



Agenda

REGULAR MEETING OF
THE GOVERNING BODY
AUGUST 26, 2009
CITY COUNCIL CHAMBERS

Amended – Add Item #14

AFTERNOON SESSION – 5:00 P.M.

1. CALL TO ORDER
2. PLEDGE OF ALLEGIANCE
3. SALUTE TO THE NEW MEXICO FLAG
4. INVOCATION
5. ROLL CALL
6. APPROVAL OF AGENDA
7. APPROVAL OF CONSENT CALENDAR
8. APPROVAL OF MINUTES: Reg. City Council Meeting – August 12, 2009
Special City Council Meeting – August 13, 2009
9. PRESENTATIONS
 - a) Proclamation – Erik Mason, Immigration Committee. (5 minutes)
 - b) Youth Award Recipient. (Mayor's Youth Advisory Committee) (5 minutes)
10. CONSENT CALENDAR
 - a) Bid No. 09/42/B – Santa Fe River Trail Construction from Ricardo Road to Camino Alire Agreement Between Owner and Contractor; Advantage Asphalt and Seal Coating, LLC. (Brian Drypolcher)
 - b) Bid No. 09/43/B – FY 2009/2010 City-Wide Water Utility Construction and Repair Contract; Sub Surface Contracting, Inc. (Stephanie Reynolds)
 - c) Bid No. 10/02/B – City of Santa Fe Employee Uniforms; Various Vendors. (Robert Rodarte)
 - d) Request for Approval of Change Order No. 5 – Fire Station No. 3; Samcon, Inc. (Chip Lilienthal)

CITY CLERK'S OFFICE

DATE 8-24-09 TIME 11:45am

SERVED BY _____

RECEIVED BY Hydromirans



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- e) Request for Approval of Professional Services Agreement – Financial Advisor Services for Cash Management and Investments (RFP #09/26/P); First Southwest Company. (Helene Hausman)
- f) Request for Approval of Professional Services Agreement – Investment Advisor Services for Cash Management and Investments (RFP #09/27/P); First Southwest Asset Management. (Helene Hausman)
 - 1) Request for Approval of Budget Increase – General Fund Finance.
- g) Request for Approval of Sole Procurement and Hardware and Software Maintenance Agreement for Library Division; Innovative Interfaces, Inc. (Patricia Hodapp)
- h) Request for Approval of 2009 Emergency Management Performance Grant – Emergency Management Preparedness Coordinator's Salary and Benefits; New Mexico Department of Homeland Security and Emergency Management. (Joyce Purley)
- i) Request for Approval of Agreement – Nutrition Service Incentive Program for Senior Division; North Central New Mexico Economic Development District Non-Metro Area Agency on Aging. (Ron Vialpando)
 - 1) Request for Approval of Budget Adjustment from Grant Revenues – Grant Fund.
- j) Request for Approval of Contract – Capital Outlay; State of New Mexico, New Mexico Aging and Long-Term Services Department. (Ron Vialpando)
 - 1) Request for Approval of Budget Increase From Grant Revenues – Grant Fund.
- k) Request for Approval of Procurement under Cooperative Agreement – Two (2) Ambulances for Fire Department; Professional Ambulance. (Chief Barbara Salas)
- l) Request for Approval of Procurement under Cooperative Agreement – Water Tanker for Fire Department; First In, Inc. (Chief Barbara Salas)



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- m) Request for Approval of Vendor Agreement – Services Program for Senior Division; North Central New Mexico Economic Development District Non-Metro Area Agency on Aging. (Ron Vialpando)
 - 1) Request for Approval of Budget Adjustment from Grant Revenues – Grant Fund.
- n) Request for Approval of New Mexico Statewide Ambulance Tariff Increase; Public Regulation Commission. (Chief Barbara Salas)
- o) Request for Approval of Memorandum of Understanding – Rail Runner Project; Mid-Region Council of Governments. (Robert Siqueiros)
- p) Request for Approval of Professional Services Agreement – Security Services at GCCC (RFP 09/29/P); Chavez Security, Inc. (Liz Roybal)
- q) Request for Approval of New Mexico Finance Authority Loan Terms for Purchase of The College of Santa Fe Campus and for Improvements to the Campus. (David Millican)
- r) CONSIDERATION OF RESOLUTION NO. 2009-_____.
A Resolution Supplementing Ordinance No. 2009-35 which Authorized the Execution and Delivery of a Loan Agreement by and between the City of Santa Fe, New Mexico (the “Governmental Unit”) and the New Mexico Finance Authority in a Principal Amount Not to Exceed \$30,000,000; Establishing the Exact Aggregate Principal Amount, the Net Effective Interest Rate and Other Matters with Respect to the Loan Agreement; and Ratifying Actions Previously Taken in Connection Therewith. (Dave Millican)
- s) CONSIDERATION OF RESOLUTION NO. 2009-_____. (Councilor Calvert)
A Resolution Adopting Standard Formulas by Water Use Category for Calculating Development Water Budgets. (Amanda King)
- t) Request for Approval of Proposed Fees for Administering the Vehicle Forfeiture Ordinance. (Captain Anthony Robbin)



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- u) Request for Approval of Change Order No. 2 – On-Call Construction Services for Acequia Trail on PNM Easement; A.S. Horner, Inc. (Leroy Pacheco)
- v) CONSIDERATION OF RESOLUTION NO. 2009-_____. (Councilor Calvert, Councilor Romero and Councilor Wurzbarger)
A Resolution Adopting New Program Guidelines and Authorizing Rebates for the Installation/Retrofit of Efficient Water Conservation Technologies. (Dan Ransom)
- 11. Request for Approval of Amendment to 2009/2010 Union/Management Negotiations – Section 16 Compensation Paragraph E (Specialized Units); Santa Fe Police Officer's Association. (Captain Gary Johnson)
 - a) Request for Approval of Budget Adjustment Requests to Fund Pay Increases.
- 12. MATTERS FROM THE CITY MANAGER
- 13. MATTERS FROM THE CITY ATTORNEY
EXECUTIVE SESSION:

Discussion of Lease of Property within Santa Fe Railyard, Pursuant to §10-15-1 (H) (8) NMSA 1978.
- 14. MATTERS FROM THE CITY CLERK

Request for Approval to Change Monday, November 9, 2009 Regular City Council Meeting to Tuesday, November 10, 2009.
- 15. COMMUNICATIONS FROM THE GOVERNING BODY

EVENING SESSION – 7:00 P.M.

- A. CALL TO ORDER
- B. PLEDGE OF ALLEGIANCE
- C. SALUTE TO THE NEW MEXICO FLAG
- D. INVOCATION



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THE GOVERNING BODY
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E. ROLL CALL

F. PETITIONS FROM THE FLOOR

G. APPOINTMENTS

H. PUBLIC HEARINGS:

- 1) Pursuant to §60-6B-10 NMSA 1978, a Request for a Waiver of the 300 Foot Location Restriction and Approval to Allow the Sale/Consumption of Alcoholic Beverages at El Museo Cultural de Santa Fe, 1615 B. Paseo de Peralta, which is Within 300 Feet of Alvord Elementary School, 551 Alarid and Located on City Property. The Request is for Barela/Vigil Wedding Reception to be held on September 5, 2009 from 5:00 p.m. to 11:00 p.m. (Yolanda Y. Vigil)
- 2) **Case #AB-2009-05:** 604 1/2 Galisteo Appeal. Stefanie Beninato Appeals the April 30, 2009 Board of Adjustment Decision to Deny Case Number V-2009-9 Variance Request From Section 14-7.1(B)(g)(5)(ii)(C) (Minimum Setback Standards for Second Stories) to Allow a Second Story Side Yard Setback Less Than 10 Feet. The Property is Zoned RM1 and Located Within the Don Gasper Historic Overlay District and Historic Downtown Archaeological Review District. (Daniel Esquibel) **(Postponed at August 12, 2009 City Council Meeting)**
- 3) Request for Approval of Amendment #1 to the Professional Services Agreement for Workforce Development Services; Monte Del Sol Charter School. (Fabian Trujillo)
- 4) Short Term Rental:
 - a) Short Term Rental 18 Month Report. (Jeanne Price & Tomas Herrera) **(Postponed at July 29, 2009 City Council Meeting)**
 - b) Request for Approval to Publish Notice of Public Hearing on October 14, 2009:

Bill No. 2009-40: An Ordinance Amending Section 14-14-6.2(A)(6) SFCC 1987 Regarding Short Term Rental Units. (Councilor Wurzbarger and Councilor Romero) (Jeanne Price)



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CITY COUNCIL CHAMBERS

- c) Hearing on Remand of Goodman v. City of Santa Fe, Including Refund Claims Filed by 176 Short Term Rental Permittees. (Frank Katz)

I. ADJOURN

Pursuant to the Governing Body Procedural Rules, in the event any agenda items have not been addressed, the meeting should be reconvened at 7:00 p.m., the following day and shall be adjourned not later than 12:00 a.m. Agenda items, not considered prior to 11:30 p.m., shall be considered when the meeting is reconvened or tabled for a subsequent meeting.

NOTE: New Mexico law requires the following administrative procedures be followed when conducting "quasi-judicial" hearings. In a "quasi-judicial" hearing all witnesses must be sworn in, under oath, prior to testimony and will be subject to reasonable cross-examination. Witnesses have the right to have an attorney present at the hearing.

Persons with disabilities in need of accommodations, contact the City Clerk's office at 955-6520, five (5) days prior to meeting date.

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SANTA FE CITY COUNCIL MEETING
August 26, 2009

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**MINUTES OF THE
REGULAR MEETING OF THE
GOVERNING BODY
Santa Fe, New Mexico
August 26, 2009**

AFTERNOON SESSION

A regular meeting of the Governing Body of the City of Santa Fe, New Mexico, was called to order by Mayor David Coss, on August 26, 2009, at approximately 5:00 p.m., in the City Hall Council Chambers. Following the Pledge of Allegiance, Salute to the New Mexico flag, and the Invocation, roll call indicated the presence of a quorum, as follows:

Members Present

Mayor David Coss
Councilor Rebecca Wurzbarger, Mayor Pro-Tem
Councilor Patti J. Bushee
Councilor Christopher Calvert
Councilor Miguel Chavez,
Councilor Carmichael A. Dominguez
Councilor Matthew E. Ortiz
Councilor Ronald S. Trujillo

Members Excused

Councilor Rosemary Romero

Others Attending

Galen Buller, City Manager
Frank Katz, City Attorney
Yolanda Y. Vigil, City Clerk
Melessia Helberg, Council Stenographer

6. APPROVAL OF AGENDA

Mr. Buller said staff has requested that Item 9(a) be postponed to the next meeting of the Council. He said Mr. Millican has asked the Council to remove Item 10(r) on the Consent Calendar for a presentation.

