

MINUTES
SPECIAL MEETING OF THE CITY COUNCIL
CITY OF LIVE OAK
WILL BE HELD IN CITY HALL, 8001 SHIN OAK DRIVE,
WEDNESDAY, JANUARY 24, 2007, AT 6:30 P.M.

1. CALL TO ORDER

Mayor Edwards called the January 24, 2007, Special City Council Meeting to order at 6:30 p.m.

2. INVOCATION/PLEDGE OF ALLEGIANCE

3. ROLL CALL

Mayor Henry O. Edwards Jr.
Councilmember Suzanne Hildebrand, Place 1
Councilmember Pat Kauts, Place 2
Councilmember Debbie McFarland, Place 3
Councilmember Anne Jorrie, Place 4
Councilmember Loretta Kusek, Place 5

Mayor Edwards realigned the Agenda to address Item 5 (B) before adjourning to Executive Session. Minutes will reflect current how Agenda was written and posted.

4. EXECUTIVE SESSION

Mr. Galindo explained to City Council, staff and audience the procedures that would be followed concerning the Executive Session and any discussion of rights and duties of the City and City Engineer, McCrary and Associates; this included the relationship with Wagner Materials and Construction. He added that Detective Bob Frame, Don McCrary, McCrary and Associates, and Steve Wagner, Wagner Materials and Construction were present.

Mayor Edwards informed City Council, staff and audience about the procedures for questions, which included a time limit of up to ten minutes for City Council questions; thereafter any rebuttal or follow-up with an additional ten minutes.

City Council convened into Executive Session at 6:43 p.m.

A. An Executive Session With The City Attorney To Receive Legal Advice Concerning The Legal And Jural Relations Between The City Of Live Oak And/Or Its Representatives With Don McCrary And Associates For Engineering Services And To Further Receive Legal Advice Concerning Unpaid Invoices For Services Rendered By Wagner Materials And Construction And Don McCrary And Associates Engineering Services

City Council reconvened into the Special City Council meeting at 7:55 p.m.

Mr. Galindo spoke about the following items:

- Payment to Wagner Materials and Construction (two invoices)

- \$103,000 – invoice; which was questioned by Interim City Manager Jackley
- \$89,000 – subsequently reduced to this amount
- Invoice currently not paid; which invoice needed to be paid

Mr. Galindo asked Steve Wagner, Wagner Materials and Construction, to explain the two invoices and why two different prices.

Steve Wagner provided the following information:

- Park Road, cost was increased due to coring
- Change order had been done
- Spoke with Jim Bray, McCrary and Associates and asked about the additional cost, if any.
- Materials would be an addition \$12/15 thousand dollars, however the project was still under the original total job price of \$103,000 (not over budget); Jim Bray instructed him to do the job.

Mr. Galindo asked if he had been told to expedite the job, while working on another job. Steve Wagner stated he was scheduled to start work on the park project within three weeks, but was asked to expedite the job. He had another subcontractor finish the project he had been working on prior to beginning the park project. He received a call not to start the project (two parking lots and basketball court) as these projects had not been added into the work order due to pay issues. He had already committed to the subcontractor to finish his other job; he had committed the movement of his equipment. Mr. Galindo asked him if he felt the statement of \$103,000 was a just figure, especially dealing with his profit and cost margin. Mr. Wagner indicated it was a just cost (originally figure was \$89,400) and there was extra cost due to materials, labor and movement of equipment.

Mayor Edwards asked if there was only one statement/invoice in contention, and Mr. Wagner explained there was an additional bill (Phase II project: \$130,000); he had not contacted the City. Mayor Edwards asked about the change orders being processed. Mr. Wagner explained the change orders had been worked on, but they were unsigned, and the process was stopped. Mayor Edwards asked who would be authorized to sign the change orders, and Mr. Wagner replied, City Engineer, City Manager, and himself.

Questions by City Council members

Councilmember Kusek asked why the project had been halted. Mr. Wagner explained the funds for the park project (parking lots and basketball court) could not be joined. Councilmember Kusek asked who the City Manager was and Mr. Wagner replied “Mark Jackley”.

