

## **REGULAR COUNCIL MEETING    October 13, 2020**

**6:00 p.m.**

### **CALL TO ORDER**

The Regular Council meeting was held Tuesday, October 13, 2020, in the City Hall Conference Room at City Hall, 17 S. 8<sup>th</sup> Street, Miles City, Montana. Mayor John Hollowell called the meeting to order. Council Members present were Brant Kassner, Dwayne Andrews, Ken Gardner, Rick Huber, Austin Lott and Elizabeth Patten. Councilperson Kathy Wilcox was excused.

Also present were City Attorney Dan Rice, Public Works Director Scott Gray, Public Utility Director Tom Speelmon, Police Captain Dan Baker, Fire Chief Branden Stevens, Planner in Training II Ally Capps, Flood Plain Administrator/Auto Cad/Assistant PWPV, Battalion Chief Sarah Lewin, Fire Captain Taran Harbaugh, Fire Inspector Ed Kanduch, Dispatch Supervisor Lyne Anderson and City Clerk/Minute Recorder Lorrie Pearce.

### **PLEDGE OF ALLEGIANCE**

Mayor Hollowell led the Council in the Pledge of Allegiance.

### **APPROVAL OF COUNCIL & COMMITTEE MINUTES**

#### **City Council Minutes: 09/22/2020**

**\*\***     *Councilperson Gardner moved to approve the minutes of the Regular Council Meeting of September 22, 2020, and seconded by Councilperson Kassner. The motion **passed** by unanimous consent, 6-0.*

#### **Human Resource Committee Minutes: 9/17/2020**

**\*\***     *Councilperson Andrews moved to approve the minutes of the Human Resource Committee Meeting of September 17, 2020, and seconded by Councilperson Gardner. The motion **passed** by unanimous consent, 6-0.*

#### **Special Council Minutes: 10/06/2020**

**\*\***     *Councilperson Kassner moved to approve the minutes of the Special Council Meeting of October 6, 2020, and seconded by Councilperson Gardner. The motion **passed** by unanimous consent, 6-0.*

### **SCHEDULE MEETINGS**

*The following meetings will be held in the City Hall Conference Room:*

Finance Committee

10/20/20 @ 6 pm

### **REQUEST OF CITIZENS & PUBLIC COMMENT**

Discussion and approval on letter of support for Holy Rosary Healthcare Clinic

**\*\***     *Councilperson Patten moved to approve the support letter, seconded by Councilperson Kassner. The motion passed by consent vote*

### **APPOINTMENTS**

URDBOC- Elizabeth Patten

**\*\***     *Councilperson Kassner moved to approve the appointment, seconded by Councilperson Lott. The motion passed unanimously*

### **PROCLAMATIONS**

None

**STAFF REPORTS**

**Branden Stevens-** Reported the department is down one full time employee and two full time employees are on 14-day quarantine, so there will be a lot of overtime throughout October and November. For the first time in a long time all of the engines passed the pump test. Covid-19 calls are going up, so the department is changing their procedure in protective equipment. Transfers are limited because of staffing and mechanical issues. He introduced Taran Harbaugh and congratulated him on his promotion to Captain. Chief Stevens said he was the leading member in patient care. He also introduced Sarah Lewin and announced that she had been promoted to Battalion Chief. He said she is in charge of emergency medical techs and does an awesome job. He is looking forward to Sarah bringing her energy and drive to the position.

**Scott Gray-** Reported the Darling Project is close to completion. There is landscaping and concrete to finish and the punch list is being fulfilled.

**Lyne Anderson-** Said that as of today Zuercher is up, but not running accurately. It took ten hours to get dispatch up and running. She will be working with the Police and Sheriff departments soon.

**CITY COUNCIL COMMENTS**

None

**MAYOR COMMENTS**

He asked Council how it would like to continue meeting because of the increase of COVID-19 cases.

**\*\*** *Councilperson Gardner moved to go back to Zoom, seconded by Councilperson Andrews.*

Council discussed the pros and cons of returning to Zoom or having Council meetings upstairs in the Judges chamber.

**\*\*** *The motion was voted on by roll call, and the result was a tie. Councilpersons Gardner, Lott and Patten voted yes, and Councilperson Kassner, Huber and Andrews voted no*

Mayor Hollowell asked the Council to continue with the conversation before he broke the tie.