MOTION: Councilor Wurzbarger moved, seconded by Councilor Calvert, to approve the agenda as amended.

VOTE: The motion was approved on a voice vote with Councilors Bushee, Calvert, Chavez, Dominguez, Ortiz, Trujillo and Wurzbarger voting for the motion and none against.

7. APPROVAL OF CONSENT CALENDAR

MOTION: Councilor Calvert moved, seconded by Councilor Chavez, to approve the following Consent Calendar, as amended.

VOTE: The motion was approved on the following Roll Call vote:

For: Councilor Bushee, Councilor Calvert, Councilor Chavez, Councilor Dominguez, Councilor Ortiz, Councilor Trujillo and Councilor Wurzbarger.

Against: None.

- a) **BID NO. 09/42/B – SANTA FE RIVER TRAIL CONSTRUCTION FROM RICARDO ROAD TO CAMINO ALIRE, AGREEMENT BETWEEN OWNER AND CONTRACTOR; ADVANTAGE ASPHALT AND SEAL COATING, LLC. (BRIAN DRYPOLCHER)**
- b) **BID NO. 09/43/B – FY 2009/2010 CITY-WIDE WATER UTILITY CONSTRUCTION AND REPAIR CONTRACT; SUB SURFACE CONTRACTING, INC. (STEPHANIE REYNOLDS)**
- c) **BID NO. 10/02/B – CITY OF SANTA FE EMPLOYEE UNIFORMS; VARIOUS VENDORS. (ROBERT RODARTE)**
- d) **REQUEST FOR APPROVAL OF CHANGE ORDER NO. 5 – FIRE STATION NO. 3; SAMCON, INC. (CHIP LILIENTHAL)**
- e) **REQUEST FOR APPROVAL OF PROFESSIONAL SERVICES AGREEMENT – FINANCIAL ADVISOR SERVICES FOR CASH MANAGEMENT AND INVESTMENTS (RFP #09/26/P); FIRST SOUTHWEST COMPANY. (HELENE HAUSMAN)**
- f) **REQUEST FOR APPROVAL OF PROFESSIONAL SERVICES AGREEMENT – FINANCIAL ADVISOR SERVICES FOR CASH MANAGEMENT AND INVESTMENTS (RFP #09/27/P); FIRST SOUTHWEST ASSET MANAGEMENT. (HELENE HAUSMAN)**
 - 1. **REQUEST FOR APPROVAL OF BUDGET INCREASE – GENERAL FUND FINANCE.**
- g) **REQUEST FOR APPROVAL OF SOLE PROCUREMENT AND HARDWARE AND SOFTWARE MAINTENANCE AGREEMENT FOR LIBRARY DIVISION; INNOVATIVE INTERFACES, INC. (PATRICIA HODAPP)**
- h) **REQUEST FOR APPROVAL OF 2009 EMERGENCY MANAGEMENT PERFORMANCE GRANT – EMERGENCY MANAGEMENT PREPAREDNESS COORDINATOR'S SALARY AND BENEFITS; NEW MEXICO DEPARTMENT OF HOMELAND SECURITY AND EMERGENCY MANAGEMENT. (JOYCE PURLEY)**

- l) REQUEST FOR APPROVAL OF AGREEMENT – NUTRITION SERVICE INCENTIVE PROGRAM FOR SENIOR DIVISION; NORTH CENTRAL NEW MEXICO ECONOMIC DEVELOPMENT DISTRICT NON-METRO AREA AGENCY ON AGING. (RON VIALPANDO)**

 - 1) REQUEST FOR APPROVAL OF BUDGET ADJUSTMENT FROM GRANT REVENUES – GRANT FUND.**
- j) REQUEST FOR APPROVAL OF CONTRACT – CAPITAL OUTLAY; STATE OF NEW MEXICO NEW MEXICO AGING AND LONG-TERM SERVICES DEPARTMENT. (RON VIALPANDO)**

 - 1) REQUEST FOR APPROVAL OF BUDGET INCREASE FROM GRANT REVENUES – GRANT FUND.**
- k) REQUEST FOR APPROVAL OF PROCUREMENT UNDER COOPERATIVE AGREEMENT – TWO (2) AMBULANCES FOR FIRE DEPARTMENT; PROFESSIONAL AMBULANCE. (CHIEF BARBARA SALAS)**
- l) REQUEST FOR APPROVAL OF PROCUREMENT UNDER COOPERATIVE AGREEMENT – WATER TANKER FOR FIRE DEPARTMENT; FIRST IN, INC. (CHIEF BARBARA SALAS)**
- m) REQUEST FOR APPROVAL OF VENDOR AGREEMENT – SERVICES PROGRAM FOR SENIOR DIVISION; NORTH CENTRAL NEW MEXICO ECONOMIC DEVELOPMENT DISTRICT NON-METRO AREA AGENCY ON AGING. (RON VIALPANDO)**

 - 1) REQUEST FOR APPROVAL OF BUDGET ADJUSTMENT FROM GRANT REVENUES – GRANT FUND.**
- n) REQUEST FOR APPROVAL OF NEW MEXICO STATEWIDE AMBULANCE TARIFF INCREASE; PUBLIC REGULATION COMMISSION. (CHIEF BARBARA SALAS)**
- o) REQUEST FOR APPROVAL OF MEMORANDUM OF UNDERSTANDING – RAIL RUNNER PROJECT; MID-REGION COUNCIL OF GOVERNMENTS. (ROBERT SIQUEIROS)**
- p) REQUEST FOR APPROVAL OF PROFESSIONAL SERVICES AGREEMENT – SECURITY SERVICES AT GCCC (RFP 09/29/P); CHAVEZ SECURITY, INC. (LIZ ROYBAL)**
- q) REQUEST FOR APPROVAL OF NEW MEXICO FINANCE AUTHORITY LOAN TERMS FOR PURCHASE OF THE COLLEGE OF SANTA FE CAMPUS AND FOR IMPROVEMENTS TO THE CAMPUS. (DAVID MILLICAN)**

- r) *[Removed for discussion by the Council at the request of David Millican]*
- s) **CONSIDERATION OF RESOLUTION NO. 2009-83 (COUNCILOR CALVERT). A RESOLUTION ADOPTING STANDARD FORMULAS BY WATER USE CATEGORY FOR CALCULATING DEVELOPMENT WATER BUDGETS. (AMANDA KING)**
- t) **REQUEST FOR APPROVAL OF PROPOSED FEES FOR ADMINISTERING THE VEHICLE FORFEITURE ORDINANCE. (CAPTAIN ANTHONY ROBBIN)**
- u) **REQUEST FOR APPROVAL OF CHANGE ORDER NO. 2 – ON-CALL CONSTRUCTION SERVICES FOR ACEQUIA TRAIL ON PNM EASEMENT; A.S. HORNER, INC. (LEROY PACHECO)**
- v) **CONSIDERATION OF RESOLUTION NO. 2009- 84 (COUNCILOR CALVERT, COUNCILOR ROMERO AND COUNCILOR WURZBURGER). A RESOLUTION ADOPTING NEW PROGRAM GUIDELINES AND AUTHORIZING REBATES FOR THE INSTALLATION/RETROFIT OF EFFICIENT WATER CONSERVATION TECHNOLOGIES. (DAN RANSOM)**

**8. APPROVAL OF MINUTES: REGULAR CITY COUNCIL MEETING – August 12, 2009
SPECIAL CITY COUNCIL MEETING – August 13, 2009**

MOTION: Councilor Dominguez moved, seconded by Councilor Calvert, to approve the minutes of the Regular City Council meeting of August 12, 2009, as presented.

VOTE: The motion was approved on a voice vote with Councilors Bushee, Calvert, Chavez, Dominguez, Ortiz, Trujillo and Wurzbürger voting for the motion and none against.

MOTION: Councilor Dominguez moved, seconded by Councilor Wurzbürger, to approve the minutes of the Special City Council meeting of August 13, 2009, as presented.

VOTE: The motion was approved on a voice vote with Councilors Bushee, Calvert, Chavez, Dominguez, Ortiz, Trujillo and Wurzbürger voting for the motion and none against.

9. PRESENTATIONS

a) PROCLAMATION – ERIC MASON, IMMIGRATION COMMITTEE

This item is postponed to the Council meeting of September 9, 2009.

b) YOUTH AWARD RECIPIENT. (MAYOR'S YOUTH ADVISORY COMMITTEE)

Alex Wirth, Chair of the Mayor's Youth Advisory Board, presented a brief overview on the first Youth Award and the work of the Board, including the new Teen Center, Fall Food Drive, working with law enforcement regarding gang violence and DWI. He introduced Board members in attendance Adrian Salazar and Caman Tari.

Alex said Sergio Gonzales, this year's Youth Award recipient, is a High School Senior, member of the Mayor's Youth Advisory Board, the Advisory Board representative to Sustainable Santa Fe, the Rotary Interact Club, and works with the homeless at St. Elizabeth's – he is a role model for teens of Santa Fe.

Mayor Coss presented Mr. Gonzales with a plaque and commended him for being a youth model. He thanked Councilor Dominguez for his work with the Board

Councilor Dominguez said the Board does a good job by themselves. He thanked Sergio for his work in the community, and said many people can benefit and learn from him about what it means to be a community advocate. He thanked the Mayor's Board for working to establish this award.

Sergio said although he appreciates the award, he believes what he has done is his duty to the community, and something for which he should not receive an award.

Councilor Chavez, Councilor Trujillo and Councilor Bushee said Sergio should be rewarded, congratulated him on the award, and commended him for his service and for giving back to the community.

Mayor Coss again thanked Sergio, and his family as well for their support.

