solution and honor its commitment.

Mayor Bernard commented that he had asked District representatives to attend this meeting.

Mr. Swanson had suggested to them that they not attend. He discussed bonded debt and the assessor's translating the amount into a rate. The assessor appropriately applied the amount of the principal and interest payment to the assessed value. The District would not collect any more, but the individual rates to all the properties in the District were slightly less. He was willing to take responsibility so people could move on and solve the problem. Anyone with criticisms or complaints could level those at him.

Mayor Bernard said the City would lose $169,000 over that $.14/$1,000. It was a small amount on the tax bill. People he talked to at the Farmers' Market said they did not want their money back. He and the City Manager talked to people about the annexation measure with the understanding there would be no tax increase. He wanted people to know the City did not lie but was misinformed. There were people who did not care to have their money back. He discussed the complexities of trying to refund taxpayers.

Mr. Swanson was trying to find a simple way for the City to honor its commitment.

Councilor Collette understood the rate was $.14 per thousand, and taxpayers in the City as a whole were paying approximately $169,000.

Mr. Swanson said the first bond issue would retire this December, so there would be a decrease of approximately $370,000 in principal and interest payments. The other bond issue was for buildings and apparatus some of which directly served the City. Although that might be a great justification, the City made a promise that needed to be fulfilled. The tax statements were correct, and the City would figure out a way to make things good next year. The commitment to make the annexation tax neutral would be made up. In addition to the bond issue that was retiring this December, there was a second issue that he believed went to 2015. The problem would go away when that was paid off, but in the mean time, it had to be made right with Milwaukie taxpayers.

Mayor Bernard had heard a concern that someone selling there home would not get the benefit.

North Main Village

Mr. Swanson announced the documents would be signed later in the week, and Mr. Kemper would put up a fence on Friday that signaled the beginning of construction.

Other Items

Mayor Bernard felt the City made a contract, which was very important to him, and one of his basic principles was that a contract was a contract. He was concerned, however, that the Council broke its contract with the North Industrial businesses. He expected all those who spoke would work hard to make things work in that area. His biggest concern was with Harder Mechanical. He was somewhat disappointed with himself and had felt solid in his vote until Councilor Loomis went in an unexpected direction.

ADJOURNMENT

It was moved by Councilor Stone and seconded by Councilor Collette to adjourn the meeting. Motion passed unanimously

Mayor Bernard adjourned the regular session at 9:35 p.m.

_____
Pat DuVal, Recorder

CITY OF MILWAUKIE

City Council Special Meeting
November 8, 2005

CALL TO ORDER

Mayor Bernard and the following Councilors were present at 5:30 p.m. in the City Hall Council Chambers.

Council President Deborah Barnes	Joe Loomis
Susan Stone	Carlotta Collette

Staff present:

Mike Swanson, City Manager	Gary Firestone, City Attorney

PLEDGE OF ALLEGIANCE

Mayor Bernard read a statement into the record.

He wanted to say he was sorry. We show respect for the people who elected us by showing respect for each other and our wonderful staff. Last Tuesday, we didn't do that. You deserve better, and we will do better. These were difficult decisions we had to make, but difficult decisions should not mean difficult behavior. As important as these decisions are for our community what was important is that we make them as a community. We won't lose sight of the fact that, despite our differences, that we are all friends and neighbors trying to do the best we can for the City we love so much.

This was a special session of the Milwaukie City Council called pursuant to the City Charter and Municipal Code. He asked the City attorney to briefly review the Charter and Code provisions.

Mr. Firestone reviewed the notice requirements relating to special meetings. ORS 192.640(1) authorized special sessions and required notice reasonably calculated to give actual notice to interested persons including news media. The statute required that the notice include a list of principal subjects. Charter §20 authorized the Mayor to call a special meeting of the Council. Municipal Code §2.04.080 also authorized the Mayor to call a Council meeting and required that notice be provided to the remaining Councilors, the City Manager, the City Attorney, and the public. The notice was required to specify the time and place of the meeting and a description of the business to be transacted. The City did issue notice to the meeting, and it was distributed to the media, posted at City Hall, posted on the City website, to the Councilors, City Manager, and City Attorney. The notice specified the time and place of the meeting and the subject

matTer of the meeting. The notice and method of distribution was consistent with the statutes, Charter, and code.

Mayor Bernard called the meeting to order in his capacity as Mayor of Milwaukie. The business to be transacted is "Council discussion and possible action on the use of the property known as the Kellogg Lake Transit site and purchased from Ms. Dena Swanson in 1991." That was the focus of the meeting, and he intended to keep the discussion focused on that business only. This meeting did not call for discussion other than that from the Council. There was ample opportunity for participation last week. He expected that participants at the dais as well as those in attendance to cooperate AND to maintain order. Outbursts from the audience like those the Council heard last week aimed at individuals or ideas, would not be tolerated. Mayor Bernard understood that feelings ran deep on issues like the one before Council. He asked that Council President Barnes assist and interrupt him at any time she believed he was not discharging to the fullest of his responsibilities as chair of the meeting.

He called the special meeting because he believed the action last week with respect to the Kronberg-Swanson property was wrong. His vote was wrong and he wished to have the opportunity to consider righting that wrong.

Last year, after months of hard work by the Working Group, the Planning Commission, and this City Council, the Council adopted Resolution No. 31-2004 – *A Resolution of the City Council of the City of Milwaukie, Oregon, Recommending the Tillamook Branch Light Rail Alignment and Alternative 2.5 (Kellogg Lake) Transit Center Site*. That recommendation, which remained the position of this Council, was addressed to the City's regional partners, who must now consider whether or not to amend the Locally Preferred Alternative Report. If it is amended, extensive environmental and land use processes will determine whether or not the Kellogg Lake site ultimately succeeds. The Council action of last week sent a mixed message to the region and did not support the decision made after months of hard work – a decision that still must survive rigorous review at several levels.

One year ago the Council asked the region to focus on the Kellogg Lake site, and last week it left the question of whether it could be used as a transit center in doubt despite the fact the Council had the ability to clarify that issue. That was simply the wrong way to work with partners from whom you expect something – especially when you have taken advantage of the opportunity before the City. In recent years, Milwaukie experienced numerous successes and did so by maintaining its focus, because it had not run from the challenges facing it, because it was decisive and took advantage of the solutions presented. Milwaukie should not abandon that formula for success.

The issue arose from Mr. Bartlett's letter of December 27, 1991. From that letter, we see that the parties – the City and Ms. Dena Swanson – anticipated a City park on that property and the use of the Kronberg name. He did not speak to the

latter issue other than to say that the City violated its commitment to use the name, and that must be corrected.

However, he did believe that we can and should make a serious effort to explore with Ms. Swanson the use issue and the recommendation Milwaukie made to the region. Last week's decision ignored the possibility of creative solutions. The decision was based on simple either/or thinking. That is, we made a decision based on the simple assumption that the property was either a park or it was not a park. However, there were most likely other possible solutions that, for example, might incorporate both uses on the property.

He respected the positions and reasons for each Councilor's vote last week, but he believed that he too quickly walked away from a solution. Council heard last week that Ms. Swanson was willing to discuss this issue, and he believed that the Council was too quick to dismiss that possibility. The Council heard that the 1991 decision must not be changed – a contract was a contract. He believed that. But this agreement – this contract and deed – was between the City and Ms. Dena Swanson, and she is available, able and willing to discuss a clarification. If she were not willing to discuss the use of the property, or if the Council had reason to believe that she was able to do so, then he believed that last week's vote should stand. But that is not the situation the City found itself in. The Council should not dismiss a potential solution so easily.

Milwaukie made a commitment to the region to work with them as partners. The Council also made a commitment to Milwaukie citizens and businesses that served on the Working Group and the Planning Commission that it would pursue the recommendation they worked on so hard. At the time the Kellogg Lake recommendation was made, the Council did not know about the agreement between the City and Ms. Swanson. Once it was discovered and the fact that it clouded the issue of whether or not the property could be used for a transit center, the Council should have turned its attention to a solution. Once the Council discovered that the original grantor of the property – Ms. Swanson – was willing to discuss the problem, it should have worked with her to conform the 1991 agreement with her to our 2004 commitment to the region, the Working Group, the Planning Commission, and all the citizens of the City of Milwaukie. What was once appropriate in 1991 did not automatically mean that it should remain as City policy for all time. Our commitment to work with our partners as well as recognize the efforts of those who made and reviewed the Kellogg Lake recommendation should not be so easily dismissed, especially when the City had the ability to discuss a change with Ms. Swanson.

The Council was not setting the Kellogg Transit Center site in concrete. Perhaps discussion with Ms. Swanson would not yield a solution. Perhaps the environmental studies would uncover an insoluble problem, or the land use process will fail to result in needed changes. The Council had the ability to let those processes fully run their course, and it should not so easily walk away.

Addressing Councilor Loomis, Mayor Bernard said he was most concerned about the argument regarding the pressures on Ms. Swanson if the City did initiate discussions. The first order of business with her was to meet the commitment to rename the property, and the City needed to follow through on that. He also believed that the Council must explore – not pressure – the issue with her. He could not control what others did, and he hoped that they respected her and did not turn this into an assault on her time and privacy. It was not her problem to solve, and she should not be subject to undue pressure to adopt any one point of view. He also believed that had this information surfaced during the Working Group process, the Group might have acted to explore a resolution by contracting Ms. Swanson then. It would not necessarily have served as an automatic disqualification of the Kellogg Lake option.

In summary, he believed that his vote last week was hasty. It did not acknowledge our responsibility to follow through on our responsibilities in the region. He would not say this if he thought that Dena Swanson was not willing and able to discuss the issue. She is able, and the Council had a responsibility to explore that alternative.

Mayor Bernard intended to move that the Council direct staff to work with Ms. Swanson to conform the use language in the December 27, 1991 letter from Mr. Bartlett to the Council's Resolution No. 31-2004.

Mayor Bernard outlined the procedure he intended to follow. Although the review might be dry, he had come to realize that Council discussions must be more aware of parliamentary procedure. He paraphrased the introduction to Robert's Rules of Order that allowed the membership to be heard and to make the decision without confusion. He briefly reviewed the procedure:

- §2.04.040 of the Code provides that the Mayor is the presiding officer.
- §2.04.050 requires that the presiding officer "conduct all meetings, preserve order, enforce the rules of the Council and determine the order and length of discussion on any matter before the Council …"
- §2.04.200 requires reference to Roberts' Rules of Order should the Code not provide a rule to govern a point or procedures.
- Robert's Rules permits debate after "a motion [is] made by a member who has obtained the floor; second, that it be seconded …; and third, that it be stated by the … presiding officer."
- §2.04.160 provides that "[n]o councilor shall be allowed to speak more than once on a particular question until every other councilor has had an opportunity to do so," and Robert's Rules provides that "[n]o member shall speak more than twice during the same day to the same question…, nor longer than ten minutes at one time, without leave of the assembly; and the question upon granting the leave shall be decided by a two-thirds vote without debate."

Mayor Bernard moved that the Council authorize the City Manager to discuss with Dena Swanson her intent as to the letter from Dan Bartlett to her that she countersigned and whether she wishes to clarify or amend what was stated in the letter, and if appropriate given her response, to entire into a written agreement consistent with Ms. Swanson's response. He asked if there was a second to the motion.

Councilor Barnes seconded the motion.

Mayor Bernard stated the question. It was moved and seconded that the Council authorize the City Manager to discuss with Dena Swanson her intent as to the letter from Dan Bartlett to her that she countersigned and whether she wishes to clarify or amend what was stated in the letter, and if appropriate given her response, to enter into a written agreement consistent with Ms. Swanson's response.

Mayor Bernard asked if the Council was ready for the question or if any member of the Council wished to be recognized for purposes of debate. Under the rules of debate each member had the right to speak twice on the motion but could not speak a second time as long as any member who had not spoken on the question wished to do so. Debate would be limited to the merits of the question before the Council.

Councilor Loomis admired anyone who admits a mistake. He thought that was what the Council was talking about. The City made a mistake and was trying to rectify that mistake. He read a portion of the response he sent out. Probably the most difficult part about being a City Councilor was that any decision made some folks happy and others were disappointed. He never let that influence the way he reached his decision. His 'no' vote was not meant in any way to dismiss all the hard work done by the City staff, citizens, stakeholders, and fellow Councilors in preparing to locate the transit center at the Kellogg Lake site. He truly appreciated all the great work done throughout the process. He did believe that locating the transit center at the Kellogg Lake site was a good decision, but he voted no because there was no doubt in his mid that the intent of the agreement between Mr. and Mrs. Swanson and the City was for the entire piece of property to be used as park and that it reflect the Kronberg name. Ms. Swanson called the Mayor to inquire why it had not been done. It was stated she did not want the transit center there. Ms. Swanson already had phone calls from folks who were for and against the site. For the transit site to be located there, it would have to survive consideration of the South Corridor Policy Committee, environmental studies, land use processes, and acquisition of sufficient funding. If Mr. Swanson negotiated a deal with her to site the transit center there and it failed one of those tests, it would be another broken promise. He did not believe it was right to put her in the middle of this contentious issue. She deserved better than that. The City already let her down once. Milwaukie needed to keep its promise and admit it made a mistake. He felt the City owed her that. He only knew the Council was meeting because of the notice. He did not have a chance to discuss it personally with the Mayor although he called him repeatedly. He understood Mayor

Bernard was busy. He wanted to know if the Mayor discussed it with any other Councilors.

Mayor Bernard said he had.

Councilor Loomis asked if Mayor Bernard had discussed it with Councilor Stone.

Mayor Bernard replied that he had not.

Councilor Loomis asked if Mayor Bernard had discussed it with Councilor Collette.

Councilor Barnes called for a point of privilege. She believed the Council should stay with the order of the day that stated the Council must stay with the agenda, and the Council was going off on other tangents.

Mayor Bernard agreed.

Councilor Stone did not agree it was a tangent. It was an issue.

Councilor Barnes called a point of order that the Councilor had not been recognized by the chair.

Councilor Loomis asked to amend the motion before the City Council. Councilor Loomis moved that Mayor Bernard, Councilor Stone, City Manager Mike Swanson, or staff designee meet with Ms. Swanson to attempt to accurately inform her of the history of the siting of the transit center at Kellogg Lake. The purpose of the meeting would not be to propose any thoughts or ideas on how to develop the property. The sole intent would be to make Ms. Swanson aware of the passion citizens bring to this issue for and against. No other Council member should contact Ms. Swanson or encourage anyone to contact her. The parties above shall meet once and only once unless Ms. Swanson requested further meetings of the group. Councilor Stone seconded the motion.

Councilor Collette respected Councilor Loomis's concerns and his position, but it was not the Councilmembers' role to negotiate on behalf of the City and to meet on this type of issue. It was staff's role and generally the city manager's role, so she would not support the amendment.

Councilor Stone spoke specifically regarding Councilor Loomis's amendment. The discussion with Ms. Swanson should be unbiased, and she should hear a very balanced account of what had transpired thus far. She thought it would be best to have a citizen represented in the discussion process to give that balanced account. She looked at this woman in her mid-70's that, bright as she may be, people can be easily convinced of something that they maybe otherwise would not thought of. She thought the Council should make sure it was a balanced discussion. She was certainly not advocating talking to Ms. Swanson, but if it came to that it should be a very balanced discussion with a citizen as well representing the issues.

Councilor Loomis clarified in his motion, he was not talking about negotiations if Councilor Collette had not heard it clearly. He had moved that Mayor Bernard, Councilor Stone, City Manager Mike Swanson, or staff designee meet with Ms. Swanson to attempt to accurately inform her of the history of the siting of the transit center at Kellogg Lake. The purpose of the meeting would not be to propose any thoughts or ideas on how to develop the property. The sole intent would be to make Ms. Swanson aware of the passion citizens bring to this issue for and against. No other Council member should contact Ms. Swanson or encourage anyone to contact her. The parties above shall meet once and only once unless Ms. Swanson requested further meetings of the group. The City Manager and staff would conduct all negotiations and report back to Council with their recommendations but he did not see that was necessary as that was already in the first part of the motion. He wanted to clarify that for Councilor Collette's sake.

Councilor Loomis repeated the motion prior to the Council's voting.

The motion on Councilor Loomis's amendment failed 2 – 3 with the following vote: Councilors Loomis and Stone voting 'aye' and Mayor Bernard and Councilors Barnes and Collette voting 'no.'

Mayor Bernard went back to the first motion and asked if there was any further discussion.

Councilor Barnes said last week was an embarrassment to the community, and she wanted to spend her allotted time saying she was sorry and to apologize. First for Ms. Swanson who had been described as a 70-year old unable to speak for herself. She knew many 70-year old women who were quite capable of standing up and saying things – in fact bless them for being able to do that even in adversity.

Councilor Loomis called for point of order. He thought Councilor Barnes was going to control outbursts from the audience and staying on track with the issue.

Mayor Bernard replied that was the issue and requested that the audience not make responses.

Councilor Barnes publicly apologized for last week's vote and how it affected David Aschenbrenner and Lisa Batey who came to the podium to speak their minds but were shouted down with catcalls from the audience. She was embarrassed for the Council and the rest of the community that someone with the courage to step forward would actually be shouted down. She apologized to the Working Group that spent countless months volunteering their time and energy without pay to come up with a solution for a very difficult problem. She apologized to the Planning Commission for all of the efforts it put in to work hard to make the right decision be it controversial or not. She apologized to the regional and the business partners who worked very hard trying to get economic development started in this community. Sending a message last week to Milwaukie's partners that it was not open for business and that Milwaukie could not get things done because a small vocal minority stopped it every time would

no longer be tolerated. She apologized to staff at the City of Milwaukie Johnson Creek Boulevard facility. They worked very hard and have suffered innuendoes and meaningless comments regarding their own personal lives, personal ethics, and for that end she apologized to them. She apologized to City Recorder Pat DuVal who spent many days listening to many people come to her office and in the past year was actually called a liar. City Manager Mike Swanson put up with so much, who was called unethical and doubted. He spent countless hours on his own time making sure this City worked and worked well. To nearly 21,000 Milwaukie residents who got up every morning, hoping they can go to work and come home and feed their families and they prayed their governing body did not screw them over – she apologized for last week. She thanked those who had the courage to notify the City Council individually and as a whole and say, "I'm done." Thank you for finally stepping up to the plate and saying you were listening to what was going on at City Council meetings and would not be ignored any longer. They were not the vocal minority; they would be the vocal majority that was going to make a difference. On behalf of all of them, Councilor Barnes said she was sorry for what the Council put the City through last week, and it would not happen again.

Mayor Bernard added when Ms. Swanson called him, she did not say she did not want a transit center there. She reminded him there was an agreement between the City of Milwaukie and that her name should be on it. That was in the paper just like everyone read. Ms. Swanson called him twice, and he let the City Manager know she had called. Ms. Swanson called the second time to make sure something was happening, and Mayor Bernard assured her that the City Manager was looking for the letter in the files. She did not once tell him that she did not want a transit center, and she was concerned that she had read it in the paper and that there was an agreement with the City. Milwaukie has a wonderful staff and citizens, and he was proud to see many of them here who had worked very hard on the decision. He had made a mistake. He got a lot of nasty e-mails, but no one ever tried to make him change his mind. He knew he had made the wrong decision when he walked out of City Hall. He tried to justify his decision to his wife, and the next day he could not stand it any more. He had to step forward and admit he made a mistake. Ms. Swanson deserved a chance to tell the City how she really felt. For that reason, he called this special meeting to talk about the matter and allow the City Manager to talk to Ms. Swanson. He was a dedicated employee of the Council and has done a great job. He felt confident that Mr. Swanson would work with her to come up with something that she would support – not what he supported and not any one point of view. He was confident that was what would happen.

Councilor Collette seconded the comments of Mayor Bernard and Councilor Barnes. The Council did owe the City an apology. They tried to set a level of self-respect and respect for the community by governing for those who elected the Council members to make the tough decisions. The Council generally tried to do that. What happened last week was a real breakdown. Mayor Bernard commented that difficult decisions did not call for difficult behavior. The Council

needed to learn how to make difficult, controversial decisions without being rude and without showing a complete lack of respect for each other and the community. You elected us and asked us to make tough decisions. This community went through a long and difficult process arriving at the decision to choose to forward the Kellogg Lake site for a transit center. It was not an easy process, and she was not on the Council at the time but on the Working Group. She went through each of the alternatives, as did some of the business leaders and people from the neighborhoods. It was an amazingly complex process. When they got to the open house and people looked at all the options and the pros and cons of each, she heard people say they understood why it was so difficult. Coming up with the right answer was very difficult, but the people at that open house agreed with the Working Group that the option to put the transit center at Kellogg Lake was the right choice. The Planning Commission voted 6 – 1 to approve the choice, and the City Council voted to approve that choice. It was a shame on this City and especially this Council that what should have been a very narrow vote nearly took all of that work off the table because a very loud minority won the day. All deserved more from the City Council, and as some said this meeting, they were committed to doing more and earning community respect. "We are the sum of our dreams." This City is the sum of its dreams, and we need to be able to dream what we want in our future. Not what we had in the past and good old Mayberry. Milwaukie never was and never will be Mayberry – we are Milwaukie and can be a wonderful Milwaukie. People have approached the City from the region, state, and federal levels for grants. Partners and investors want to work with the City to move forward and help it be the City people dreamed it could be. The City needed to respect itself and its partners in that process. The Council cannot go back on its word – it has got to keep moving forward. This issue did not live or die by tonight's vote. This was the beginning of a much more involved process. She hoped everyone would be back at the table to look in more detail at the option. She wanted the Council to move forward and show respect for all the citizens, Ms. Swanson, and all who helped it move forward. The Council could not vote to shut down communication.

Councilor Stone felt like she conducted herself in a very professional manner last week. She thought she said what she needed to say and did not feel she needed to apologize. For the people on the Council who were apologizing that was fine – maybe they needed to do that. She certainly did not feel like her conduct last week needed to have an apology. She was a little bit troubled by hearing Mayor Bernard talk about making a mistake by his vote last week. As she reviewed the tape, she saw several times where he made mention at the end especially about why he made the decision he made. He talked about his values and his principles, and that was what he based his life on in terms of upholding a contract. This was what the Council was talking about -- upholding a contract. Mayor Bernard also made a statement that the City needed to change the path of where it was going, and he felt he could lead the project to a very good conclusion. It took courage for him to say that, and she admired him for standing

up and saying that. It was hard to turn the ship around when you believed it all along, but he did it. Now he was rescinding that. It did not change the fact there was a contract out there because there was. There were two pieces of paper back in 1991 that were signed on the same day even though the deed was recognized a few months later. They were signed on the same day. The intent was very clear that this site was to be a park, and it was a donation. It was clearly in the deed that it was a donation even though the sum of money the City paid was $38,000 plus back taxes. Citizen money paid for that property, and the balance of that which was almost $45,000 was indeed a donation. To talk about Ms. Swanson and what she wants and what she wanted then and not think about the citizens and this was a gift to them was wrong. This was our park. It should be a park; it's always been known as a park. It was on the North Clackamas Parks and Recreation District list as a park – a 3.5-acre park. If the City looked to convince Ms. Swanson otherwise to maybe use part of the area as a park and the rest be the transit center, then she wondered how Ms. Swanson would really think about it once she realized what a small area it was. Once she realized she had a 5-story parking structure right next to her park. Once she realized that during the day it would be so fraught with pollution and noise from busses laying over there, from cars. At night it would be a place for people that were doing illicit activities and drugs. People were not going to want to have their kids go over there. The City really needed to present what everything would look like to her before going down the road of trying to convince her otherwise.

Councilor Stone read a couple of excerpts from the Comprehensive Plan because that had not changed. The Milwaukie Downtown Riverfront Land Use Framework Plan and the Comprehensive Plan were both plans to be a guide to plan for the future. To execute sound ideas that enhanced the quality of life here in Milwaukie. The Comprehensive Plan was "fundamentally a guide to the physical development of the City. It was the translation and reflection of the community's social and economic values into a scheme that describes where to build, what to preserve and conserve, where to rebuild, and how to direct growth." It went on to say, "Existing natural resources and developments of character will be preserved, and new development will contribute to improving the quality of the living environment and to a sense of citywide identity and pride. Wise use and management of the remaining natural resources of land, air, and water and natural environment was particularly important in Milwaukie because the City is almost completely developed and few areas remain in a natural state." Councilor Stone believed she brought that up last week in her testimony. Milwaukie was sorely lacking in open space and green space. "The protection of these natural resources is essential if citizens are to experience the pleasures and amenities which can only be enjoyed when nature is close at hand." One of the goal statements from the Plan read, "To conserve open space and protect and enhance natural and scenic resources in order to create an aesthetically pleasing urban environment while preserving and enhancing significant natural resources." The Comprehensive Plan had designated areas along Kellogg Lake and Kellogg Creek to be of special importance to all City residents. Preservation

of these natural areas and improved public access to the riverfront were important neighborhood objectives. Ms. Swanson needed to hear that. She needed to know that. In terms of looking at green space, and the Council heard it last week from Metro Councilor Brian Newman when he gave his presentation, he alluded to growth in the area. The Council was looking at this site, and it was a small site. If half or part of it would be used as a park, then there would not be any room for expansion. The City needed to be thinking in bigger, more global ways that it would really incorporate growth and transit.

A contract was a contract. Councilor Stone still believed that the Council needed to do the right thing and uphold the 1991 agreement between Ms. Swanson and the City. The City did not do due diligence in not executing what it said it was going to do. She thought the Council needed to do that now and formally designate that area as a park. It was listed as a park right now, and it should remain a park.

Councilor Loomis said this was a governing body and made group decisions representing all the citizens in Milwaukie. When he was elected to the City Council he thought that was its biggest strength – that everyone was different but had the same goal of improving the City. Whatever decision was made tonight, which was clear to him, he agreed to uphold the Council Communication Agreement. He read one line from it, "Once the group has acted, I accept and respect the decision, and I do not publicly ridicule the Council, any individual member, or participant for the decision." Councilor Loomis would do that as he had always done. He had great concern – he had great respect when someone made a mistake and had a hard time with it – but he did not think it was right not to include the whole governing body and make them aware of what was going on, so they had input into the discussion. He felt that Councilor Stone and he were left out of that. To him that was a mistake.

Mayor Bernard responded to several comments. The City recently bought Kellogg Lake that provided opportunities to expand that park into the wetlands someday. He addressed Councilor Stone's comments on the Comprehensive Plan. It was important to acknowledge that it was a guide as was the Downtown Plan. It was the way Milwaukie as a community chose to grow, but again those were guides. That was what the Council was doing. The Plans needed to be amended as the City changed. The direction was correct. Milwaukie has had many successes that were visible around town today. All that was from staying the course, focusing on the goal, and following the vision.

It was moved by Councilor Barnes and seconded by Councilor Collette that the previous question be called.