**\*\*** *Councilperson Andrews moved to amend the main motion to have Council meetings in the Judge's chamber until it is not COVID-19 appropriate, seconded by Councilperson Kassner.*

**\*\*** *After a short conversation, the amended motion passed unanimously*

**\*\*** *The amended main motion passed by a unanimous vote*

He announced that the City of Miles City received Montana Municipal Interlocal Authority's Loss Control Achievement award for Second Class Cities for 19/20 fiscal year in the Workers' Compensation program.

**COMMITTEE RECOMMENDATIONS**

None

**BID OPENINGS**

None

**BID AWARDS**

None

**PUBLIC HEARINGS**

- A. **ORDINANCE NO. 1343- An Ordinance Revising Limited Parking Zone Locations in the City of Miles City, Montana**

Mayor Hollowell called for comments from proponents three times, then opponents three times and, hearing none, the hearing was closed.

**UNFINISHED BUSINESS**

- A. **ORDINANCE NO. 1343- (Second Reading) An Ordinance Revising Limited Parking Zone Locations in the City of Miles City, Montana**

\*\* *Councilperson Andrews moved to approve the Ordinance, read by title only, and seconded by Councilperson Kassner. On roll call vote, the motion passed by unanimous consent, 6-0. Ordinance No. 1343 passed.*

- B. **Approval on proceeding with Splashpad project as presented by MCI<sub>2</sub>**

\*\* *Councilperson Kassner moved to table the issue until Finance can review it, and seconded by Councilperson Lott. On roll call vote, the motion passed by unanimous consent, 6-0.*

**NEW BUSINESS**

- A. **RESOLUTION NO. 4374- A Resolution Revising City of Miles City Personnel Policies Regarding Wage Increase Requests**

\*\* *Councilperson Kassner moved to approve the Resolution, read by title only, and seconded by Councilperson Gardner.*

Mayor Hollowell explained that the due date was changed and the process in section 5 was changed so the request is sent to the Finance Committee.

\*\* *On roll call vote, the motion passed by unanimous consent, 6-0. Resolution No. 4374 passed.*

- B. **RESOLUTION NO. 4376- A Resolution Approving a Storm Water Pollution Prevention Plan for Frank Wiley Field**

\*\* *Councilperson Gardner moved to approve the Resolution, read by title only, and seconded by Councilperson Andrews. On roll call vote, the motion passed by unanimous consent, 6-0. Resolution No. 4376 passed.*

- C. **RESOLUTION NO. 4377- A Resolution Adopting Findings of Fact and Approving the Amended Plat and Subdivision Exemptions for the Purpose of Boundary Line Relocations and Aggregation of Lots Involving Lots 4-6 of Block 12 of the Plat of Park Addition in the City of Miles City, Montana**

\*\* *Councilperson Andrews moved to approve the Resolution, read by title only, and seconded by Councilperson Gardner. On roll call vote, the motion passed by unanimous consent, 6-0. Resolution No. 4377 passed.*

- D. **RESOLUTION NO. 4378- A Resolution Granting a Revocable License to "MSTB LLC" for an Encroachment Upon City of Miles City Right of Way for Main Street, to Erect a Sculpture in Front of 908 Main Street for the Benefit of Lots 15-16 in Block 64 of the Miles City Original Townsite**

\*\* *Councilperson Huber moved to approve the Resolution, read by title only, and seconded by Councilperson Gardner.*

Representative Jenna Janshen explained that she is asking Council to approve the erection of a structure in front of her property on 908 Main Street. The structure will be installed against the building, not in the grated area previously reported. The existing grate was too close to the street and she did not want it to get hit.