CONSENT CALENDAR DISCUSSION

- 10 (r) CONSIDERATION OF RESOLUTION NO. 2009-85. A RESOLUTION SUPPLEMENTING ORDINANCE NO. 2009-35 WHICH AUTHORIZED THE EXECUTION AND DELIVERY OF A LOAN AGREEMENT BY AND BETWEEN THE CITY OF SANTA FE, NEW MEXICO (THE "GOVERNMENTAL UNIT") AND THE NEW MEXICO FINANCE AUTHORITY IN A PRINCIPAL AMOUNT NOT TO EXCEED \$30,000,000; ESTABLISHING THE EXACT AGGREGATE PRINCIPAL AMOUNT, THE NET EFFECTIVE INTEREST RATE AND OTHER MATTERS WITH RESPECT TO THE LOAN AGREEMENT; AND RATIFYING ACTIONS PREVIOUSLY TAKEN IN CONNECTION THEREWITH. (DAVE MILLICAN)**

A copy of the final Resolution, dated August 26, 2009, is incorporated herewith to these minutes as Exhibit "1."

A copy of the Summary of the Financing Acquisition of College of Santa Fe Property through the New Mexico Finance Authority, is incorporated herewith to these minutes as Exhibit "2."

Mr. Millican presented information from Exhibit "2," to the Council, regarding the loan agreement and the proposed Resolution. He said Bond Counsel Dwayne Brown and Finance Advisor George Wiliford are in attendance to answer any questions.

Responding to Councilor Bushee, Mr. Millican said the only way we could get closer to the 1.279 interest rate would be to issue variable rate debt which probably isn't something we would want to do on this project. The MFOA can do this because the initial issue is coming from the portfolio funds of NMFA, and its alternative reinvestment is about 1.25% which is the London Interbank offering rate plus.9%.

Responding to Councilor Bushee, Mr. Millican said the primary savings will be a little more than \$400,000 in fees and issuance costs, as well as that we don't have to have NMFA hold a one year debt reserve. We were able to fund that ourselves, earn the interest on it and use it much more flexibly than if we had issued debt ourselves.

Councilor Bushee said she is disappointed that the Governor's office is considering the \$5 million the City will get from Stimulus funds as the only funds we will get. She would like someone from the City to look into that. She said this isn't a fair situation because the City isn't sure to get the \$5 million.

Councilor Chavez said there is a committee which will have oversight regarding the distribution of the stimulus funds. He would like to have a list of the eligible projects which have been funded, in addition to the Governor's stimulus package.

Mayor Coss asked Robert Romero to present a report on this at Councilor Bushee's Committee.

MOTION: Councilor Wurzburger moved, seconded by Councilor Calvert, to adopt Resolution No. 2009-85.

VOTE: The motion was approved on the following Roll Call vote:

For: Councilor Bushee, Councilor Calvert, Councilor Chavez, Councilor Dominguez, Councilor Ortiz, Councilor Trujillo and Councilor Wurzburger.

Against: None.

END OF CONSENT CALENDAR DISCUSSION

11. **REQUEST FOR APPROVAL OF AMENDMENT TO 2009/2010 UNION/MANAGEMENT NEGOTIATIONS – SECTION 16 COMPENSATION, PARAGRAPH 3 (SPECIALIZED UNITS); SANTA FE POLICE OFFICERS ASSOCIATION. (CAPTAIN GARY JOHNSON)**
 - a) **REQUEST FOR APPROVAL OF BUDGET ADJUSTMENT REQUEST TO FUND PAY INCREASES.**

Deputy Chief Abram Anaya presented information regarding this matter from Captain Gary Johnson's Memorandum of August 7, 2009, to the Finance Committee, which is in the Council packet.

Councilor Bushee asked if Public Safety personnel are required to take furloughs, and Deputy Chief Anaya said no.

Responding to Councilor Bushee, Mayor Coss said there will be two votes on this item, one for approval of the amendment and one for approval of the budget adjustment.

MOTION: Councilor Calvert moved, seconded by Councilor Chavez, to approve the requested amendment as presented.

VOTE: The motion was approved on the following Roll Call vote:

For: Councilor Bushee, Councilor Calvert, Councilor Chavez, Councilor Dominguez, Councilor Ortiz, Councilor Trujillo and Councilor Wurzbarger.

Against: None.

a) REQUEST FOR APPROVAL OF BUDGET ADJUSTMENT REQUEST TO FUND PAY INCREASES.

Councilor Bushee said she is not opposed to this BAR. However, she is starting hear to from various departments, particularly Transit, that the furloughs are costing the City more money, because people are working at time and a half to fill in for those on furlough. She said the furlough idea was to save money. She said she has a memorandum from Transit which she can forward to Mr. Buller, reiterating she understands this is happening in a few other departments.

Councilor Ortiz said he has the same concerns. He advised Councilor Bushee that the issue of furloughs will be revisited at the Finance Committee meeting Monday. He said, with regard to administrative support personnel in the Police Department or in public safety, he is unopposed to considering a plan which has furloughs for non-public safety employees in the Police and/or Fire Departments. He said there has been some talk that these departments are "sacred cows," but they are not. He said we are going to have to look at sacrifices across all departments. He looks forward to that discussion on Monday. He invited Councilor Bushee to attend the Committee meeting.

MOTION: Councilor Calvert moved, seconded by Councilor Chavez, to approve the requested Budget Adjustment.

VOTE: The motion was approved on the following Roll Call vote:

For: Councilor Bushee, Councilor Calvert, Councilor Chavez, Councilor Dominguez, Councilor Ortiz, Councilor Trujillo and Councilor Wurzbarger.

Against: None.

12. MATTERS FROM THE CITY MANAGER

None.

13. MATTERS FROM THE CITY ATTORNEY

EXECUTIVE SESSION:

- a) **DISCUSSION OF LEASE OF PROPERTY WITHIN SANTA FE RAILYARD, PURSUANT TO §10-15-1(H)(8) NMSA 1978.**

MOTION: Councilor Wurzburger moved, seconded by Councilor Ortiz, that the Council go into Executive Session for the purpose of discussing the lease of property within the Santa Fe Railyard, pursuant to §10-15-1(H)(8).

VOTE: The motion was approved on the following roll call vote:

For: Councilor Bushee, Councilor Calvert, Councilor Chavez, Councilor Dominguez, Councilor Ortiz, Councilor Trujillo and Councilor Wurzburger.

Against: None.

The Council went into Executive Session at 5:35 p.m.

MOTION TO COME OUT OF EXECUTIVE SESSION

MOTION: At 7:15 p.m. Councilor Calvert moved, seconded by Councilor Wurzburger, that the City Council come out of Executive Session and stated that the only item which was discussed in executive session was the item which was on the agenda, and no action was taken.

VOTE: The motion was approved unanimously on a voice vote with Councilors Bushee, Calvert, Chavez, Dominguez, Ortiz, Trujillo and Wurzburger voting for the motion and no one voting against.

END OF AFTERNOON SESSION AT 7:15 P.M.

EVENING SESSION

A. CALL TO ORDER AND ROLL CALL

The Evening Session was called to order by Mayor David Coss, at approximately 7:15 p.m. Following the Pledge of Allegiance, salute to the New Mexico Flag, and Invocation, Roll Call indicated the presence of a quorum as follows:

Members Present

Mayor David Coss
Councilor Rebecca Wurzbarger, Mayor Pro-Tem
Councilor Patti J. Bushee
Councilor Christopher Calvert
Councilor Miguel Chavez,
Councilor Carmichael A. Dominguez
Councilor Matthew E. Ortiz
Councilor Ronald S. Trujillo

Members Excused

Councilor Rosemary Romero

Others Attending

Galen Buller, City Manager
Frank Katz, City Attorney
Yolanda Y. Vigil, City Clerk
Melessia Helberg, Council Stenographer

F. PETITIONS FROM THE FLOOR

A copy of a letter to President Obama, Governor Richardson and others, dated July 10, 2009, entered for the record by Katherine Montano, is incorporated herewith to these minutes as Exhibit "3."

Katherine Montano, Las Vegas, New Mexico, expressed concerns with regard to transportation and burial of nuclear waste in New Mexico. Please see Exhibit "3" for specifics of this petition.

G. APPOINTMENTS

Archaeological Review Committee

Mayor Coss made the following appointments to the Archaeological Review Committee:

James Ivey – Reappointment – term ending 06/2011;

Janet McVickar – Reappointment – term ending 06/2011; and
Jason Shapiro – Reappointment – term ending 06/2011.

MOTION: Councilor Bushee moved, seconded by Councilor Chavez, to approve these appointments.

VOTE: The motion was approved on a voice vote with Councilors Bushee, Calvert, Chavez, Dominguez, Ortiz, Trujillo and Wurzbarger voting for the motion and none against.

Occupancy Tax Advisory Board

Mayor Coss made the following appointment to the Occupancy Tax Advisory Board:

Kimberly Klinkrodt (Lodging Industry) – to fill unexpired term ending 02/2010.

MOTION: Councilor Wurzbarger moved, seconded by Councilor Calvert, to approve the appointment.

VOTE: The motion was approved on a voice vote with Councilors Bushee, Calvert, Chavez, Dominguez, Ortiz, Trujillo and Wurzbarger voting for the motion and none against.

Immigration Committee

Mayor Coss made the following appointment to the Immigration Committee

Miguel Angel Acosta – to fill unexpired term ending 02/2011.

MOTION: Councilor Dominguez moved, seconded by Councilor Trujillo, to approve the appointment.

VOTE: The motion was approved on a voice vote with Councilors Bushee, Calvert, Chavez, Dominguez, Ortiz, Trujillo and Wurzbarger voting for the motion and none against.

Santa Fe Civic Housing Authority

Mayor Coss made the following appointment to the Santa Fe Civic Housing Authority:

Virginia Soto – to fill unexpired term ending 03/2010.

MOTION: Councilor Bushee moved, seconded by Councilor Calvert, to approve the appointment.

VOTE: The motion was approved on a voice vote with Councilors Bushee, Calvert, Chavez, Dominguez, Ortiz, Trujillo and Wurzburger voting for the motion and none against.

Councilor Chavez departed the meeting at this time

H. PUBLIC HEARINGS

- 1) **PURSUANT TO §60-6B-10 NMSA 1978, A REQUEST FOR A WAIVER OF THE 300 FOOT LOCATION RESTRICTION AND APPROVAL TO ALLOW THE SALE/ CONSUMPTION OF ALCOHOLIC BEVERAGES AT EL MUSEO CULTURAL DE SANTA FE, 1615 B, PASEO DE PERALTA, WHICH IS WITHIN 300 FEET OF ALVORD ELEMENTARY SCHOOL, 551 ALARID AND LOCATED ON CITY PROPERTY. THE REQUEST IS FOR BARELA/VIGIL WEDDING RECEPTION TO BE HELD ON SEPTEMBER 5, 2009 FROM 5:00 P.M. TO 11:00 P.M. (YOLANDA Y. VIGIL)**

The staff report was given by Yolanda Vigil, noting the Church is within 400 feet of Alvord Elementary School, noting the proposed event is on City property.