Mayor Bernard repeated the motion which was that that the Council authorize the City Manager to discuss with Dena Swanson her intent as to the letter from Dan Bartlett to her that she countersigned and whether she wishes to clarify or amend what was stated in the letter, and if appropriate given her response, to enter into a written agreement consistent with Ms. Swanson's response.

The motion passed 3 – 2 with the following vote: Mayor Bernard and Councilors Barnes and Collette voting 'aye' and Councilors Loomis and Stone voting 'no.'

Mayor Bernard noted that Councilor Loomis was right – Council members were different, but in the end everyone really cared about the community. He looked forward to building better partnerships.

It was moved by Councilor Barnes and seconded by Councilor Collette to adjourn the meeting. Motion passed 4 – 1 with the following vote: Mayor Bernard and Councilors Barnes, Collette, and Stone voting 'aye' and Councilor Loomis voting 'no.'

Mayor Bernard adjourned the meeting at 6:17 p.m.

_____

Pat DuVal, Recorder

MINUTES

MILWAUKIE CITY COUNCIL WORK SESSION
NOVEMBER 15, 2005

Mayor Bernard called the work session to order at 5:30 p.m. in the City Hall Conference Room.

Council Present: Councilors Barnes, Collette, Loomis, and Stone.

Staff Present: City Manager Mike Swanson; Community Development/Public Works Director Kenny Asher; Paul Shirey, Engineering Director; and Intern Alex Campbell.

Community Development Block Grant Project Selection

Mr. Asher provided background on the Community Development Block Grant (CDBG) program that was in Milwaukie's case administered by Clackamas County. It was the County's role to develop a competitive process to consider the various funding requests and distribute the funds. CDBG funds were available to cities, non-profits, and other organizations that had a social service commission. The County updates the CDBG program every three years. In the last cycle, Milwaukie received $400,000 for two projects – the right-of-way improvements in Ardenwald and sewer connection assistance for the area south of Johnson Creek Boulevard. The objective of the CDBG program was to revitalize distressed neighborhoods, to expand community services and facilities, to expand and conserve the housing stock that housed low- and moderate-income people, expand employment opportunities, and eliminate conditions detrimental to the community health and welfare. The cutoff in Clackamas County was 46% of the households being at 80% median family income or less. He pointed out those areas in Milwaukie that qualified for the program that included a portion of the downtown, Ardenwald, and Lewelling. The City as a whole was close to 46%, so the argument could be made for projects that would serve the greater community. The Island Station Neighborhood was at 48%, so it was close to qualifying. Staff would argue for a project in that area if approved.

Councilor Barnes asked what the percent meant in terms of actual income.

Mr. Asher said one number was used that was adjusted according to family size. For a family of four, it would be $54,000, and an individual was $38,000. At least 46% of the households in those neighborhoods made that amount or less. Most of the CDBG projects were infrastructure improvements such as sidewalk repair, ADA compliance, and sewer hookups. He distributed a current list of projects.

He distributed the updated project list. Staff did not identify any projects larger than $300,000, which would be a large grant out of this program. The project list was broken into two categories "reach" and "traditional" projects. The reach projects were the intersection of 22nd Avenue and McLoughlin Boulevard that could be an important part of the transit center relocation. The Library annex

acquisition, if it were programmed in such a way that there was a clear community service benefit, might be eligible. For the Texaco site, there could be predevelopment money for a market study, environmental work, or design studied that would defray those costs from a private developer and give the City and Metro a better idea of what was ultimately desirable on that site. He discussed the feasibility of affordable housing on that site. Mr. Asher was not sure any of these reach projects would get on the County list, but it might, with Council direction, to advance one of them. The traditional projects on the list had high probabilities of being competitive. They were all neighborhood projects including streets, sewer, sidewalks, and park improvements. The City would have to submit its formal list by December 2, and the County process would run through April.

Councilor Barnes thought one of the ways to leverage might be to connect the Library annex with literacy and English language learning projects. She discussed Title 1 funding availability.

Mayor Bernard was concerned a reach project might take funding from traditional projects like Logus Road and Ardenwald Phase II. If there were a non-traditional project, he would select the Library annex.

Mr. Asher said there were two considerations – the aggregate dollar request and the number of projects. Milwaukie would likely only get funding for a couple of projects regardless of the dollar amount. He suggested one large project and several little ones. He commented on the availability of unexpended funds from other agencies.

Mayor Bernard said his priority would be Logus Road and Ardenwald Phase II.

Councilor Loomis thought Ardenwald Phase II should be the first priority. The only reach project he would be interested in was the Library.

Mr. Asher thought based on Council comments that Milwaukie should advance as many as possible and cut from the bottom up in the traditional projects. Staff would get a sense whether or not the Library annex had a chance and the amount of money available for traditional projects.

Councilor Stone was concerned about the projects at the bottom of the traditional list regarding failed septic systems as they were in the potential annexation areas. She agreed with comments about the Library annexation reach project.

Mr. Asher said at this point it was a matter of submitting the project list, and Council would probably be asked to assist during the public input process.

Discussion of Future Direction of Texaco/City Parking Lot Site

Mr. Swanson discussed a developer's concepts on the joint Texaco/City Hall block and the adjacent block to the south. He understood the developer had met with a number of people and wanted to present his concept at a work session. Mr. Swanson asked if the City Council wished to do that. His concern was that if the City began the process that it would be difficult to say no to anyone else who

might wish to come before the Council. Metro closed on the Texaco property within the last month, and the City had an agreement with Metro to jointly market the site as one block. The concept was to get some activity going at North Main Village and then go out an seek requests for proposals (RFP) from qualified developers for the next block. He still thought that was a good plan. The surplus real property ordinance required that the City seek competitive bids. He discussed the transit-oriented development (TOD) and urban centers money from Metro and noted that that agency favored a competitive selection process. He believed that process would be similar to the one used with North Main. He expected this project to have more private funding and less public subsidy.

He asked if the Council wanted Mr. Link to make a presentation. He suggested taking a breather as North Main Village started and then beginning to look into development of the Texaco/City property.

Mayor Bernard said there was an opportunity that needed to be considered. He was not suggesting that Mr. Link come to the Council. He did want to discuss the proposal, however, it included clearing up over a $1 million of environmental pollution in one block. The proposal also included a partnership with another property owner that would offer huge redevelopment opportunities. He met with Mr. Link and would like to speak with Mr. Swanson about the ordinance. Timing was important because of the investment potential.

Councilor Stone believed Mr. Link had contacted all the Council members. She understood the work session was just for information and not an actual proposal. It was just to share a design concept. She asked Mr. Swanson if the Texaco site that was jointly owned by Metro and the City would be developed as one block.

Mr. Swanson said that was correct.

Councilor Stone understood that was one block, and Mr. Link's proposal incorporated two blocks of the downtown. It made her think about the clean up area and the effort and the money it would cost and Mr. Asher's list that included the Texaco site. The City might want to consider that being a priority if there was another project after North Main. She would not have a problem with Mr. Link's coming and sharing his design. She had seen it and thought it was a very good design. It certainly would not commit the City to anything. She would not be opposed to someone else who had a design to share information with Council.

Mr. Swanson thought there would be a lot of interest if the North Main sales effort proved to be successful. He suspected if the door were opened that the Council would not be able to close it. Even if no decisions were made, it would be difficult to deny the rest. In the competitive bid process it would be very powerful for a proposer to say he could do two blocks. His concern was that the City might get into a situation where there were a lot of people presenting a lot of pretty pictures. What the City needed to do was to develop a set of criteria and some kind of orderly process that lead to a good decision. There were two proposers for North Main, and Mr. Swanson anticipated a lot more interest in this second project. He recommended going through a controlled and reasonable process.

Councilor Stone understood Mr. Swanson's hesitation that he did not want to just open the door to people, but she thought it would be a good thing to have people knocking at the City's door. North Main would not be done for a year.

Mr. Swanson explained the City would want to have a process underway before North Main was completed. The pervious process was extensive with advisory groups, and the proposers were asked to prepare some fairly substantial packages. That process eventually led to a success.

Councilor Barnes understood from Mr. Swanson's comments that the City had a process in place to ensure qualified proposers were ready to make presentations. She felt the Council should follow the City Code and not go off on a tangent.

Mr. Swanson suggested taking a breather of fairly short duration. He was hoping to begin the second when North Main was completed. He did not want a long period of time between the completion of one and the beginning of what came second. It was about keeping up the momentum.

Councilor Stone was sensitive to that. North Main would be done in a year, and she thought Council should see proposals sooner than later. She did not want to send this developer or others the message that Milwaukie was not open for business. When someone said they had some information to share, she felt the Council should fit them in. The process should be followed in terms of bids and going out for proposals, but she did not have a problem with someone just coming in to share information.

Councilor Barnes had not met with Mr. Link.

Councilor Loomis had gotten the information through someone else.

Mayor Bernard added 70% of the property was owned by this person and the City. He was not suggesting that Mr. Link come in. He would like a process ready to go so that any developer could submit a proposal within the next few months. The cost of cement and steel was not going down.

Mr. Asher added he knew of other developers who were interested in the property. If the Council had one developer come in, he was not sure how to respond to the others. The City had a partner in Metro who might also know about some developers and would probably care about the sanctity of the process.

Mr. Swanson said it would probably cost a developer about five figures to put together a proposal that made sense. If someone thought they wanted to invest $20,000 in preparing a proposal and thought they might not be treated equally, then the City might not see the range of choices it might like. The more independent and hands off, the greater the number of proposals submitted. Metro had been contacted by several developers and had seen Mr. Link's proposal. People have been impressed with his proposal, but that was not the issue. The issue was that each proposer would have to get beyond the drawings and develop estimates in order to participate. They would be less inclined to do so if they felt their chances were compromised.

Mr. Asher said this was different in that the City was about to offer the property, and it was about ready to go into a public bidding process.

Councilor Stone asked when staff would be ready to start the process.

Mr. Swanson suggested early spring 2006. North Main was a very difficult project because of the multitude of financing sources and should not be taken as the example. He did not think there would be that much state money in the next project. The next one would be working with actual data from North Main, so it would to be a two-year process. The second project would likely be more code inspired with review process. He believed all proposers should start at the same time, and he felt there would be a lot of interest. This project would have some of the best river views in the region, and that alone would draw some interest. He did not believe anyone doubted that Milwaukie was open for business. He recommended conducting business in a reasonable, rational manner. A competitive process was the best way to go.

Discuss of Future Transit Center Work Session

Mr. Swanson said at the Council hearing two weeks ago there was discussion of scheduling a work session about transit, but he felt the Council needed to define what it wanted to discuss. Otherwise the discussion would not be focused.

Mayor Bernard requested an update from Metro and TriMet on the next steps in the process.

Councilor Stone brought it up at the teambuilding session that the Council never really deliberated about the transit center siting and changing the locally preferred option (LPA). In terms of all the Council members being in Eugene last week for a conference on ethical leadership, Dr. Bill Grace gave a really great presentation about values-based decision making and really looking at tough issues. He was really focusing on city leaders and state leaders and politicians. It was still a very contentious issue in the City. There were still a lot of problems with it. She thought the City needed to be looking at alternatives should this not happen. She thought those discussions might be helpful if some of the values-based decision making model was used in doing that. There was a lot of conflict going on. One of the things Dr. Bill Grace said was that anytime there was conflict, people did not make their best decisions.

Mayor Bernard felt the Council had deliberated for months. There were many City Council meetings and work sessions. He did not want to start the whole process over again. He thought the City had done all the things that Dr. Grace addressed and felt confident the City Council had followed all the process he suggested.

Councilor Stone did not agree. She and Councilors Loomis and Collette went through the workshop, and a couple of them brought up that issue. Some of the results that people came up with in terms of what to do about the latest dilemma with the Kellogg site were interesting. It was an issue that caused a lot of tension

between the Council and in the community. The City Council needed to have the courage to talk about it.

Councilor Loomis felt the decision was made. He got a lot out of the session too. He had fun with it, and it was interesting to have people in the break-out group looking at the issue without an emotional tie. They looked at the problem itself; however, there was only five minutes. Some people thought it was a moral thing, and that was the end of it. It would be a lot of fun once the Council got through this for Dr. Grace to have a work session or retreat to find out what the outcome would be. He thought it was a great way to problem solve. He disagreed with Mayor Bernard. The special meeting format was good, and Council would have been a lot more productive if it had used that sooner. A lot of the issues would not be there if that had happened. There was work to do. He could see looking at a Plan B down the road. He discussed the Communication Agreement.

Councilor Stone added it was an issue no one wanted to touch. There was not a vocal minority out there despite what some people might think. There was a lot of discord in the community, and it would really be great if everybody could talk about it. Maybe by talking about it, everyone could agree on something.

Councilor Collette agreed with Councilor Loomis. Dr. Grace's decision making process was very interesting although she got a little lost in the actual details and would welcome an update on how to do it. She did not want to revisit the decision the Council made and felt the community needed to look forward. Look at the environmental work and engage the community in the rest of the process. She recommended not just an update as Mayor Bernard suggested but also clarification of responsibilities in moving forward, getting people involved, and resolving conflicts. She felt the Council would send an entirely wrong message to the region if it gave any appearance that it might turn back on that decision. People were committing huge amounts of money based on the City's decision. Every time the Council waffles, all those investments of time, energy, and taxpayer money look in jeopardy. She did not want to be sending that message over and over again. She wanted Milwaukie to look like it stood by its decisions and was willing to work with the region for the best possible outcome.

Councilor Loomis asked Councilor Stone for clarification of her comments and if she wanted to reopen discussions.

Councilor Stone replied in light of the new information that came forward about this contract and deed of sale, it kind of opened things back up. She really had to wonder if the City Council was on the right road. She appreciated the comment about spending millions of dollars of taxpayer money. She did not want to do that unnecessarily. She did not want to see taxpayer dollars go for an environmental study when the site was going to fail. It was all projection. She did not want to do that unnecessarily. She did not want to see taxpayer dollars go for an environmental study when the site was going to fail. There was no money yet, and the City Council needed to make the best decision for the community. She remembered when the whole issue of light rail came up the

neighborhood leaders were very adamant about making sure Milwaukie's interests were protected. She was sensitive to working with the regional partners but she thought they also wanted the City Council to make the best decision for the community.

Mayor Bernard said the City was far from that site being a transit center. It was more than 15 years away. An environmental study would have to be done for a baseball field, so why not spend the money to at least find out what could be done there eventually whether it was a ballfield, transit center, or park. After that the region would have to decide whether to accept the LPA. There had to be traffic analyses and federal government acceptance to proceed. There may be insoluble environmental and transportation issues. No one even knows what Ms. Swanson wants to do.

Councilor Stone asked if anyone had an update on that because she had heard a document was sent to Ms. Swanson.

Mayor Bernard had read that in the newspaper.

Mr. Swanson said there was no document in the City's possession.

Councilor Collette saw a faxed copy that indicated Ms. Swanson wanted to work with the City on a transit center at that site.

Councilor Stone said Mayor Bernard just said that would be years before that happened. Ms. Swanson would be about 100 years old by that time.

Councilor Collette said it was not likely that it would be 15 years before they started looking at it as a transit center site. TriMet committed to looking at it as soon as possible.

Councilor Stone understood then that Ms. Swanson was willing to work with the City.

Councilor Collette replied that Ms. Swanson wanted to work with the City and was enthusiastic about figuring out how to put transit center on that site – according to the letter.

Councilor Stone asked if Ms. Swanson had signed the letter.

Councilor Collette replied that she had.

Councilor Stone asked if the letter was from the City or was it a private letter from Carolyn Tomei.

Councilor Collette said apparently as she was not a party to it Ms. Swanson asked Ms. Tomei to help her with some language, and Ms. Tomei sent her a draft via fax. Ms. Swanson had her son-in-law who is an attorney with the Department of the Interior look at the language. He rewrote some of it, and she signed it and sent it back to Ms. Tomei. Councilor Collette said it was referenced in the newspaper but was not a City document.

Councilor Stone said how it would hold up if it was not a City document.

Mayor Bernard said the City had not spoken with her yet.

Mr. Swanson said he would be talking with her, but he had not done so at this point. He avoided receiving a copy of the correspondence because until last Tuesday he was not supposed to be involved. As of last Tuesday he was supposed to be involved, so he would be talking with Ms. Swanson as she assented to a meeting. He assumed there was still some interest, but he would not know until he actually spoke with her.

Councilor Stone asked Mr. Swanson if he had set a meeting date.

Mr. Swanson hoped it would be yet this week.

Councilor Stone said this issue was not over. She agreed with Councilor Loomis that Dr. Grace should do a session with the Milwaukie City Council.

Councilor Loomis noted that both Councilors Stone and Collette believed it was a good session, and it would help the Council come to a good decision.

Councilor Stone added that Dr. Grace lived in Washington State, so he was local.

Mayor Bernard understood the work session would be scheduled at a later date.

Heckmann Suit

Mr. Swanson reported that of the Heckmann case. The City Council authorized the City Attorney to make an offer in the amount of $14,568 which was the amount paid on the veteran's loan. At one point, Ms. Heckmann appeared to accept the offer, and then appeared not to. The Federal District Court was being very careful as Ms. Heckmann was representing herself. He and Mr. Corrigan would participate in a mediation session to determine the outcome.

Clearwater Project

Mr. Swanson said the judge has taken it under advisement as to whether the matter was subject to referendum.

Mayor Bernard announced the City Council would meet in executive session pursuant to ORS 192.660(1)(e) to discuss real property.

Councilor Stone asked for an update on the South Corridor Policy Committee meeting.

Mayor Bernard said the update would be given during the regular session, and **Councilor Collette** indicated she would comment on that during Council reports.

Mr. Shirey introduced Civil Engineer George McGregor who would begin with the City approximately February 1.

Mayor Bernard adjourned the work session at 6:30 p.m.

_____

Pat DuVal, Recorder

CITY OF MILWAUKIE

CITY COUNCIL MEETING
NOVEMBER 15, 2005

CALL TO ORDER

Mayor Bernard called the 1970th meeting of the Milwaukie City Council to order at 7:00 p.m. in the City Hall Council Chambers. The following Councilors were present:

Council President Deborah Barnes	Joe Loomis
Susan Stone	Carlotta Collette

Staff present:

Mike Swanson, City Manager	John Gessner, Planning Director
Gary Firestone, City Attorney	Paul Shirey, Engineering Director
Kenny Asher, Community Development/Public Works Director	Stewart Taylor, Finance Director

PLEDGE OF ALLEGIANCE

PROCLAMATIONS, COMMENDATION, SPECIAL REPORTS AND AWARDS

AUDIENCE PARTICIPATION

- **Dana Churchill, Portland.**

Mr. Churchill discussed the *Epic Times*, which began as a Chinese newspaper and is now published in eight languages.

- **David Aschenbrenner, Hector Campbell Neighborhood Association Chair.**

Mr. Aschenbrenner announced the theft of sod from the recently dedicated Homewood Park. He wanted people to be aware this was happening and encouraged then to call the police if they saw any suspicious behavior.

- **Les Poole, 15115 SE Lee, Oak Grove.**

Mr. Poole was pleased to see the North Main Village Project beginning. He clarified some comments made at the last two Council meetings. There were comments that Kellogg Lake/Kronberg Park/Option 2.5 was not a donation. He had $65,000 worth of documentation that said yes indeed it was a donation for the park. If one looked at the second page of the information he left [1] it showed the actual $92,000 sale price and listed $38,000 plus approximately $8,000 in taxes together with other property of value given or promised. That referred to the donation. Directly below that, it said the Bartlett

[1] Mr. Poole did not leave a copy of the document for the record.

letter stated the City was purchasing the property for use as a public park and agreed to name the park to reflect the Kronberg name. The next to the last paragraph in the agenda noted that we needed to present a proposed agreement to the Council to clarify the language. Mr. Poole thought Councilor Loomis stated it best on November 1, "…there was no confusion about the language." Some may wonder how long Mr. Poole had known it was a park – he had probably known it a lot longer than a lot of people. Kellogg Lake Park was clearly listed on the North Clackamas Parks and Recreation District website, and he hoped it would continue to exist.

PUBLIC HEARING

A. Appeal of Planning Commission Condition of Approval and Street Vacation Request
AP-05-03 by Norm Scott
8555 SE 28th Avenue

Mayor Bernard called the public hearing to order at 7:11 p.m.

The purpose of this hearing was to consider the appeal of the Milwaukie Planning Commission's condition of approval and street vacation related to file numbers S-04-04, TPR-04-10, VR-02-12, WQR-04-04, and SV-04-01. Norm Scott made the appeal and requested that he not be required to construct a sidewalk along 28th Avenue between Rockvorst and the Springwater Corridor as required by City Code. Mr. Scott further requested two street vacations. The applicable standards to be considered are outlined in the staff report. Mayor Bernard reviewed the order of business.

The applicant had the burden of proving that the application complied with all relevant criteria of the Comprehensive Plan and Zoning Ordinance. The City was in receipt of the appeal, which identified the issues and the reasons for the appeal.

All evidence and testimony was to be directed toward the applicable substantive criteria. Failure to address a criterion precluded an appeal based on that criterion. Failure to raise constitutional or other issues related the proposed conditions of approval with sufficient specificity to allow a response precluded an action for damages in circuit court. Any party with standing may appeal the decision of the City Council to the State Land Use Board of Appeal according to the rules adopted by that Board. Persons with standing were those who testified or signed the attendance sign-up sheet.

Mayor Bernard reviewed the conduct of the hearing.

Discussion of jurisdiction, impartiality, and site visits

Councilors Collette and **Loomis** had visited the site.

Councilor Collette announced that she had met with Mr. Scott when he first proposed this when she was Neighborhood Association Chair. She worked with him and the NDA to look at the site; they toured the site. She had also worked with him since then to try to get the property to be a neighborhood project. She believed she had been too involved as a neighborhood person, so she would not vote as a Council member on this issue.

No members of the audience made any challenges or objected to Council's jurisdiction to consider the matter.

Staff Report

Mr. Gessner said the issues before the City Council was if the Planning Commission erred in denying Mr. Scott's original request for a variance to not construct a sidewalk along 28th Avenue. The staff report detailed how the Planning Commission believed that Mr. Scott did not demonstrate compliance with the variance criteria. The staff report also addressed Mr. Scott's recent letter contained in the packet that he had not secured enough signatures as required by state law for the City Council to actually approve the vacation. For the purpose of the record, staff requested that the City Council take an action to establish that the approval criteria for the vacation had not been met. He would provide more detailed information in his staff report as to why the Planning Commission felt the sidewalk should be constructed.

There were four separate applications on this project. The decision before the City Council was limited to the street vacation and the sidewalk issue. He indicated the site on an aerial photo. Mr. Scott's proposal would include putting in a street on Rockvorst for access. The wetland on the low end of the site was fed by drainage from the Springwater Corridor and connected with Roswell Pond.

He indicated 28th Avenue and the right-of-way encroachment. The rest of the site was fairly steep to moderately sloping. There were steep conditions along the right-of-way, and the applicant believed that would significantly constrain the sidewalk. He provided an enlargement of the subdivision and pointed out the street vacation requests. Those street vacations were not necessary to actually construct the subdivision. He provided a photo along 28th Avenue looking north of Mr. Scott's driveway, the fence in question, and the Springwater Corridor. The right-of-way was very narrow, and there were vehicles parked in the street. One photo indicated the substantial elevation change. The actual right-of-way location was at the bottom of the hill. The full slope contained by the fence was brought into Mr. Scott's property. He presented a slide that illustrated how a sidewalk might be constructed. Mr. Scott indicated in his application that there were slope constraints that made it impossible to reasonably construct the sidewalk. The Planning Commission acknowledged that there were serious site constraints and that there were some really nice trees to be saved. The Commission also waived the strict requirements of the City's street design standards so that some sidewalk could be constructed along the south side of the right-of-way. There was no documentation from Mr. Scott that it was impractical or unreasonable to do this which was the basis of the staff recommendation to deny the appeal.

Mr. Gessner referred to staff report pages 4 and 5 that detailed the reasons for denial. Technically, the City Code required that the applicant demonstrate there were unusual conditions over which he had no control. Staff believed there were some unusual conditions in that there was a very steep slope and narrow bench along the top of the street. However, an additional requirement was that the applicant proves there were no feasible alternatives to building the sidewalk. The City had not received any material that demonstrated other than by assertion that a sidewalk could not be constructed. Thirdly, an additional criterion was that the adverse impacts of granting the variance would be mitigated. The applicant indicated he believed there were no adverse impacts of not constructing the sidewalk. The Planning Commission differed with that position when deciding the application and felt a sidewalk was warranted because of two

potential duplexes, a new single-family residence, and the existing house would create additional pedestrian demand along that street frontage. There were about half a dozen code citations in the transportation regulations that insisted on sidewalks being constructed at the time of development. In addition, the Planning Commission waived the requirement of the applicant to construct a 130-foot sidewalk within the subdivision to help defer the cost of building the sidewalk on 28th Avenue. The Commission felt the money would be better spent putting the sidewalk along 28th Avenue and provided the applicant with some relief from the construction costs. He pointed out a correction on page 8, paragraph 7.b. that should read, "However, the applicant has not demonstrated that there are no feasible alternatives to the variance as required…" The variance applicant was required to show there was no way of complying with the Code.

Staff believed the applicant had not complied with the variance criteria and recommended the Council deny the appeal, uphold the Planning Commission's decision, and adopt findings and conditions that would allow Mr. Scott to construct the subdivision with the sidewalk requirement. Staff also requested that the Council adopt a motion denying the requested street vacations for failing to demonstrate compliance with statutory requirements.

Councilor Stone commented that neighborhood currently did not have sidewalks. Based on the aesthetics of the neighborhood and trying to keep in the neighborhood design, would that be a reason not to build a sidewalk? Could the Council look at the Code in terms that there were not any existing sidewalks and that it might look out of place? In terms of looking at the increase in numbers of pedestrians and cars, it did not seem like it would be significant.

Mr. Gessner responded to the question about not requiring a sidewalk for purposes of design or aesthetics. The Code as currently written would not authorize Council's taking that action. When the Code was adopted there were strong feelings by the Planning Commission, Council, and neighborhoods that development should pay for itself and that sidewalks should be constructed in residential areas at the time of development. The regulations had the bias built in that sidewalks would be built at the time of development or funded so they could be built at some point in the future. With regard to the question about vehicle traffic, there was a fair amount of neighborhood concern about additional traffic at that location. He did not know that the Planning Commission had so much concern about cars being at that section of 28th Avenue – cars belonging to homes in that subdivision. The Commission felt strongly it would be appropriate to require sidewalks for pedestrian safety when considering the opening of the Springwater Corridor Three-Bridges Project, the addition of up to six new families, and the existing condition of the street.

Councilor Stone understood the sidewalk was not very long or wide and asked the dimensions.