Councilmember McFarland asked about the cost of \$103,000 and inquired who he contacted about this issue. Mr. Wagner replied he contacted Jim Bray, Vice President of McCrary and Associates. Mr. Wagner could not elaborate on the procedures after he spoke with the Mr. Bray, but added he is directed by the City Engineer and would only

contact them. Councilmember McFarland spoke about the procedures concerning notification: Wagner would contact City Engineer; City Engineer would contact the City Manager for budgeting purposes.

Mayor Edwards asked for a consensus of City Council concerning the payment of \$103,000

Councilmember McFarland made a motion of approval; seconded by Councilmember Kusek

Mayor Edwards asked if there was any more discussion before the vote.

Councilmember Hildebrand asked if Mr. Bray is required to advise the City when incidents like this happen. Mr. Bray explained if there had been additional cost which would exceed the budget, McCrary and Associates would not have approved this item; the \$13,000 change order was the last item in Phase I. Councilmember Hildebrand asked Mr. Bray if he was a registered engineer; Mr. Bray stated he was not a registered engineer.

Mayor Edwards asked if Chief Jackley had anything to add to the issue. Chief Jackley explained the sequence of events were concentrated on the basketball slab and the two parking lots. He did not want the heavy trucks on the new asphalt; therefore other projects were worked before the park road. Mr. Bray agreed, however, he wanted to clarify the original order was for the parking lots, basketball slab, new road at Woodcrest and the park road (change order).

There was a discussion concerning the June 2006 City Council Workshop/Special City Council Meeting in which this topic had been addressed; approval procedures, parking lots, roads, and advertisements.

Councilmember Hildebrand wanted all contracts to be contract-specific to address issues. Mayor Edwards instructed Mr. Homan, Finance Director, to ensure the check to Mr. Wagner is completed.

Vote FOR: Councilmembers Jorrie, Kusek, McFarland, Kauts, and Hildebrand - Passed 5 - 0

Mr. Galindo: The next item for consideration was invoices from September 18, 2006 through January 12, 2007. The following invoices were discussed:

- January 12, 2007 – Overall Phase III- brought before City Council in 2004 percentage of construction - overall percentage industry standard
- October 17, 2006 – Woodcrest Park, ten percent paid; breakdown of services
- November 17, 2006 – Main Park and Woodcrest
 - Curbing problems at park; Mr. McCrary indicated the contractor did not include backfill, but it had been in the contract
- November 17, 2006 - Capital Improvement Street project, Phase II
- January 12, 2007 – ADA Project; sidewalk and ramps

- November 17, 2006 – New Little League Field
- October 17, 2006 – Capital Improvement Project, Phase II

There was a discussion concerning the billing, receipt and procedures of how invoices are received, paid and follow up system

- September 18, 2006 – Inspector for the street project

There was a discussion concerning the inspector who managed the street inspection for the City of Live Oak. The following issues were discussed:

- Qualifications - there were no qualifications for inspectors; no certification process
- Education – a week long school for street inspectors; asphalt and pavement
- Experience of Jim Bray Jr.
- Background checks, criminal history or drug testing – McCrary and Associates does not perform these checks
- City of Live Oak drug testing policies for all City employees

Mayor Edwards reaffirmed that McCrary and Associates, Inc., had not been paid for the above invoices, and Mr. McCrary agreed.

Councilmember Kauts made a motion to authorize payment at the earliest possible date upon receiving the necessary information; seconded by Councilmember Jorrie

Councilmember Hildebrand asked to amend the motion to include language instructing that Mark Wagster, Director of Public Works would review all the invoices to ensure they were in order

Vote For Amendment – Councilmembers Hildebrand, Kauts, McFarland, Jorrie and Kusek

Vote For Basic: was not completed

5. NEW BUSINESS

A. Council Action On The Matters Considered In Executive Session, Namely: Resolution Of Outstanding Issues And Retention Or Severance Of Engineering Services By Don McCrary And Associates, Inc., And To Further Take Action On The Payment Of Unpaid Invoices To Wagner Materials And Construction And Don McCrary And Associates

Mr. Galindo spoke about the next matter to be addressed concerning the retention of Mr. McCrary as the City Engineer for the City of Live Oak. He provided a history of the relationship between the City of Live Oak and McCrary and Associates. Mr. Galindo spoke about the following issues:

- Mr. McCrary was instructed not to use Jim Bray Jr., as a Street Inspector
- McCrary contracts were under scrutiny