Public Hearing

There was no one speaking for or against this request.

The Public Hearing was closed

MOTION: Councilor Calvert moved, seconded by Councilor Wurzburger, to grant the request for a waiver of the 300 foot location restriction and approval to allow the sale/consumption of alcoholic beverages at El Museo Cultural de Santa Fe for the Barela/Vigil wedding reception on September 5, 2009 from 5:00 p.m. to 11:00 p.m..

VOTE: The motion was approved on the following roll call vote:

For: Councilor Bushee, Councilor Calvert, Councilor Dominguez, Councilor Ortiz, Councilor Trujillo, and Councilor Wurzburger.

Against: None.

Absent: Councilor Chavez.

- 2) **CASE #AB-2009-05: 604 ½ GALISTEO APPEAL. STEFANIE BENINATO APPEALS THE APRIL 30, 2009 BOARD OF ADJUSTMENT DECISION TO DENY CASE NUMBER V-2009-9 VARIANCE REQUEST FROM SECTION 14-7.1(B)(g)(ii)(C) (MINIMUM SETBACK STANDARDS FOR SECOND STORIES) TO ALLOW A SECOND STORY SIDE YARD SETBACK LESS THAN 10 FEET. THE PROPERTY IS ZONED RM1 AND LOCATED WITHIN THE DON GASPAR HISTORIC OVERLAY DISTRICT AND HISTORIC DOWNTOWN ARCHAEOLOGICAL REVIEW DISTRICT. (DANIEL ESQUIBEL)**

A Case Packet Summary Index for Case Number AB-2009-05, is incorporated herewith to these minutes as Exhibit "4 ."

A letter dated June 23, 2006, to David Rasch from Peter B. Komis, President, Don Gaspar Neighborhood Association, signed June 23, 2006, regarding 604 ½ Galisteo Street, Stefanie Beninato addition, entered for the record by Stefanie Beninato, is incorporated herewith to these minutes as Exhibit "5."

A notarized letter dated August 26, 2009, to the Mayor and City Councilors, from Charlene Ortiz, regarding Case A-2009-05, Stephanie Beninato, 604 and 604 ½ Galisteo Street, entered for the record by Stefanie Beninato, is incorporated herewith to these minutes as Exhibit "6."

A CD containing photographs, entered for the record by Stefanie Beninato, is incorporated herewith to these minutes as Exhibit "7."

A copy of a Memorandum dated September 17, 2007, with attachment, to Michael Purdy, Acting Division Director, Inspections and Enforcement, from Bobby Padilla, Acting Construction Inspector, regarding 60 ½ Galisteo, Building Permit #06-236, entered for the record by Michael Purdy, is incorporated herewith to these minutes as Exhibit "8."

The staff report was presented by Daniel Esquibel, Case Manager, which is contained in Exhibit "4." He noted the Board of Adjustment heard this case on April 30, 2009, and denied the request for a variance, noting the Findings of Fact are included in the Council packet. He said Kelly Brennan, on packet page 6, responded to the standards on the information submitted by Ms. Beninato "after this," and summed up by saying what is not in dispute is that the Building Permit issued to the Appellant did not include the construction of the second story, the Appellant constructed the second story, and the construction of the second story triggered the 10 ft. setback requirement, and the second story does not meet the setback requirements. He said staff has reviewed the information submitted by the Appellant and of the 31 issues which were presented, staff could find that possibly only 7 were relevant to the variance standards or had any relevance to what was presented to the Board of Adjustment, which "was identifying the 8.62 setback," and Items 4-7 can be addressed by Yolanda Cortez, Building Division and Michael Purdy and his staff from Inspections.

Public Hearing

Mayor Coss said the Appeal raises two issues: whether the Appellant meets the criteria for a variance established under Code; and whether the Board of Adjustment decision was arbitrary and capricious, unsupported by substantial evidence or otherwise contrary to law. He said the Council should not admit or consider evidence that does not relate to these issues. He said Ms. Beninato will have a total of 45 minutes inclusive to state the case, question the witness, rebut any evidence or testimony presented by the opposition witnesses and to make a closing statement.

Presentation by the Applicant

Stefanie Beninato, 604 ½ Galisteo, was sworn. Ms. Beninato entered two letters for the record [Exhibits "5" and "6"].

STENOGRAPHER'S NOTE: Ms. Beninato used a combination of power point and overhead to present information to the Council regarding this matter.

Ms. Beninato said, "That's my house and that's the one that's under appeal. That's 604 Galisteo, the one to the right, all the way back by the light. As you can see, it's about 120 feet from the street. As you can see, it's about 120 ft. from the street, it is above grade about 14.8 ft. which is what the H-Board approved and it sits down and sits in and it's not a very obtrusive sort of building. When I first bought that building, it was one story, it had had a sun room added on that was very short, you would step up into the sun room. It has three zero lot lines and maybe the only building in my immediate area that actually does have three zero lot lines. Which means it was cave-like back there, even with a couple of opening skylights, one in the kitchen and one in another room. And, I'll give you different picture of that and let you see it a little bit better. So, I think that gives you a little bit better view of the house itself. It has the appearance, I guess, of a little bit of a clerestory which is what the H-Board wanted it to look like. And, the windows and everything are exactly what the H-Board did in fact approve."

Ms. Beninato continued, "The problem is with the story. And what happened is I wanted to put a second story up there, well because, there's a lot of reasons, and I'll go into those in a minute. And so, my intent was always to set it back at least 10 ft. I was never intending to come closer than 10 feet from the lot line. Because I knew what windows were opening, I was not going to get up there to open them, I certainly wasn't leaving a ladder up in my living room, me trying to move it around. I have an upper back disability and that just wouldn't even be a possibility."

Ms. Beninato continued, "I didn't draw the second story, because when I began the project, I wasn't really sure how I was going to do that, or what kind of second story I was going to do, whether it was going to be a loft or could it be a full second story. Because of drainage requirements and having to backfill that, I got an extra foot and my house actually stepped down into the house. So, actually, within the interior had enough room to do adequate two stories... to comply with zoning requirements. When I

realized that I could do that, which was after they approved the backfill with the foot for the drainage requirements, I asked what do I do, and I was told to pull a second bathroom permit and get inspections and that would be fine. Had somebody said, 'Do the second floor drawing.' I would have done the second floor drawing at that time."

Ms. Beninato continued, "I'm here today to petition you to allow this second story and not make me tear it down or set my wall back, which would be the consequence of denying this variance. I believe, actually, that I have met all the criteria and I could go into arbitrary and capricious and other objections, but it's in your packet. It's in the packet I gave you recently, so I'm not really going to go into that part. I really want to emphasize how I meet the criteria and why equitably, you should, I would hope, give me this variance."

Ms. Beninato said, "So, this is a partial plat, so what we see here is on the southwest corner, it's 8.6 feet from the lot line, which is about 16-17 inches. If you look on the southeast corner, and you turn it around, you'll see that this actually is more distance, so this is actually 9.6 feet from the lot line. My intention was to make these ten and a half feet. And on this part here, what happened, is that the survey itself was wrong. And you have in your packet two surveys. One was done in 1989, by Paul Serna. And, at that point, if you look on page 2 of the information I gave you, you'll see an as built survey and that was done by my neighbor's surveyor. And, you'll see that there's a garage right near my house. So, this garage was put up in the seventies, and it made, I suppose in 1989, getting this lot line exact rather difficult. No GPS nothing like that."

Ms. Beninato continued, "When I went in to put in the drawing, because that is what I was red tagged for, not having the drawing and the plans, then after a lot of things that came up, it turns out that the only problem was the setback. And it turns out that that survey in 1989 was incorrect by 9 inches to my detriment. So, on this corner of my house... on this corner of the house, had that 9 inches not been off, I would have been back 10.4 feet. And the reason it wasn't 10.5 feet was because I had added 2 inches of rigid insulation on the outside. Otherwise, it actually would have been 10.5 feet. On my plans, which I think you have copies, but I would just like to get a copy of the floor plan itself. By the way, this is the original survey where the lot line, where again it's off by 9 inches. And if you look here... right here at the corner of my house before it was built out by my predecessor, it says 1.1 feet. Down here, it's 18 inches. And so, again, I was relying on this survey and I was being conservative and not taking it at 18 inches, but only taking it as 9 inches, excuse me, I was taking it as 18 inches, even though another survey showed it being actually more distance there."

Ms. Beninato continued, "This right here is the area of the second floor. This is south, going toward 610 Galisteo. If you look at this drawing, the intention was to make this... it was 12 by 24 and the idea was to set it on this wall right here, and just coming over by about 6 inches. The interior of the kitchen here is 10 ft. 3 in. on the inside. It's adobe. It has layers of plaster on the inside, so I figured it was about 11 ft. So, even though this thing overhangs that wall by about 6 inches, again, I should have had 10.5 ft. back from the lot line, or from the outside of the house, which is on my property, it doesn't encroach

on anybody's property. So I should have again been adequately set back. For some reason, I don't know, again, these carpenters that I had working for me were highly recommended. I don't know if they looked at the roofing plan rather than the floor plan. But for now, this came out into the kitchen and that's why this 16 inches off, because not only is the survey off, but there was the building itself. I did not intend it to be this way, I did not ask them to do it. It just happened."

Ms. Beninato continued, "The City has known that there was a second floor since January of 2007 at least, if not actually earlier, when the framing inspection occurred. And, at that point, I was told that I would have to get a letter from an engineer because Mr. Padilla had some concerns, and so I did. And, I kept going with my building permit. And I'd like to switch back, I just want to show you a picture of what the second floor looked like in January when it was inspected. So, that's what it looked like. That's the second floor. Obviously, it was in place in January 2007 and that's what was looked at when the inspectors came out for insulation, for plumbing, electrical, for all inspections."

