

MCCOOK CITY COUNCIL
December 19, 2011
7:30 P.M.

A MEETING OF THE MAYOR AND COUNCIL OF THE CITY OF MCCOOK, NEBRASKA convened in open, regular, and public session at 7:30 o'clock P.M. in the City Council Chambers.

Present: Mayor Berry; Councilmembers Gonzales, Kircher, Calvin, Hilker; City Attorney Schneider; City Manager Hancock; City Clerk-Treasurer Doak.

Absent: None.

Notice of the meeting was given in advance thereof by publication in the McCook Daily Gazette on December 15, 2011, the designated method of giving notice, a copy of the proof of publication being attached to these minutes. Advance notice of the meeting was also given to the Mayor and members of the City Council and a copy of the Acknowledgment of Receipt of such notice is attached to these minutes. Availability of the agenda was communicated in the advance notice to the Mayor and Council. All proceedings hereafter shown were taken while the meeting was open to the attendance of the public.

Mayor Berry announced that a copy of the Open Meetings Act was posted by the entrance to the Council Chambers and available for public review.

(1) INVOCATION - THE MCCOOK MINISTERIAL ASSOCIATION - PASTOR MCCOOK HARVEST CHURCH.

No one was present for the invocation.

(2) CITIZEN'S FORUM.

No one was present for Citizen's Forum.

(3) MAYOR'S ANNOUNCEMENTS & RECOGNITIONS.

City Manager Hancock gave an update on his housing study. He is doing research and continues to meet with the various interested parties.

(4) CONSENT AGENDA:

Councilmember Kircher requested that Item A be removed from the Consent Agenda and placed on the Regular Agenda.

Councilmember Calvin requested that Item D be removed from the Consent Agenda and placed on the Regular Agenda.

City Attorney Schneider requested that Item E be removed from the Consent Agenda and placed on the Regular Agenda.

ITEM B RECEIVE AND FILE CLAIM FOR DAMAGES FROM VICKY DRAKE, ROBERT EDWARDS, AND TAMARA MCADAMS AND INSTRUCT THAT IT BE SUBMITTED TO THE CITY'S INSURANCE CARRIER FOR REVIEW AND

APPROPRIATE ACTION.

Upon a motion by Mayor Berry, seconded by Councilmember Gonzales, the Council voted to receive and file claim for damages from Vicky Drake, Robert Edwards, and Tamara McAdams and instruct that it be submitted to the City's insurance carrier for review and appropriate action. The motion passed upon the following roll call vote: YEA: Berry, Gonzales, Calvin. NAY: None. ABSTAIN: Kircher, Hilker.

ITEM C APPROVE THE APPLICATION FOR A SPECIAL DESIGNATED LIQUOR LICENSE SUBMITTED BY MO DOUGH, LLC, LICENSE #IK-57785, FOR THE NEBRASKA YOUNG FARMERS & RANCHERS CONVENTION TO BE HELD AT THE CHIEF MOTEL - POOL SIDE, 612 WEST "B" STREET, ON JANUARY 27 AND 28, 2012, FROM 1:00 P.M. TO 1:00 A.M. EACH DAY.

Upon a motion by Mayor Berry, seconded by Councilmember Gonzales, the Council voted to approve the application for a Special Designated Liquor License submitted by MO Dough, LLC, License #IK-57785, for the Nebraska Young Farmers & Ranchers Convention to be held at the Chief Motel - pool side, 612 West "B" Street, on January 27 and 28, 2012, from 1:00 P.M. to 1:00 A.M. each day. The motion passed upon the following roll call vote: YEA: Berry, Gonzales, Calvin. NAY: None. ABSTAIN: Kircher, Hilker.

REGULAR AGENDA

ITEM 4A APPROVE THE MINUTES OF THE DECEMBER 5, 2011 AND THE DECEMBER 8, 2011 REGULAR CITY COUNCIL MEETINGS.

Mayor Berry introduced a motion to approve the minutes of the December 5, 2011 and the December 8, 2011 regular City Council meetings. Councilmember Gonzales seconded the motion.