Mr. Gessner said it would be approximately 130-feet long and the width would be something reasonable to fit in the bench along the top of the street. The real concern was that the wider the sidewalk and the wider the travel lanes, the more the sidewalk was pushed toward the slope increasing the need for retaining walls. The more you can make it fit, the less costly it would be.

Mayor Bernard asked how the property line issue would be resolved. He understood part of the existing house was over the property line.

Mr. Gessner replied that question had not been answered yet. A partial vacation that would take at least the corner of the house out of the right-of-way might make sense so it would not be a problem for the sale of the property or for future improvements. That seemed reasonable.

Mr. Firestone said the property owner could request a vacation or the City may initiate it.

Correspondence: None.

Appellant Testimony

Norm Scott, property owner, 8550 SE 28th Avenue and **Paul Roeger**, consulting engineer, 15702 SE Cordova Court, Oak Grove.

Mr. Roeger said his client was appealing the requirement to build improvements on 28th Avenue as well as the denial of the street vacation because no access would be taken from 28th Avenue. Also it was not practical to construct curb and sidewalk improvements on 28th Avenue abutting the property. In order to do so would require a 5 to 6 foot retaining wall to put the sidewalk in the right-of-way. He indicated the contour lines. [Mr. Roeger stepped away from the microphone, so his comments were not audible] Improvements were currently being done, and the 3-Bridges Project, were drawing people to the Springwater Corridor. Sidewalks for pedestrians and bicycle access were a community benefit. Therefore, he felt the City of Milwaukie and the City of Portland should participate instead of putting the entire cost of the sidewalk improvement on one private citizen developing his property. It was a community benefit that should be paid for by the community. Mr. Scott had not created the need for sidewalk or street improvements on 28th Avenue. Residents and visitors to the subdivision would access to and from 32nd Avenue via Van Water Street. He indicated the route on a drawing. To jog down 28th Avenue to Sherrett did not make sense. In the Planning Commission minutes, even City Attorney Gary Firestone stated, "… to require a developer to provide improvements staff has to demonstrate there is a direct impact of the development on the facility and that what is being asked was directly proportional to the impact. By putting in a couple of lots it's not clear that people from this area would use that way to access the trail." He also stated there "are provisions that say if you are not adding traffic to a particular location there is no relationship. It is unclear if it can be established that these houses would be adding pedestrian traffic in these locations. The impact has to be a present impact of this development, not something that could occur in the future or the assumption that people in this development would be creating pedestrian traffic." The offer of eliminating the sidewalk on the west side of the northerly extension of Rockvorst in place of building the sidewalk on 28th Avenue did not benefit Mr. Scott's development. The sidewalk on the northerly extension would be built by the builder who constructed the house on that lot. The sidewalk on 28th Avenue would be built by Mr. Scott in the development of the property because it was not the frontage of a lot that was going to be developed. There was a subdivision south of Lake Road, Vernie Avenue, and Somewhere Drive where the developer was not required to build sidewalk on the backside of lots that fronted on the

new street in the subdivision. The backside was on Somewhere Drive, and there were no sidewalks built on Somewhere Drive.

In the approval of the Planning Commission, the existing fence within the right-of-way on 28th Avenue also was required to be removed. The fence provided a visible barrier to motorists on 28th Avenue. No one had ever hit the fence; therefore it provided protection to Mr. Scott's property for many years. It also provided a privacy screen for the Scott property. The barricade required by the Planning Commission only provided physical protection but no privacy. Shrubs could be planted; however, they took time to mature. Building the fence on the property line would not provide any protection or privacy because it was way down below. It needed to be where it was to provide maximum protection and screening.

The street vacation petition originally submitted to the City had the required number of signatures. The primary reason for the petition was to put Mr. Scott's existing house entirely on private property and provide some setback from the right-of-way line. Currently the corner of the house containing the garage was about 6-1/2 feet into the public right-of-way. The deck was less than a foot into the Rockvorst right-of-way. The City accepted the petition and the $1,000 petition fee and then allowed people to withdraw their signatures when they found out he was also planning on subdividing the property. The subdivision was a separate action from the street vacation. It was shown that the property could be developed without the street vacation. The street vacation was still necessary to have Mr. Scott's house to be entirely on private property. If the City was going to allow people to withdraw their signatures they should also give Mr. Scott back his $1,000 fee. He submitted the petition in good faith and with the proper number of signatures. One of the options the Council had on the street vacation was to approve it in whole or in part upon findings of compliance with ORS 271. Mr. Scott was in compliance with the original petition. He felt it should be ruled on based on the original signature submittal.

Mr. Scott had lived there about 8 years and did quite a few improvements on the house. He did not do anything to put the house in the right-of-way. It was already in the right-of-way when he bought it. He invested a lot of time, energy, and money into making it a nice house. When he originally bought the house, it was a hodge-podge of different remodels. It was pretty ugly. He went to an architect and redid the whole thing and added 2,000 square feet to the house. He thought it was a real improvement to the neighborhood. It was a big issue for him – the whole aspect of the fence. The house actually faced away from 28th Avenue. The front of the house faced west, and the back of the house was 28th Avenue. The fence was his backyard. To have to take the fence down and bring the sidewalk closer to the house, which was already close, had a real detrimental impact on his house. It was a significant cost to put a driveway or street down into the property. To make it so he had to improve 28th Avenue and ruin the privacy of his house…. People would not go out of the development down 28th Avenue. They would go straight up Van Water. Ask the neighbors; ask Claire Putnam if she ever went down 28th Avenue. She would say she never did and would say she used Van Water. People were not going to use 28th Avenue. People did not zig around streets. When they leave, they want to get out to the main street as fast as possible. The only feasible way of going straight out was going up Van Water. To say this development

would have an impact on 28th Avenue was ridiculous. The main traffic people would see on 28th Avenue was Three-Bridges traffic. It was a wonderful project that would bring people from the neighborhood to the bike trail, but it had nothing to do with his development. For the big guys to gang up on him and say they wanted it developed and that he should pay for it – even though his development did not impact it at all but by the letter of the law they could require it -- was totally unfair. He wanted to appeal that aspect and present the whole case. The street probably did need to be improved, but it had nothing to do with his development.

Testimony in Support

None.

Testimony in Opposition

- **Kris Beck 8625 SE 28th Avenue.**

Mr. Scott was asking for a 15-foot street vacation over the entire length on 28th Avenue. The only value she saw in the street vacation was that it increased the property value of his new subdivision. Mr. Scott said there was no impact on 28th Avenue from his construction. He has had dirt delivered to his site using 28th Avenue. The existing asphalt was becoming severely damaged at this point in time by the amount of traffic. Mr. Scott's own family accesses the property on 28th Avenue. Saying that the new residents in the neighborhood would not be using 28th Avenue to access the Trail was not feasible because there was no other way to access the Trail from that subdivision location. There was existing curb and sidewalk east of the site from 30th Avenue to 32nd Avenue.

- **Mike Mendez, 2807 SE Sherrett Street.**

Mr. Mendez agreed with all of Ms. Beck's comments. If one built and brought traffic into the neighborhood, then the improvements should be made. Foot traffic would increase, and the road deteriorating just from rain and the recent dirt hauling that Mr. Scott was doing. If the street was going to be used by five more families, it should be improved.

Councilor Loomis asked Mr. Mendez if he had signed the petition originally.

Mr. Mendez had not signed it, but his wife had. He totally disagreed with it then and did not agree with it now. He felt those who did sign the petition thought they were misrepresented, and unfortunately he thought that was true. He believed he understood what was going on from the beginning.

Neutral Testimony

None.

Staff Recommendation

Mr. Gessner addressed several points made in the applicant's testimony. It was stated that since there was no access along 28th Avenue that no sidewalks should be required on 28th Avenue. That might be a legitimate position to take … an opinion, but City Code did not support that. The requirement to construct sidewalks was not a condition upon whether or not access was taken from the street. By comparison, if one were building a new single-family home on a corner lot anywhere in the City today, one would either

construct or pay for sidewalks on both corners. In an R-7 zone that might even equal the distance along 28th Avenue. The policy and requirement for the sidewalk was consistent with how the regulations were applied elsewhere throughout the City. There was also a comment about who was responsible for building the sidewalks. The ultimate development of the subdivision would require someone to construct sidewalks on 28th Avenue if approved and elsewhere in the subdivision. The City would not assign the responsibility for constructing those sidewalks to new homebuyers. Those sidewalks would need to be constructed at the same time as the subdivision. He did not believe the issue mentioned on Somewhere Drive was necessarily relevant. There was a sidewalk constructed on one side of the street and not required on the other side of the street largely because there was a sidewalk constructed on one, and the other side of the street backed up to other houses. The pedestrian need was met by construction of the sidewalk.

The Planning Commission felt that Mr. Scott did not demonstrate compliance with the variance criteria. Staff requested that the City Council uphold the Planning Commission decision, approve the subdivision, but with the requirement to construct the sidewalk at reduced standards to help minimize the cost and physical impacts. To the extent the Planning Commission waived some of the design requirements, the City did not necessarily expect that a curb would be constructed. Staff encouraged Mr. Scott to consider alternatives such as green street designs to minimize the physical requirement while still providing a good, solid walkway and minimizing the costs. He felt that was consistent with Planning Commission thinking. There would be minimally necessary pedestrian improvements to help manage the demand created by the subdivision application. Secondly, with regard to the street vacation, staff did not believe the criteria had been met and that the City Council should deny the vacation. If the City Council did decide to adopt the staff recommendation, he asked that the record indicate the correction he had noted to paragraph 7.b on page 8 of the staff report and insert the word “no” before the word “feasible.”

Mayor Bernard understood Mr. Scott was concerned about removing the fence, but that was not appealed to the City Council.

Mr. Gessner replied the fence was not appealed. There was a condition in the Planning Commission decision on page 13, number B.3 to remove the fence prior to the final plat.

Councilor Loomis asked Mr. Gessner to discuss the petition. It sounded like originally he had enough signatures. How far had that dropped?

Mr. Gessner did not know the specifics. The City received a letter from Mr. Scott saying he did not have enough signatures. He could say second hand how that happened. There were some neighbors who felt there was misrepresentation in the original request to support the street vacation. A number of neighbors had organized and went door-to-door advising those who had originally signed that they believed there was misrepresentation in the request. A sufficient number of neighbors agreed and rescinded their approval, so Mr. Scott was not able to secure the necessary number of signatures. Staff received copies of written, signed requests to rescind the original consents to the street vacation.

Councilor Stone asked if that was allowable. Can people rescind and not return Mr. Scott's $1,000?

Mr. Gessner said the fees associated with applications cover the costs of staff time in administering the application, and staff had already expended a significant amount of effort on the application. He was not sure what the Council authority was to waive or return fees. He asked the City Attorney to comment on the issue of rescinding signatures.

Mr. Firestone said the statutes and Code provisions talk about consent. They did not expressly address whether a consent once granted could be withdrawn. The general rule was that a consent could always be withdrawn unless there was a statutory provision or requirement of law that prevented it from being withdrawn. For example, in annexation, a consent to annexation can be binding if it was part of an agreement that was subsequently recorded. In that case the consent was binding and could not be withdrawn. In the absence of any clear provision in the Code or statute, Mr. Firestone said the best view was that consents could be withdrawn. Regarding fee payment, he has taken the position in the past if the City's decision demonstrated that the application was not required and the person did not need to apply, then it was appropriate to refund the fee. This was not that kind of case because the applicant was still asking for it.

Councilor Stone had a technical question about the sidewalk. Mr. Roeger mentioned a retaining wall. Did that mean it would be a tall sidewalk similar to the one near 42nd and Harmony? It was kind of a tall sidewalk on one end.

Mr. Gessner thought Mr. Roeger's point was the further the sidewalk was pushed to the west because of the slope the greater the need for some type of retaining structure. The actual elevation of the sidewalk would be at-grade. If there was some form of retaining wall, one would not see the face of that wall except from the inside of the site. Depending on the difference in height from the top of the sidewalk and the slope below there would probably need to be some form of guardrail for safety purposes. Staff had not seen any drawing or analysis that would show that a sidewalk could not be constructed. That was an important part of the Planning Commission's decision. It had not been shown other than by assertion, which the Planning Commission found that was not satisfactory proof to grant the variance.

Mayor Bernard asked if the retaining wall could include some sort of fence that would provide privacy or did the Code require that the fence be removed because of its location.

Mr. Gessner replied the fence was presenting an unauthorized encroachment in the right-of-way. City Code states there can be no encroachment within the right-of-way except by permit. If one put up a fence, the property essentially became part of the overall property. It was taking a public asset and privatizing it. That was technically done through a street vacation process where it was legitimized at the policy level that it could be put to a better use. That was where the Planning Commission found there was no substantial benefit for giving up that resource. Staff typically took a very conservative approach when advising the Commission, Council, and private parties. Once the right-of-way was given up, it was very difficult to get it back in the future.

Councilor Stone asked if Mr. Scott put up this fence.

Mr. Gessner did not know.

Councilor Stone heard a comment from the neighbor who testified that there were trucks loaded with dirt and ruining the street. The condition of the street right now, did it in Mr. Gessner's opinion need to be improved? If so did it make sense to require Mr. Scott to build a sidewalk when the street needed to be improved? If that was the case, it sounded like something the City should also look at.

Mr. Gessner replied the street was presently in very poor condition. He did not know how much of the sidewalk construction would result in some repair of the street. That would have to be coordinated. He did not believe Mr. Scott should be held responsible for repairing the street.

Councilor Stone asked if she heard Mr. Gessner correctly about the sidewalks that the developer was willing to build within the development, and the Planning Commission did not require that. They said it would be better to build the sidewalk on 28th Avenue. So sidewalks would not be built in the development, so would it be the responsibility of the owners of the property.

Mr. Gessner replied the Planning Commission excused Mr. Scott from the requirement to build about a 130-foot section for the benefit of having a full sidewalk on 28th Avenue thereby reducing his costs. The developer of the subdivision would be required to build the sidewalk.

Appellant's Rebuttal

Mr. Roeger addressed who built the sidewalk. It was his understanding, and it had always been so in the past, that lots with existing homes would be building the sidewalk at the time the streets were built. Lots that would be built on later, the sidewalks were built by whoever built the houses on those lots. The lots on the west side of the extension to the north, those sidewalks would be built by the developer of that lot. On 28th Avenue the west side of the frontage was on Mr. Scott's existing house. Even the extension to the Springwater Corridor would also be built by him because it was not on the frontage of a lot where a home would be built. The street he was referring to, Somewhere Drive, where sidewalks were not built was not the new street in the subdivision where they only built sidewalk on the east side where the homes were built but on the west side since they backed up to existing lots there were no sidewalks built. He was referring to the backside of the lots on the new street that backed onto Somewhere Drive which was an existing street with curb and sidewalk on the east side and no curb and sidewalk on the west side. Those properties were not required to build curb and sidewalk on the west side of Somewhere Drive even though they had the back of their lots on that existing street. That was what he was referring to. The fence was mentioned in the memo of appeal in the last paragraph. It was not stated officially in the headline that that was being appealed, but it was mentioned.

Mr. Scott said he considered the fence a huge issue. He addressed the dissentions. When one did a land vacation situation, basically one had to go to 35 neighbors and hire a notary. He went around to all the property owners. He always considered the street vacation and the land development two separate issues. For the land development, people would get letters and there would be hearings that people could go to and testify. He admitted he did not talk to most of the neighbors about his plans to

develop – he did not say anything about not developing. He basically told them about the main plans he had for his house. Going to 35 neighbors and hiring a notary took a lot of time. When you go to that many people and have to talk about it, he wanted to keep it a simple as possible. With some of the people like Mike Mendez and his wife, he was very careful. They went down on the property, and he showed them exactly what he intended to do with the street vacation and where the access for the development was. When they signed it, they knew exactly about the development. They could not say they did not know. Again, he did not think it was fair for the people to rescind if it was a separate issue. If they were intertwined and the development was contingent on the street vacation, he could see rescinding it, but they were two completely separate issues. People did not have a problem with the street vacation when there wasn't a development there. He thought it needed to be considered – either the money refunded or the original petition of 70% should stand.

Mr. Scott said the fence was basically half-built when he bought the house, and he did extend it. It was right at the brink of the hill; he just extended it where it seemed the best. As far as constructing the sidewalk – he fully admitted a sidewalk could be constructed there. The issue was not if a sidewalk could be constructed there but how much was it going to cost. It was going to be a huge cost. It was going to wreck his property. It was going to come toward his house. They wanted him to take his fence down, which he considered a huge issue also. From his perspective as a homeowner he considered the fence issue a big issue. All the neighbors who did not want him to develop he had not talked to one of them that had a problem with the fence. They liked the fence because it provided a barrier for them and for him and his family. There was no opposition to the fence from any neighbor that he knew of. As far as people stealing from your property, there was a barrier there to protect the backyard a little bit. He had some trucks coming in to deposit dirt, so that if he did the development there would need to be some fill dirt for the road that was going to be constructed. Basically, he had some people bringing in free dirt, so there have been some truckloads coming in. He also pointed out that the Three Bridges Project was going in there too. They had big trucks and hammers and backhoes coming in to work on that project. That was a short time deal and not the way people were going to be going in if the property developed. They would go straight down Van Water and not down 28th Avenue. 28th Avenue right now for the Three Bridges Project and his project was just a short-time thing.

Mr. Roeger added the sidewalk extension was 130-feet as Mr. Gessner said. The sidewalk on 28th Avenue would be 190-feet.

Councilor Loomis asked Mr. Scott if he had gotten any estimates for the sidewalk.

Mr. Scott replied one estimate was around $36,000 and the other was $20,000 to $25,000 to do the street and the sidewalk. Those estimates were Eagle-Elsner and Moore Construction.

Councilor Loomis asked about the cost of the retaining wall and what the difference would be.

Mr. Scott replied he just got the estimate today and had not looked at it that closely.

Councilor Stone asked Mr. Scott if it was the portion of the fence that he added that extended into the right-of-way.

Mr. Scott replied the fence was all in the right-of-way.

Councilor Stone understood Mr. Scott had been in that house for 8 years, and that the fence had been standing.

Mr. Scott replied half of the fence was there before he moved in, and he extended it shortly after he bought the house.

Councilor Stone asked the City Attorney how many years were there before saying it was grandfathered-in.

Mr. Firestone said the right to have a structure somewhere – either one got an easement or acquired property by adverse possession, but that did not operate in cities. As long as it was in the right-of-way, the City could say to take it out no matter how long it had been. The City could require that it be moved because rights-of-way were dedicated to the public for travel purposes.

Councilor Stone asked Mr. Roeger about the concern about increased traffic. Obviously this was a local street and probably not many traffic counts had been done. What additional trips did he estimate per day?

Mr. Roeger did not anticipate any additional trips on 28th Avenue. On Van Water each single-family residence would generate 9 – 10 trips per day.

Mr. Scott added the Trail could be accessed without using 28th Avenue. There could be a Trail access coming off the property that would not force people to walk up to 28th Avenue to get to the Trail. He was not proposing the street right-of-way to go all the way to the Trail. There was a lot of street right-of-way that people from the subdivision could use to access the Trail without actually going out to 28th Avenue. The actual plan had not been determined, but there was a good possibility they would not even have to go out to 28th Avenue to walk down to the Trail.

Councilor Collette had a question, but Mr. Firestone said she had recused herself from participation as a Council member.

Mayor Bernard closed the public hearing at 8:17 p.m.

Mr. Firestone said if the City Council decided to essentially affirm the Planning Commission decision totally, he believed it would be advisable after consultation with the Planning Director to make a tentative decision and allow staff to prepare additional findings related to some of the testimony presented tonight. That was if the City Council approved the Planning Commission decision as it was. On another matter, this was not directly related to the decision, but the City Council could give some indication to staff whether it believed some different vacation could or should be initiated by the City – to vacate the area of the house.

Councilor Stone was inclined to vacate that area. So many times things were not very clear. The issue of the sidewalk was one with which she was having a little bit of trouble. We have our Code but our Code needed to be looked at for what it was. She understood with new development they certainly wanted to go that route. This was an existing development on the backside of his property. It did not front the new development. She would rather see sidewalks in the development rather than on 28th Avenue. Just looking at the street, she understood there was a partial sidewalk

between 30th Avenue and 32nd Avenue. She hated the way that looked with little piecemeal this and that in the neighborhood. She thought it took away from the aesthetics of the neighborhood. She would vote against putting in that sidewalk. In terms of the fence if it was in the right-of-way probably should be moved because it was in the right-of-way. On the other hand, she looked at the reality – the neighborhood liked the fence. It was not hurting anything. It looked nice. It kept his property private. There was that little piece of vacated land that probably needed to be dealt with. She would probably vote to have that done. The City would eventually have to look at improvements on 28th Avenue, and she did not feel it was the property owner's responsibility to fix the street. She would not want to see a brand new sidewalk go in on a street that was in disrepair.

Mayor Bernard asked Councilor Stone what she thought of the second street vacation.

Councilor Stone said the street vacation issue was troublesome because of the way it came about. She heard testimony that the neighbors and she saw in a letter that they may have felt they were a little duped by how it was presented to them. She felt for them in that regard. She did not think she would vote for the street vacation. She would vote for the piece of land his house was on.

Councilor Barnes had several concerns. In reading the letter from Mr. Scott dated October 20, if she had been a neighbor she would have felt duped as well. She did not think Mr. Scott came forward and gave all of the information for a reason. He knew he would have concerned citizens in the neighborhood who would feel they should have a voice in the matter. She did not think Mr. Scott gave them that voice, and she was concerned he made that decision. Now, understandably, those neighbors were coming forward and saying they had not heard the whole story from him. They wanted their names off the petition when they heard the whole story. Mr. Scott said publicly that he added 2,000 square feet to his home. Even that additional square footage had to have cost some money. She did not feel the $20,000 to $25,000 would be unreasonable for a developer for the sanctity of the neighborhood. The neighbors say that Mr. Scott's family used the street he said no one would use. She did not understand why a sidewalk could not be constructed without removing the fence. With all that in mind and the issue of builders' constructing sidewalks were all part of improving a neighborhood with safe places for children to walk. She would support the Planning Commission recommendations.

Councilor Loomis felt the Planning Commission had asked almost every question one could think of. It was very detailed. He agreed with Mr. Scott that the issues were separate, but he felt the whole story should have been told. The neighbors felt they were duped. In the testimony from the neighbors, they all said he was a great neighbor, which he appreciated. They seemed concerned about the whole situation. In reading it, he thought they were thinking they did not want this development, but that was not the issue. The issue was the sidewalks and the improvements. He would support the Planning Commission.

Mayor Bernard would support the Planning Commission decision in both areas. He was concerned about the slope and people falling from the sidewalk. He would like to see some kind of help for that. He would like to vacate the property where the house

was sitting so he had clear title. He doubted $1,000 was sufficient to pay the taxpayers for a house built in the right-of-way.

Councilor Loomis commented on the vacation of the fence area and asked if he could install a fence for privacy.

Mr. Gessner said Mr. Scott presently did not have enough signatures to vacate any portion of the right-of-way. He could envision a sidewalk design that could incorporate a fence for privacy purposes, but the question was how that right would be granted. Was there some way other than a vacation that Mr. Scott might be able to have some form of privacy? He suggested looking at that as a follow-up to the Council decision. The Code does allow for right-of-way permits, so he would like to discuss this with the City Attorney outside the hearing to find out if there was a compromise on the fence issue.

It was moved by Mayor Bernard and seconded by Councilor Barnes to deny the appeal and uphold the Planning Commission decision and adopt the recommended findings and conditions and with the correction to item 7.b "no feasible alternatives". Mr. Firestone recommended the City Council make a tentative decision to uphold the Planning Commission, adopt the findings as stated, and direct staff to prepare and consider additional findings. The motioner and seconder accepted the proposed amendment.

Mayor Bernard restated the motion which was to deny the appeal upholding the Planning Commission's decision and adopt the recommended findings and conditions with the changes to item 7.b, "However, the applicant has not demonstrated that there are feasible alternatives to the variance as required by Zoning Ordinance Section 702.1(B)." The decision was tentative and staff was directed to prepare additional findings. Motion passed 3 – 1 with the following vote: Mayor Bernard and Councilors Barnes and Loomis voting 'aye' and Councilor Stone voting 'no.'

Mayor Bernard said this matter would be continued to December 6, 2005.

It was moved by Mayor Bernard and seconded by Councilor Barnes to deny the street vacation based on the findings that the required owner agreement had not been obtained.

Mayor Bernard restated the question and asked for discussion. There was no additional discussion.

Motion passed unanimously among the voting members. [4:0].

Mayor Bernard said any party with standing could appeal the Council's decision to the Oregon Land Use Board of Appeals (LUBA) according to the rules adopted by that Board. At this time, only the vacation decision was a final decision. The written decision will contain an explanation of the appeal rights. If you have questions, please contact the planning department staff.

Mayor Bernard recessed the meeting at 8:32 p.m. reconvened it at 8:41 p.m.

B. Wastewater Utility Rate Increase – Resolution

Mayor Bernard called the public hearing to order at 8:41 p.m.

The purpose of the hearing was to consider public comment on the proposed resolution to increase wastewater utility rates by 6% per year for a period of six years.

Staff Report

Mr. Shirey and **John Ghilarducci** of Financial Consulting Solutions Group (FCFG) provided the staff report. The recommendation was for a 6% increase over five years and in the sixth year an increase of 3.75%. Four percent of the increase would meet inflation and fund ongoing system replacement including depreciation and 2% would go toward Clearwater. The rate increase had been considered for about one year. As the Clearwater Project was going through the process, the City made a decision to hold off on the increase. The Milwaukie City Council approved an agreement with the County on the Plan, and staff requested approval of a rate increase that included the 2% for Clearwater.

Mr. Shirey commented on the level of outreach that included Neighborhood Association meetings, the quarterly leadership meeting, an open house, newsletter articles, and the City website. He felt it was fair to say that people were not enthusiastic about the increasing cost of utilities, but no one said the proposal was out of line at any of the meetings. The other important part of the recommendation was the approval of the Citizens Utility Advisory Board (CUAB) but to also consider another revenue source other than rates to make the Clearwater payment.

Mr. Ghilarducci provided general background, commented on the health of the utility, and addressed the rate projections. The study goal was to look at the current financial condition of the wastewater utility and the current rate levels. There were three funds associated with the wastewater utility. Fund 540 was the operating fund that included sewer rates, miscellaneous fees, and interest earnings. The obligations of the operating funds were operating expenses, keeping a minimum fund balance for unanticipated expenses, and transferring to Fund 550, the capital fund. The intent of the 550 fund was to fund all construction. When one had excess rate revenues, then those can trickle down into the capital fund. Depreciation contribution also went in to the capital fund. He recommended a certain amount be set aside annually equal to depreciation expenses, which was not normally a cash expense but did go into the capital fund for ongoing system replacement. Milwaukie had a mature system with ongoing replacement needs, and this provided a source of funds. The third obligation of the capital fund was policy obligations as defined by Council, which in this case was the accumulation of funds to make the payments to decommission Kellogg associated with the Clearwater Program. The third fund was the system development charge (SDC) fund, which was also used for capital, and there were specific rules as to how those funds could be spent.