\*\* *On roll call vote, the motion passed by unanimous consent, 6-0.  
Resolution No. 4378 passed.*

**E. RESOLUTION NO. 4379- A Resolution Approving an Agreement With William Eckart for Mitigation of Certain Floodplain Violations**

\*\* *Councilperson Andrews moved to approve the Resolution, read by title only, and seconded by Councilperson Huber.*

Following was the discussion on the issue:

- Councilperson Gardner read the following:

National Flood Insurance Program (NFIP) is based on an agreement between local communities and the Fed Gov. It states that the community will adopt and enforce floodplain management. The City is mandated/required to issue permits for proposed projects along with assuming the responsibility to monitor and enforce the requirements of NFIP. The flood way designation is intended to assist the communities in managing floodplain development along with its projected impact on other property owners. This includes any new construction within the floodway. To ensure that Miles City remains in good standing within the NFIP and to prevent FEMA from taking enforcement proceeding it is paramount that good floodplain management is followed. Failure to comply would result in negative consequences which would be far reaching to the property owners and citizens of Miles City. Mr. Eckart failed to follow the law when it comes to floodway regulations. There was little consideration for the negative impact his actions would have on Miles City and its citizens. Lack of his compliance could result in FEMA placing the City on suspension then probation. This will result in an increase in flood insurance premiums and could ultimately result in Miles City being dropped from the National Flood Insurance Program. At this time, I cannot in good conscience support Resolution 4379.

- Councilperson Patten said that the letter received from Thomas Birney, FEMA representative for our region, stated that the failure to comply with what the City has required jeopardizes the City's continuing participation with the National Flood Insurance Program (NFIP). Probation would charge everyone who has a flood insurance policy an extra \$50 per year. Suspension does not allow anyone to renew their flood insurance policy. Those are huge factors for home owners in the floodway, because those mortgages require flood coverage. Council's decision could put Miles City in danger of suspension, and felt it was a major part of the discussion moving forward. Are we going to make an agreement with someone that violated Council's decision not to build? She felt that all citizens that live in the City limits need to abide by City ordinances, whether it is our own property or not.
- Attorney Rice said that Mr. Birney gave feedback to the agreement and the updated draft was suggested by him. The 30-day timeline was extended to 50 because it takes a while to get the mitigation study completed. His understanding is if the agreement is approved, it would keep the City in good graces with FEMA, pending the mitigation work. If the work is not

completed the City can terminate the agreement and proceed with litigation options.

- Councilperson Kassner asked if the agreement covers the building as well as the property. Mayor Hollowell said that under 1) D “including for building and occupancy permits, as well as flood permits; with said flood permit to refer to the FEMA Section 1316 designation” means that Mr. Eckart needs to get all the necessary documentation that are required, and to this agreement as justification for not requiring said structure to be in strict compliance with the City’s flood code provisions. Attorney Rice said the building would not be in compliance, but the property would. Administrator Malenovsky said that 1316 talks about the encroachment and not the encroachment to the floodway. The building is not in compliance with State, Federal or local laws. Mayor Hollowell said that the building had not been inspected, so the City does not know if it complies or not. Any commercial building has the ability to “flood proof” the structure. They can be built below base flood elevation (BFE), but they can be built up to BFE plus 2, which is the State statute and be in compliance. Attorney Rice said that the building had not been specifically addressed. Mr. Eckart would need to purchase a permit and if the stipulation was not agreed on, this agreement could be terminated. The agreement can be changed along the way, because right now nobody knows the answers to all the issues that will come up after the mitigation report.
- Councilperson Kassner asked if the City can continue with the ticket issue since the agreement states that there will not be any court action. Attorney Rice said the tickets are a part of a diversion in the agreement that depends on his compliance with the terms in the agreement. Administrator Malenovsky stated to get to a 1316 the City had to send notice of violations, a letter as to how the noncompliance affects flood insurance and issue tickets. After these were completed, by rights, the City is supposed to send the issue to court. By doing all of this it shows FEMA that the City has exhausted all means to try and make him compliant. She does not know where the court is on the tickets. Attorney Rice said the tickets are not contingent with the agreement and would be in a different agreement. That agreement would not need to be approved by Council.
- Administrator Malenovsky explained the difference between flood fringe vs flood way.
  - a. Flood fringe/proof is following engineering recommendation, plus 2 feet. This includes a flood certificate.
  - b. Flood way there are no new structures allowed once the mitigation report is completed, no matter what is done, the building is still infringing or diverting the water.
- Mayor Hollowell explained that he will be transparent all through out and thought that it is all a difference is perception, not to say if it is right or wrong. He does not see the agreement as an enforcement, it is more for the City to avoid the cost of litigating, but attempting to get this person to do something that he always had the ability to do beforehand. It is more of a plea to take responsibly for the action that he has done and put the City at risk versus a punishment.
- Planner Capps asked how this sets presence for future building in the area. Mayor Hollowell said that everyone has always had the ability to choose to violate. Once the building is built then the City writes a report as to whether there is a violation or not. Administrator

Malenovsky stated that in the Ordinance itself, it states that encroachment analysis can be done in the flood way as long as it shows a flood rise of 0.00. The property owner has the right to do that report, bring it to the Flood Administrator for a variance that Council would need to approve. Those steps were not followed and the property owner knew of the process for at least six years. This process has nothing to do with 1316. The agreement is already in the Ordinance, which includes the correct process that should have been completed.