Upon a motion by Mayor Berry, seconded by Councilmember Calvin, the Council voted to amend the December 5, 2011 minutes to include that Councilmember Kircher would be abstaining from any vote and the December 8, 2011 to include Kircher as abstaining in the vote of Item 7 and that it should be West 4th instead of East 4th in Item 8. The motion passed upon the following roll call vote: YEA: Berry, Gonzales, Calvin. NAY: None. ABSTAIN: Kircher, Hilker.

The Mayor then stated the question: "Shall the minutes of the December 5, 2011 and the December 8, 2011 regular City Council meetings be approved as amended?" Upon roll call vote the following Councilmembers voted YEA: Berry, Gonzales, Calvin. NAY: None. ABSTAIN: Kircher, Hilker. Motion carried.

ITEM 4D APPROVE THE AUTOMATIC RENEWAL OF ALL CURRENT RETAIL LIQUOR LICENSES IN THE CITY OF MCCOOK FOR THE YEAR 2012 AND INSTRUCT THE CITY CLERK TO PUBLISH INDIVIDUAL NOTICE OF THE RIGHT OF AUTOMATIC RENEWAL OF EACH LICENSE.

Councilmember Calvin introduced a motion to approve the automatic renewal of all current Retail Liquor Licenses in the City of McCook for the year 2012 and instruct the City Clerk to publish individual Notice of the Right of Automatic Renewal of Each License. Councilmember Gonzales seconded the motion.

Councilmembers expressed concern with one establishment (Sport's Night Club) having more infractions than the others. How many is too many? When does it become necessary not to recommend approval?

Police Chief Brown stated that the Council did have the option not to recommend automatic renewal of a license, which would require them to complete the long form application process with the Nebraska Liquor Control Commission. He added that might be appropriated in this situation. Chief Brown also noted that Sports Night Club has also received a 30-day suspension from an incident in July from the Liquor Commission. To date the Commission has not acted on this suspension.

Councilmember Calvin expressed concerns with the state choosing not to care and not processing the suspension.

Councilmember Calvin introduced a motion to pull the automatic renewal of the Sport's Night Club and request that the State require that the complete to long-form renewal process. Motion died for lack of a second.

The Mayor then stated the question: "Shall the motion on the floor be approved?" Upon roll call vote the following Councilmembers voted YEA: Berry, Gonzales, Calvin. NAY: None. ABSTAIN: Kircher, Hilker. Motion carried.

ITEM 4E RECEIVE AND AUTHORIZE THE CITY MANAGER TO EXECUTE THE AGREEMENT BETWEEN THE CITY OF MCCOOK AND MILLER & ASSOCIATES CONSULTING ENGINEERS, P.C., FOR THE DESIGN OF THE FAILED 16" TRANSMISSION MAIN AND WATER TREATMENT PLANT WASTE STREAM LAGOON FACILITY CURRENTLY BEING PUMPED TO THE WASTEWATER TREATMENT PLANT.

Mayor Berry introduced a motion to receive and authorize the City Manager to execute the agreement between the City of McCook and Miller & Associates Consulting Engineers, P.C., for the design of the failed 16" transmission main and Water Treatment Plant Waste Stream Lagoon Facility currently being pumped to the Wastewater Treatment Plant. Councilmember Gonzales seconded the motion.

Upon a motion by Mayor Berry, seconded by Councilmember Gonzales, the Council voted to approve the language changes made by City Attorney Schneider in Subsection H - Exclusion of Contractor Claims, adding "except that this clause will not absolve the ENGINEER, ENGINEER's officers, employees, affiliated corporations, and subcontractors for any claim arising from its own will misconduct or negligent actions" to the end of the first sentence of the second paragraph and Subsection I-(b) - Owner's Insurance by adding "except that no waiver of subrogation shall be allowed for the ENGINEER, ENGINEER's officers, employees, agents, and subcontractors from any claim that shall result for the ENGINEER, ENGINEER's officers, employees, agents, and subcontractors willful misconduct or negligent actions." The motion passed upon the following roll call vote: YEA: Berry, Gonzales, Calvin. NAY: None. ABSTAIN: Kircher, Hilker.

The Mayor then stated the question: "Shall the motion on the floor be approved as amended?" Upon roll call vote the following Councilmembers voted YEA: Berry, Gonzales, Calvin. NAY: None. ABSTAIN: Kircher, Hilker. Motion carried.