Ms. Beninato continued, "So, what happened is, that's January. I get Mr. Purdy and Mr. Padilla was at the end of October, excuse me, the end of September, tell me they had a complaint. They told me that what I needed to do was to come in and submit a water budget on... I think that was a mistake, because the complaining person said that my bottom floor was 524 sq. ft., but in fact on my plans, which you do have, it shows it as 120 sq. ft., it was 120 sq. ft. And the total project, even if you count the second floor is less than 400 sq. ft. So, I didn't need a water budget, but that kind of held me up, because I had to get the plumber to write something out for that. And I was going away to work for FEMA and I did let them know I was doing that and that I really wouldn't be able to get everything in to them to the end of the year, and they said that was fine. But, then I got red tagged at the end of the year. Actually, I'm wondering if it wasn't really the beginning of 2008, because I did have a final electrical January 2, 2008, and I don't think I could have gotten that if I had been red tagged and there are some discrepancies in the dates of the red tag in the City file and on the actual red tag."

Ms. Beninato continued, "So, I'd just like to go why I think I meet the criteria. And I think in your packet my objection is based on arbitrary and capricious and all that kind of stuff. It's in the packet. I really don't want to that. I really want to emphasize why I believe I qualify for the variance. And also, I'd just like to enter into the record the pictures that I do have, there's more of them on here, but again, I'm not really going to go those unless I have to. But I do have one for City Clerk and for the Legal Department. [Ms. Beninato submitted a CD for the record Exhibit "7."],"

Ms. Beninato continued, "So, I think I've met the criteria because, one, it's rather the mistake is of your own doing. As I said, the survey, actually I went and got Mr. Serna to come back and do a second survey through Morning Ridge and it turns out that instead of 18 inches at one point, I have 9 inches. So, again, I relied on the survey of record. My title company relied on that survey. So, again, that's not my mistake and I think it's normal to rely on recorded surveys. Again, the City approved my plans with the backflow, because that was brought up. And I asked about the second story, and again, if I had known I had to modify the plans then, I would have done it right then. I will say, that at one point, early on in this

project, I realized that there was a mistake made and the height was going to be too high. I actually spent a day... I tore out a day and a half of work and several hundred dollars of work, so that I would make sure that the height was correct. So, again, if somebody had said to me your setback isn't correct, when I was framing it, I probably could have done something about it at that time. But, my house was 95% complete, really, by the time I get red tagged and by the time the neighbor complains. And I will say, in equity, that my neighbor knew in the beginning of June that I had a second story and waited until the end of September to actually file a complaint, mid-September and then again the end of September."

Ms. Beninato continued, "The other criteria... is the literal interpretation of the provisions of this ordinance would deprive me of rights commonly enjoyed by other properties in the same district. Many buildings in my area do have second stories, so I would be deprived of that right. And, under historic, you are allowed to have a second story, it has to be partial, but you are not denied a second story. And it's really a question of, do you have enough height to do it. And there are other buildings with zero lot lines, but as I've mentioned, I believe I'm the only one with 3 zero lot lines. And at one point when that garage was up, 6 inches on the south, 6 inches on the west, about 2.5 feet on the north with one very small window that wasn't going really anywhere. It didn't really help anything, because it came up to a wall. But I don't have, that everybody else has in the neighborhood, and probably in many places in the City, adequate air. There was not really that much light, and certainly not enough ventilation going on at all in this house. So, my idea was, again, to try to get adequate light and air and make the house more habitable so that, either I could live there, or that I could rent it out as affordable housing, because I do try to make my houses, my rental on that property, affordable. Because it is a middle class neighborhood and I'd really like to keep it a middle class neighborhood where people... real people are living there and they're not all condos and vacation rentals. So, again, I'm just asking to have the same adequate light and air really that everybody else had. That was my goal in trying to do this"

Ms. Beninato continued, "I will not get any special privilege by giving me this ordinance [variance?], because, as I say, several have second stories. I'm just asking for a bedroom that meets current standards for light and air, again so it'll be habitable. And, I guess I could go on about that, but I think that really is what I'm doing. I'm not getting any kind of special privilege. People do have second stories and they do have adequate light and air. And I know that people have come in after the fact and then changed their permits, and they were okay and nobody red tagged them."

Ms. Beninato continued, "This is really the minimum variance that I need to make reasonable use of the property. I mean, again, it's 95% done. It would be an incredible waste of resources to make me tear it down at this point. I am low income. I am disabled, and I really can't afford it. I don't have the resources, actually, to take it down at this point. And even other people who have zero lot lines usually, and I can name several in my neighborhood, that have windows on the north and south side. So even though there are zero lot lines, they actually have adequate light and air, because it's usually a one room depth. So, all those houses were one room depth, so you have adequate light and air. Mine, for whatever reason, that just didn't happen."

Ms. Beninato continued, "And I can make reasonable use of the property because, again, I'm entitled to a second floor. I only have one bedroom and it's downstairs. There's no adequate cross-ventilation, and there's no way of constructing a bedroom on the first floor that does have that with the 3 zero lot lines. As City staff testified, I was 95% done and they didn't red tag me for almost a year after they knew the second floor was there. I have been living in the house, and it's really a much more habitable house than it used to be. I really can't be on the first floor sleeping because there's so many mechanical noises and it does interfere with my sleep."

Ms. Beninato continued, "I have rented the house from 2001 onward, until the construction, and it was really difficult to rent. It would take sometimes months to rent it, because people would drive up and they wouldn't even come in and they would say, this is way too dark, I don't even want to look at it. So, again, to make it more habitable, to make it more usable, I needed to do something different. If I wanted to rent it out, it was also difficult because there was only one closet in the whole house. And, maybe one person could live there, but if there was two, there wasn't enough space. And this way, also, if my daughters come to visit, they are adults, but they do visit me, we have enough room for them, their spouses to visit. I don't have any other house to move into, because my front house, unfortunately one of my tenants smoked tobacco and had somebody smoke in there, and I am highly allergic to tobacco and I probably won't be able to be in that house for about a year."

Ms. Beninato continued, "I believe the variance is in harmony with the general purpose and intent of the chapter and will not be injurious to the neighborhood. And, if you look at the letter that I gave you from the Don Gaspar Neighborhood Association, and Mr. Komis reminded me the other day that he had actually written this letter, but I had forgotten about it. But, it just addresses the general welfare issue which I also addressed. And I would like to read that to you [Exhibit "5"] They are, the Association was in support of having the house raised up to 14.8, they were even in support of it going 16.8, which, when I got my height calculation, it was 16.8, but then the H-Board decided not to give the extra 2 feet and I was 14.8."

Ms. Beninato then read portions of the letter into the record. Please see Exhibit "5" for the complete text of this letter.

Ms. Beninato continued, "There's also an alley back here, let's see if I can find it, oh, it's not really, it's back in here... It's back here and we would find syringes and lots of alcohol bottles back here. We don't find those any more back there. So, the Don Gaspar neighborhood was in support of this. I submitted a letter to you from my neighbor who is actually the neighbor that is adjacent to my building and within 6 inches and that's from Larry Casados, at 1407 Paseo de Peralta, and that's on page 3 of the 46 page packet I gave you. In Mr. Casados's letter, he has no problem with my second story, he's giving me a character reference telling you all that I'm a good neighbor, that's been his experience with me."

Ms. Beninato said, "I have another letter to you today from Charlene Ortiz [Exhibit "6"] who is another neighbor. Ms. Ortiz's family owns a lot of property on Chavez Place, is also in support of this

project. She has pointed out the other two story buildings within the area 600 Galisteo, 521, etc. She's urging that you give me this variance. She feels that the project has given fees to the City, that it would create a hardship for me and again, that you should give me, or she would request that you give me this variance. You also have a letter in there from another woman who knows me who just volunteered to give me a character reference because again, I was fairly personally attacked fairly strongly and she just offered to do that for me."

Ms. Beninato continued, "And I would say also that the Don Gaspar Neighborhood Association also came in and was in favor of the variance at the BOA meeting. So, other than the Nelsons who are opposed... Ms. Nelson who no longer lives on the property has a problem for privacy reasons, but really, my house doesn't interfere with their privacy and Mr. Nelson said it didn't, and he didn't really care about the second story, so there's really nobody who actually lives there who is in opposition to it, other than for other reasons that don't really comply with the ordinance. This is what I see out of the second story, so I really don't interfere with anybody's privacy. I look into a parking area and then I look across to the next lot at a two story building which also looks into the parking area of 610 Galisteo. And, I'm also not a safety hazard, because this is the side that's too close. It's not a safety hazard, because there's no structure, probably within 70 feet of that building. So, again, my neighbor who's really impacted, Mr. Casados, is in support. The two neighborhood associations are in support, and nobody here really cares about the second story, even people that have complained."

Ms. Beninato said, "I think that's all I need to say. I will say just for correction on the affidavit I gave you, the address is 603, not 607, and under Paragraph 7, it should read 613-B, not 613, and if you look at that affidavit which is in your packet, you will see that there are many properties around me who have gotten away with things, not been red tagged, not come forward. And so, again, I've come forward, I'm trying to comply with this process and I believe that I have."

Mayor Coss asked Ms. Beninato if she would like to call witnesses or rebut any testimony from City staff.

Ms. Beninato said, "I think that my rebuttal is on the record and I think that's sufficient. I'm really trying to focus on the positive here tonight and why it is that I believe that you should grant me this variance, rather than try to go point by point and rebut. I think that the rebuttal is there. If it comes up, and you have questions, I'd be happy to address that."

Speaking to the Request

There was no one speaking for or against this request.

The public testimony portion of the public hearing was closed

Councilor Wurzbarger said she has a question of staff on a point brought up at the end of the presentation. She asked if this variance was to be granted and if someone wanted to build on the lot next door, what would be the impact on that person's setback.

Mr. Esquibel said the first floor of a house in R-1 and even in RM districts require only a 5 ft. setback from the side yard property line. He said as Mr. Beninato indicated, the initial location of the first story still met the 5 ft. setback. He said the clerestory doesn't trigger a 5 ft. setback and wouldn't require a setback at all, except the setback which would be required by the building permit, or if it was part of the first floor that was at the zero property line. He said, to address the zero property line in the RM district along, the residential district, the applicant can negotiate with the adjacent property line to be able to build at the zero property line.