There were key assumptions built into the analysis. The first one had to do with Fund 540. The recommendation was to keep 45-days of working capital or about 12% of annual operating expenses in that fund as a minimum balance. The recommendation for capital projects was to continue to operate on a pay as you go basis and to not issue debt. The third recommendation had to do with transfers equal to depreciation expense into the capital fund to meet replacement needs. Because that had a significant rate impact, full depreciation would be phased in over three years.

Mr. Ghilarducci discussed the current rate structure. Residential bi-monthly rates were $15 per dwelling unit plus $2.10 per ccf of usage based on the previous winter's average usage. Low income residential paid exactly half of that, and commercial customers paid the $15 per account plus $2.95 for usage. With the current volume-based rate structure, people were billed based on their actual behavior during the previous winter. Because of this rate structure, the City was able to generate revenues equal to utility obligations, created more equity among the residential customer, and did not over collect.

For the current fiscal year, rate revenues were estimated at about $2.84 million against all the obligations including policy choices. The capital projects included the first part of the accumulation for the Clearwater Program. Those equaled a rate revenue requirement of a little over $3 million. At this time, an obvious increase was necessary to meet that deficiency of about $170,000. He recommended a 6% increase in 2005/2006 to meet the minimum obligations of operating expenses, the first step the depreciation funding policy, and the initial accumulation of funds for the Kellogg Plant decommissioning. This increase plus the balances one currently had would get the City through the current budget year and the scheduled capital projects for this year and next year plus accumulating funds for Kellogg. A series of four more 6% increases was necessary with the final 3.75% increase in fiscal year 2010/2011. The increases would allow the City to pay what it understood the costs of decommissioning Kellogg as scheduled. He reviewed several charts with estimated revenues and capital expenditures. By the end of the period, the City would have cut its existing fund balance in half, but it would have weathered the Clearwater payments.

Mr. Ghilarducci reviewed the recommended rates. The fixed charge would be $15.90 per unit and $2.25 per ccf with similar increases in other customer classes. He reviewed typical bi-monthly residential bills based on winter average of 17 ccf.

Mr. Shirey said the average user's bi-monthly bill would go up about $16 over the next six years. He reviewed several charts including bi-monthly bills for water, wastewater, and stormwater. He discussed this increase relative to other jurisdictions in the region, and one set of data showed Milwaukie was about average when compared with Portland, Lake Oswego, Gresham, and Washington County.

Mr. Ghilarducci provided some anecdotal information that rates similar to Portland's were becoming commonplace as agencies made major treatment plant improvements. He discussed a water and wastewater survey completed by the League of Oregon Cities (LOC) in 2004 to which 39 agencies responded. The average month bill for those 39 respondents was $26.89 per month. The proposed rates for the City of Milwaukie on a monthly basis for wastewater was $26.87. This indicated Milwaukie would be near the state average with the proposed increase.

Councilor Collette asked if Mr. Ghilarducci or Mr. Shirey if either of them had compared the combined rates with other cities.

Mr. Shirey replied staff had some information, but it was not very useful.

Mr. Ghilarducci had the combined rates for this region only. The typical bi-monthly bill for Milwaukie about $98 under its current rates. The unaudited calculations for Portland was $155.69, Lake Oswego $100.86, and Gresham $107.05. Washington County was

$64.53 for wastewater only. Based on those comparisons, Milwaukie would be the lowest of that sample.

Councilor Stone noted the bar graph for Milwaukie indicated $92.87.

Mr. Ghilarducci said one calculation included the wastewater increase and the other did not.

Councilor Loomis asked how the Clearwater Program fell under core principles.

Mr. Shirey replied the payment was a contribution the City was making because it was not part of the District. The District was charging it customers, and this was the amount it determined would be Milwaukie's share. The project was not about buying the opportunity to redevelop the riverfront; it was about contributing to a program that would meet the regional needs at the least cost and most efficiently over time.

Councilor Loomis asked about the alternatives for making the final payment.

Mr. Shirey said under the terms of the intergovernmental agreement (IGA) with the County, the City could share the proceeds of the sale with the District. The City Council may wish to use that money for other purposes. The other source would be an increased tax revenue to the City upon redevelopment of the site. There would be increased tax revenues, and it was conceivable that all or a portion of that could be used to refund the ratepayers at that time. Staff recommended rate revenue based on his earlier statement of what the $4.5 million was for. It was not about buying land for redevelopment. That was a residual benefit. This was a contribution to the consolidation of wastewater treatment in Clackamas County that would have the greatest benefit over the long term. He noted there were differences of opinion including members of the CUAB.

Councilor Loomis asked what would happen if the Clearwater proposal were on the ballot and voted down.

Mr. Shirey replied there was an existing agreement with the County. Until the County said it could no longer uphold its end of the agreement, the City would move forward. If the County could not uphold its end of the agreement, then staff would come back to the City Council to discuss the options.

Councilor Collette understood the City was not meeting the costs of providing services at the current rate.

Mr. Ghilarducci replied the utility did have some fund balance, but it was not sustainable. Rates should meet operating expenses and any additional obligations.

Councilor Collette understood that if the City wanted to postpone its decision on Clearwater, the City would still be running a deficit.

Mr. Ghilarducci responded that the utility would be eating into the fund balances. It may mean the percentage increases to meet the Clearwater deadlines in order to accumulate the payment in a shorter amount of time if the Council waited a long time to implement the rates.

Correspondence.

None.

Audience Testimony

- **Charles Bird, 12312 SE River Road.**

Mr. Bird lived in the Island Station Neighborhood and was a member of the Land Use Subcommittee for the Neighborhood and was on the CUAB. Sitting on the CUAB he saw a progressions of things he studied carefully. Evidence showed the least-cost approach was to keep Kellogg operating and putting additional expansion at the Oregon City site. The more costly approach was to decommission and demolish Kellogg because it was an operating facility with certain efficiencies, and it complied with its permits. It met discharge standards and surprisingly odor requirements. He wanted to make sure the number justified the move. The numbers did not justify moving it because it was a perfectly operating facility. Next, it was bundled with Clearwater with Oak Lodge opting out. The bundling was to put Kellogg in and make it a big plant even though it did not make economic sense. It was negotiated as a package, so now they cannot be taken apart. In his mind representing the ratepayers as a CUAB member, he was not sure all the ratepayers should pay for all the costs of moving a perfectly good treatment plant. He was split because he also lived close to it and thought it was a great idea to move it. Apparently Oregon City was accepting this plan with open arms. He did not feel comfortable asking all the ratepayers who were not impacted as heavily as Island Station to equally pay for the move. Mr. Shirey came up with a couple of good options. His was the minority opinion in the CUAB. He discussed giving the money back to the ratepayers through collateral benefits as they were being asked to front the money. He asked the Council to consider alternate ways to fund the project.

Councilor Collette asked if Mr. Bird was seeking some kind of codification that if and when the City sold the property then ratepayers would receive a rebate. Or was he asking that the rate increase not be as high from the start?

Mr. Bird replied the depreciation money was needed, and he agreed with that part. He did not agree with putting the 2% on the ratepayers. He understood the wastewater needed to go someplace and needed to be treated. This was a political decision. From his standpoint there were other parties that should be asked to help pay for it. Perhaps those who lived closer to the plant received a greater benefit. The decision was how to pay for it and perhaps spread the payment so it was more fair.

Councilor Stone understood the rate increase was in two parts. One was to cover depreciation with a 4% increase.

Mr. Shirey said the rate increase was actually built with three 2% increases -- inflation, depreciation, and Clearwater.

Councilor Stone thought the ratepayers should be clear that the full 6% was not going to decommissioning Kellogg. That was a piece of the pie.

Councilor Barnes understood the Kellogg facility was not in 100% shape, and there was concern about its coming apart.

Mr. Shirey replied Water Environment Services (WES) is responsible for owning, operating, and maintaining the Plant, and staff made statements publicly as to their assessment of the needs for the Kellogg Plant in the future. Those included a new discharge permit that could only be met by an expensive retrofit to deal with ammonia.

The current discharge permit was expired. WES was not convinced it could install the retrofit at the Plant and meet the new discharge requirements. That was not cheap, but WES had not given him a cost estimate. The Plant was almost 30 years old and was reaching obsolescence. If Kellogg were to stay, then the assertion was that WES would have to invest in solving the ammonia discharge problem. WES anticipated it would have to spend more money to keep Kellogg running than it would cost to build a new plant. If the Clearwater agreement came apart, then there was no agreement between the Tri-City District and Service District #1. In that case all the new development to the east would have to come to Kellogg. The only way to make Kellogg big enough was to move into the Island Station Neighborhood. The alternative was to locate a treatment plant somewhere east of Happy Valley. That would be very expensive and highly problematic given the requirements for discharge permits.

Mayor Bernard discussed Metro's growth projections in Happy Valley and Damascus that alone would require the expansion of Kellogg and push it into the neighborhood. He believed the real truth was the future benefit of the plant was not in what happened at the site as much as the tax revenue that paid for other services such as police, fire, library, and schools. Everyone would benefit by the additional revenue by value created. He felt this was the cheapest way to go, and everyone would benefit.

Mayor Bernard closed the public hearing at 9:28 p.m.

Councilor Loomis agreed with Mr. Bird's suggestion because he had a problem with that 2%. He hoped Mr. Swanson would have some ideas on how benefited properties could be assessed. Current ratepayers were paying for it right now, and they may not be here later and not get any refund. He would like to see that other 2% tied to the property.

Mr. Swanson replied the projected scenario was that the City would market the property and share 1/3 to 2/3 with the District. At its current assessed value it would yield $800,000 - $900,000 for the City. One of the theories of government was that it attempted to provide expensive services by spreading the costs over a large population. Similarly, utility costs were spread over a large population and over a large number of years. Hopefully, this was looking out for the future by investing money that would someday enrich someone else. He could look for other ways, but he had difficulty seeing what those might be. The City could use the money from the sale of the property, but that was in the future. The option he felt most comfortable with was funding it over time with a small increase in rates. If Clearwater did not pan out – which would be a tragedy because it was about the future – then the City would adjust the rates downward. He thought the most effective way over time was to do what was suggested and put the money away to be ready for the last payment. Rates were increased over the past couple of years because the City found it was not funding depreciation. Water rates, for example, had not gone up in 10 years. He understood that 2% did mean something particularly to those on fixed incomes. He saw the Clearwater Project as being about the future and leaving a system that would work in the long term.

It was moved by Mayor Bernard and seconded by Councilor Collette to approve a resolution to increase wastewater utility rates by 6% per year for a period of six years.

Councilor Barnes was pleased that Mr. Shirey went to the Neighborhood Association meetings and that there was no opposition. That meant a lot to her because this was a very vocal community. One woman said to her recently that she did not have a lot of money and did not want to pay any more. Councilor Barnes responded she did not like asking people to pay more but likened it to putting money in a savings account to pay for infrastructure. This was a hard decision for Council to say that had to be done. In 10 to 20 years people would ask why someone had not had the foresight to fix things before they fell apart. The woman understood that line of thinking. She and Councilor Loomis had jumped up and down about rate increases in the past, but she understood the need this time. Clearwater was important because it did not just impact the Island Station Neighborhood but all of Milwaukie.

Councilor Collette agreed that the future was not going to be a smaller population. The future would be more and more people whether it was in Happy Valley or in Milwaukie. People really needed to plan for those resources to meet future needs. One of those needs was a larger, more efficient, and more effective wastewater system. She would like the City Council to revisit the rates if Clearwater did not go through. She would want the Council to lower the rates accordingly if it was voted down.

Mayor Bernard accepted the amendment. If Clearwater Project failed in an election, then the City Council would open up a discussion on reducing the rates.

Mr. Firestone said the motion on the floor could be approved with a separate motion directing staff to come back to the City Council.

Councilor Stone understood the rate increase was 6% for five years, and this motion was for six years.

Mr. Shirey clarified the 6% increase was for five years and 3.75% for the sixth year.

Mayor Bernard moved to withdraw his motion and Councilor Barnes seconded.

It was moved by Mayor Bernard and seconded by Councilor Barnes to approve the resolution to increase wastewater utility rates by 6% per year for a period of five years and 3.75% in the sixth year.

Councilor Stone understood the rates would be 3.75% by 2011 and asked if that would cover depreciation costs from that point on.

Mr. Ghilarducci said that it would.

Councilor Loomis corrected Councilor Barnes' comment. He never jumped up and down about increases. He wanted the increases justified so he could tell the voters and his neighbors why. He had to be convinced. It took a long time for staff to get him to understand. He hoped some money from the sale of the property would be dedicated to the rest of the City of Milwaukie.

Mayor Bernard spent 23 weeks at the Farmers' Market and only one person who lived in the community came to him and stated opposition to Clearwater.

Motion passed unanimously. [5:0]

It was moved by Councilor Collette and seconded by Councilor Loomis that if Clearwater did not move forward then the City Council would review the rates and adjust them accordingly. Motion passed unanimously. [5:0]

Mr. Swanson commented on the goal of retaining Milwaukie's small town feel while growth and development was occurring.

OTHER BUSINESS

A. Council Reports

- **Councilor Barnes** wrote a grant that would fund a video highlighting the City of Milwaukie, and she prepared a draft script for review. She hoped to have it on cable by holiday break. She was working on scheduling Sen. Ron Wyden for a town hall meeting in Milwaukie in February.
- **Councilor Collette** attended the South Corridor meeting and discussed the potential Tacoma light rail station/Wal-Mart site. There were some limitations to building a Wal-Mart store there because it was zoned for up to 60,000 square feet of commercial use, and the Wal-Mart was anticipated to be 150,000 square feet. She noted also that there was a 6-foot sewer line running through the site, and that might be a constraint on the future use of the site. There were water resource issues that would restrict the use, but there was some leniency for public uses such as a park-and-ride.

  Mayor Bernard added the pipe was very old and made of brick.

  Councilor Stone asked if the issue with the Kellogg Lake site came up at the meeting.

  Councilor Collette said the group was moving forward with planning and would try to do some early environmental studies at the site. There was discussion of the schedule for the whole light rail line, but the group did not make a decision about adopting the Working Group's recommendation versus the other.

  Councilor Stone asked if there was funding for the other environmental work.

  Councilor Collette replied there was a $300,000 funding gap. The $4 million plus this was for the entire corridor.
- **Mayor Bernard** announced the Holiday Farmers' Market on November 20.
- **Councilor Loomis** announced the Winter Solstice Event on December 10.

ADJOURNMENT

It was moved by Mayor Bernard and seconded by Councilor Barnes to adjourn the meeting. Motion passed unanimously

Mayor Bernard adjourned the regular session at 9:52 p.m.

_____

Pat DuVal, Recorder

RESOLUTION NO._____

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MILWAUKIE, OREGON, DESIGNATING THE FIRST AND THIRD TUESDAYS OF EACH MONTH AS THE REGULAR CITY COUNCIL MEETING DATE, ESTABLISHING THE TIMES OF THE SAID MEETINGS, AND REPEALING RESOLUTION 37-2004.

WHEREAS, Section 20 of the Milwaukie City Charter requires the City Council to hold a regular meeting at least twice each month in the City at a time and at a place which it designates; and

WHEREAS, the Municipal Code Chapter 2.04.070 states that the City Council must provide notice of its regularly scheduled meeting times and locations; and

WHEREAS, the City Council adopted Resolution 37-2004, which set the work session and the regular meeting on the first and the third Tuesday of each month; and

NOW THEREFORE, BE IT RESOLVED by the Council of the City of Milwaukie, Oregon:

Section 1: The regular City Council meeting will be held on the first and third Tuesday of each month at 7:00 P.M. in the Council Chambers at City Hall, 10722 SE Main Street or designated alternate location as required by the Public Meetings Laws of the State of Oregon.

Section 2. The City Council work session will be held on the first and third Tuesday of each month at 5:30 P.M. in the Conference Room at City Hall, 10722 SE Main Street or designated alternate location as required by the Public Meetings Laws of the State of Oregon.

Section 3. The City Council may recess and reconvene the work session after adjournment of the regular session if discussion of work session topics has not concluded; or the City Council may announce continuation of the unfinished item or items to a future work session.

Section 4. The City Council may schedule additional work sessions if deemed necessary by the members, and further the City Council may cancel any work sessions if there are insufficient agenda topics to warrant convening a meeting.

Section 5: The City Recorder is directed to provide notice to the public of all City Council meetings as required by law.

Section 6: Resolution No. 37-2004 adopted November 16, 2004 is repealed.

Section 7: This resolution is effective January 1, 2006.

Introduced and adopted by the City Council on December 20, 2005.

_____
James Bernard, Mayor

APPROVED AS TO FORM:
Ramis Crew Corrigan, LLP

By: _____
City Attorney

ATTEST:

_____
Pat DuVal, City Recorder

To: **Mayor and City Council**

Through: **Mike Swanson, City Manager**
Kenny Asher, Community Development and Public Works Director

From: **Brenda Schleining, Associate Engineer**
Paul Shirey, Engineering Director

Subject: **National Pollutant Discharge Elimination System (NPDES) Municipal Storm Water System Support Services**

Date: **December 5, 2005 for December 20, 2005 City Council Meeting**

Action Requested

Authorize the City Manager to sign a contract for engineering services for the National Pollutant Discharge Elimination System (NPDES) Interim Evaluation Report and municipal storm water system support services with URS Corporation, in the amount of $32,830. This amount includes a 10% project contingency.

Background

The City received three proposals to provide storm water engineering services. The proposals were evaluated based on the qualifications of the firm and project team, project approach, project understanding, timeframe, and cost.

Stormwater management focuses on quantity (flooding) and quality. The NPDES program requires that the City adopt a management plan to address water quality of the systems' discharge to creeks and rivers, and to report on the effort annually. The Department of Environmental Quality (DEQ) issues the permits, reviews annual reports, and enforces the federal regulations on stormwater discharge quality. Each municipality covered under the permit is required to document their individual efforts to improve stormwater quality. These efforts, referred to as Best Management Practices (BMP's) are addressed in the annual report. BMP's include such things as erosion control, public education, street sweeping, catch basin cleaning, and manhole cleaning. Due to a recent change in the NPDES permit, which resulted from litigation, an interim report is required to address changes in the permit. The interim report is due in April of 2006

and requires that the municipality notify the public of the process to provide for public feedback.

The stormwater consultant will assist the City of Milwaukie with several tasks that include:

1) Preparing the Interim Evaluation Report
2) Conducting three stormwater process interviews of the other co-permitees such as Oregon City or West Linn (to determine level of effort by similar size permit holders)
3) An internal evaluation review
4) Conducting a staff workshop (to further define implementation strategies where Storm Water Management Plan (SWMP) revisions are proposed).

Fiscal Impact

The engineering firms that submitted proposals and the total proposed fees are:

Contractor	**Fee** (does not include 10% contingency)
LDC Design	**$25,458**
URS Corporation	**$29,845**
HDR , Inc	**$41,576**

The decision to award to URS Corporation is based on the following criteria: Previous experience with similar projects, expertise of staff, understanding the project challenges and cost of services. URS has also been hired by several other government agencies and is “up to date” on the required environmental reporting that is required by Milwaukie. URS assisted the City in preparing an update of its Stormwater Master Plan, adopted last year.

Concurrence

The Stormwater Operations Manager and the Public Works Operations Manager concur with this award. Engineering will schedule a follow up session with City Council to explain the findings of the Interim Report.

Work Load Impacts

This project is included in the work plan for Engineering for this fiscal year.

Alternatives

1. Authorize the City Manager to approve the personal services contract.
   - This will allow adequate time for report writing and required legal notifications to proceed on schedule.

2. Elect to defer the project to a later date.
   - This action may have legal ramifications for the City because storm water reporting is required as a condition of the NPDES permit by a specific deadline.
3. Take no action.
   - This could cause serious legal ramifications and possible loss of the NPDES permit due for failing to meet conditions of permit.

To: **Mayor and City Council**

Through: **Mike Swanson, City Manager**
Kenny Asher, Community Development & Public Works Director

From: **John Gessner, Planning Director**

Date: **December 6, 2005 for the December 20, 2005 Council Hearing**

Subject: **Zoning Ordinance Amendment ZA-05-01**
Limitations on Repeat Submission of Applications

Action Requested

Adopt the proposed ordinance limiting repeat submission of denied applications.

Background

On November 22, 2005, the Planning Commission adopted a motion recommending the proposed Zoning Ordinance amendment for Council adoption. On December 6, 2005, the Council reviewed the Commission recommendation and directed staff to proceed to an adoption hearing.

The amendment improves applicant and neighborhood certainty about the land use process by making clear rules that limit resubmission of denied applications. The amendment also reduces city workload by prohibiting submission of applications that were already proven unacceptable under city code.

Key provisions of the amendment include:

1. Planning Director determinations are final if not appealed.

2. Denied applications may be resubmitted only if one or more of the following conditions are met:

   A. Two years have passed since the denial.

   B. Substantial changes have been made to the application and those changes resolve all findings of the original denial.

C. Code changes adopted following the denial, resolve the reasons for original decision.

D. Proposals may be resubmitted when there is a substantial change in City Council compositions for denials on legislative and policy actions.

Policy Explanation

2-year Wait

On November 8, 2005, the Planning Commission found that a 2-year wait is a reasonable period to prohibit resubmission in cases where substantive changes were not made to the application.

Code and Application Changes

The proposal ensures fairness to applicants by allowing resubmission when changes to the code or the application have been made.

Changes in City Council Membership

Actions including code amendments, Comprehensive Plan amendments, and zoning amendments are typically policy driven. In these cases the City Council is the final decision-maker. The City Attorney has recommended the code allow for reconsideration of policy decisions upon a substantial change in the composition of the City Council. A substantial change in the composition of the City Council occurs if fewer than three Council members who voted to deny the original application remain on the Council.

Applicability

The amendment applies to actions made under the Zoning, Sign, and Land Division Ordinances.

Decision Making Process

Zoning Ordinance amendments are legislative actions governed by Milwaukie Municipal Code Sections 900 and 1000. The Planning Commission makes recommendations to the City Council, which has the final decision-making authority.

Compliance with Approval Criteria

The following is a summary describing how the proposal complies with substantive provisions of the Milwaukie Zoning Ordinance.[1]

[1] Complete code criteria can be found in the Milwaukie Municipal Code Title 19 at http://www.qcode.us/codes/milwaukie/.

Zoning Ordinance Section 904.1 Requirements for Zoning Text Amendments

1. Procedures outlined in Section 1003, which detail the manner in which applications must be made, have been followed.

2. Reasons for the request are detailed in this report.

3. The proposed amendments supplement existing authorities within Zoning Ordinance Section 1000 Administrative Provisions. There are no known inconsistencies with other existing code provisions.

Zoning Ordinance Section 905 Approval Criteria for All Amendments

1. Consistency with the Comprehensive Plan, the Urban Growth Management Functional Plan, and applicable regional policies is required. There are no known policies within the mentioned documents that are affected by the proposed amendment.

2. Proposed amendments must meet applicable state, federal, and regional policies. There are no known applicable state or federal policies. The amendment process is consistent with Statewide Planning Goals policies that govern public involvement.

3. Section 905(D) applies to code and zoning changes that affect the transportation system. Section 905(B) and 905(C) apply to area rezonings. The proposal does not affect these sections.

Concurrence

The City Attorney concurs with the proposed ordinance for legal sufficiency.

Fiscal Impact

No fiscal impacts have been identified.

Workload Impacts

Not applicable.

Decision-Making Alternatives

The Council has the following decision-making alternatives:

1. Approve the proposed ordinance and code amendment.
2. Direct staff to modify the proposal.
3. Reject the proposal.
4. Take no action.

ORDINANCE NO. _____

MILWAUKIE OREGON

AN ORDINANCE OF THE CITY OF MILWAUKIE, OREGON, AMENDING THE MILWAUKIE ZONING ORDINANCE BY ADDING A NEW SECTION LIMITING THE RESUBMISSION OF ZONING INTERPRETATIONS AND LAND USE APPLICATIONS WHEN DENIED AND NOT APPEALED

WHEREAS, the City Council desires to amend the Milwaukie Zoning Ordinance to limit the resubmission of requests or applications when denied and not appealed to improve overall certainty about the land use and zoning process and to reduce the potential waste of city resources; and

WHEREAS, legal and public notices have been provided as required by law; and

WHEREAS, on November 22, 2005, the Milwaukie Planning Commission conducted a public hearing as required by Zoning Ordinance Section 1011.5 and adopted a motion in support of the amendment; and

WHEREAS, on December 20, 2005, the Milwaukie City Council conducted a public hearing as required by law, heard and considered all testimony, and found that the proposal is consistent with applicable sections of Zoning Ordinance Sections 900 and 100; and

WHEREAS, the Milwaukie City Council finds that the proposed amendment is in the public interest of the City of Milwaukie,

NOW, THEREFORE, THE CITY OF MILWAUKIE DOES ORDAIN AS FOLLOWS:

Section 1: Milwaukie Zoning Ordinance Section 1000 is hereby amended by creating the new “Section 1004 Limitations” as shown in Attachment 1, effective February 19, 2006.

Read the first time on _____, 2005, and moved to second reading by

_____ vote of the City Council.

Read the second time and adopted by the City Council on _____, 2005.

Signed by the Mayor on _____, 2005.

_____
James Bernard, Mayor

ATTEST:

APPROVED AS TO FORM:
Ramis, Crew, Corrigan LLP

_____
Pat Duval, City Recorder

_____
City Attorney

Ordinance No._____

Attachment 1

Milwaukie Zoning Ordinance
Text Amendment
File ZA-05-01

Section 19.1004 Limitations.

A. Purpose. The purpose of this section is to promote efficient practices for the review of zoning and land use decisions while recognizing the appeal rights of property owners and applicants. Prohibitions on repeat submissions of denied applications fosters a greater sense of certainty on behalf of the community, property owners, and applicants in preparing and responding to city decisions on zoning and development proposals.

B. Applicability. This section applies to decisions, determinations, and interpretations made under Title 19 Zoning Ordinance, Title 17 Land Division Ordinance, and Title 14 Sign Ordinance.

C. Variance provisions not applicable. Relief from provisions of this section may not be granted under Zoning Ordinance Section 700.

D. Planning Director Determinations. An interpretation or determination made by the Planning Director in accordance with Sections 19.809 Determination of Nonconforming Situations, 19.1001.1 Authority, and 1001.4 Planning Director Determinations is final if not appealed. The Planning Director's decision to reject a request for a repeat determination or interpretation is not subject to appeal.