- Live Oak Police Department investigation
- Multiple Open Records requests to McCrary and Associates
- Areas of principle concern:

Item 1:

- Unsigned contract by previous city manager – proposal was submitted and signed by Mr. McCrary (no other actions could be found)
- August 10, 2004 Minutes approving Resolution to retain services of McCrary and Associates from previous City Council; which passed with a 5 – 0 vote
- Resolution and contract were found, however they were unsigned (Mr. Galindo stated this Resolution and the action of the previous City Council to approve the contract was sufficient to execute a binding agreement with the City)

Item 2:

- Inconsistencies concerning Street Inspection Reports
- Duplication of inspector services; inspector was working with the City of Windcrest and Live Oak at the same time
- Fugro lab tests; failed lab tests for streets being repaired (50 failures); no records which indicate failure of roads
- City of Live Oak requested records of the qualifications of Jim Bray Jr., and the records of projects that McCrary and Associates had been working within the past five years
- Meeting on January 10, 2007 with Mr. Wagner, Mr. McCrary, Mr. Smith and Mr. Galindo concerning all issues; Mr. McCrary had informed everyone at the meeting that he had completed all the design work for Phase I, II, and III

Mr. Galindo asked Detective Sergeant Bob Frame, Live Oak Police Department to come to the podium to outline his investigative analysis.

Sergeant Frame came before the City Council and provided the following information:

- Fugro test records; documentation were not consistent, as some were detailed others were not
- 485 tests performed by Fugro (Phase I project); approximately 50 tests were failures; moisture and density (two locations were retested – concerned with failures of the main and lateral sewer lines)
- Time sheets and Activity Reports are inconsistent
- Councilmember McFarland was concerned with the inspector performing his job sufficiently, as he was working multiple jobs.

- Activity Report of a trench backfill on a sewer line on Forest Bluff had failed density and moisture – the report indicated that McCrary’s office had been notified, however report indicates the trench was filled in and never retested
- Open Records Requests were submitted, however none were received, nothing from contractors
- Request for the credentials of Jim Bray Jr., however there was no response
- The onsite records indicate workers or inspectors worked on holidays and weekends; inconsistent
- \$40,0000 for site administrator; \$80,0000 for a full time inspector; definition of full time employee 40 hours (Sergeant Frame’s opinion of 40 hours)
- The City of Windcrest failed to provide documentation of their inspector, Jim Bray, Jr.; did not reply to repeated requests for information, to include McCrary and Associates
- Notification from Fugro to inspector of failed streets; the requests were faxed or mailed to McCrary and Associates, inspector and Mr. Wagster; Mr. Wagster indicated there were no failures of tests brought to his attention, all other documents are compiled and placed in a notebook
- Some cities have inspectors who are allowed to have five jobs throughout the area. Inspector has an office within the Public Works Department; speculation that he was at the location only a dozen times; Mr. Wagster stated he did not know where this comment from but the comment was not correct.
- Complete and thorough investigation could only be accomplished with all documentation and Sergeant Frame did not have all documentation
- Holiday work schedule – if worker comes in to check on any aspect of the project it would be considered work hours regardless if it is a holiday or weekend. There was a handwritten time card indicating the inspector was working a holiday.

Mr. Galindo asked Mr. McCrary and Mr. Wagner if they were aware or had been notified of any failures concerning the streets (moisture or density). It was explained that Fugro would let them know; the time frame was between 5 – 6 days notification. There was a brief explanation and discussion on procedures of tests, percentage allowed for pass and failure, proctors, and procedures.

Councilmember McFarland thanked Sergeant Frame for his work and spoke about the tax dollars that were wasted on city projects and we needed to ensure this type of wastefulness never happens again.

Councilmember Kusek thanked Sergeant Frame, but was concerned with why the City was looking at Windcrest. Sergeant Frame explained that documentation from

Windcrest had been asked for, and this information could not be located; correlation of information concerning the inspector.

Mayor Edwards asked about paying the inspector \$84,000 (escalation cost) and should have the inspector on a daily basis; 40 hours. He added the City's procedures need to be tightened up and have the City Attorney review the contracts.

Councilmember Kauts asked about the number of jobs most inspectors have. Mr. Wagner stated they are all over the area; many locations

Mr. Galindo asked if the street inspector came out only when people are working, and Mr. Wagner replied that an inspector can come out whenever, and he would not be aware either way.