(5) RECEIVE A PRESENTATION FROM HOWARD OLSEN OF SIMMONS OLSEN LAW FIRM, P.C. AND RECEIVE AND FILE THE OPINION FROM HOWARD OLSEN REGARDING THE CONTINUED QUALIFICATIONS OF COUNCIL MEMBERS

AARON KIRCHER AND SHANE HILKER TO SERVE ON THE MCCOOK CITY COUNCIL.

Councilmember Calvin introduced a motion to receive a presentation from Howard Olsen of Simmons Olsen Law Firm, P.C. and receive and file the opinion from Howard Olsen regarding the continued qualifications of council members Aaron Kircher and Shane Hilker to serve on the McCook City Council. Councilmember Gonzales seconded the motion.

Howard Olsen of Simmons Olsen Law Firm, P.C. reviewed the legal opinion completed by his firm dated December 14, 2011 with the Council via a telephone conference call. Their opinion as outlined is as follows:

1. Council Members Kircher and Hilker have been convicted of "crimes" within the meaning of the relevant Nebraska statute.
2. As a result of those convictions, Council Members Kircher and Hilker have forfeited their offices.
3. The applicable statute is self-executing. By this they mean that at the moment of conviction, they ceased to be lawful members of the McCook City Council.

The consequences of these facts threaten to be quite severe. Any action by the City Council could be subject to challenge. Even if the challenge could be defeated, the city would incur significant legal expense. The legal expense, however significant it might be, is as nothing when compared to the consequences of city actions, particularly tax and budget actions, being determined to be invalid because of the presence of people on the council who were not lawfully there. In light of this fact, they recommend:

1. Council Members Kircher and Hilker should resign immediately.
2. If they, or either of them, refuse to do so, written notice should be given to the County Attorney asking him to undertake the appropriate suit to remove them from the McCook City Council.
3. This gets a "clock" moving so that after the expiration of ten days someone else can file the suit if the County Attorney refuses to do so.
4. When and if Council Members Kircher and Hilker resign or are removed, the council should ratify all actions taken since the date of the earlier conviction.

Councilmember Kircher questioned the implied forfeitures, and asked if there was any statute that would prevent them from being reappointed to their forfeited positions. That may be the best solution for the City, if the vacancies would be filled with the two who had been elected for those terms.

Discussion was held regarding the process, where do we go from here. Letters will be sent to Councilmember Hilker and Councilmember Kircher giving them five days to acknowledge the forfeiture of their office.

The Mayor then stated the question: "Shall the motion on the floor be approved?" Upon roll call vote the following Councilmembers voted YEA: Berry, Gonzales, Calvin. NAY: None. ABSTAIN: Kircher, Hilker. Motion carried.

(6) MUNICIPAL FACILITIES UPDATE.

City Manager Hancock gave an update on the municipal facilities project. Bids for the final package are scheduled for December 20. He and Building Official Baugher reviewed the proposed special

inspections contract document and made some changes to the required inspections, resulting in a cost savings to the City.

(7) COUNCIL COMMENTS.

Councilmember Hilker read the following statement:

“Ladies and Gentleman, It has been deemed that due to Nebraska state statute 19-613 my seat on the McCook city council has been forfeit. Although I personally do not agree with this law, I understand that I am still subject to it. Although my time on council was short I hope that it did serve some purpose. I want people to learn from my mistake, and just maybe even be a little inspired to change things. Hopefully some perceptions have changed about youth as well, the older generation will understand and appreciate that youth can have quality well thought out ideas and plans. Maybe young people will learn that with energy, passion, hard work, and some people skills that one person can make a difference in a city like McCook in a short time. I would like to close by thanking those who have given me such tremendous support, in supporting my decision to run for council the work I have done here, and through these proceedings. So thank you Councilmen and thank you to Jeff Hancock, thank you to Kurt Fritsch and thank you to all the citizens who have defended me. Most of all thank you to my family and fiancée for supporting me in these trying times. Thank you.”

(8) ADJOURNMENT.

There being no further business to come before the Council, Mayor Berry declared the meeting adjourned at 8:52 P.M.

Dennis Berry, Mayor

ATTEST:

Lea Ann Doak, City Clerk-Treasurer