E. Resubmission Prohibited. If an application for a land use approval has been denied, an application for the same or similar project on the same property may not be resubmitted unless one or more of the following occurs:

1. Two years have passed since the denial became final.
2. Substantial changes are made to the application. Substantial changes to an application have occurred only if the changes resolve all findings for denial of the original application.
3. Standards and criteria relative to the findings of the original denial have changed and now support the application.
4. For legislative and major quasi-judicial decisions, there has been a substantial change in the composition of the Council and the City Council was the final decision-maker. A substantial change in the composition of the City Council occurs if fewer than three Council

members who voted to deny the original application remain on the Council.

F. Meaning of denial. For purposes of this section, a land use approval is denied when the City's final decision of denial is not appealed or is upheld on appeal.

G. Procedural denials exempt. An application that was denied solely on procedural grounds, or which was expressly denied without prejudice, is not subject to this section.

~end~

To: Mayor and City Council

Through: Mike Swanson, City Manager

From: JoAnn Herrigel, Community Services Director

Subject: Code Changes and Granting of Franchises for Solid Waste Management Services

Date: December 8, 2005

Action Requested

Two actions are requested:

1) Approve an ordinance amending Chapter 13.24 of the Milwaukie municipal code regarding management and collection of solid waste and recycling, and
2) Approve a resolution granting non-exclusive franchises for solid waste management services.

Background

In 1994, the City of Milwaukie granted franchises to seven garbage haulers for the provision of solid waste management and collection services in the City. The original term of these franchises ended in October 2004. Council extended these franchise terms to allow staff to complete negotiations and finalize code changes and administrative rule language. The current extension will lapse on December 31, 2005.

Staff has worked closely with David White, negotiating for the franchised haulers, to develop new code language and to modify the administrative rules for solid waste management and collection. Before engaging in negotiations with Mr. White, staff completed the following preliminary steps:

- In May of 2002, staff met with Council at a work session to discuss the existing solid waste franchise system and other systems that the City might consider as an alternative. Council stated their interest in maintaining the current franchise system in Milwaukie.

- In November of 2002, staff hired a survey firm to complete surveys of Milwaukie's commercial and residential garbage customers. The results of a random phone survey of 150 commercial customers showed 97% of those surveyed were satisfied with their garbage services. The results of a mail survey of residential customers (31% return rate) reflected a 93% satisfaction rate.
- In the summer of 2003, staff met with the seven garbage companies and presented a list of issues that City staff felt should be addressed in the new franchise agreement. Staff also asked the haulers if they wished to negotiate with the City directly or through a haulers' representative. The haulers identified David White, of the Oregon Refuse and Recycling Association, as their representative for the negotiations.
- In September of 2003, City staff and David White began meeting to develop amendments to the existing code language and to update the administrative rules.

Important elements of the new Code language include:

- Term of franchises is 10 years with a review at year five and five year renewal with staff recommendation, public notice and public hearing.
- Code language includes Down To Earth Day, the City's annual waste collection event, as a requirement for all franchisees.
- Administrative Rules are approved by the City Manager after advertisement and public review. An appeals process is described.
- A target operating margin for franchisees is established as 10% and acceptable range is 8%-12%.
- The franchise fee is set at 5%.

Staff and the haulers have now agreed on the language presented to Council in the attached ordinance and resolution. Council is asked to adopt the code language and grant the franchises. The administrative rules will be approved, according to the new code language, after adequate public notice, by the City Manager. (Note: staff mistakenly told Council that the administrative rules would be brought to them for approval and then realized that Council approval is not required.)

Concurrence

The City Recorder, the City Manager, the City Attorney and the seven franchised haulers have reviewed these materials and concur with staff's recommendation.

Fiscal Impact

None.

Work Load Impacts

The Community Services Director looks forward to having this particular work item off her task list. This process has taken up a great deal of time over the past three years.

Alternatives

Do not approve the recommended ordinance or resolution, directing staff to continue negotiations with the haulers.

ORDINANCE NO. _____

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MILWAUKIE, OREGON AMENDING CHAPTER 13.24 OF THE MILWAUKIE MUNICIPAL CODE REGARDING MANAGEMENT AND COLLECTION OF SOLID WASTE AND RECYCLING AND DECLARING AN EMERGENCY.

WHEREAS, the current language in Chapter 13.24 was adopted in 1993 by ordinance number 1752 and has not been amended significantly since that time; and,

WHEREAS, the terms of the franchises for the solid waste providers lapse on December 31, 2005 and renewal of those franchises will take place before that date; and

WHEREAS, the City and the solid waste management providers wish to update code language regarding the rules and regulations in this area; and

WHEREAS, the City and the solid waste management providers worked together to develop the amendments to Chapter 13.24 and approve of the substance thereof; and

WHEREAS, this Ordinance enables continued provision of solid waste services and protects public health, which would be at risk if solid waste services are interrupted;

NOW, THEREFORE, THE CITY OF MILWAUKIE DOES ORDAIN AS FOLLOWS:

Section 1. Chapter 13.24 of the Milwaukie Municipal Code is hereby amended as shown in attachment A.

Section 2. All solid waste management service providers granted franchises by the City of Milwaukie shall comply with Milwaukie Municipal Code Chapter 13.24.

Section 3. Because this ordinance is needed to protect public health and safety, an emergency is declared and this ordinance is effective upon passage.

Read the first time on_____, and moved to second reading by _____vote of the City Council.

Read the second time and adopted by the City Council on _____.

Signed by the Mayor on_____.

_____
James Bernard, Mayor

ATTEST:

_____
Pat DuVal, City Recorder

APPROVED AS TO FORM:
Ramis, Crew and Corrigan, LLP

_____
City Attorney

ATTACHMENT A

Section 13.24.010 Policy.

It is declared to be the public policy of the city of Milwaukie to regulate solid waste management service by:

A. Insuring safe, economical, and comprehensive solid waste management service;

B. Insuring service rates and charges that are just and reasonable and adequate to provide necessary public service;

C. Prohibiting rate preferences and other discriminatory practices; and

D. Providing technologically and economically feasible resource recovery by and through the franchisees. ~~(Ord. 1752 § 1, 1993)~~

Section 13.24.020 Definitions.

The following definitions shall apply to this chapter:

"City" means the city of Milwaukie, Clackamas County, Oregon.

"City council" or "council" means city council of Milwaukie, Oregon.

In addition, for the purpose of this chapter, the following definitions shall be applicable:

"Allowable Expenses" means those expenses that are known and measurable, calculated in accordance with Generally Accepted Accounting Principles (GAAP), not in excess of the fair market value of like services, and are reasonably and prudently incurred by the Franchisee in the course of performing its obligations under this Franchise. A narrative of allowable expenses shall be established by the City in its Administrative Rules.

"Bulky wastes" means large items of solid waste such as appliances, furniture, large auto parts, trees, branches greater than four inches in diameter and thirty-six inches in length, stumps and other oversize wastes whose large size precludes or complicates their handling by normal collection, processing or disposal methods.

"Commission" means the State of Oregon Environmental Quality Commission (EQC).

"Compensation" includes~~:~~

~~Includes~~ any type of consideration paid for service, including but not limited to, rent, the sale of recyclable materials, and any other direct or indirect provisions for payment of money, goods or benefits by property owners, tenants, members, licensees, and similar persons. It shall, also, include any exchange of services, including the hauling of Solid Waste and Waste. Compensation includes the flow of consideration from the person owning or possessing the Solid Waste or Waste to the person collecting, sorting, transporting, or disposing of Solid Waste or Waste.

~~1. Any type of consideration paid for service including, but not limited to, rent, membership fees, the proceeds from resource recovery, any direct or indirect provision for the payment of money, goods, services or benefits by tenants, lessees, occupants, members or similarly situated persons; and~~

~~2. The exchange of service between persons.~~

– **"Curbside,"** as defined here, may also be called **"curbside/roadside"** means a location within three (3) feet of public right-of-way. This does not allow the garbage or recycling receptacle to be placed on the inside of a fence or enclosure even if the receptacle is within three (3) feet of said road or roads. For residences on "Flag Lots", private roads or driveways, "Curbside/Roadside" shall be the point where the private road or driveway intersects a City Road, Public Access Road, State Road or Federal Road.

~~and applies only to recycling and yard debris collection and refers to containers being located within three feet of the edge of a public street. The "street" may be a public alley if a franchisee desires to pick up garbage or recyclables from the alley. The three-foot rule does not allow the yard debris or recycling container to be placed on the house side of a fence or enclosure even if the container is within three feet of the public street/alley. For residences on a flag lot, or other private driveway, "curbside" shall be the point where the driveway intersects the public street, or at such other location agreed upon between a franchisee and customer.~~x

"Department" means the State of Oregon Department of Environmental Quality (DEQ).

"Disposal site" means land and facilities used for the disposal, handling or transfer of, or resource recovery from solid wastes, including but not limited to dumps, landfills, sludge lagoons, sludge treatment facilities, disposal sites for septic tank pumping or cesspool cleaning service, transfer stations, resource recovery facilities, incinerators for solid waste delivered by the public or by a solid waste collection service, composting plants and land and facilities previously used for solid waste disposal at a land disposal site; but the term does not include a facility subject to the permit requirements of ORS 468B.050; a landfill site which is used by the owner or person in control of the premises to dispose of soil, rock, concrete or other similar nondecom-posable material, unless the site is used by the public either directly or through a solid waste collection service; or a site operated by a wrecker issued a certificate under ORS 822.110.

"Franchisee" means the person to whom a franchise is granted by the city council pursuant to this chapter. Such franchise shall grant exclusive rights to provide service and solid waste management service for compensation.

"Infectious waste" means biological waste, cultures and stocks, pathological wastes, and sharps, as defined in ORS 459.386 and 459.387.

"Person" means the state or a public or private corporation, cooperative, local government unit, public agency, individual, partnership, association, firm, trust, estate or any other legal entity.

"Placed for collection" means solid waste or recyclable material that has been placed by the customer for service by a franchisee under the requirements contained herein.

"Processing" means an operation where collected, source separated, recyclable materials are sorted, graded, cleaned, densified or otherwise prepared for end use markets.

"Recyclable material" means any material or group of materials that can be collected and sold for recycling at a net cost equal to or less than the cost of collection and disposal of the same material.

"Resource recovery" means the process of obtaining useful material or energy resources from solid waste and includes:

1. "Energy recovery," which means recovery in which all or a part of the solid waste materials are processed to utilize the heat content, or other forms of energy, of or from the material;
2. "Material recovery," which means any process of obtaining from solid waste, by presegregation or otherwise, materials which still have useful physical or chemical properties and can be reused or recycled for some purpose;
3. "Recycling," which means any process by which solid waste materials are transformed into new products in such a manner that the original products may lose their identity;
4. "Reuse," which means the return of a commodity into the economic stream for use in the same kind of application as before without change in its identity.

"Solid waste" and **"waste"** are interchangeable. Solid waste shall include all putrescible and non-putrescible waste, including but not limited to, garbage; compost; organic waste; yard debris; brush and branches; land clearing debris; sewer sludge; residential, commercial and industrial building demolition or construction waste; discarded residential, commercial and industrial appliances, equipment and furniture; discarded, inoperable or abandoned vehicles or vehicle parts and vehicle tires; manure; feces; vegetable or animal solid and semi-solid waste and dead animals; and infectious waste. Waste shall mean useless, unwanted or discarded materials. The fact that materials, which would otherwise come within the definition of Solid Waste, may, from time to time, have value and thus be utilized shall not remove them from the definition. The terms Solid Waste or Waste do not include:

a. Environmentally hazardous wastes as defined in ORS 466.055;
b. Materials used for fertilizer or for other productive purposes on land in agricultural operations in the growing and harvesting of crops or the raising of fowl or animals;
c. Septic tank and cesspool pumping or chemical toilet waste;
d. Source separated, principal recyclable materials as defined in ORS 459A and the Rules promulgated there under and under this Ordinance, which have been purchased or exchanged for fair market value, unless the City declares a site of uncollected principal recyclable materials to be public nuisance;
e. Applications of industrial sludges or industrial waste by-products authorized through a Land Use Compatibility Statement or Management Plan approval and that have been applied to agricultural lands according to accepted agronomic practices or accepted method approved by the Land Use Compatibility Statement or Management Plan, but not to exceed 100 dry tons per acre annually;

Stabilized municipal sewage sludge applied for accepted beneficial uses on land in agricultural, non-agricultural, or silvicultural operations. Sludge-derived products applied for beneficial uses on land in landscaping projects.

~~means all putrescible and nonputrescible wastes, including but not limited to garbage, rubbish, refuse, ashes, waste paper and cardboard; sewage sludge, septic tank and cesspool pumpings or other sludge; commercial, industrial, demolition and construction~~

~~wastes; discarded or abandoned vehicles or parts thereof; discarded home and industrial appliances; manure, vegetable or animal solid and semisolid wastes, dead animals, infectious waste as defined in ORS 459.387, special wastes and other wastes; but the term does not include:~~

~~1. Hazardous wastes as defined in ORS 466.005;~~

2. ~~Materials used for fertilizer or for other productive purposes or which are salvageable as such materials are used on land in agricultural operations and the growing or harvesting of crops and the raising of animals.~~

"Solid waste collection service" or "service" means the collection, transportation or disposal of or resource recovery from solid wastes.

"Solid waste management" means ~~prevention or reduction of solid waste; management of the storage, collection, transportation, treatment, utilization, processing and final disposal of solid waste; or resource recovery from solid waste; and facilities necessary or convenient to such activities.~~ the management of the accumulation, storage, collection, transfer, handling, compaction, transfer, handling, compaction, transportation, treatment, processing and final disposal or utilization of Solid Waste and Waste or resource recovery from Solid Waste and facilities necessary or convenient to those activities. The Franchisee may contract with another person to provide service of any type under the Franchisee's Service Franchise, but the Franchisee shall remain ultimately responsible for Solid Waste and Waste Management in the Franchisee's franchised service area.

"Source separate" means that the person who last uses recyclable material separates the recyclable material from solid waste.

"Special wastes" shall have the meaning given to them in the METRO code as now referenced at METRO Code Section 5.02.015(s), or as hereafter amended, ~~since METRO has the regulatory authority for the disposal of such wastes.~~ or as provided in the City's administrative rules. The collection of "special wastes" shall be controlled by this Chapter and any rules adopted hereunder.

"Transfer station" means a fixed or mobile facility normally used as an adjunct of a solid waste collection and disposal system or resource recovery station between a collection route and a disposal site.

"Unallowable Expenses" means any expenses not included in the definition of allowable expenses and:

1. Interest and amortization on the purchase of franchise routes or other routes or business opportunities.

2. Political and charitable contributions.

3. Federal, state, and local income taxes.

4. Loss on sale of assets.

5. Officers' life insurance premiums.

6. Director fees.

7. Interest on the purchase of equipment or facilities to the extent that the purchase price exceeds the fair market value of the asset at the time of purchase.

8. Penalties and fines.

"Waste" means material that is no longer usable or wanted by the source of the material, which material is to be utilized or disposed by another person. For the purposes of this paragraph, "utilized" means the productive use of wastes through recycling, reuse, salvage, resource recovery, energy recovery or landfilling for reclamation, habilitation or rehabilitation of land.

"White goods" means kitchen or other large appliances which are bulky wastes.

"Yard debris" means and includes grass clippings, leaves, ~~hedge trimmings and similar vegetative waste generated from residential property or landscaping activities, but does not include stumps or similar bulky wood materials. (Ord. 1809, 1996; Ord. 1752 § 2, 1993)~~ tree and shrub prunings of no greater than four (4) inches in diameter or similar yard and garden vegetation. Yard debris does not include such items as: dirt, sod, stumps, logs, tree and shrub prunings greater than four (4) inches in diameter, rocks, plastic, animal waste or manure, cat litter, potting soil, prepared food wastes or nonputrescible material.

Section 13.24.030 Enforcement officers--Access to and review of books and records.

A. The city manager shall enforce the provisions of this chapter, and his agents, including police officers and employees of the public works department, may enter any premises for the purpose of determining compliance with the provisions and terms of this chapter. Such entry shall be upon permission of the occupant or upon warrant.

B. In order for the franchisees to perform services under this chapter, it may be necessary for a franchisee to disclose to city or city may otherwise acquire, a franchisee's confidential business or technical information. The city may make an inspection for such purposes upon at least twenty-four hours' notice, during normal business hours, at an office of the franchisee located in the local metropolitan area. The city will receive and maintain in confidence all information and will prevent the disclosure of information to others except as required by law in connection with litigation. The city will not use information for any purpose other than in connection with the performance of services pursuant to this chapter.

The above shall not apply to any portion of information: (1) which was developed by the city and is in the city's possession prior to the city's first receipt thereof directly or indirectly from a franchisee; (2) which is now or hereafter becomes through no act or failure to act on the city's part generally available on a nonconfidential basis; (3) which was heretofore or hereafter furnished to a franchisee by others as a matter of right without restriction on disclosure; or (4) which is required by law to be publicly disclosed by the city. Information shall not be deemed to be within one of the foregoing exceptions if it is merely embraced by more general information available on a nonconfidential basis.

The city agrees that each of its employees, agents and subcontractors who participates in the performance of services or who has access to information is obligated in a manner

consistent with this section. The obligations of this section shall survive the termination of any request for services and the termination of this chapter.

~~C. Prior to the granting or renewal of a franchise under the ordinance codified in this chapter, and at each five-year interval thereafter, during the term of the franchise, or at more frequent intervals if determined necessary by the city, the city shall have the right to contract with an outside accounting firm to conduct a review of each franchi-see's books and records relating to operations under their franchise. (Ord. 1752 § 3, 1993)~~

Section 13.24.040 Franchise required and exceptions thereto.

A. Except as otherwise provided in this chapter, it is unlawful for any person other than the franchise holders under the provisions of this chapter, to provide or offer to provide solid waste management or collection service in the city for compensation.

B. Nothing in this franchise shall:

1. Prohibit a federal or state agency that collects, stores, transports or disposes of waste, solid waste or recyclable materials, or those who contract with such agencies to perform the service, but only insofar as the service is performed by or for the federal or state agency;

2. Prohibit any person in the city from hauling that person's own waste, solid waste or recyclable materials in a lawful manner; provided, however, that no person will be permitted to haul such waste, solid waste or recyclable material for any other person or firm. In the case of a residential dwelling unit (whether individually owned, nonowner occupied or grouped through an association or cooperative of property owners) any waste generated or produced is owned by the individual owner or occupant and not by the landlord, property owner, cooperative or association or property manager or agent of such person;

3. Prohibit a generator of source separated recyclable material from selling or exchanging such material to any person for fair market value for recycling or reuse;

4. Prohibit any person from transporting, disposing of or resource recovering, sewage sludge, septic pumpings and cesspool pumpings;

5. Prohibit any person licensed as a motor vehicle wrecker under ORS 822.110 et seq. from collecting, transporting, disposing of or utilizing motor vehicles or motor vehicle parts;

6. Prohibit any person transporting solid waste through the city that is not collected within the city;

7. Prohibit a contractor registered under ORS Chapter 701 from hauling waste created in connection with the demolition, construction or remodeling of a building or structure or in connection with land clearing and development. Such waste shall be hauled in equipment owned by the contractor and operated by the contractor's employees;

8. Prohibit the collection, transportation and reuse of repairable or cleanable discards by private charitable organizations regularly engaged in such business or activity including, without limitation, Salvation Army, Goodwill, St. Vincent De Paul, and similar organizations;

9. Prohibit a person from conducting an activity determined by the city manager to be a civic, community, benevolent or charitable program, providing that such activity does not include the collection of putrescible solid waste. The organization conducting such program shall comply with all applicable provisions of this chapter;

10. Prohibit a person from transporting or disposing of waste that is produced as an incidental part of the regular carrying on of the business ~~of janitorial service,~~ but a person shall not provide collection service for any accumulated waste generated by a customer of that business;. ~~gardening or landscaping service, or rendering. (These sources do not include the collection, transportation or disposal of accumulated or stored wastes generated or produced by other persons);~~

11. Require franchisee to store, collect, transport, dispose of or resource recover any hazardous waste as defined by or pursuant to ORS Chapter 466; provided, however, that franchisee may engage in a separate business of handling such wastes separate and apart from this franchise and chapter. ~~(Ord. 1752 § 4, 1993)~~

Section 13.24.050 ~~Rules and regulations~~Adoption and Revision of Rules.

~~The city manager may propose and prepare rules and regulations pertaining to this chapter. The rules and regulations shall be printed or typewritten and be maintained for inspection in the office of the city recorder. All proposed rules and regulations promulgated under the authority of this section and all amendments thereto shall be immediately forwarded to all franchisees operating under this chapter for the response. Each franchisee shall have thirty days to respond in writing to such proposed rules and regulations. The rules and regulations and any amendments thereto, may be approved by the city council, after hearing, following said thirty-day period. (Ord. 1752 § 5, 1993)~~

a. Under authority of the City Code, the City Manager is authorized to adopt rules, procedures and forms to implement provisions of this Chapter that regulate the collection and disposal of Solid Waste, Recycling and Yard Debris within the City of Milwaukie.

b. Any rule adopted or revised according to the authority of the City Code shall require a public review process. Not less than ten nor more than thirty days before such public review process, notice shall be given by publication in a newspaper of general local circulation. Such notice shall include the place, time and purpose of the public review process and the location at which copies of the full set of the proposed rules may be obtained.

c. During the public review, the Solid Waste Coordinator shall hear testimony or receive written comment concerning the proposed rules. The City Manager shall review the recommendations; taking into consideration the comments received during the public review process and shall either adopt the proposal, modify or reject it.

d. An interim rule may be adopted by the City Manager or his designee without prior notice upon a finding that failure to act promptly will result in serious prejudice of the public interest of the affected parties, including the specific reasons for such prejudice. Any rule adopted pursuant to this paragraph shall be effective for a period of not longer than 180 days.

Section 13.24.060 Sanitary and safety regulations.

Each franchisee shall comply with all state, federal, regional and city laws, rules and regulations relating to solid waste management service, as now or hereafter constituted. Violation shall be an offense against the city. ~~(Ord. 1752 § 6, 1993)~~Where enforcement action is not taken by any other agency, the City may exercise this authority in order to cure the violation.

Section 13.24.070 Standards for collection and storage of solid wastes and recyclable materials.

A. Storage and collection of solid waste and recyclable materials shall not create vector production and sustenance, conditions for transmission of disease to man or animals, fire hazards or hazards to service or disposal workers or to the public. All solid wastes placed for collection shall be stored by the customer in a can (metal or heavy-duty plastic), cart, metal container or drop box, and such receptacles, other than drop boxes, must have tight-fitting covers and hand or mechanical bales to facilitate pickup. Extra volumes of solid waste that are in addition to the subscribed service, may be in heavy plastic bags that are securely tied at the top and which will accommodate the weight and volume of waste contained in them so that they do not break open upon being collected. The cleanliness of the grounds surrounding the solid waste and recyclable materials storage area and of the receptacle for such materials shall be the responsibility of the customer. Solid waste containing putrescible materials shall be stored in closed containers.

B. Recyclable materials and yard debris shall be prepared by customers and placed at curbside for collection by a franchisee in accordance with rules and standards adopted under this chapter.

C. Customers shall provide a space for all cans, carts, containers or drop boxes, whether used for garbage or recycling, that has adequate and safe access for collection personnel and equipment. The space provided must also comply with the city development code.

D. Placement of receptacles for collection by a franchisee and requirements pertaining to weight limitations, type and quality, and contents of receptacles placed for collection by a franchisee shall be in accordance with rules and standards adopted under this chapter.

E. The temporary storage of solid waste is permitted without compliance with the requirements for solid waste disposal sites if the temporary storage is provided under safe and sanitary conditions. Temporary storage must comply with all relevant codes and chapters of the city. ~~(Ord. 1752 § 7, 1993)~~

Section 13.24.080 Franchise requirements.

A. Each franchisee shall make available, for subscription, all levels of solid waste collection service for which the city sets rates, to every customer in its franchised geographic area, subject to the limitations in Section 13.24.150 for refusal of service. Collection of bulky wastes shall be made by special arrangement between franchisee and a customer. Each franchisee shall provide each of their new customers with city-approved written information on all solid waste and recycling collection services that are available and the rates for these services. The franchisee shall not intentionally provide solid waste collection service to customers in another franchisee's geographic area within the Milwaukie city limits except by arrangement with another franchisee under a subcontract. Customers shall be given written notice of any changes in service.

B. Each franchisee shall use proper and suitable equipment for the hauling, removal and transportation of solid waste. All equipment for transporting solid waste on public roadways within the city shall be covered and all equipment for handling said waste material shall be equipped with a metal body, watertight and drip proof to the greatest extent practicable. All equipment shall be kept clean at all times and sufficient equipment shall be kept on hand to properly and adequately remove all solid waste, subject to the terms of this chapter, together with rules and standards adopted under this chapter.

C. Each franchisee shall make available solid waste management and collection service as defined in Section 13.24.020 of this chapter to customers in the city not less than once per week.

D. Each franchisee may subcontract with others to provide a portion of the service where the franchisee does not have the necessary equipment or service capability. Such a subcontract shall not relieve the franchisee of total responsibility for providing and maintaining service and from compliance with this chapter. Said franchisee shall provide written notice to the city of its intention to subcontract any portion of the service prior to entering into such agreement, and provide the city with a copy of the agreement, which shall require city approval prior to the agreement becoming effective. The subcontractor shall comply with all provisions of this chapter.

E. Each franchisee shall provide the opportunity to recycle in accordance with Chapter 459A of Oregon Revised Statutes, together with the rules and regulations promulgated thereunder by the EQC, DEQ, METRO and the city.

F. Each franchisee shall permit inspection by the city of said franchisee's facilities, equipment and personnel at reasonable times.

G. Each franchisee shall comply with all laws relating to solid waste management service and shall not have a record of violations of law or chapters that would indicate an inability to satisfactorily perform the service being franchised.

H. Each franchisee shall submit a certificate of public liability insurance with a thirty-day notice of cancellation clause, acceptable to the city, which will cover its business operation including each vehicle operated by said franchisee. This coverage shall include Contractual Liability insurance. Coverage will include $1,000,000 per occurrence and $2,000,000 general annual aggregate. Said insurance shall name City as an additional insured and shall require written notice to City thirty (30) days in advance of cancellation. If Contractor hires a carrier to make delivery, Contractor shall ensure that said carrier complies with this paragraph. ~~The insurance coverage shall be in amounts not less than the minimum requirements of the Oregon Tort Claims Act as now enacted or hereafter amended.~~ The insurance shall indemnify and save the city harmless against liability or damage which may arise or occur from an injury to persons or property as a result of said franchisee's operation of the solid waste business. ~~The city shall be named as an additional insured.~~

~~I. Each franchisee shall provide a cash security deposit or a performance bond in an amount up to five thousand dollars to guarantee payment to the city or another affected person of a judgment secured against the franchisee because of work performed that does not conform with the requirements of the franchise, until one year after expiration of the franchise and after all claims or demands made against it have been settled or secured. The amount of the security deposit or bond shall be dependent upon the extent of the collection activity in the city by a franchisee. A deposit in a savings account in trust, to secure this obligation, shall be sufficient conformance with this subsection.~~

I~~J~~. Each franchisee shall comply with the hours of collection which may be set by rules and regulations under this chapter.