Councilmember Kauts asked about bad weather days and holidays if the inspectors come out for work. Mr. Wagner was not aware of any holidays, but there were times someone would go out for watering streets for dust or other aspects.

David Earl, Attorney, 111 Soledad, Ste 111, San Antonio, TX came before City Council to assist with any questions City Council might ask Mr. McCrary.

Councilmember Hildebrand asked if McCrary carried \$1,000,000 errors and omissions liability insurance. Mr. Earl stated the City of Live Oak did not require this in the contract, however McCrary and Associates does carry over \$1,000,000 insurance.

Councilmember Hildebrand spoke about a November 2006 Executive Session which concerned the validity of contracts concerning McCrary. She asked if Mr. McCrary had seen or received the materials. Mr. Earl stated Mr. McCrary had not been provided the documents. She asked about pictures she had concerning a location in Live Oak, where a CPS pole had been installed on Forest Bluff and Toepperwein in a handicapped sidewalk, which interferes with the clear sight triangle. Mr. Earl explained the area in question might be a CPS responsibility, but we would need time to research the job; he will get back with City Council.

Mayor Edwards asked Mr. Earl if he had anything else he would like to address, and Mr. Earl spoke about the following:

- Continuing a good relationship with the City of Live Oak
- His concern with Mr. Jackley contacting the street project contractors and informing them that McCrary and Associates had been fired and they were not to communicate with them, which undermines his functions and professional relationship
- Failure of inspections, and investigating the engineering performance – should ensure there was an engineering professional to review problems versus having a layperson asking pertinent questions.
- Proctor issue – require multiple soil samples (green passes/red failures)
- Two industry standards plus or minus two points, and Fugro used two point and McCrary used a three point system – passed according to the current contract

- Don McCrary's dedication to the City of Live Oak
- Inspector's time sheet and contract. Time sheet is irrelevant, as there is an annual contract, which means that no matter how many hours he worked daily, he would get the exact amount of money (monthly billing) for the duration of his contract (firm is paid \$80,000, with a 5% increase). He provided the procedures for payment, and added an activity reports are necessary.
- Inspectors' schooling – week long school, on-the-job-training, practical schools, certified in Texas

Ed McNew, McCrary and Associates, spoke about the following:

- Two full time inspectors for a back up person on this job when on vacation or ill
- Open Records Request – not required to comply with the request, however he did turn in paperwork, some information was not necessary to be turned over
- Inspector had cell phone for any questions of citizens or staff; problems or complaints
- Inspector (Jim Bray Jr.) experience – six years
- Public works office – on site – trying to validate number of hours or days the inspector was in the office; could not confirm
- Notices to citizens – some did receive notices and some did not

Councilmember Kauts asked Chief Jackley when the first problems concerning the engineer's office surfaced. Chief Jackley indicated he had received an invoice for \$8,000 for the on-site inspector. The amount concerned an eight week span (after the summer/no work in the city), upon further review there appeared to be no contract filed in the City Secretary's office. He, Roger Aguillon, and Mark Wagster contacted (telephone conference) Mr. McCrary concerning the inspector. The discussion centered on paying the inspector when he was not working during this eight week span, and whether a contract had been executed. Mr. McCrary had a copy of a contract, which had been approved by the previous administration. Chief Jackley explained that Mr. McCrary told him it was not something (inspector) that you would have to have and it was at that point he fired the inspector, as he believed it was not necessary to have this individual. He added that he did not say Mr. McCrary's services were no longer needed. There was an explanation concerning a second year of this inspection service, a sister city that was using the exact service (lower cost), unfilled open records requests and a consecutive invoice with a percentage of the invoice reduced. Councilmember Kauts asked if the City had contacted McCrary as a follow up measure concerning all the issues that have been spoken about as this meeting; Chief Jackley indicated he had not done a followed up and neither had McCrary. Chief Jackley explained that Mr. Wayman, Mr. Wagster and Mr. Aguillon met with McCrary concerning the Subdivision Ordinance (20 years old), which needed to be re-addressed, and other projects that were still being worked on by McCrary (projects that would need to be finished), however

this was the only contact that had been made. He felt it was a good time to look at other options, to find out if what we were getting and paying comparable and fair market price.