- Councilperson Lott expressed his concern that if the agreement is approved that the City is setting a precedent moving forward. If it is approved he believes that the City will be negotiating with someone who willfully chose to do what he wanted. When he crossed the line, erecting a building without a flood or building permit he broke the law. He also felt the agreement was rushed and put together at the last minute. He did not think it was a safe assumption for the City to accept the agreement and hope that it is going to make things more stringent down the road. He also had a problem with Section 1D concerning the structure being in strict compliance. Attorney Rice said the drafted agreement was in Friday's packet and the updates were suggested by FEMA, which changed the "30 days" to "50 days" and the "no rise was removed" which makes the agreement stricter.
- Councilperson Patten said that the Council would not be talking about the voting for or against the agreement if the structure was not built. She stated that if the agreement is approved and the violation is not corrected that the City would be back to litigation. She wondered, what would be best, going to litigation now, or wait to see if the City is forced into litigation. Either way the City is going to spend money it does not have. She asked Administrator Malenovsky if the City is still receiving a flood insurance discount and how long before it is taken away. Administrator Malenovsky said the City is receiving the discount at the moment and if the City is put on probation, which means nothing is done, the flood insurance rates would increase, the City would lose funding for Section 205 and the community would be responsible to rectify the problem. Which means it would no longer be a Council problem, but a community problem. Mayor Hollowell said that the reason for the negotiation was because no matter what, the issue had to be remedied as to the City paying for the structure or litigate. Councilperson Patten said the way she sees it, worst case scenario is the City loses grant money for the flood project, everyone in Miles City that pays flood insurance pays a higher rate plus an extra 50 dollars violation fee per year, and possibly lose their flood insurance altogether. If you are going to weigh all cost, which one cost more? Mayor Hollowell said that would happen only if the City chose to do nothing. He also suggested that the City could send out a public announcement on contacting the Floodplain Administrator before building any structure, because you don't have to necessarily violate the law to get what you want.
- Councilperson Andrews said there was no way that the building was coming down and thought the agreement was the best solution.

**\*\*** *Councilperson Gardner called for question, seconded by Councilperson Huber. The motion passed 5-1 with Councilperson Lott voting no*

**\*\*** *On roll call vote, the motion was a tie, 3-3 with Councilperson*

*Gardner, Kassner and Lott voting no*

Mayor Hollowell asked Council if there was any way that a Council member may change their mind?

- Councilperson Andrews- Asked who was going to pay for it? Mayor Hollowell said the City would. Mr. Andrews asked if the City has an extra \$150,000 over the next three years? Mayor Hollowell said yes, we could figure it out
- Councilperson Huber-It was not a good situation or topic. He respects the words and efforts from Attorney Rice and he respects the words from Administrator Malenovsky. He thought that it was a good learning thing for the community, and he felt that voting for the agreement was the way to go because of the financial situation of the City. The engineering study is going to bring something forth and he felt that FEMA was for the agreement
- Attorney Rice explained that the City will not get a straight answer from FEMA, and he does not get any satisfaction from the agreement. If he could have negotiated more he would have. He added the tickets were not negotiable. The cost was a subject that went back and forth before Eckart agreed to pay for the mitigation study. The agreement should not cost the City at this point. He did not like any of this, but did not see any other option.
- Administrator Malenovsky- Said she was nervous because no other City in Montana has dealt with this issue before. FEMA will not tell her if it is for or against the agreement. She wants to do whatever is best for the community
- Councilperson Kassner- Said it is to open ended, and too many shoulds/coulds. For instance, the agreement on inspections. He questioned what is reasonable, is it what Eckart feels reasonable or what the City feels reasonable? All in all, just not comfortable with the agreement. Attorney Rice stated that there are a lot of unknowns and will find out during the process, because neither the Floodplain Administrator or the Building Inspector have been inside.
- Attorney Rice explained why the 30 days was changed to 50 days. He was told by FEMA that it will take 4-6 weeks to get the data so the engineers can perform the mitigation study
- Councilperson Patten- Stated, if the agreement is approved, that the moment it is not adhered to, the City needs to be prepared to respond quickly and follow through. The City cannot be afraid to spend the money in a situation that could potentially cost the community a lot more.
- Councilperson Gardner-Said if the agreement went south because the City was once again told by Eckart that he did not want to do it. The City would-be put-on suspension, which means, the residents would not be able to purchase insurance policies and the City could not receive federal grants or loans. At this point unless you had cash to purchase a home, good luck. How is he suppose to explain that to the citizens?