~~K. Each franchisee shall maintain a bill- paying station within the city and provide telephone service so that the business of the franchisee may be reached by the public during the period from eight a.m. to five p.m. The location of the bill-paying station shall be approved by the city manager. (Ord. 1752 § 8, 1993)~~

J. Each franchisee shall provide staff, equipment, transportation and disposal for waste collected at one annual collection event in the City. Expenses from this event shall be reported in annual financial reports as allowable expenses for services provided within the City of Milwaukie.

Section 13.24.090 Non-Exclusive Franchise.

No person shall do business in the collection and transport of solid waste generated within the City without a current, valid City franchise. A Franchise to provide collection service for solid waste, recyclable materials and yard debris in a service area of the City shall be granted only after a determination of need for the service. The determination of need is the responsibility of the City Council, which will seek the best balance of the following objectives:

(1) To insure safe, efficient, economical and comprehensive solid waste service;
(2) To avoid duplication of service that will cause inefficiency, excessive use of fuel, increased traffic, and greater wear on streets;
(3) To provide service in areas of marginal return;
(4) To promote and encourage recycling and resource recovery;
(5) To improve the likelihood of the Franchise holder making a reasonable profit and thereby encourage investment in modern equipment;
(6) To cooperate with other governmental bodies by recognizing their service arrangements; and
(7) To otherwise provide for the service in a manner appropriate to the public interest.

In granting a franchise renewal or a new franchise due to an annexation, termination, or revocation of a franchise, the Council shall, in addition to the above, consider the following factors in selecting a new or replacement Franchisee:

a. The candidate's prior service record in the same or a related industry and its professional relationships with other corporate entities and local, regional and/or state jurisdictions;
b. The candidate's financial ability to perform the obligations of a franchise holder;
c. The candidate's equipment and personnel available to meet current and future needs of a franchise holder;
d. The candidate's ability to provide all services to customers within the geographic boundaries of the designated franchise area, including every residential, multi-family and commercial customer;
e. The candidate's exercise of the burden of proof demonstrating a proposed franchise area is being or has been underserved by the existing or previous franchise holder; and
f. The candidate's good moral character as is relevant to a franchised provider's customer relations, namely any unpaid judgments against the applicant (whether doing business under the same or another name) and any judgments for civil fraud or for a crime of dishonesty.

Franchises granted by the City shall be non-exclusive, however it is understood that during the term of franchises granted under this Ordinance, the City shall not grant any other person a franchise for Solid Waste Management unless there is a showing by the applicant of the need for such additional service in the proposed service area. As to such application(s) the Council may consider whether a current Franchisee is capable of

providing the additional service. In evaluating whether a need exists for additional service, the City Council may consider, among any other criteria deemed relevant by the City Council, the following items:

(1) An increase in the population of the City;

(2) An extension of the boundaries of the City;

(3) Intensive residential, commercial or industrial development within the boundaries of the City;

(4) Changes in solid waste technology and/or recycling collection technology that could substantially improve collection service or reduce collection costs to residents of the City;

(5) The effect that an additional franchise would have on each existing Franchisee's ability to meet the City's service standards and maintain a fair return on its investment;

(6) The number of existing Collection Franchisees or Drop Box Service Franchisees, as applicable, providing service in the area of the City in which the applicant wishes to provide service; and

(7) Changes in federal or state laws, rules or regulations that substantially affect solid waste or recycling collection requirements.

{PRIVATE }Section 13.24.100 Term of Franchise{tc \l 1 "Section Term of Franchise"}

A franchise to provide collection service for solid waste, recyclable materials and yard debris in a portion of the City shall be granted for a period of ten (10) years, beginning December 21, 2005.

The City shall review franchises annually to evaluate rates and may review customer service and franchisee performance issues.

Staff shall report to the Council a comprehensive review of the rates. As part of this review, the City may review customer service, franchise performance and overall state of the franchise system based on the first 60 months of the franchise term. As part of that review, at the request of a Franchisee, staff may make a recommendation to renew or not renew, and the Council may consider renewing that person's franchise for an additional five years to be added to the end of the existing term for a total of ten (10) years. Any such extension shall be granted only after the notice to all interested parties and a public hearing.

Nothing in this section restricts the Council from suspending, modifying or revoking the franchise for cause pursuant to Section 13.24.140 of this Code.

A Franchisee who desires to terminate its rights and obligations under a franchise, shall give not less than 90 days' notice of its intent. Upon receipt of such notice the Council shall initiate proceedings to consider applications by any other person for a franchise to serve the same area.

Section 13.24.110 Notice Request for Franchise Applications

Prior to the end of a franchise term, notice that the City intends to solicit applications for solid waste Franchises shall be published in a newspaper of general circulation within the City. Notice shall also be sent to all holders of Milwaukie solid waste franchises. The City Manager or his designee may keep a list of interested persons who will also be provided notice.

The City Manager shall establish forms and deadlines.

Section 13.24.120 Description of Franchise Areas

A City Solid Waste Franchise service area shall include single unit residential customers and any multi-family residential, commercial and industrial customers within that service area. The service areas shall be determined by Council resolution. The Franchise areas and the Franchisees serving such areas shall be indicated on a map entitled "Solid Waste Franchise Service Areas of the City of Milwaukie" (the "Map"). A copy of the Map shall be dated with the effective date of the Council resolution and maintained in the Office of the City Manager. Amendments to the map may be made by Council resolution, and copies of amendments shall be kept on file by the City Recorder.

Section 13.24.130 Transfer of Franchise

An assignment or transfer of a Franchise shall include, but not be limited to:

(1) A sale, exchange or other transfer of 50% or more of Franchisee's assets dedicated to service in the City;
(2) A sale, exchange, or other transfer of fifty percent (50%) or more of the outstanding common stock of a Franchisee;
(3) Any reorganization, consolidation, merger, recapitalization, voting trust, pooling agreement, escrow arrangement, liquidation or other transaction to which Franchisee or any of its shareholders is a party which results in a change of ownership or control of fifty (50%) or more of the value or voting rights in the stock of the Franchisee; and
(4) Any combination of the foregoing that has the effect of a transfer or change of ownership and control.

The Franchisee shall provide no less than 60 days' advance written notice to the City of any proposed transfer or assignment. Except as specifically authorized by the City, the Franchisee shall not assign any of its rights or delegate or otherwise transfer any of its obligations to any other person without the prior consent of the City Council. Any such assignment without the consent of City Council shall be void and any such attempted assignment shall constitute default and grounds for termination of the Franchise.

If a Franchisee requests the City's consent to transfer the Franchise, the City shall act on such request within sixty (60) days of the receipt of the Franchisee's written request together with all information, as set forth below, required for the City's action on the request. The City shall not unreasonably refuse to consent to an assignment of the Franchise to a proposed assignee that has sufficient knowledge, experience, and financial

resources so as to be able to meet, to the satisfaction of the City Council, in its sole discretion, all obligations of the Franchisee hereunder. An application to the City to consider a sale or other transfer of a Franchise shall include the following:

(1) A nonrefundable application fee of two thousand dollars ($2000) payable at the time of application to the City in advance to defray the City's anticipated expenses and costs resulting from the Franchisee's request;

(2) Financial statements audited or reviewed by a Certified Public Accountant of the Proposed Assignee's operations for the three immediately preceding operating years together with any additional evidence of financial ability to perform its Franchise obligations; and

(3) A showing that the proposed Assignee meets all City criteria for the grant of a Franchise as are set out in section 12.24.090 of this ordinance.

~~**Section 13.24.090 Granting a franchise.**~~

~~A. The city council may, by resolution, from time to time, franchise one or more persons to provide solid waste management service within the city. The rights, privileges and franchise to be granted hereunder to each franchisee shall continue and be in force for a period of ten years from and after the date the franchise becomes effective, except that the city shall have the sole discretion, with or without cause, at any time within a three-month period prior to the expiration of each five-year period from the effective date of the franchise to terminate the franchise upon one year's notice to each franchise in writing; otherwise, each franchise shall remain in effect.~~

~~B. Franchises awarded under this chapter shall be based on geographic districts within the city and approved by the city council, but only one franchise shall be issued for each specific geographic district. A detailed map setting forth specific geographic districts is adopted as Exhibit A of the ordinance codified in this chapter. Any change in the boundaries of these districts shall require prior written approval by the city council. Said approval shall not unreasonably be withheld. The city is empowered to carry out all the terms and provisions of this chapter to dispose of waste and solid waste in the manner provided by the chapter in the event any franchise is canceled for cause. Any franchise under this chapter may be canceled for cause by the city upon sixty days' written notice of the grounds for the cancellation for failure to comply with the provisions of this chapter or the rules and regulations adopted hereunder. Any franchisee affected by such written notice may demand and receive a public hearing. The decision of the city council shall be made on said allegations of grounds for cancellation and upon the evidence produced and presented to the council. (Ord. 1760, 1994: Ord. 1752 § 9, 1993)~~

Section 13.24.14~~00~~0 Suspension, modifications or revocation of franchise.

A. The city council may suspend, modify or revoke the contract of a franchisee upon finding that the holder thereof has violated this chapter or ORS Chapter 459 or Chapter 459A, or any rule or regulation promulgated thereunder.

B. When the city receives information indicating a violation of this chapter, a written notice of such violation shall be provided to said franchisee. Such notice shall provide a description of the alleged violation, and shall provide a reasonable opportunity to correct the violation.

C. Upon receipt of the written notice, referred to in subsection B of this section, said franchisee shall have thirty days from the date of mailing of the notice in which to comply or to request a public hearing before the city council. A request for a public hearing before

the city council shall be made in writing and in the event a public hearing is held, said franchisee and other interested persons shall have a reasonable opportunity to present information and testimony in oral or written form.

D. The council shall adopt findings of fact and conclusions which will support or deny the alleged violation. The council may, on the basis of such findings, suspend, modify or revoke the franchise of said franchisee or condition such action upon continued ~~non~~compliance with ~~the alleged violation~~ this code. Said franchisee shall comply with the time specified in the notice or with the order of the city council. ~~(Ord. 1752 § 10, 1993)~~

Section 13.24.15~~10~~ Interruption of service.

Each franchisee agrees, as a condition of their franchise, that whenever the city council finds that the failure of service or threatened failure of service would result in creation of an immediate and serious health hazard or serious public nuisance, the city council may, after a minimum of twenty-four hours' actual notice to the franchisee and a public hearing if the franchisee requests it, provide or authorize another person to temporarily provide the service or to use and operate the land, facilities and equipment of the franchisee to provide emergency service. If a public hearing is requested by the franchisee, it may be held immediately by the city council after compliance with the minimum notice requirements for such meetings established by the Oregon Public Meetings Law. The city council shall return any seized property and business upon abatement of the actual or threatened interruption of service, and after payment to the city for any net cost incurred in the operation of the solid waste service. ~~(Ord. 1752 § 11, 1993)~~

~~Section 13.24.120 Actions of franchisee requiring approval of city.~~

~~No contract, nor any interest therein granted by the council to a franchisee pursuant to the provisions of this chapter, may be sold, assigned, consolidated, merged, or otherwise transferred without the prior written consent of the council. Such consent shall not be unreasonably withheld. The council may grant, deny or impose such conditions with respect to the transfer of the contract or any interest therein, as is in the interests of the public herein and general welfare. (Ord. 1752 § 12, 1993)~~

Section 13.24.16~~30~~ Rates under this chapter.

~~Rates to be charged by each franchisee under this chapter may be set by city council resolution as deemed necessary by the council. In determining rates or proposed rate changes, the council shall give due consideration to the cost of doing business of the franchisees. The council shall consider the investment in facilities and equipment; all direct and indirect costs of doing business such as wage scales, cost of disposal, cost of operating equipment, and all costs of service demands upon the franchisees; consideration shall be given to program changes, technological changes, needs for additional or improved equipment, handling charges, length of haul, frequency of service, extra effort or investment needed for handling of dangerous or unusual waste or solid waste, and due consideration to a reasonable operating margin for the franchisees.~~

~~Each franchisee shall comply with reporting requirement set forth in the administrative rules adopted by the city.~~

~~In setting collection rates the city council shall give particular consideration to the rates for similar services charged in surrounding areas.~~

~~Rates shall be uniform throughout the city, for the same service or may be uniform within zones taking into account haul distance, concentration of dwelling units and other factors which the city council considers to justify variations in rates that outweigh the~~

~~benefits of having a single rate structure to encourage requests for service from throughout the entire service area. (Ord. 1752 § 13, 1993)~~

The City Council shall review and set rates on an annual basis by Council resolution that considers the following goals:

(1) Rates shall be established to the greatest extent practicable on a cost of service basis.
(2) Rates shall be adequate to provide an expected Operating Margin for the subsequent rate year equal to ten percent (10%) of composite Franchise-wide Gross Revenues; however, the City shall not be required to change rates if the expected Operating Margin in the current year falls between eight and twelve percent of Gross Revenues. The 10% target, and the 8% - 12% range of return on Gross Revenues is considered sufficient to reflect the level of business risk assumed by the Franchisee, to allow investment in equipment, and to ensure quality collection service.

Accordingly, the City shall have the authority to commission audits, reviews, or analyses of Franchisee Annual Reports to validate hauler submissions. The expected Operating Margin for the subsequent rate year shall incorporate projected and expected inflation factors, and the effect of known or expected increases or decreases in expenses or revenues prepared on a composite basis.

The rates charged by Franchisees shall conform to the most current Council rate resolution. Prior to implementation, the Council must approve any interim rate for services not included in the current resolution.

If the haulers for the majority of the franchise areas within the City notify the City Manager in writing that they believe a material change outside the Franchisees' control has occurred, and the change will have an adverse effect on operating margins, such that current year operating margins will be less than seven percent, a material change will be deemed to have occurred. At that time, the City may undertake any type of review it finds necessary to validate the existence of the material change and estimate its effect on the operating margin. If the results of the review are such that no rate adjustment is warranted, persons requesting the review shall reimburse the City for reasonable costs incurred during the investigation at the time the next payment of franchise fees is due.

If the City believes that a material change has occurred that will result in a current year operating margins falling under 8% percent or over 12% percent, the City may undertake a supplementary rate review at its own expense.

A change in tipping fee at disposal facilities will be evaluated by the City to determine the effect upon rates and services.

Section 13.24.17~~040~~ Franchise fee.

~~As compensation for the contract rights to franchisees, and for the use of city streets, the franchisees under this chapter shall pay to the city such sum or sums, at such times as may be set by resolution of the council. In setting such franchise fee, due consideration shall be given to the impact such a fee will have on service rates charged to customers of~~

~~the franchisees. The franchise fee payable by persons under this chapter shall be set by city council resolution. (Ord. 1752 § 14, 1993)~~

For the privilege of using the City's streets and other facilities and for the purpose of defraying the City's regulatory expenses, each Franchisee shall pay a Franchise Fee to the City equal to 5% percent of cash receipts on residential service, commercial and drop box service, net of material sales revenue. For drop box service, disposal costs will be considered a pass through cost.- The Franchise Fee shall be computed and collected on a calendar quarterly basis. The fee shall be paid by the Franchisee not later than the last day of the month immediately following the end of the quarter. A Franchise fee payment shall become delinquent if not paid by the last day of the month immediately following the end of the quarter. A simple interest charge of 18% shall be charged against the entire delinquent balance until the balance is paid.

At the time of payment of the quarterly fee, each Franchisee shall file with the City Manager a verified statement of quarterly cash receipts for the period covered by the tendered fee. Such statements shall be public records. Each Franchisee shall maintain books and records disclosing the cash receipts derived from business conducted within the City, which shall be open at reasonable times for audit by the City Manager or his designee. The City may require a uniform system of bookkeeping and record keeping to be used by all Franchisees.

Material misrepresentation of cash receipts by a Franchisee constitutes cause for revocation of the Franchise.

The Franchise Fee imposed by this section is in addition to and not in lieu of any other fee, charge, or tax imposed by the City. The obligation to pay franchise fees on cash receipts generated from services performed under a City franchise shall survive termination of the franchise no matter how terminated.

The City Council by resolution may change the amount and computation of Franchise Fees from time to time. The Council, by resolution, may reallocate the Franchise Fee percentages for different customer groups, such as residential or commercial, if such a reallocation mitigates a cost of service disparity that is not fully corrected through the rate setting process. In order to do so, the City Manager must be able to demonstrate that the composite rate of return among the Franchisees is improved. Such a reallocation may not materially reduce the amount of total Franchise Fee Revenue obtained by the City.

Section 13.24.18~~5~~0 Payment for services and interruption or discontinuance of service.

A. Rules and regulations pertaining to billing sequences may be adopted pursuant to this chapter. Solid waste management service may be discontinued by any franchisee when payment for such service is delinquent for a period of thirty days, and after giving ten days' written notice of delinquency to the occupant of the premises. Said franchisee shall not be required to resume service until the delinquency is paid and until a deposit equal to two months' service is paid in advance. In the event service is discontinued for

delinquency, the city shall be given a copy of the written notice of delinquency given by a franchisee to the occupant of the premises.

B. No franchisee shall terminate service to any or all of its customers under this chapter except in accordance with the provisions of this chapter. Service may be interrupted or terminated when:

1. The street or road access is unavoidably blocked through no fault of the franchisee or if there is no reasonable alternative route or routes to serve all or a portion of its customers; but in either event, the city of Milwaukie shall not be liable for any such blocking of access; or

2. Adverse weather conditions render providing service unduly hazardous to persons or equipment providing such service or if such interruption or termination is caused by an "act of God" or a public enemy.

C. A franchisee shall have the right to establish, by agreement with individual customers in the city, the time or times when solid waste shall be gathered and collected, but such agreement shall not conflict with any rules adopted by the city. ~~(Ord. 1752 § 15, 1993)~~

Section 13.24.19~~6~~0 Annexation of property to city.

If property is annexed by the city, the city and the franchisee shall comply with ORS 459.085(3~~). (Ord. 1752 § 16, 1993)~~

Section 13.24.~~170~~ 200 Violations.

A. Without the consent of the owner or lessee, it is unlawful for any person to dispose of, place or deposit any waste, solid waste or recyclable materials in a container, drop box or other receptacle owned or leased by another person.

B. No unauthorized person shall take or remove any solid waste or recyclable materials placed for collection by a franchisee.

C. No person shall provide nor offer to provide solid waste management service in the city unless they are exempted under Section 13.24.040 of this chapter or unless they are a franchisee under this chapter.

D. No person shall violate any other provisions of this chapter or rules and regulations promulgated thereunder.

These violations shall be subject to the penalties set forth in Section 13.24.180 of this chapter. (Ord. 1752 § 17, 1993)

Section 13.24.210~~180~~ Process for Determining Penalties.

Any person deemed to be in violation of any of the provisions of this Chapter, shall be charged with a civil infraction and cited into municipal court using the civil infraction procedures of Title 1 of the Milwaukie Municipal Code.

Any person violating any of the provisions of this chapter shall be deemed guilty of a civil infraction, and upon conviction thereof, shall be ~~punished by a~~ fined ~~of not more than five hundred dollars~~according to rules established under Chapter 1.12.010 of this Milwaukie code. Any non-franchised person engaging in any of the activities franchised under this chapter for compensation, shall in addition be guilty of a civil infraction for each day of violation of the chapter and subject to an additional fine not exceeding one hundred dollars for each and every day after the first day of said violation. ~~(Ord. 1752 § 18, 1993)~~

ATTACHMENT A

Section 13.24.010 Policy.

It is declared to be the public policy of the city of Milwaukie to regulate solid waste management service by:

A. Insuring safe, economical, and comprehensive solid waste management service;
B. Insuring service rates and charges that are just and reasonable and adequate to provide necessary public service;
C. Prohibiting rate preferences and other discriminatory practices; and
D. Providing technologically and economically feasible resource recovery by and through the franchisees. (Ord. 1752 § 1, 1993)

Section 13.24.020 Definitions.

The following definitions shall apply to this chapter:

"City" means the city of Milwaukie, Clackamas County, Oregon.

"City council" or "council" means city council of Milwaukie, Oregon.

In addition, for the purpose of this chapter, the following definitions shall be applicable:

“Allowable Expenses” means those expenses that are known and measurable, calculated in accordance with Generally Accepted Accounting Principles (GAAP), not in excess of the fair market value of like services, and are reasonably and prudently incurred by the Franchisee in the course of performing its obligations under this Franchise. A narrative of allowable expenses shall be established by the City in its Administrative Rules.

"Bulky wastes" means large items of solid waste such as appliances, furniture, large auto parts, trees, branches greater than four inches in diameter and thirty-six inches in length, stumps and other oversize wastes whose large size precludes or complicates their handling by normal collection, processing or disposal methods.

"Commission" means the State of Oregon Environmental Quality Commission (EQC).

"Compensation" includes any type of consideration paid for service, including but not limited to, rent, the sale of recyclable materials, and any other direct or indirect provisions for payment of money, goods or benefits by property owners, tenants, members, licensees, and similar persons. It shall, also, include any exchange of services, including the hauling of Solid

Waste and Waste. Compensation includes the flow of consideration from the person owning or possessing the Solid Waste or Waste to the person collecting, sorting, transporting, or disposing of Solid Waste or Waste.

"Curbside," as defined here, may also be called **"curbside/roadside"** means a location within three (3) feet of public right-of-way. This does not allow the garbage or recycling receptacle to be placed on the inside of a fence or enclosure even if the receptacle is within three (3) feet of said road or roads. For residences on “Flag Lots”, private roads or driveways, “Curbside/Roadside” shall be the point where the private road or driveway intersects a City Road, Public Access Road, State Road or Federal Road.

"Department" means the State of Oregon Department of Environmental Quality (DEQ).

"Disposal site" means land and facilities used for the disposal, handling or transfer of, or resource recovery from solid wastes, including but not limited to dumps, landfills, sludge lagoons, sludge treatment facilities, disposal sites for septic tank pumping or cesspool cleaning service, transfer stations, resource recovery facilities, incinerators for solid waste delivered by the public or by a solid waste collection service, composting plants and land and facilities previously used for solid waste disposal at a land disposal site; but the term does not include a facility subject to the permit requirements of ORS 468B.050; a landfill site which is used by the owner or person in control of the premises to dispose of soil, rock, concrete or other similar non-decomposable material, unless the site is used by the public either directly or through a solid waste collection service; or a site operated by a wrecker issued a certificate under ORS 822.110.

"Franchisee" means the person to whom a franchise is granted by the city council pursuant to this chapter. Such franchise shall grant exclusive rights to provide service and solid waste management service for compensation.

"Infectious waste" means biological waste, cultures and stocks, pathological wastes, and sharps, as defined in ORS 459.386 and 459.387.

"Person" means the state or a public or private corporation, cooperative, local government unit, public agency, individual, partnership, association, firm, trust, estate or any other legal entity.

"Placed for collection" means solid waste or recyclable material that has been placed by the customer for service by a franchisee under the requirements contained herein.

"Processing" means an operation where collected, source separated, recyclable materials are sorted, graded, cleaned, densified or otherwise prepared for end use markets.

"Recyclable material" means any material or group of materials that can be collected and sold for recycling at a net cost equal to or less than the cost of collection and disposal of the same material.

"Resource recovery" means the process of obtaining useful material or energy resources from solid waste and includes:

1. "Energy recovery," which means recovery in which all or a part of the solid waste materials are processed to utilize the heat content, or other forms of energy, of or from the material;
2. "Material recovery," which means any process of obtaining from solid waste, by presegregation or otherwise, materials which still have useful physical or chemical properties and can be reused or recycled for some purpose;
3. "Recycling," which means any process by which solid waste materials are transformed into new products in such a manner that the original products may lose their identity;
4. "Reuse," which means the return of a commodity into the economic stream for use in the same kind of application as before without change in its identity.

"Solid waste" and **"waste"** are interchangeable. Solid waste shall include all putrescible and non-putrescible waste, including but not limited to, garbage; compost; organic waste; yard debris; brush and branches; land clearing debris; sewer sludge; residential, commercial and industrial building demolition or construction waste; discarded residential, commercial and industrial appliances, equipment and furniture; discarded, inoperable or abandoned vehicles or vehicle parts and vehicle tires; manure; feces; vegetable or animal solid and semi-solid waste and dead animals; and infectious waste. Waste shall mean useless, unwanted or discarded materials. The fact that materials, which would otherwise come within the definition of Solid Waste, may, from time to time, have value and thus be utilized shall not remove them from the definition. The terms Solid Waste or Waste do not include:

a. Environmentally hazardous wastes as defined in ORS 466.055;
b. Materials used for fertilizer or for other productive purposes on land in agricultural operations in the growing and harvesting of crops or the raising of fowl or animals;
c. Septic tank and cesspool pumping or chemical toilet waste;
d. Source separated, principal recyclable materials as defined in ORS 459A and the Rules promulgated there under and under this Ordinance, which have been purchased or exchanged for fair market value, unless the City declares a site of uncollected principal recyclable materials to be public nuisance;

e. Applications of industrial sludges or industrial waste by-products authorized through a Land Use Compatibility Statement or Management Plan approval and that have been applied to agricultural lands according to accepted agronomic practices or accepted method approved by the Land Use Compatibility Statement or Management Plan, but not to exceed 100 dry tons per acre annually; Stabilized municipal sewage sludge applied for accepted beneficial uses on land in agricultural, non-agricultural, or silvicultural operations. Sludge-derived products applied for beneficial uses on land in landscaping projects.

"Solid waste collection service" or "service" means the collection, transportation or disposal of or resource recovery from solid wastes.

"Solid waste management" means the management of the accumulation, storage, collection, transfer, handling, compaction, transfer, handling, compaction,-transportation, treatment, processing and final disposal or utilization of Solid Waste and Waste or resource recovery from Solid Waste and facilities necessary or convenient to those activities. The Franchisee may contract with another person to provide service of any type under the Franchisee's Service Franchise, but the Franchisee shall remain ultimately responsible for Solid Waste and Waste Management in the Franchisee's franchised service area.

"Source separate" means that the person who last uses recyclable material separates the recyclable material from solid waste.

"Special wastes" shall have the meaning given to them in the METRO code as now referenced at METRO Code Section 5.02.015(s), or as hereafter amended, or as provided in the City's administrative rules. The collection of "special wastes" shall be controlled by this Chapter and any rules adopted hereunder.