Councilmember Kauts asked Chief Jackley if staff/employees were asked not to use McCrary and Associates, and Chief Jackley stated he did not use him, but Mr. Wayman used his services, and staff was given latitude to finish projects. Mr. Wayman explained that he used Mr. McCrary's services for on-going projects such as plat reviews.

Ed McNew spoke about another allegation concerning Windcrest Street Project and the erroneous cost of \$50,000 (budget figure). He explained the Windcrest Street Project cost was an annual figures, and they paid hourly (\$40.00), which equates to \$86,000, which is the exact amount the City of Live Oak was charged. He added that they contacted the City, cut the cost, and used the inspector at Windcrest. Councilmember Kauts asked if they notified staff, and Mr. Bray indicated it was Mark Wagster, but he was unsure. Mr. Bray briefly spoke about another inspector (Ben Marshall) and the slow down of the work in the city (Phase I and II). Chief Jackley stated he had received this information from Ronnie Cain, City Manager of Windcrest and this had been approved through the City Council. He added that he had spoken to Mr. Cain concerning a basic road contract and the shared inspector and voiced that each should get one-half back. It was at that time he had asked Mr. Cain for copies of the agreement, which Mr. Cain agreed to send over, however when the copies were not received (asked six separate times), Chief Jackley resorted to an Open Records request (with no results).

Councilmember Jorrie asked Mr. McNew what his position was with McCrary and Associates and about his background. Mr. McNew stated he was the Vice President, and he had an engineer degree with UTSA (1996).

Councilmember Jorrie asked about the cost of the inspector, and wanted to verify the cost would have still been \$80,000 (span of time), no matter what amount of time the inspector was actually working and Mr. McNew agreed, and spoke briefly about the inspector's time spent at the job site (six hours at least daily). Councilmember Jorrie indicated she saw the problem, as contracts needed to be more specific, therefore less confusing to City Council and everyone else. Mr. McNew indicated there had been a specific breakdown of the contract, which explained where the \$80,000 was coming from, which included a back-up inspector, truck, workers' compensation, health insurance and a 10% profit for McCrary and Associates.

Mr. Galindo stated that Mr. McCrary contracted with the City to provide for an inspector, and in turn pay McCrary for the inspector. He added it was a turnkey amount of \$80/84,000 to pay the inspector, but it was specified how often the inspector would be there, or what constitutes full time.

Mr. Galindo asked Mr. Wagner if he was advised of the density and moisture failures, what corrective actions were taken, and were the tests within the 3% margin for pass or failure. Mr. Wagner explained although they are verbally notified as it could take five or six days for the documents to be sent to him. Additionally, he indicated that to have 100% perfection in the streets it would require him to provide a proctor test (sample) at

every location and each test is approximately \$200. He spoke briefly about the procedures concerning proctors and 2% - 3% differential involved with sampling; Mr. McNew provided input with the differential.

Councilmember Hildebrand asked Chief Jackley if he any malicious intent concerning the review of contract or other issues, and Chief Jackley stated that there was no malicious intent. Chief Jackley briefly provided a recap of his intentions concerning the invoices, inspector and other projects.

Councilmember Kusek asked Chief Jackley about the invoices and what brought about the firing of the inspector. Chief explained that Mr. McCrary indicated the City did not have to have an inspector, and he took him at his word. There was a brief discussion concerning the inspector, inspection costs, qualifications, and contract. Mr. Earl came forward clarify the 10% administration charge, which included change orders, payment of construction scheduling and inspections.

There was a discussion concerning conversations with David Earl, Chief Jackley's correspondence, lawsuits and the availability of McCrary and Associates at the evening's meeting.

Mayor Edwards spoke about a paper trail of documents concerning this issue, and made comments concerning documentation which indicated a full time inspector with the cost to be determined. He was concerned with the way the contracts (unsigned) and paperwork was handled. Mr. Earl provided additional correspondence concerning the issue, spoke about fiscal responsibility, and commended Chief Jackley on his training concerning investigations.

Mr. Smith spoke about the investigation, contracts, inspections, soil condition clarification, (services) confusion of information and records keeping.

Councilmember Hildebrand was concerned with the records keeping of both the City of Live Oak and McCrary and Associates; wanted to see some serious work on these issues. Mr. Smith agreed, and indicated he would work toward ensuring these types of problems are corrected. Additionally he spoke about functional realignment of employees, record and other aspects of city work.