Mr. Esquibel continued, "If the neighbor agrees to that, that is done through a lot line affidavit. And what the zero lot line affidavit is doing for the neighbor is he is agreeing that he will build either 10 feet away from that building, or they both agree to utilize a common wall to build up against that house. If the neighbor fails to agree to that, then technically, you don't have that zero lot line affidavit authority to build. The problem is that second stories don't get that option to deal with that zero lot line affidavit. And, I believe that had to deal mainly with some fire protection issues as you get that second story getting up. So, how that affects the adjacent property owner, I believe the adjacent property owners property as it was developed had an area of open space right up against that particular side where that house is being developed. Originally, there was a garage and they did share a zero lot line, but the garage was demolished as part of their development to meet the lot coverage requirements and the parking requirements, along with the open space requirements. So, technically, if Ms. Beninato were to build at zero or to obtain the variance, I guess in many cases, the Board of Adjustment has always asked for that zero lot line affidavit. I don't know if it affects it any other way aside from that."

Councilor Wurzbarger said she is trying to prevent future problems, if the Council were to grant the variance. She said she is speaking of the vacant lot and not the garage or anything else, if there is a vacant lot and someone wants to build something next door, are they going to have to get permission from Ms. Beninato to build next door, under the condition she's created and we would have endorsed by having this variance.

Mr. Esquibel said Ms. Beninato's house is already at zero on the first floor.

Councilor Wurzbarger said she isn't talking about the first floor. She is asking what is the impact from the second floor.

Mr. Esquibel said he doesn't think the second floor would trigger anything on the adjacent property with regard to a zoning requirement of second floor having to be set back 10 ft. from the side yard property line.

Councilor Wurzbarger said she is confused about this logically, because she thought the reason for the variance, according to staff report, is that there are possible fire, safety or other concerns. She asked if you have to have 10 feet on one side, why you don't need 10 feet on the other side.

Mr. Esquibel said, ultimately the variance that was presented to the Board of Adjustment did not meet the specific section of the Code to warrant an easing or variance of the Code, and Ms. Beninato did not meet those findings of fact. He said the Board of Adjustment did not render a decision in her favor as the result of her not meeting those standards. So, the appeal came to the City Council, because the Board of Adjustment denied that. He said it doesn't necessarily have an issue relevant as to whether there is a conflict between the neighbors. It was more the factual aspects of how she met the Code requirements.

Ms. Beninato said, "I would answer that for you Councilor. There is no safety hazard on the south side where it's too close. On every other side... first of all on the east side, it's my property. On the north side, it's 12.5 ft. back and on the left side it's 10 ft. back, so it meets it on the other two sides. On the north side, there is nothing there. There may be a shed, but I don't know that it's totally adjacent to that building. There is an adobe wall between my building and that building. On the south side, which is where the potential problem could be, that property has pretty much been developed to it's max. It's three condos, and pretty much 40% lot coverage and that area that I showed you is common open space so there will be no parking there.

Councilor Bushee said in the minutes or in some memo, it says a permit was not taken out for a second story, it was just for a clerestory. She said she would guess then, that it wouldn't meet the requirements of the Board of Adjustment, given that it wasn't for a second story construction. She said at the beginning, Ms. Beninato said if the appeal wasn't upheld that two things would happen: the second story would come down completely and the wall would be moved. She asked Ms. Brennan to comment on this.

Kelly Brennan, Assistant City Attorney, said there are two solutions. One would be to remove the second story and make it into the clerestory which was approved and permitted. Another, would be to move the wall in to meet the setback requirements.

Councilor Bushee said the Code is about fire safety. She believes that's what we're talking about here, and not just about meeting the Code.

MOTION: Councilor Bushee moved, seconded by Councilor Calvert, to deny the appeal and to approve the Findings of Fact and Conclusions of Law from the Board of Adjustment in this case.

CLARIFICATION BY MS. BENINATO: Ms. Beninato said, "The idea was again, that for Historic, is I had to call it a clerestory, that's what they wanted it to look like. They had Randy Bell on the Board at the time. He didn't want anybody to have a second story. My intention was originally... was to have a second story there of some sort because of the need for light and air. The part, the south side, that's too close, is never

going to be a fire hazard, because there is no building. The nearest building is literally 70 feet from that second story. In every other direction, it's set back adequately for safety. And again, my intention always was to set it back over 10 feet, so that if I could make a second story up there, I would be allowed to do that. And, I wouldn't build just a clerestory and made it 14 ft. high, it's terribly energy inefficient, and I wouldn't have done that at all. My intention, again, was to have some kind of second story, work with the Board and make it look like a clerestory and then inside, if I could meet zoning requirements, which I did, to make two adequate stories that actually meet Code for height and all of that. So, interiorly, there is nothing that violates Code. I had it inspected. It was inspected all the way through. And, again, I would ask that you reconsider your motion here."

DISCUSSION: Councilor Wurzburger said, in the Findings of Fact, Section 6(a) states, "That decision to construct the Second Story without a building permit was the Applicant's. That decision triggered the 10-foot setback requirement. The violation of the 10-foot setback requirement is thus due to the choice of the Applicant to construct the Second Story without a building permit. Had the Applicant sought a building permit to construct the second Story, prior to commencing construction, the 10-foot setback requirement could have been complied with and no variance would have been required." She asked Ms. Brennan if this is a correct statement, and Ms. Brennan said that is a correct statement.

Councilor Wurzburger said she thinks that fact has nothing to do with the issue of a correct or incorrect survey – these two facts aren't related.

Ms. Brennan said this is correct. She said if the intention was always there to build a second story, the proper course of action would have been to obtain a building permit which included a second story. And that is the issue here, that it was built without a permit. And, had that been submitted, even if at that time it had relied on another survey, it might have been more defensible, because it had been done under a permit. But, presumably there would have been some checking at the time.

Ms. Beninato said, "The survey, actually the incorrect survey, is absolutely vital, because, even if I had applied for a second story permit, my survey was going to be wrong. And, I would have looked at the survey and set it back, thinking I had 10 or 10 ½ feet when I set it back. Again, it was always my intention, whether I called it a clerestory or second story, my intention was always to set it back that 10 ft. And it was the survey being wrong that pushed at least one corner too close. Otherwise, we wouldn't even be standing here, because it would have just been a matter of coming in and changing the plans to show the second story."

Councilor Wurzburger asked Ms. Beninato, again, to tell the Council why she did not get a.... [Ms. Beninato interrupted Councilor Wurzburger].

Ms. Beninato said, "Because I wasn't sure what was going to happen. I had a step down into the house.

Councilor Wurzbarger asked Ms. Beninato if she is saying once she started building she wasn't sure what she was building.

Ms. Beninato said, "No, I knew I was going to go up 14.8 ft., that I knew, above grade, because that's what the H-Board allowed me. So, I knew I was going to make part of my building up to 14.8 ft. My intention then was to set it back. What I didn't know, is how much room I was going to have inside the building, because my house isn't at level. It steps down, you step down into the house, so I already had a foot into the main part of the house below grade. And, the sun room that had been added on by the owner before me, that stepped out. And so that was part of the problem of trying to visually understand what grade where I was going to be at, how much room inside the building that I was going to have."

Councilor Wurzbarger asked Ms. Beninato at what point she realized she was building a second story.

Ms. Beninato said, "When I got the permit issued to me, I said at that point to Joseph, I think that's his name, and I don't remember his last name, he takes permits in, and that's where I picked up my permit."

Councilor Wurzbarger asked if this was when she picked up her original permit.

Ms. Beninato said, "Yes. And I said, now that you've approved it with this backflow, I think I can do a second story, what do I need to do. And he said... and let me also say Councilor Wurzbarger, that I did pay my value on my permit for a second story, because in case whatever I could do, I valued it as if I was going to build it out totally. I also asked what to do, and all I was told... I wasn't told I needed to show the second story. I was told to pull a bathroom permit and then we will inspect and that's what you need to do. You have an affidavit from the plumber in the packet. He said pull the second permit, and he was there when Mr. Padilla was there in January. And again, the inspector knew the second story was there. You saw the picture of the framing. That's what it looked like it looked like when he came in. That second story was very obvious to the Inspector in January 2007. At any point he could have said, it's not in your building plans, but he didn't. And had he said that, I would have done it. And even if we assume, that the Memo that Mr. Padilla put in is true, being written, the City knew the second story was there. I also relied on that inspection to make sure that, in fact, everything was okay. So again, I'm relying on City Inspections, I've gone all the way through, I got a final electric, final grading, got final for the plumbing, got the footing, got the insulation."

Councilor Bushee said a permit for a clerestory and a second story are two different things. Structurally you need to do many more things to put a second story on. She asked staff to comment. She isn't following how this is confusing at this point.

Yolanda Cortez said the City issued a building permit to Ms. Beninato for a living room addition and a clerestory on October 17, 2006. They also issued a plumbing permit in November. She said on packet page 98, there is the amendment for the second floor which was submitted to the office much later on November 2, 2008. She said on packet page 99 there is the existing floor plan and the proposed floor

plan. She said the plumbing permit indicates that six fixtures were a part of this permit, associated with this plan. She said, on the proposed floor plan, there is a toilet, a shower and a sink which is basically a bathroom which was relocated to the north side. She said there is a laundry room where the existing bathroom was located, so you have a washer and dryer, and a mechanical room. She said there are 3 fixtures in the bathroom, one each for the washer, dryer vent and the water heater which are the 6 fixtures that the plumber pulled related to the original permit and not related to any second floor addition.

Councilor Bushee asked if Ms. Beninato amended the plans, and paid a difference, and if the plan was amended to include a second story.

Ms. Cortez said she submitted an amendment, so it is pending, it was not approved and it is not a part of the approved set of plans.

Councilor Bushee asked if she was already red tagged at that time, and Ms. Cortez said yes.

Ms. Beninato said, "The heater and the washing machine were already there. If you look at my notarized letter from my plumber, which is page 4 of the packet, he says, and he is a licensed plumber, the permit that I pulled was for an upstairs bathroom and a relocated downstairs bathroom, did not pull a permit, did not count those fixtures. And again, there were plumbing inspections, and it's clear again from the photo as well as the plumbing inspections, that there was a second floor. Had at any point anyone had said to me, come and do this, I would have done it. I was doing it. In fact, as I came in, I was being red tagged. And the reason it took so long for me to come in with the new plans when I was asked, is number one, I was deployed to New Orleans for FEMA and I was told I needed a water budget, which I actually didn't need because my development was less than 500 sq. ft., and that again is the reason for the time lag."

Councilor Wurzbarger asked Mr. Purdy to come forward. She said she knows when he does an inspection he has the plans in hand and on site, and they are required to be on site. She asked when he was doing the framing inspection if he was using a set of plans which showed a second story.