Mayor Hollowell asked all Council members to state their strongest reasons as to why they voted the way they did. This would help his decision on which way to vote.

- Councilperson Gardner- We were elected to represent the citizens of Miles City and finds it very difficult to tell the people of Miles City that as a result of his vote their flood insurance is going up and the future may look really bad. He felt that a lot of "ifs" would have to happen, but it is a possibility

- Councilperson Huber- Voting for the agreement shows that the City can work with a party to end the problem with a positive ending. If the City is not going to be penalized, he felt the City should "go with the flow" at this time
- Councilperson Patten- The building is there and believed litigation will happen one way or another. The City needs to be prepared to spend the money to rectify the situation. The building was denied by Council and he still built it, now it is Council's problem. She wondered why the City could not tear down the building because it is in all kinds of violations for all kinds of things. If the City loses the NFIP rating, everyone will leave town. FEMA does not care if the City receives more and more violations. She felt that the City should make him accountable and if the agreement was approved, she needed to know why so she could explain it to her ward and the citizens of Miles City
- Councilperson Kassner- Too open and too many variables on should/would and does not like it. Mr. Eckart broke the law. He was told not to build and he did it anyways and was issued tickets. Now he does not want them. Theoretically, I could build a garage right now and should not receive a cease and desist without a building permit. Eckart did not get one, so why should he? He did not feel right if the issue is not followed through
- Councilperson Lott- Did not like how the agreement came together. The City had 10 months to do it. He knows that FEMA gave us a deadline, but it does not make the agreement better. Mr. Eckart broke the law. If the agreement is approved he agrees with Councilperson Patten that the City needs to be prepared to react if it is not followed. At this point he is prepared to go to litigation. Morally, he cannot vote for the agreement because he broke the law. He felt that it was build now, forgive later issue. The reasons he voted against the agreement are the variabilities of what could happen.
- Councilperson Andrews- Felt that the City had higher priorities to deal with that is way more important to the citizens. Mitigate and move on. The City is showing efforts to stay in compliance with FEMA, and felt that FEMA would not pull the insurance

Mayor Hollowell asked if there is someone on Council that has changed their vote. He said he would break the tie, but he would like Council to make the decision.

Councilperson Patten said if the City loses the NFIP rating, everyone in this town will be forced to leave with a bankruptcy or possibly a foreclosure attached to their names. The problem with approving the agreement is that if someone else builds without approval from the City, they can say well Eckart did it, why can't I? FEMA does not care if the City receives more and more violations. Those folks do not sit at a local establishment and have coffee with you. In the end they follow the letter of law that was laid out for them. We have to take care of the people that live here and each other. She does not know what the right thing to do is, but felt that the City should make Mr. Eckart accountable because he was told so many times that what he wanted to do was not in compliance as to where his property lies in Miles City. She thought Council needed to decide what process is best to protect the NFIP rating. What are we saying if we go with the agreement and what will be shared with our public as to why we went with it? If we have really good reasons why and still protect the flood rating, then the agreement should not be approved.

Councilperson Kassner explained if the agreement is approved and Mr. Eckart pulls something and FEMA looks at it and says this is ridiculous. Are you



willing to risk your house on a potential deal? If the City denies the agreement we are still ok with FEMA and now we have to go to court. He would rather spend City money on protecting people, than it possibly falling through and hurting the community.