"Transfer station" means a fixed or mobile facility normally used as an adjunct of a solid waste collection and disposal system or resource recovery station between a collection route and a disposal site.

"Unallowable Expenses" means any expenses not included in the definition of allowable expenses and:
1. Interest and amortization on the purchase of franchise routes or other routes or business opportunities.

2. Political and charitable contributions.

3. Federal, state, and local income taxes.

4. Loss on sale of assets.

5. Officers' life insurance premiums.

6. Director fees.

7. Interest on the purchase of equipment or facilities to the extent that the purchase price exceeds the fair market value of the asset at the time of purchase.

8. Penalties and fines.

"Waste" means material that is no longer usable or wanted by the source of the material, which material is to be utilized or disposed by another person. For the purposes of this paragraph, "utilized" means the productive use of wastes through recycling, reuse, salvage, resource recovery, energy recovery or landfilling for reclamation, habilitation or rehabilitation of land.

"White goods" means kitchen or other large appliances which are bulky wastes.

"Yard debris" means and includes grass clippings, leaves, tree and shrub prunings of no greater than four (4) inches in diameter or similar yard and garden vegetation. Yard debris does not include such items as: dirt, sod, stumps, logs, tree and shrub prunings greater than four (4) inches in diameter, rocks, plastic, animal waste or manure, cat litter, potting soil, prepared food wastes or nonputrescible material.

Section 13.24.030 Enforcement officers--Access to and review of books and records.

A. The city manager shall enforce the provisions of this chapter, and his agents, including police officers and employees of the public works department, may enter any premises for the purpose of determining compliance with the provisions and terms of this chapter. Such entry shall be upon permission of the occupant or upon warrant.

B. In order for the franchisees to perform services under this chapter, it may be necessary for a franchisee to disclose to city or city may otherwise acquire, a franchisee's confidential business or technical information. The city may make an inspection for such purposes upon at least twenty-four hours' notice, during normal business hours, at an office of the franchisee located in the local metropolitan area. The city will receive and maintain in confidence all information and will prevent the disclosure of information to others except as required by law in connection with litigation. The city will not use information for any purpose other than in connection with the performance of services pursuant to this chapter.

The above shall not apply to any portion of information: (1) which was developed by the city and is in the city's possession prior to the city's first

receipt thereof directly or indirectly from a franchisee; (2) which is now or hereafter becomes through no act or failure to act on the city's part generally available on a nonconfidential basis; (3) which was heretofore or hereafter furnished to a franchisee by others as a matter of right without restriction on disclosure; or (4) which is required by law to be publicly disclosed by the city. Information shall not be deemed to be within one of the foregoing exceptions if it is merely embraced by more general information available on a nonconfidential basis.

The city agrees that each of its employees, agents and subcontractors who participates in the performance of services or who has access to information is obligated in a manner consistent with this section. The obligations of this section shall survive the termination of any request for services and the termination of this chapter.

Section 13.24.040 Franchise required and exceptions thereto.

A. Except as otherwise provided in this chapter, it is unlawful for any person other than the franchise holders under the provisions of this chapter, to provide or offer to provide solid waste management or collection service in the city for compensation.

B. Nothing in this franchise shall:

1. Prohibit a federal or state agency that collects, stores, transports or disposes of waste, solid waste or recyclable materials, or those who contract with such agencies to perform the service, but only insofar as the service is performed by or for the federal or state agency;

2. Prohibit any person in the city from hauling that person's own waste, solid waste or recyclable materials in a lawful manner; provided, however, that no person will be permitted to haul such waste, solid waste or recyclable material for any other person or firm. In the case of a residential dwelling unit (whether individually owned, nonowner occupied or grouped through an association or cooperative of property owners) any waste generated or produced is owned by the individual owner or occupant and not by the landlord, property owner, cooperative or association or property manager or agent of such person;

3. Prohibit a generator of source separated recyclable material from selling or exchanging such material to any person for fair market value for recycling or reuse;

4. Prohibit any person from transporting, disposing of or resource recovering, sewage sludge, septic pumpings and cesspool pumpings;

5. Prohibit any person licensed as a motor vehicle wrecker under ORS 822.110 et seq. from collecting, transporting, disposing of or utilizing motor vehicles or motor vehicle parts;

6. Prohibit any person transporting solid waste through the city that is not collected within the city;

7. Prohibit a contractor registered under ORS Chapter 701 from hauling waste created in connection with the demolition, construction or remodeling of a building or structure or in connection with land clearing and development. Such waste shall be hauled in equipment owned by the contractor and operated by the contractor's employees;

8. Prohibit the collection, transportation and reuse of repairable or cleanable discards by private charitable organizations regularly engaged in such business or activity including, without limitation, Salvation Army, Goodwill, St. Vincent De Paul, and similar organizations;

9. Prohibit a person from conducting an activity determined by the city manager to be a civic, community, benevolent or charitable program, providing that such activity does not include the collection of putrescible solid waste. The organization conducting such program shall comply with all applicable provisions of this chapter;

10. Prohibit a person from transporting or disposing of waste that is produced as an incidental part of the regular carrying on of the business but a person shall not provide collection service for any accumulated waste generated by a customer of that business.

11. Require franchisee to store, collect, transport, dispose of or resource recover any hazardous waste as defined by or pursuant to ORS Chapter 466; provided, however, that franchisee may engage in a separate business of handling such wastes separate and apart from this franchise and chapter. (Ord. 1752 § 4, 1993)

Section 13.24.050 Adoption and Revision of Rules

a. Under authority of the City Code, the City Manager is authorized to adopt rules, procedures and forms to implement provisions of this Chapter that regulate the collection and disposal of Solid Waste, Recycling and Yard Debris within the City of Milwaukie.

b. Any rule adopted or revised according to the authority of the City Code shall require a public review process. Not less than ten nor more than thirty days before such public review process, notice shall be given by publication in a newspaper of general local circulation. Such notice shall include the place, time and purpose of the public review process and the location at which copies of the full set of the proposed rules may be obtained.

c. During the public review, the Solid Waste Coordinator shall hear testimony or receive written comment concerning the proposed rules. The City Manager shall review the recommendations; taking into consideration the comments received during the public review process and shall either adopt the proposal, modify or reject it.

d. An interim rule may be adopted by the City Manager or his designee without prior notice upon a finding that failure to act promptly will result in serious prejudice of the public interest of the affected parties, including the specific

reasons for such prejudice. Any rule adopted pursuant to this paragraph shall be effective for a period of not longer than 180 days.

Section 13.24.060 Sanitary and safety regulations.

Each franchisee shall comply with all state, federal, regional and city laws, rules and regulations relating to solid waste management service, as now or hereafter constituted. Violation shall be an offense against the city. (Ord. 1752 § 6, 1993) Where enforcement action is not taken by any other agency, the City may exercise this authority in order to cure the violation.

Section 13.24.070 Standards for collection and storage of solid wastes and recyclable materials.

A. Storage and collection of solid waste and recyclable materials shall not create vector production and sustenance, conditions for transmission of disease to man or animals, fire hazards or hazards to service or disposal workers or to the public. All solid wastes placed for collection shall be stored by the customer in a can (metal or heavy-duty plastic), cart, metal container or drop box, and such receptacles, other than drop boxes, must have tight-fitting covers and hand or mechanical bales to facilitate pickup. Extra volumes of solid waste that are in addition to the subscribed service, may be in heavy plastic bags that are securely tied at the top and which will accommodate the weight and volume of waste contained in them so that they do not break open upon being collected. The cleanliness of the grounds surrounding the solid waste and recyclable materials storage area and of the receptacle for such materials shall be the responsibility of the customer. Solid waste containing putrescible materials shall be stored in closed containers.

B. Recyclable materials and yard debris shall be prepared by customers and placed at curbside for collection by a franchisee in accordance with rules and standards adopted under this chapter.

C. Customers shall provide a space for all cans, carts, containers or drop boxes, whether used for garbage or recycling, that has adequate and safe access for collection personnel and equipment. The space provided must also comply with the city development code.

D. Placement of receptacles for collection by a franchisee and requirements pertaining to weight limitations, type and quality, and contents of receptacles placed for collection by a franchisee shall be in accordance with rules and standards adopted under this chapter.

E. The temporary storage of solid waste is permitted without compliance with the requirements for solid waste disposal sites if the temporary storage is provided under safe and sanitary conditions.

Temporary storage must comply with all relevant codes and chapters of the city. (Ord. 1752 § 7, 1993)

Section 13.24.080 Franchise requirements.

A. Each franchisee shall make available, for subscription, all levels of solid waste collection service for which the city sets rates, to every customer in its franchised geographic area, subject to the limitations in Section 13.24.150 for refusal of service. Collection of bulky wastes shall be made by special arrangement between franchisee and a customer. Each franchisee shall provide each of their new customers with city-approved written information on all solid waste and recycling collection services that are available and the rates for these services. The franchisee shall not intentionally provide solid waste collection service to customers in another franchisee's geographic area within the Milwaukie city limits except by arrangement with another franchisee under a subcontract. Customers shall be given written notice of any changes in service.

B. Each franchisee shall use proper and suitable equipment for the hauling, removal and transportation of solid waste. All equipment for transporting solid waste on public roadways within the city shall be covered and all equipment for handling said waste material shall be equipped with a metal body, watertight and drip proof to the greatest extent practicable. All equipment shall be kept clean at all times and sufficient equipment shall be kept on hand to properly and adequately remove all solid waste, subject to the terms of this chapter, together with rules and standards adopted under this chapter.

C. Each franchisee shall make available solid waste management and collection service as defined in Section 13.24.020 of this chapter to customers in the city not less than once per week.

D. Each franchisee may subcontract with others to provide a portion of the service where the franchisee does not have the necessary equipment or service capability. Such a subcontract shall not relieve the franchisee of total responsibility for providing and maintaining service and from compliance with this chapter. Said franchisee shall provide written notice to the city of its intention to subcontract any portion of the service prior to entering into such agreement, and provide the city with a copy of the agreement, which shall require city approval prior to the agreement becoming effective. The subcontractor shall comply with all provisions of this chapter.

E. Each franchisee shall provide the opportunity to recycle in accordance with Chapter 459A of Oregon Revised Statutes, together with the rules and regulations promulgated thereunder by the EQC, DEQ, METRO and the city.

F. Each franchisee shall permit inspection by the city of said franchisee's facilities, equipment and personnel at reasonable times.

G. Each franchisee shall comply with all laws relating to solid waste management service and shall not have a record of violations of law or chapters that would indicate an inability to satisfactorily perform the service being franchised.

H. Each franchisee shall submit a certificate of public liability insurance with a thirty-day notice of cancellation clause, acceptable to the city, which will cover its business operation including each vehicle operated by said franchisee. This coverage shall include Contractual Liability insurance. Coverage will include $1,000,000 per occurrence and $2,000,000 general annual aggregate. Said insurance shall name City as an additional insured and shall require written notice to City thirty (30) days in advance of cancellation. If Contractor hires a carrier to make delivery, Contractor shall ensure that said carrier complies with this paragraph.The insurance shall indemnify and save the city harmless against liability or damage which may arise or occur from an injury to persons or property as a result of said franchisee's operation of the solid waste business.

I. Each franchisee shall comply with the hours of collection which may be set by rules and regulations under this chapter.

J. Each franchisee shall provide staff, equipment, transportation and disposal for waste collected at one annual collection event in the City. Expenses from this event shall be reported in annual financial reports as allowable expenses for services provided within the City of Milwaukie.

Section 13.24.090 Non-Exclusive Franchise.

No person shall do business in the collection and transport of solid waste generated within the City without a current, valid City franchise. A Franchise to provide collection service for solid waste, recyclable materials and yard debris in a service area of the City shall be granted only after a determination of need for the service. The determination of need is the responsibility of the City Council, which will seek the best balance of the following objectives:

(1) To insure safe, efficient, economical and comprehensive solid waste service;
(2) To avoid duplication of service that will cause inefficiency, excessive use of fuel, increased traffic, and greater wear on streets;
(3) To provide service in areas of marginal return;
(4) To promote and encourage recycling and resource recovery;
(5) To improve the likelihood of the Franchise holder making a reasonable profit and thereby encourage investment in modern equipment;
(6) To cooperate with other governmental bodies by recognizing their service arrangements; and

(7) To otherwise provide for the service in a manner appropriate to the public interest.

In granting a franchise renewal or a new franchise due to an annexation, termination, or revocation of a franchise, the Council shall, in addition to the above, consider the following factors in selecting a new or replacement Franchisee:

a. The candidate's prior service record in the same or a related industry and its professional relationships with other corporate entities and local, regional and/or state jurisdictions;
b. The candidate's financial ability to perform the obligations of a franchise holder;
c. The candidate's equipment and personnel available to meet current and future needs of a franchise holder;
d. The candidate's ability to provide all services to customers within the geographic boundaries of the designated franchise area, including every residential, multi-family and commercial customer;
e. The candidate's exercise of the burden of proof demonstrating a proposed franchise area is being or has been underserved by the existing or previous franchise holder; and
f. The candidate's good moral character as is relevant to a franchised provider's customer relations, namely any unpaid judgments against the applicant (whether doing business under the same or another name) and any judgments for civil fraud or for a crime of dishonesty.

Franchises granted by the City shall be non-exclusive, however it is understood that during the term of franchises granted under this Ordinance, the City shall not grant any other person a franchise for Solid Waste Management unless there is a showing by the applicant of the need for such additional service in the proposed service area. As to such application(s) the Council may consider whether a current Franchisee is capable of providing the additional service. In evaluating whether a need exists for additional service, the City Council may consider, among any other criteria deemed relevant by the City Council, the following items:
(1) An increase in the population of the City;
(2) An extension of the boundaries of the City;
(3) Intensive residential, commercial or industrial development within the boundaries of the City;
(4) Changes in solid waste technology and/or recycling collection technology that could substantially improve collection service or reduce collection costs to residents of the City;
(5) The effect that an additional franchise would have on each existing Franchisee's ability to meet the City's service standards and maintain a fair return on its investment;

(6) The number of existing Collection Franchisees or Drop Box Service Franchisees, as applicable, providing service in the area of the City in which the applicant wishes to provide service; and
(7) Changes in federal or state laws, rules or regulations that substantially affect solid waste or recycling collection requirements.

{PRIVATE }Section 13.24.100 Term of Franchise{tc \l 1 "Section ____ Term of Franchise"}

A franchise to provide collection service for solid waste, recyclable materials and yard debris in a portion of the City shall be granted for a period of ten (10) years, beginning December 21, 2005.

The City shall review franchises annually to evaluate rates and may review customer service and franchisee performance issues.

Staff shall report to the Council a comprehensive review of the rates. As part of this review, the City may review customer service, franchise performance and overall state of the franchise system based on the first 60 months of the franchise term. As part of that review, at the request of a Franchisee, staff may make a recommendation to renew or not renew, and the Council may consider renewing that person's franchise for an additional five years to be added to the end of the existing term for a total of ten (10) years. Any such extension shall be granted only after the notice to all interested parties and a public hearing.

Nothing in this section restricts the Council from suspending, modifying or revoking the franchise for cause pursuant to Section 13.24.140 of this Code.

A Franchisee who desires to terminate its rights and obligations under a franchise, shall give not less than 90 days' notice of its intent. Upon receipt of such notice the Council shall initiate proceedings to consider applications by any other person for a franchise to serve the same area.

Section 13.24.110 Notice Request for Franchise Applications

Prior to the end of a franchise term, notice that the City intends to solicit applications for solid waste Franchises shall be published in a newspaper of general circulation within the City. Notice shall also be sent to all holders of Milwaukie solid waste franchises. The City Manager or his designee may keep a list of interested persons who will also be provided notice.

The City Manager shall establish forms and deadlines.

Section 13.24.120 Description of Franchise Areas

A City Solid Waste Franchise service area shall include single unit residential customers and any multi-family residential, commercial and industrial customers

within that service area. The service areas shall be determined by Council resolution. The Franchise areas and the Franchisees serving such areas shall be indicated on a map entitled “Solid Waste Franchise Service Areas of the City of Milwaukie” (the “Map”). A copy of the Map shall be dated with the effective date of the Council resolution and maintained in the Office of the City Manager. Amendments to the map may be made by Council resolution, and copies of amendments shall be kept on file by the City Recorder.

Section 13.24.130 Transfer of Franchise

An assignment or transfer of a Franchise shall include, but not be limited to:
(1) A sale, exchange or other transfer of 50% or more of Franchisee’s assets dedicated to service in the City;
(2) A sale, exchange, or other transfer of fifty percent (50%) or more of the outstanding common stock of a Franchisee;
(3) Any reorganization, consolidation, merger, recapitalization, voting trust, pooling agreement, escrow arrangement, liquidation or other transaction to which Franchisee or any of its shareholders is a party which results in a change of ownership or control of fifty (50%) or more of the value or voting rights in the stock of the Franchisee; and
(4) Any combination of the foregoing that has the effect of a transfer or change of ownership and control.

The Franchisee shall provide no less than 60 days’ advance written notice to the City of any proposed transfer or assignment. Except as specifically authorized by the City, the Franchisee shall not assign any of its rights or delegate or otherwise transfer any of its obligations to any other person without the prior consent of the City Council. Any such assignment without the consent of City Council shall be void and any such attempted assignment shall constitute default and grounds for termination of the Franchise.

If a Franchisee requests the City’s consent to transfer the Franchise, the City shall act on such request within sixty (60) days of the receipt of the Franchisee’s written request together with all information, as set forth below, required for the City’s action on the request. The City shall not unreasonably refuse to consent to an assignment of the Franchise to a proposed assignee that has sufficient knowledge, experience, and financial resources so as to be able to meet, to the satisfaction of the City Council, in its sole discretion, all obligations of the Franchisee hereunder. An application to the City to consider a sale or other transfer of a Franchise shall include the following:

(1) A nonrefundable application fee of two thousand dollars ($2000) payable at the time of application to the City in advance to defray the City’s anticipated expenses and costs resulting from the Franchisee’s request;
(2) Financial statements audited or reviewed by a Certified Public Accountant of the Proposed Assignee’s operations for the three immediately preceding

operating years together with any additional evidence of financial ability to perform its Franchise obligations; and

(3) A showing that the proposed Assignee meets all City criteria for the grant of a Franchise as are set out in section 12.24.090 of this ordinance.

Section 13.24.140 Suspension, modifications or revocation of franchise.

A. The city council may suspend, modify or revoke the contract of a franchisee upon finding that the holder thereof has violated this chapter or ORS Chapter 459 or Chapter 459A, or any rule or regulation promulgated there under.

B. When the city receives information indicating a violation of this chapter, a written notice of such violation shall be provided to said franchisee. Such notice shall provide a description of the alleged violation, and shall provide a reasonable opportunity to correct the violation.

C. Upon receipt of the written notice, referred to in subsection B of this section, said franchisee shall have thirty days from the date of mailing of the notice in which to comply or to request a public hearing before the city council. A request for a public hearing before the city council shall be made in writing and in the event a public hearing is held, said franchisee and other interested persons shall have a reasonable opportunity to present information and testimony in oral or written form.

D. The council shall adopt findings of fact and conclusions which will support or deny the alleged violation. The council may, on the basis of such findings, suspend, modify or revoke the franchise of said franchisee or condition such action upon continued compliance with this code. Said franchisee shall comply with the time specified in the notice or with the order of the city council. (Ord. 1752 § 10, 1993)

Section 13.24.150 Interruption of service.

Each franchisee agrees, as a condition of their franchise, that whenever the city council finds that the failure of service or threatened failure of service would result in creation of an immediate and serious health hazard or serious public nuisance, the city council may, after a minimum of twenty-four hours' actual notice to the franchisee and a public hearing if the franchisee requests it, provide or authorize another person to temporarily provide the service or to use and operate the land, facilities and equipment of the franchisee to provide emergency service. If a public hearing is requested by the franchisee, it may be held immediately by the city council after compliance with the minimum notice requirements for such meetings established by the Oregon Public Meetings Law. The city council shall return any seized property and business upon abatement of the actual or threatened interruption of service, and after payment to the city for any net

cost incurred in the operation of the solid waste service. (Ord. 1752 § 11, 1993)

Section 13.24.160 Rates under this chapter

The City Council shall review and set rates on an annual basis by Council resolution that considers the following goals:

(1) Rates shall be established to the greatest extent practicable on a cost of service basis.
(2) Rates shall be adequate to provide an expected Operating Margin for the subsequent rate year equal to ten percent (10%) of composite Franchise-wide Gross Revenues; however, the City shall not be required to change rates if the expected Operating Margin in the current year falls between eight and twelve percent of Gross Revenues. The 10% target, and the 8% - 12% range of return on Gross Revenues is considered sufficient to reflect the level of business risk assumed by the Franchisee, to allow investment in equipment, and to ensure quality collection service.

Accordingly, the City shall have the authority to commission audits, reviews, or analyses of Franchisee Annual Reports to validate hauler submissions. The expected Operating Margin for the subsequent rate year shall incorporate projected and expected inflation factors, and the effect of known or expected increases or decreases in expenses or revenues prepared on a composite basis.

The rates charged by Franchisees shall conform to the most current Council rate resolution. Prior to implementation, the Council must approve any interim rate for services not included in the current resolution.

If the haulers for the majority of the franchise areas within the City notify the City Manager in writing that they believe a material change outside the Franchisees' control has occurred, and the change will have an adverse effect on operating margins, such that current year operating margins will be less than seven percent, a material change will be deemed to have occurred. At that time, the City may undertake any type of review it finds necessary to validate the existence of the material change and estimate its effect on the operating margin. If the results of the review are such that no rate adjustment is warranted, persons requesting the review shall reimburse the City for reasonable costs incurred during the investigation at the time the next payment of franchise fees is due.

If the City believes that a material change has occurred that will result in a current year operating margins falling under 8% percent or over 12% percent, the City may undertake a supplementary rate review at its own expense.

A change in tipping fee at disposal facilities will be evaluated by the City to determine the effect upon rates and services.

Section 13.24.170 Franchise fee.

For the privilege of using the City's streets and other facilities and for the purpose of defraying the City's regulatory expenses, each Franchisee shall pay a Franchise Fee to the City equal to 5% percent of cash receipts on residential service, commercial and drop box service, net of material sales revenue. For drop box service, disposal costs will be considered a pass through cost. The Franchise Fee shall be computed and collected on a calendar quarterly basis. The fee shall be paid by the Franchisee not later than the last day of the month immediately following the end of the quarter. A Franchise fee payment shall become delinquent if not paid by the last day of the month immediately following the end of the quarter. A simple interest charge of 18% shall be charged against the entire delinquent balance until the balance is paid.

At the time of payment of the quarterly fee, each Franchisee shall file with the City Manager a verified statement of quarterly cash receipts for the period covered by the tendered fee. Such statements shall be public records. Each Franchisee shall maintain books and records disclosing the cash receipts derived from business conducted within the City, which shall be open at reasonable times for audit by the City Manager or his designee. The City may require a uniform system of bookkeeping and record keeping to be used by all Franchisees.

Material misrepresentation of cash receipts by a Franchisee constitutes cause for revocation of the Franchise.

The Franchise Fee imposed by this section is in addition to and not in lieu of any other fee, charge, or tax imposed by the City. The obligation to pay franchise fees on cash receipts generated from services performed under a City franchise shall survive termination of the franchise no matter how terminated.

The City Council by resolution may change the amount and computation of Franchise Fees from time to time. The Council, by resolution, may reallocate the Franchise Fee percentages for different customer groups, such as residential or commercial, if such a reallocation mitigates a cost of service disparity that is not fully corrected through the rate setting process. In order to do so, the City Manager must be able to demonstrate that the composite rate of return among the Franchisees is improved. Such a reallocation may not materially reduce the amount of total Franchise Fee Revenue obtained by the City.

Section 13.24.180 Payment for services and interruption or discontinuance of service.

A. Rules and regulations pertaining to billing sequences may be adopted pursuant to this chapter. Solid waste management service may be

discontinued by any franchisee when payment for such service is delinquent for a period of thirty days, and after giving ten days' written notice of delinquency to the occupant of the premises. Said franchisee shall not be required to resume service until the delinquency is paid and until a deposit equal to two months' service is paid in advance. In the event service is discontinued for delinquency, the city shall be given a copy of the written notice of delinquency given by a franchisee to the occupant of the premises.

B. No franchisee shall terminate service to any or all of its customers under this chapter except in accordance with the provisions of this chapter. Service may be interrupted or terminated when:

1. The street or road access is unavoidably blocked through no fault of the franchisee or if there is no reasonable alternative route or routes to serve all or a portion of its customers; but in either event, the city of Milwaukie shall not be liable for any such blocking of access; or

2. Adverse weather conditions render providing service unduly hazardous to persons or equipment providing such service or if such interruption or termination is caused by an "act of God" or a public enemy.

C. A franchisee shall have the right to establish, by agreement with individual customers in the city, the time or times when solid waste shall be gathered and collected, but such agreement shall not conflict with any rules adopted by the city. (Ord. 1752 § 15, 1993)

Section 13.24.190 Annexation of property to city.

If property is annexed by the city, the city and the franchisee shall comply with ORS 459.085(3). (Ord. 1752 § 16, 1993)

Section 13.24.200 Violations.

A. Without the consent of the owner or lessee, it is unlawful for any person to dispose of, place or deposit any waste, solid waste or recyclable materials in a container, drop box or other receptacle owned or leased by another person.

B. No unauthorized person shall take or remove any solid waste or recyclable materials placed for collection by a franchisee.

C. No person shall provide nor offer to provide solid waste management service in the city unless they are exempted under Section 13.24.040 of this chapter or unless they are a franchisee under this chapter.

D. No person shall violate any other provisions of this chapter or rules and regulations promulgated thereunder.

These violations shall be subject to the penalties set forth in Section 13.24.180 of this chapter. (Ord. 1752 § 17, 1993)

Section 13.24.210 Process for Determining Penalties.

Any person deemed to be in violation of any of the provisions of this Chapter, shall be charged with a civil infraction and cited into municipal court using the civil infraction procedures of Title1 of the Milwaukie Municipal Code.

Any person violating any of the provisions of this chapter shall be deemed guilty of a civil infraction, and upon conviction thereof, shall be fined according to rules established under Chapter 1.12.010 of this Milwaukie code. Any non-franchised person engaging in any of the activities franchised under this chapter for compensation, shall in addition be guilty of a civil infraction for each day of violation of the chapter and subject to an additional fine not exceeding one hundred dollars for each and every day after the first day of said violation. (Ord. 1752 § 18, 1993)

RESOLUTION NO._____

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MILWAUKIE, OREGON GRANTING NON-EXCLUSIVE FRANCHISES FOR SOLID WASTE MANAGEMENT SERVICES.