Michael Purdy said Inspector Bobby Padilla did the frame inspections. He said he has a Memorandum from Mr. Padilla which was submitted at the Board of Adjustment which states he asked Ms. Beninato for the approved plans when he arrived on site, noting he has a copy of the Memorandum for the Governing Body. He said Ms. Beninato gave Mr. Padilla a set of plans, and in that set of plans was a second floor framing detail. He said Mr. Padilla disapproved it because there were structural issues, and he wanted a structural engineer to confirm that the structure would hold the loads on the second floor. He said Mr. Padilla was under the assumption he was looking at the approved plans, and that the second floor was approved, but it wasn't, in fact approved.

CROSS EXAMINATION OF BOBBY PADILLA: Ms. Beninato asked that Mr. Padilla be put under oath and actually say that under oath, because he hasn't been under oath and made any statements, it's all hearsay and all secondary information. She said, "You have a notarized letter from the plumber that says

he was there when Mr. Padilla was there and he did not see Mr. Padilla look at any plans. And I can tell you that anytime an inspector has come to my house and looked, they don't look at the plans, they look at the framing to see if there is a violation."

Councilor Ortiz asked Ms. Beninato if the notarized statement from her plumber to which she is referring is also hearsay.

Ms. Beninato said, "It's better than a memo that's not notarized at all, and again you accept notarized statements and it is in the record, and he did swear under oath that what he was saying is true."

Councilor Ortiz asked Mr. Padilla to come forward and asked if he has the memorandum with him, and Mr. Padilla indicated he did. Councilor Ortiz asked to wait to hand out the Memorandum.

Bobby Padilla was sworn by Yolanda Vigil.

Councilor Ortiz asked Mr. Padilla to state his name and title.

Mr. Padilla said his name is Bobby Padilla and he is the Building Inspector Supervisor.

Councilor Ortiz asked Mr. Esquibel to show Mr. Padilla the document he is about to hand out, and Mr. Esquibel did so.

Councilor Ortiz asked Mr. Padilla, "What is that document that you're looking at Mr. Padilla."

Mr. Padilla said, "This is a memo to Michael Purdy, Acting Director."

Councilor Ortiz asked Mr. Padilla, "Did you draft that memo."

Mr. Padilla said, "Yes, I did."

Councilor Ortiz asked Mr. Padilla, "Is everything that's in that Memo your work product."

Mr. Padilla said, "Yes."

Councilor Ortiz asked Mr. Padilla, "Is everything under that memorandum true and correct as far as you know."

Mr. Padilla said, "Yes."

Councilor Ortiz then asked Mr. Esquibel to pass out copies of the Memo to the Governing Body [Exhibit "8"], and Mr. Esquibel did so.

Councilor Ortiz said, "I don't have any other questions for Mr. Padilla until I read the Memo that you said under oath is true and correct as far as you know."

Mr. Padilla said, "Yes sir, it is true."

Ms. Beninato said, "And I would like to cross examine Mr. Padilla, then."

Councilor Ortiz said, "Mayor, in order to preserve the rights that Ms. Beninato has, I would suggest you allow her to cross examine him."

Mayor Coss said this is appropriate since Mr. Padilla has been put under oath.

Mr. Beninato asked Mr. Padilla, "Could I have a copy of the memo, I'm sure it's someplace in the packet, but I..."

Mr. Esquibel provided Ms. Beninato with a copy of the memorandum [Exhibit "8"].

Ms. Beninato asked Mr. Padilla, "So, Mr. Padilla you wrote this memo, what date was that memo."

Mr. Padilla said, "December 17, 2009."

Ms. Beninato asked Mr. Padilla, "And when did you first come out and do the inspection on my house and the framing."

Mr. Padilla said, "I believe the first date was, to the best of my recollection, was January tenth.

Ms. Beninato asked Mr. Padilla, "And you asked me to get a letter from a licensed engineer to support.. to show that the second floor was structurally sound, did you not."

Mr. Padilla said, "Yes."

Ms. Beninato asked Mr. Padilla, "So you knew the second floor was there, and when did you realized that the plans were supposedly falsified."

Mr. Padilla said, "We realized the plans.. as soon as the complaint had come in, that a second story was constructed, and we reviewed the documents, and there was not... they were not part of the documents that we had."

Ms. Beninato asked Mr. Padilla, "And exactly where, what page on these plans, where was it in my plans... here's my original set of field plans, right here."

Councilor Ortiz said, "Mayor, while Ms. Beninato is getting her plans together, I want to correct the record, that she stated on a question that Mr. Padilla believed that she had falsified the plans. In fact, if you look on the face of the memo, it says actually that he was unaware of the fact that the upper floor level framing plan for the loft area was not part of the approved set of plans. So, there is no indication.."

Mayor Coss said, "He didn't say that they were falsified."

Mr. Padilla said, "No sir, I did not."

Ms. Beninato said, "Here's the original set of plans. Where did you see it. Where was it. All of these are perforated, are they not."

Mr. Padilla said, "At the time of my inspection, the plans that were given to me, were given to me in such a manner, that they were just put together. I did not verify whether all of them had been stamped, or whether there was a full copy. I did look at a floor framing plan which was provided by Ms. Beninato, and that's how I conducted my inspection."

Ms. Beninato said, "I don't have a floor framing plan. I didn't put one in until after I actually was asked to do that in September, when Mr. Padilla came back. This is the only set of plans I have of my property. So, again, I'm putting it into the record that these are perforated. Every page in this plan is perforated. That would mean that if I slipped another page in here, it wouldn't have been perforated. And it would have been obvious that it wasn't perforated. Because again, the City is supposed to give you a copy that has this perforation that says City of Santa Fe on it. And, if you look at this, there's only one place where the... I took.. the only thing that I've ever taken off of here is the plat, because I had to reproduce it. But you can see there's no staple holes. I'm not taking it in and out. And these were the original plans. And yes, I restapled it once." *[STENOGRAPHER'S NOTE: Although Ms. Beninato stated this is for the record, these plans were not submitted for the record.]*

Ms. Beninato said, "But Mr. Padilla, again my question is where was it here. Like what page. Where were the plans. Where were we when we did this."

Mr. Padilla said, "I think we were in the living room area, on the lower floor, when you provided me with the documentation that I asked."

Ms. Beninato asked Mr. Padilla, "And did you jump up and down on my second floor to test it."

Mr. Padilla said, "I don't recall that I jumped up and down."

Ms. Beninato asked Mr. Padilla, "And did you notice at the time that there were no perforations... that that page was not perforated."

Mr. Padilla said, "I did not notice."

Ms. Beninato asked Mr. Padilla, "Okay. And did you bother to measure the setback at the time."

Mr. Padilla said, "I was not aware of the issue, no."

Ms. Beninato asked Mr. Padilla, "And you didn't measure the size of the windows or height of windows or anything like that, did you."

Mr. Padilla said, "Our particular frame inspection does not require that we measure the height of the window."

Ms. Beninato asked Mr. Padilla, "Okay. And then suddenly you, because of this complaint that came in, in September, you came back. When you came back, you looked at my plans again. Isn't that true. You and Mr. Purdy came back at the end of September and asked to look at my plans."

Mr. Padilla said, "I can't recall whether we've seen the plans or not."

Ms. Beninato asked Mr. Padilla, "Okay. Then if I told you, you did, would you contest it."

Mr. Padilla said, "I guess I wouldn't contest it, or I wouldn't..."

Ms. Beninato asked Mr. Padilla, "When you did look at the plans again, do you remember seeing the second floor plans in there."

Mr. Padilla said, "I don't recall looking at plans."

Ms. Beninato asked Mr. Padilla, "Did you tell me in September that I had to submit a second floor plan."

Mr. Padilla said, "I do believe we required you to submit the amendments to the plan that were required for approval."

Ms. Beninato asked Mr. Padilla, "And that would have been for the second floor, is that correct, the floor plan of the second floor."

Mr. Padilla indicated yes.

Ms. Beninato asked Mr. Padilla, "Okay. And I guess that's all the questions I have, your honor. I just want to again say that I feel that when somebody comes in and writes a memo ten months later, and has asked you about a second floor, again, it seems very self serving."

Councilor Ortiz said, "So Ms. Beninato, in light of your questions and the evidence that you put forward on your cross-examination, the plans that you have in your hands, those are the approved plans from the City."

Ms. Beninato said, "Yes."

Councilor Ortiz asked Ms. Beninato, "They haven't been altered in any way."

Ms. Beninato said, "They haven't been altered, I would be happy for you all to look at these plans."

Councilor Ortiz asked Ms. Beninato, "So, can you show us on that set of plans where the approval is for the second story addition that you have."

Ms. Beninato said, "There isn't. That's the whole problem. Again, I mean, what happens, and let me try to be clear. The clerestory, we called it a clerestory because that's what the H-Board wanted it to be called. They wanted it to look like a clerestory. It was, according to them, 14.8 feet high, but they didn't realize that I had room under the floor, below grade."

Councilor Ortiz said, "So, Ms. Beninato, it's your testimony that the set of plans that you have in your hand now, which are the set of plans that were submitted and given back to you by the City, do not have anywhere on them any second floor addition."

Ms. Beninato said, "Right. They do not have a second floor addition. They have a second floor bathroom permit, is what they have. And they have a valuation that is for a second story. That is the problem. I didn't understand that I would have had to amend that. I came in when I was told I needed to amend it, and submitted it as soon as I could, due to being out of town, due to thinking I needed to get a water budget from the plumber."

Councilor Ortiz said, "Thank you Ms. Beninato. Mayor, I would just like to point out, I was able to find the memo that was testified to under oath by the Code Enforcement Inspector. It's on page 115 of our packet."

Ms. Brennan said, "Mayor I would just like to correct the record. The affidavit to which Ms. Beninato referred from her plumber is on page 4 of her handout. She stated that the plumber said that he did not see Mr. Padilla look at the plans, and in fact, I do not see that in the affidavit." *[STENOGRAPHER'S NOTE: No separate handout was entered for the record by Ms. Beninato.]*

Ms. Beninato said, "It says that he has no memory of him looking at the plans, that's what it does say."

VOTE: The motion was approved on the following roll call vote:

For: Councilor Bushee, Councilor Calvert, Councilor Dominguez, Councilor Ortiz, Councilor Trujillo, and Councilor Wurzbarger.