Councilperson Andrews felt that some of the discussion had gone way over the hill. We have gone from working with an agreement that FEMA has potentially said is good, and our attorney has worked with Eckart's attorney, to the doom and gloom that everybody is going to lose their flood insurance and NFIP rating. That is not going to happen because FEMA is the most political agency in the United States, they are under scrutiny by everyone. He did not think that approving the agreement would jeopardize the flood insurance for the people of Miles City, unless we get multiple violations that we do not deal with. We have given 100% good faith and effort to deal with the situation so we can stay within the confines of what we need to do. He felt the City has done a good job at that and needs to keep after it.

Mayor Hollowell explained his opinion on comments heard throughout the process. After that he would like to have another roll call vote.

- A Councilperson does need to make their own decision because they are representing their ward
- Agreement will not put the City at risk- The City has shown resiliency by telling the property owner what they need to do, and if it does not get done, it goes to litigation
- The City tried to work and plead with Mr. Eckart and he did not care.
- No penalty- Mr. Eckart has spent a lot of money during the process, but he viewed the agreement as a way of getting what he wants done. If anyone else builds in the floodway, they would have to go through the proper channels
- "Go with the flow"-He will not disagree with it, but you have to pay attention as to what flow your going with
- It will cost the City one way or the other. He has talked to 20-40 people and they all said, if it is going to cost the City, then the building better come down.
- Too many opens- The one that bothered him was to use the 1316 designation in the agreement as justification as to not requiring said structure to be in strict compliance with the City's flood code provisions. Either the lawyer does not fully understand what we are dealing with; or we are dealing with someone who is trying to get out of other requirements
- Willingly broke the law- He gave Mr. Eckart several other options in ways to build the structure. It did not make any difference to the design. Mr. Eckart did not care how it was going to affect the community
- Don't like how it came together- Mr. Gray thought that the acceptance of the 1316 meant that the issue was finished. If the City approves the agreement, then it could do what it needs to do now, if the issue goes to litigation there could be a lot of money spent and the City is risking kicking the can down the road and end up doing what we could do now
- Build now, forgiveness later- He agreed. Council has in the past acted on others that violated City ordinances.
- Money way short- He agreed, but felt there is a way the City could finance the litigation. He would love to see the money go to more positive uses, like park improvement, a building, ambulance, police cars or things that the City really does need.
- He agreed that the City does need to be able to prove that it is working with Mr. Eckart on the issue. The issue could have been taken care of at the beginning, but now we have spent attorney hours and money to finally wake him up to it. But also, an action that seems potentially riddled with uncertainty.

Councilperson Huber explained that some Council members do not always

know what is going on, for example the tickets. He guessed that the judges and maybe the Floodplain Administrator may know what is going on, so a lot of us do not know the things that have been discussed at this meeting. He felt that Council is ok on making a decision on the issue at this time.

Attorney Rice said if the agreement is not approved, that he will advise the prosecution office that the tickets are back on the table in court. Those citations do not end with the building coming down, that has to be a separate District Court action. The end result of the tickets is a fine.

Captain Baker expressed that the law was broken by his own action and put the City in this circumstance. He thought it needed to be decided by litigation.

Jenna Janshen, 604 South Center Street, said that it is a tough call either way, but he broke the law. He basically told the City to buzz off after it tried to work with him. She encouraged Council to vote on principle, because he felt that he was above the law and could do whatever he wanted. There is a reason why the City has laws, statutes and ordinances and that is to live in it, to the best of our ability. We all have budgets to live by and citizens would be hurt if flood insurance increased. She basically follows the rules, and she did not think it was right for Mr. Eckart to end up through litigation, and besting all of us.

**\*\* Mayor Hollowell asked for a second vote, The motion *failed* 4-2 with Councilperson Gardner, Patten, Kassner and Lott voting no. Resolution No. 4379 failed.**

**F. Approval of September Claims**

**\*\* Councilperson Huber moved to approve the September claims, seconded by Councilperson Gardner and passed unanimously.**

**ADJOURNMENT**

**\*\* Councilperson Gardner moved to adjourn the meeting, seconded by Councilperson Lott and passed unanimously.**

The meeting was adjourned at 8:35 p.m.

  
**John Hollowell, Mayor**

  
**Lorrie Pearce, City Clerk**