WHEREAS, the franchise terms for the current solid waste collection franchise holders will expire on December 31, 2005; and

WHEREAS, the current Franchisees have requested to continue their franchises for solid waste and recycling service; and,

WHEREAS, the customer services surveys of both commercial and residential customers concluded that the current franchisees are providing very satisfactory waste and recycling service; and,

WHEREAS, the current franchisees are in good standing with franchise fee payments and all other aspects of current solid waste and recycling codes; and

WHEREAS, the current franchisees meet the terms and conditions for granting a franchise as set forth in section 13.24.090 of Chapter 13.24 as amended on December 20, 2005.

NOW, THEREFORE, BE IT RESOLVED that:

Section 1: Solid waste management franchises are hereby granted to the following companies:

Clackamas Garbage, Inc.
Deines Brothers sanitary Service
Mel Deines Sanitary Service, Inc.
Oak Grove Disposal Co.
Pearl Deines Disposal Co.
Waste Management of Oregon, Inc.
Wichita Sanitary Service

Section 2: In accordance with the provisions of Chapter 13.24 of Milwaukie Municipal code, as amended, the franchisees are assigned the geographic districts shown on the attached Exhibit A.

Section 3: These franchises shall be for a term of 10 years unless cancelled by either party prior to the expiration of said time pursuant to Chapter 13.24, as amended.

Section 4: The franchisees shall, within 10 days from the date of this resolution, file with the City their written acceptances of this franchise and if any franchisee fails to do so, their franchise approval will become void.

Section 5: All franchises granted pursuant to this resolution shall be effective January 1, 2006.

Section 6: This resolution is effective upon passage.

Introduced and adopted by the City Council on December 2005.

_____
James Bernard, Mayor

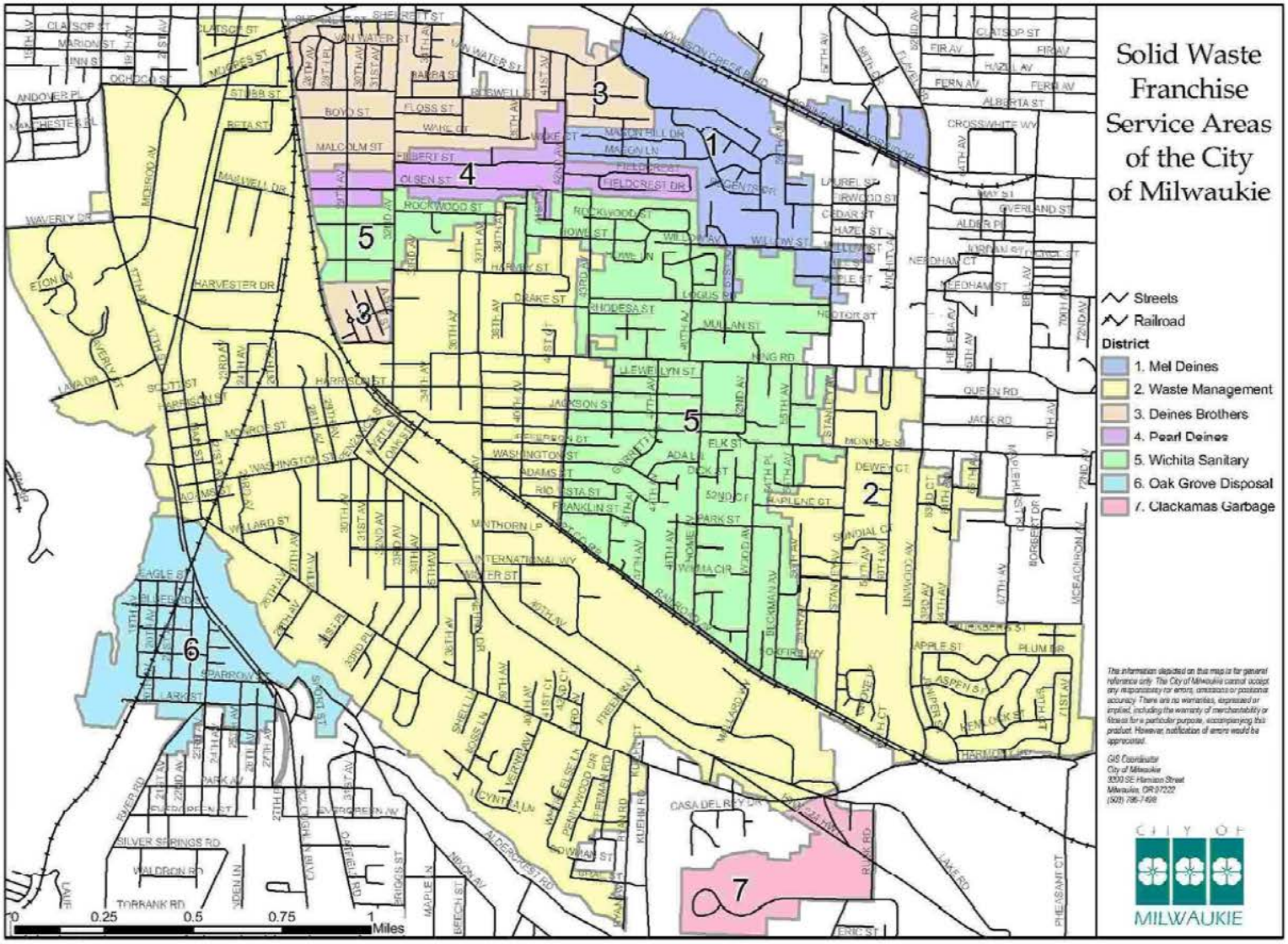
ATTEST:

_____
Pat DuVal, City Recorder

APPROVED AS TO FORM:
Ramis, Crew & Corrigan, LLP

_____
City Attorney

Attachment A



To: Mayor and City Council

Through: Mike Swanson, City Manager

From: JoAnn Herrigel, Community Services Director

Subject: Time Warner Franchise

Date: December 5, 2005

Action Requested

Approve an ordinance granting a ten-year, nonexclusive franchise to Time Warner Telecom of Oregon LLC (TWTC) to operate as a telecommunications provider within the City of Milwaukie and authorizing the City Manager to sign a franchise agreement with Time Warner Telecom of Oregon LLC.

Background

In October 2005, the City received a request from Time Warner for approval of proposed plans to relocate wires in the downtown area to accommodate a new customer. The Milwaukie Engineering Department conferred with Community Services staff and determined that Time Warner did not have a franchise in the City. Community Services staff contacted Time Warner and found that Time Warner had taken over the infrastructure formerly owned by AT+T and had neglected to pursue a franchise at that time. Time Warner agreed to work with City staff to establish a franchise before their relocation project took place.

City staff and representatives of TWTC have agreed upon the franchise language in Attachment A. Major elements of the franchise include:

- A 10-year term that expires in 2015.
- Payment to the City of the greater of a minimum franchise fee of $1,000 per quarter or the sum equal to 5 percent of the gross revenue generated within the City by TWTC from customers within the City.
- A requirement of a $25,000 bond.

Concurrence
Legal Counsel concurs with this staff report.

Fiscal Impact
The City will collect a franchise fee of either $1,000 per quarter or the sum equal to 5 percent of the gross revenue generated within the City by TWTC from customers within the City, whichever is greater.

Work Load Impacts
None.

Alternatives
Deny approval of the ordinance granting TWTC a 10-year franchise and request that staff negotiate franchise terms further.

ORDINANCE NO._____

AN ORDINANCE OF THE CITY OF MILWAUKIE, OREGON GRANTING TIME WARNER OF OREGON LLC. A NONEXCLUSIVE FRANCHISE FOR TEN YEARS TO OPERATE AS A TELECOMMUNICATIONS PROVIDER WITHIN THE CITY OF MILWAUKIE AND AUTHORIZING THE CITY MANAGER TO SIGN A FRANCHISE AGREEMENT WITH TIME WARNER OF OREGON LLC. IN SUBSTANTIALLY THE FORM OF EXHIBIT A.

WHEREAS, Time Warner of Oregon LLC (TWTC) wishes to provide telecommunication services in the City of Milwaukie;

WHEREAS, the City has the authority to regulate the use of rights of way within the City and to charge for the use of those rights of way, and

WHEREAS, the City and TWTC both desire TWTC to provide telecommunications service within the City of Milwaukie and to establish the terms by which TWTC shall use rights of way within the City;

NOW THEREFORE, THE CITY OF MILWAUKIE DOES HEREBY ORDAIN:

The City hereby grants to Time Warner of Oregon LLC. a non-exclusive franchise on the terms and conditions in the attached Exhibit "A", for a period of ten years from the effective date of this ordinance, to provide telecommunications service within the City of Milwaukie and authorizes the City Manager to sign a franchise agreement with Time Warner of Oregon LLC. in substantially the form of Exhibit A.

Read the first time on _____, and moved to second reading by _____vote of the City Council.

Read the second time and adopted by the Council on _____.

Signed by the Mayor on _____.

_____
James Bernard, Mayor

ATTEST:

Pat DuVal, City Recorder

APPROVED AS TO FORM:
RAMIS, CREW & CORRIGAN, LLP

_____
City Attorney

Exhibit A

Franchise Agreement
between
Milwaukie, Oregon and Time Warner Telecom of Oregon LLC.
December 2005

Section 1. **Rights Granted**

A. The City of Milwaukie ("City") grants to Time Warner Telecom of Oregon LLC ("TWTC"), its successors and assigns a nonexclusive franchise to operate as a competitive telecommunications provider as defined by ORS 759.005 within the City as it now exists or may be extended in the future. The franchise includes the privilege to install, maintain and operate poles, wires, fixtures, equipment, underground circuits necessary to supply telecommunications services, upon, over, along, under, and across the streets, alleys, roads and other public ways, parks and places. Nothing in this agreement limits the City from granting others the right to carry on activities similar to or different from the ones described in this agreement.

B. All facilities in possession of TWTC currently located within rights of way are covered by this agreement and are deemed lawfully placed in their current locations. The City may require relocation as further specified in Section 7 of this agreement.

Section 2. **Term**

This agreement shall be effective as of December 7, 2005 and shall remain effective through December 7, 2015 unless sooner terminated as provided in this agreement.

Section 3. **Construction Work**

A. Before TWTC conducts work involving excavation, new construction including placement of new wires or major relocation work in public rights of way, property or places, TWTC shall first notify the City Engineer and shall comply with any special conditions relating to scheduling, coordination and public safety as determined by the City Engineer. Special conditions would include work being done in the right of way by the City or other third parties and may include a requirement that the facility be placed underground. Work could include open cuts, boring, excavations, and digging new pole holes in streets or sidewalks in the right of way. In emergencies, TWTC may conduct emergency work at any time and must provide the City Engineer with written or oral notice of emergency

work as soon as reasonably possible, no later than five (5) business days after the emergency work has commenced.

B. The Company shall file preliminary maps or drawings of its proposed construction work within the City with the City Engineer showing the location of the construction, extension or relocation of its facilities and services in public rights of way, property or place of the City. In emergencies, TWTC will provide the City Engineer a map of any excavations, repavings, and new facilities conducted on an emergency basis within 30 days of completion of the work. No facility may be placed other than in a location approved by the City, except in the event of an emergency.

C. **Reasonable care.** All work by TWTC within the rights of way shall be conducted with reasonable care and with the goal of eliminating or minimizing the risk to those using City rights of way and to eliminate or minimize the risk of damage to public or private property. All work shall be performed in accordance with all applicable laws and regulations. Any work within the right of way may be inspected by the City and its officers to determine whether it has been placed in its approved location. If emergency work has been done and is determined to be in a place not approved by the city, the City will notify TWTC and give 60 days for the work to be corrected once the emergency has passed.

Section 4. **Supplying Maps**

TWTC shall maintain maps and data pertaining to its facilities located as described in Section 1 (A) in the City on file at their Portland, Oregon office. With 24 hours prior notice, the City may inspect the maps at any time during business hours. Upon request of the City and without charge, TWTC shall furnish current maps to the City, either in a printed form, or, if the City maintains compatible data base capability, then by electronic data in read-only format, showing the location of any electrical system facilities, but not other proprietary information, used in operating TWTC's transmission and distribution facilities within the City's Urban Growth Boundary area served by TWTC. The City will not sell or transmit TWTC maps or data to third parties unless permitted by TWTC. The City will make available to TWTC any City-prepared maps or data.

Section 5 **Excavation**

Subject to Sections 3 and 6 of this agreement, TWTC may make all necessary excavations within any right of way for the purpose of installing, repairing or maintaining any facility. Assuming sufficient right of way, all poles shall be placed between the sidewalk and the edge of the right of way unless another location is approved by the City Engineer. TWTC shall take all reasonable precautions to minimize interruption to traffic flow, damage to property or creation of a hazardous condition.

Section 6. **Restoration after Excavation**

Except as otherwise provided in this section, TWTC shall restore the surface of any right of way disturbed by any excavation by TWTC to the same condition it was in prior to its excavation. In the event that TWTC's work is coordinated with other construction work in the right of way, the City Engineer may excuse TWTC from restoring the surface of the right of way, providing that as part of the coordinated work, the right of way surface is restored at least to the condition it was in prior to any excavation. All restoration of right of way surface shall be subject to the approval of the City Engineer, who may issue an order requiring correction of the restoration work. If the correction order is not complied with within 30 days or such other time as may be specified in the order, the City may restore the surface of the right of way, in which case TWTC shall pay the City for the cost of resurfacing, including all administrative costs of resurfacing and of issuing the correction order.

Section 7. **Relocation**

A. **Permanent Relocation - General**. In accordance with ORS 221.420, City may by written order require TWTC to move any facility in the right of way. If the relocation is the result of a public project, TWTC shall be responsible for the costs of relocation. If the relocation is required to accommodate a private party development or project, TWTC shall have the right to seek reimbursement from the private party. In such event the City shall not be responsible for the costs of relocation of any of TWTC's facilities.

B. **Permanent Relocation - Under grounding.** As permitted by applicable law, administrative rule, or regulation, the City may require TWTC to remove any overhead facilities and replace those facilities within underground facilities at the same or different locations subject to TWTC's engineering and safety standards. The expense of such a conversion shall be paid by TWTC, and TWTC shall recover its costs of from its customers in accordance with state law, administrative rule, or regulation. Nothing in this paragraph prevents the City and TWTC from agreeing to a different form of cost recovery consistent with applicable statutes, administrative rules, or regulations on a case-by-case basis, including but not limited to the creation of an underground assessment district pursuant to ORS 758.210.

C. **Temporary Relocation at Request of Third Parties**. Whenever it is necessary to temporarily relocate or rearrange any facility of TWTC to permit the passage of any building, machinery or other object, TWTC shall perform the work on 30 business days written notice from the persons desiring to move the building, machinery or other object. The notice shall: (1) bear the approval of the City Engineer; (2) detail the route of movement of the building, machinery, or other object; (3) provide that the person requesting the temporary relocation shall be

responsible for TWTC's costs; (4) provide that the requestor shall indemnify and hold harmless the City and TWTC from any and all damages or claims resulting either from the moving of the building, machinery or other object or from the temporary relocation of TWTC facilities; and (5) be accompanied by a cash deposit or other security acceptable to TWTC for the costs of relocation. TWTC in its sole discretion may waive the security. The cash deposit or other security shall be in an amount reasonably calculated by TWTC to cover TWTC's costs of temporary relocation and restoration.

D. **Temporary Relocation at Request of City.** In accordance with ORS 221.420, the City may require the Company to remove and relocate transmission and distribution facilities maintained by the Company in any public rights of way, property or place of the City by giving notice to the Company. Prior to such relocation the City agrees to provide a suitable location which includes a minimum or maximum square footage set by the Company and the required easements from private property owners for such relocated facilities sufficient to maintain service. The cost of removal or relocation of its facilities for public projects shall be paid by the Company; however when the City requires more than one temporary relocation and both the initial and subsequent relocations are for public projects and not at the request of or to accommodate a private party, the initial relocation shall be at the expense of the Company and subsequent relocations occurring less than two years after the initial relocation shall be at the expense of the City. In the event that any relocation is requested by or is to accommodate a private party, TWTC shall seek reimbursement from the private party and not from the City. The City and the Company agree to cooperate to minimize the economic impact of such temporary relocation on each party.

E. **Notice**. The notice required by Section 7 (A), (B), (C) and (D) shall be in writing and shall be provided at least 30 business days before the date that TWTC is required to move its facilities. The City will endeavor to provide as much notice as possible. The notice shall specify the date by which the existing facilities must be removed. Nothing in this provision shall prevent the City and TWTC from agreeing, either before or after notice is provided, to a schedule for relocation. In the event that TWTC fails to comply with a notice to relocate and the City and TWTC have not reached agreement on a schedule for relocation, the City may remove or relocate TWTC's facilities that were the subject of the relocation notice at TWTC's expense.

F. **Location for Relocated Facilities**. The City shall provide TWTC with a suitable location in existing right of way sufficient to maintain service for all facilities required to be relocated pursuant to Section 7 (A), (B), and (D).

Section 8. **City Public Works and Improvements**

Nothing in this agreement shall be construed in any way to prevent the City from excavating, grading, paving, planking, repairing, widening, altering, or doing any

work that may be needed or convenient in any rights of way. The City shall coordinate any such work with TWTC to avoid, to the extent reasonably foreseeable, any obstruction, injury or restrictions on the use of any of TWTC's facilities.

Section 9. **Payment by TWTC for Use of Rights of Way**

A. In consideration for its use of rights of way and for the City's administration of the rights of way, TWTC agrees to pay the City the greater of a minimum franchise fee of $1,000 per quarter or the sum equal to 5 percent of the gross revenue generated within the City by TWTC from customers within the City. Gross revenue is defined here as monthly service charges paid by customers within the City, the full amount of charges for separately charged transmissions originating and received within the City, half the amount of separately charged transmissions that either originate or are received within the City, any amounts received for the rental of facilities within the right-or-way, and any other amounts received by the franchisee for services (including resale services) provided by the franchisee that use facilities within the right of way.

B. TWTC shall pay the franchise fee quarterly on or before 45 days after the preceding quarter. Payments shall be accompanied by a statement of how the total due amount was calculated. Interest on late payments shall accrue from the due date at a rate equal to the prime rate of interest and shall be computed based on the actual number of days elapsed from the due date until payment. Interest shall accrue without regard to whether the City has provided notice of delinquency. However, should payment be insufficient due to an error in computation, interest payments shall not begin to accrue until after the discovery of the error by TWTC or receipt by TWTC of notice of the error.

C. The City may audit TWTC no more than once per each calendar year while this agreement is in effect to determine the accuracy of the reporting of gross revenues. TWTC shall make all records available to the City and any auditor retained by the City within 30 days of written request. Any difference of payment due the City following audit shall be payable within thirty (30) days after written notice to the Grantee, and shall bear interest at the lesser of the maximum rate allowed by law or the rate of 9 per cent per annum. In the event the audit discloses that Grantee has underpaid by more than 2% of its annual payment obligation, Grantee shall pay the City's expenses of performing the audit.

D. The City shall retain the right, as permitted by Oregon Law, to charge a privilege tax in addition to the franchise fee set forth herein. The City agrees to notify ELI of the privilege tax in writing, 60 days prior to the date the tax goes into effect.

E. In consideration of TWTC's agreement to pay the franchise fee and the City's Public Utilities Privilege Tax, if implemented, the City shall not impose other

business license fees or taxes on the Company during the term of this ordinance. This provision does not exempt the property of the Company from lawful ad valorem taxes, local improvement district assessments, or conditions, exactions, fees and charges that are generally applicable to businesses within the City as required by City ordinance.

F. The obligation to pay the franchise fee imposed by Section 9 (A) shall survive expiration of this agreement as long as TWTC continues to exercise the rights granted in section (1). In the event this agreement is terminated before expiration, TWTC shall pay the City the franchise fee based on gross revenue through the date of termination within 90 days of the termination date.

G. TWTC shall be responsible for all costs associated with its work and facilities in the right of way, except as otherwise specifically provided in this agreement.

Section 10. **Performance Bond**

TWTC shall provide the City with a performance bond of $25,000 as security for the full and complete performance of this franchise, including costs, expenses, damages or loss the City pays or incurs because of any failure attributable to the grantee to comply with any codes, ordinances, rules, regulations, administrative rules or permits of the city.

Section 11. **Vacation of Right of Way**

Whenever the City initiates any proceeding to vacate any rights of way within which TWTC has a facility, the City will notify TWTC. The City will maintain a public utility easement for TWTC's facility, if requested by TWTC.

Section 12. **Use of ELI Facilities by Wireless Communications Facilities**

TWTC shall allow third parties to place wireless communications facilities on TWTC poles provided that (1) the placement will not interfere with TWTC's operations, (2) the placement and operations of the wireless communications facilities will be consistent with all safety and other applicable regulations, and (3) TWTC agrees to the amount of compensation from the third party. The third party shall be contractually responsible for compliance with all safety and other applicable regulations. TWTC may extend any existing pole to allow such co-location, consistent with the City's regulations of wireless communications facilities. The City shall have no liability arising from the co-location of third party facilities on TWTC poles.

Section 13. **Termination**

A. **By City for Nonpayment**. City may terminate this agreement and TWTC's franchise if TWTC fails to pay the franchise fee. The City shall provide 30 days' notice of termination prior to any termination for non-payment. The agreement shall not be terminated if pays the full undisputed amount, including interest, within 30 days of the notice. Any disputed amounts owing, including interest, shall be paid within 30 days after final resolution of the dispute between the parties.

B. **By City for Cause.** If TWTC ceases to maintain its facilities and the lack of maintenance increases the risk of personal injury or property damage, the City may terminate this agreement by providing TWTC 30 days' notice of termination. The agreement shall not be terminated if TWTC substantially eliminates such risk within 30 days of the notice.

Section 14. **Sale of Franchise**

TWTC shall not sell or assign this franchise without the prior written consent of the City. TWTC shall notify the City not later than 60 days prior to any intended transfer and the City will not unreasonably withhold any consent required.

Section 15. **Removal of Facilities**

If this agreement is terminated or expires on its own terms and is not replaced by a new franchise agreement or similar authorization, TWTC and the City shall by mutual agreement decide whether TWTC's facilities are to be removed or remain in place. In the event that TWTC and the City are unable to reach agreement on the disposition of TWTC facilities after termination, the City Engineer may issue an order requiring removal for any TWTC facilities the City Engineer reasonably determines interfere with future, planned City or other utility projects.

Section 16. **Hold Harmless**

TWTC shall indemnify and hold harmless the City, its public officials and employees against any and all claims, damages, costs and expenses to which they may be subjected as a result of any negligent or wrongful act or omission of TWTC, under this agreement or otherwise arising from the rights and privileges granted by this agreement. The obligations imposed by this section are intended to survive termination of this agreement.

Section 17. **Insurance**

TWTC shall, as a condition of the franchise grant, secure and maintain the following general and automobile liability *insurance* policies insuring the grantee

and listing the City, and its elected and appointed officers, officials, agents and employees as additional insureds:

1. Comprehensive general liability *insurance* with limits not less than:
   a. Three million dollars for bodily injury or death to each person;
   b. Three million dollars for property damage resulting from any one accident; and,
   c. Three million dollars for all other types of liability.
2. Automobile liability for owned, non-owned and hired vehicles with a limit of one million dollars for each person and three million dollars for each accident.
3. Worker's compensation within statutory limits and employer's liability *insurance* with limits of not less than one million dollars.
4. Comprehensive form premises-operations, explosions and collapse hazard, underground hazard and products completed hazard with limits of not less than three million dollars.
5. The liability *insurance* policies required by this section shall be maintained by the grantee throughout the term of the telecommunications franchise, and such other period of time during which the grantee is operating without a franchise hereunder, or is engaged in the removal of its telecommunications facilities.

Section 18. **Limitation on Privileges**

All rights and authority granted to TWTC by the City are conditioned on the understanding and agreement that the privileges in the rights of way are not to operate in any way so as to be an enhancement of TWTC's properties or values or to be an asset or item of ownership in any appraisal thereof.

Section 19. **Effect of Invalidity of a Portion of this Agreement**

If any section, subsection, sentence, clause, phrase, or other portion of this franchise is, for any reason, held to be invalid or unconstitutional by a court of competent jurisdiction, all portions of the agreement that are not held to be invalid or unconstitutional shall remain in effect until the agreement is terminated or expired. After any declaration of invalidity or unconstitutionality of a portion of this agreement, either party may demand that the other party meet to discuss amending the agreement to adjust the relationship of the parties to conform to their original intent in entering into this agreement. If the parties are unable to agree on a revised franchise agreement within 90 days after a portion of the agreement is found to be invalid or unconstitutional, either party may terminate the agreement on 180 days' notice to the other party.

Section 20. **Reservation of Rights**

The parties acknowledge that the law surrounding municipal franchises is unsettled. The City and TWTC do not agree on whether the fee specified in this franchise is appropriate under the law. In order to move forward with this agreement, the City and TWTC have

agreed that TWTC shall pay the franchise fee stated in this agreement but reserves its rights to challenge the appropriateness of the franchise fee. To the extent a federal court issues a final, non-appealable order which addresses the appropriateness of franchise fees for telecommunications companies, TWTC will be allowed to challenge the City's franchise fee and seek a refund or credit to the extent the fee being charged exceeds what is allowed by law. The parties agree to negotiate in good faith to resolve such a fee dispute. If agreement cannot be reached by the parties within sixty (60) days, TWTC may seek relief from any court of competent jurisdiction.

Section 21. **Definitions**

A. "Facility" includes any poles, guy wires, anchors, wires, fixtures, equipment, conduit, circuits, vaults, ground mounted switch cabinets, ground mounted mineral oil filled transformers, ground mounted secondary junction cabinets, and other property necessary or convenient to the provision of telecommunications services by TWTC within the City.

B. "Right of way" means any right of way or public utility easement within the City and under City ownership, control or administration. "Right of way" does not include any state highway or county road.

C. "Install" means to erect, construct, build, replace or place.

D. "Gross revenue" includes monthly service charges paid by customers within the city, the full amount of charges for separately charged transmissions originating and received within the City, half the amount of separately charged transmissions that either originate or are received within the City, any amounts received for the rental of facilities within the right-or-way, and any other amounts received by the franchise for services (including resale services) provided by the franchisee that use facilities within the right of way.

E. "Public project" means any project for work in the right of way that is not undertaken to benefit a specific development or redevelopment project on private property and that is not undertaken to benefit a public utility or utility service provider other than the City.

Authorized Signature: **The City of Milwaukie, Oregon**

BY: _____

TITLE: _____

DATE: _____

Authorized Signature: **Time Warner Telecom of Oregon LLC**
By Time Warner Telecom Holdings Inc., its sole member

BY: _____

TITLE: _____

DATE: _____