Mayor Edwards spoke about the March 2006 request for the State Comptroller to come in and provide a management review, pending receipt of the audit report; to be used by the City Manager. Councilmember McFarland agreed with Councilmember Hildebrand, and she indicated she would not do business with any business that does not require drug testing. She spoke about the billing system procedures, electronic billing and other issues.

Mr. Galindo explained to City Council they needed to make a determination concerning the services with McCrary and Associates for street projects and/or as City Engineer (for all projects). He spoke about the meeting with Mr. Wagner, Mr. McCrary, and Mr. Smith to review the streets in Live Oak. His opinion was that the street projects were well done, however he knew there were some problem areas that had not been addressed. These problems had resurfaced and would have to be readdressed; they are problems that will continue to happen. He discussed payment to McCrary and Associates, specific contract issues, and criminal investigative issues (no violation of

Penal Code of Criminal Statutes). Mr. Galindo indicated that Sergeant Frame should take the material to the District Attorney's Office for their review.

Mayor Edwards spoke about problems in the City, and plat signatures. He asked what the City Council thought about the following: Asking for a consensus of City Council to authorize the City Engineer (McCrary) to continue on until June 30, 2007 until such time to review the contract, and to send the investigation to the District Attorney's Office for review.

Councilmember McFarland agreed, and asked to come back in June to have the contract re-written/re-negotiated. Mr. Galindo indicated that all the work should be accomplished by mid-May, and therefore re-negotiation would not be viable.

Mr. Smith spoke about continuing with the street project in June 2007. Mr. Wagster indicated Phase III plans are almost complete; Phase III contracts have not been acted upon.

Mr. McCrary spoke about Phase II construction, and the bid Phase III process (60 days).

There was a discussion with City Council, Mr. Smith, and Mr. Homan, Finance Director concerning this comment/question, Mr. McCrary (City Engineer) definition of scope of services (which covers everything), and two contracts as City Engineer and general plat review agreements.

Mr. Earl wanted clarification concerning the consensus. Mayor Edwards indicated the investigative paperwork would be taken to the District Attorney's Office for review.

Councilmember Kauts made a motion to halt the investigation at this point and to retain McCrary's office until such time there is another reason for going through all of this; at this point in time continue on with them but with strict scrutiny; seconded by Councilmember Jorrie.

Councilmember Hildebrand stated that we cannot direct an investigator or police officer not to continue on with a criminal investigation, as it would be this is out of City Council's purview. Mayor Edwards indicated he would have to allow Mr. Galindo to answer this question, and as he had not recognized Councilmember Jorrie's second, the discussion (point of clarification) could be carried over. Mr. Galindo agreed, and recommended Sergeant Frame take his investigation documents to the District Attorney's Office for review; stating that is the appropriate thing to do.

Councilmember Kauts retracted her motion, and Councilmember Jorrie indicated she could not retract her second as Mayor Edwards had not recognized her.

Councilmember Kauts made a motion to continue with Don McCrary's office under strict scrutiny from now on; seconded by Councilmember Hildebrand. There was a brief discussion concerning the recognition of council members making seconded motions. Councilmember Hildebrand retracted her second Councilmember Jorrie. Councilmember Jorrie then seconded the motion.

Vote FOR: Councilmembers Kauts, Jorrie, Kusek, Hildebrand and McFarland – Passes 5 - 0

B. A Resolution Authorizing The City Manager To Pursue Obtaining Additional Water Pumping Rights Through the Regional Water Resource Development Group

Mr. Smith City Manager explained to City Council the Resolution would pursue the City to ask for an additional 500 acre feet (water rights, Regional Water District), and would be discussed at the next regular City Council meeting. Handouts were provided to City Council for their review.

Councilmember Jorrie made a motion for approval; seconded by Councilmember Hildebrand

Vote FOR: Councilmembers Jorrie, Kusek, McFarland, Kauts and Hildebrand – Passed 5 - 0

6. ADJOURNMENT

Motion was made by Councilmember Kauts; seconded by Councilmember Kusek, and meeting was adjourned at 10:55 p.m.

Approved:

Henry O. Edwards Jr., Mayor

Attest:

Deborah L. Goza, City Secretary