Against: None.

Absent: Councilor Chavez.

There was a short break at this time

3) REQUEST FOR APPROVAL OF AMENDMENT #1 TO THE PROFESSIONAL SERVICES AGREEMENT FOR WORKFORCE DEVELOPMENT SERVICES; MONTE DEL SOL CHARTER SCHOOL. (FABIAN TRUJILLO)

Kate Noble presented information from her Memorandum of August 12, 2009, which is in the Council packet..

Councilor Dominguez asked if the 10-20 students identified as participating in year 2, are not in this year, but the year after.

Ms. Noble, said no it is this year, and this year there will be 10-20 students and those are the outcomes required in the contract.

Councilor Wurzbarger said she thought that this is the year that they were going to train mentors, so that we aren't relying on Monte del Sol teachers.

Ms. Noble said they have already trained a team of mentorship program administrators at Capital High as part of the previous contract. She said this year, the Capital high team will be running the mentorship program with the support of Monte del Sol.

Councilor Wurzbarger said she would like some information from the students. She said these are all numbers, and she would like the people part of this, and asked if this can be done.

Ms. Noble said this year they should have those metrics because there will be students at Capital High participating in the program. The previous year, there was outreach and exposure, but no students from the traditional public schools in the program, so this year they will have those individual stories.

Councilor Dominguez said then project schedule on page 24 of the packet is the project schedule they will implement, and Ms. Noble said this is correct. Councilor Dominguez said then the one-on-one student meetings will happen in September which is the beginning of school year which is good.

Public Hearing

There was no one speaking for or against this request.

The Public Hearing was closed

MOTION: Councilor Calvert moved, seconded by Councilor Bushee, to approve this request.

VOTE: The motion was approved on the following roll call vote:

For: Councilor Bushee, Councilor Calvert, Councilor Dominguez, Councilor Ortiz, Councilor Trujillo, and Councilor Wurzbarger.

Against: None.

Absent: Councilor Chavez.

4) SHORT TERM RENTAL:

Items 4(a) and (b) were combined for purposes of discussion and public hearing, but were voted upon separately.

a) SHORT TERM RENTAL 18 MONTH REPORT. (JEANNE PRICE & TOMAS HERRERA). (Postponed at July 29, 2009 City Council Meeting)

A copy of the revised "Revenue Received By Short Term Rental Office," is incorporated herewith to these minutes as Exhibit "9."

A copy of the revised "Short Term Rental Operating Costs from 01/30/08 through 08/01/09," is incorporated herewith to these minutes as Exhibit "10."

Jeanne Price presented the Report, which is in the Council packet, noting there are revised figures for revenue and expenditures [Exhibits "9", and "10"] which differ from those in the report. She said the amendments proposed by staff are in the bill which is included in the Council packet. She said the proposed Planning Commission proposed amendments also are included in the bill. She noted Councilor Calvert submitted a proposed amendment as well.

Ms. Price reviewed the proposed amendments to the bill, which are included in the Committee packet.

Councilor Bushee asked if we are going to act on the ordinance this evening, and Mayor Coss said it is only for a request to publish.

Councilor Bushee asked if these costs are part of the report and Ms. Price said yes.

Councilor Bushee said it appears there are 1½ years of costs. She asked how accurate these costs are, in relationship to the revenue, and if the ordinance changes the revenue stream, will the City be in a shortfall situation. She wants to know how the new annual permit fees were decided.

Mr. Katz said there were a number of items which were one time start-up costs. The bill was adopted on January 30, 2008, effective May 30, 2008, to give the Land Use Department the opportunity to get geared up, purchase equipment and to allow staff to draft documents. He said there was a lot of work which was done the first year that won't be repeated. He said there were two full time people to process the permits, but going forward there will be only one staff person, so there will be substantial cuts in expenditures going forward because the renewal process will be substantially easier than the whole set-up process. He said this is the reason for a substantial cut in the fee.

Councilor Bushee asked if the Fire Department expenditures will change.

Mr. Katz said that won't change because the Fire Department is required to do annual inspections. However, he said he believes it will be easier this time, because the first time it dealt with people who weren't used to having to meet these requirements. They've now met them, to the extent that most of these are renewals. He said the anticipated expenditures are the same for the next year.

Councilor Bushee asked if there are projected costs, including salaries for the future.

Mr. Katz said that information is in the FIR in the back of the ordinance, page 58 and 61.

Responding to Councilor Bushee, Mr. Herrera said the complaints were about 20% of the calls and 8% were inquiries. The complaints were about parking on the street, not utilizing off street parking, too many occupants, but not so much regarding noise.

Councilor Bushee asked Mr. Herrera if he would be the one to investigate complaints about noise with a decimeter, and Mr. Herrera said yes.

Councilor Calvert said the FIR does seem to build a deficit over time. The revenue will continue at about the same level, but expenditures in 2011 are increased, so we will be getting in a deficit over time. He would like to give direction to staff to look at this situation, and build in a way to keep the revenues and expenditures in balance when this comes back to the Council for a public hearing.

Councilor Wurzbarger said she and Councilor Romero participated in several site visits related to fire inspections, and they are asking staff to look at those costs closely. She said the inspections in which

they participated took 35 minutes to an hour, and in the worst case it would be two hours, and we need to look at this more closely.

b) REQUEST FOR APPROVAL TO PUBLISH NOTICE OF PUBLIC HEARING ON OCTOBER 14, 2009: BILL NO. 2009-40: AN ORDINANCE AMENDING SECTION 14-14-6.2(A)(6) SFCC 1987, REGARDING SHORT TERM RENTAL UNITS. (COUNCILOR WURZBURGER AND COUNCILOR ROMERO). (JEANNE PRICE)

Councilor Bushee said she is concerned with the amendment that says you will make sure people have complied with private covenants, and that the operation of the short term rental is in compliance with any applicable private covenants. She said the City has never enforced private covenants and asked if this puts us in some kind of legal stead in terms of that provision, noting this could create false hopes that the City is going to do something.

Mr. Katz said that could be the case. However, all we're asking is that the Applicant inform the City that they are in compliance, it doesn't say we're going to enforce it. It's sort of a signal to the applicant to let them know, because presumably the applicant is going to give it to the City and not lie to the City about it. If they don't give it to us, then there is an area of discussion.

Councilor Bushee asked what happens if the HOA doesn't allow this type of operation, what recourse do they have, and will they implicate the City.

Mr. Katz said the City won't do anything because it's not the City's job to enforce the covenants.

Councilor Bushee asked the reason to give "lip service" to covenants in the ordinance.

Mr. Katz said he never thought we would sign an affidavit that says, "I'm swearing under the penalty of perjury that the covenants allow this," if I haven't looked at the covenants. The hope is that most people will make sure at that point, that what they're swearing to is true, and 95% of the people will check and swear truthfully and it will be clarified one way or the other.

Councilor Bushee said then you want to see that as a paper in the application.

Mr. Katz said if the covenants prohibit it, and the person doesn't have that in their application, we'll give them the license, but ask them if they really want to pay for a permit and license if the HOA is likely to tell you that you can't do it.

Councilor Bushee said it seems the City is giving them a certain standing by giving them a license. She is concerned that this is "double speak."

Councilor Calvert said Mr. Katz is saying it makes the person check, and if they want to falsify documents that's one thing. He said if it is not allowed, and they want to go against it, it gives the HOA the grounds needed to enforce its covenants. He said we never have enforced, and do not, enforce private covenants, and he doesn't anticipate that we will. He said we can give the applicant and HOA notice and tools if they need to do that in the future.

Councilor Bushee said the question around the Home Occupation Ordinance was similar, and we decided that we don't enforce covenants and made that plain and simple. She is concerned that we may be creating something which we might wish we hadn't.

Mr. Katz said this may be something that you don't want to add to the ordinance which is appropriate for the public discussion in this matter.

Mr. Katz said the Court of Appeals made a decision recently about homeowner covenants, and whether a covenant that says it can be only residential use means that you can't do a short term rental. The Court said that does not bar short term rentals. He will provide that decision to the Council prior to the public hearing.

Councilor Bushee suggested Mr. Katz look at the discussion around the Home Occupation Ordinance and see if he has different answers for the Council when we have the public hearing.

Councilor Ortiz said when the Council adopted this ordinance it was a close vote, and there were some of us who questioned the validity that this was such a rampant problem which needed to be addressed, as it was put out there by some members of this Governing Body as well as some members of the public. He said one of the purposes of the review was to get to the normative question as to whether or not we still need this ordinance – is it needed or not. He said he guesses the presumption is that we are going to live with it the way it is, and not revisit whether or not this ordinance is even needed. He asked if staff or members of the public can speak to this now or wait until the public hearing, and then at that meeting decide whether we want to repeal this ordinance.

Mr. Katz said Councilor Ortiz asked that the report be done at a public hearing, and the anticipation is exactly what he is raising here, is that there will be an opportunity to give comments on whether to continue or different suggestions on how it should be change.

Councilor Ortiz asked if we are going to allow the public to speak on all of these points.

Mayor Coss said this is published as a public hearing, but the only one which actually says hearing.

Councilor Wurzbarger understand the plan in bringing this item to the Council is that this would be the report, and there would be an opportunity to have these discussions when we have the public hearing.

Councilor Ortiz said, then we're only going to hear from the public on item 4(c), or are we going to hear from the public on the report itself that has been issued.

Councilor Wurzbarger understood it would be heard at the time the Ordinance was heard, and this is an information item for us tonight. As it goes forward, the public would be invited to comment on the report and the proposed ordinance changes.

Mr. Katz said a motion was made two meetings ago that this report be published as a public hearing, so comments could be made.

Mayor Coss and Councilor Ortiz said the whole thing is advertised as a public hearing tonight.

Councilor Wurzbarger said, although it wasn't her intention or that of Councilor Romero to do it this way, it seems it is published as a public hearing and there are members from the public.

Councilor Bushee asked if this would limit future public hearings.

Mayor Coss said no, there will still be a hearing on the adoption of the Ordinance amendments.

Councilor Dominguez asked how we can make a decision on Item 4(c) if we haven't adopted Item 4(b), and asked if these aren't related to one another.

Mr. Katz said he doesn't believe they are related to one another. He said Item 4(c) is a very discreet question. The Judge asked this Council to consider whether the fees that were adopted were supported by the expenses. He said we will present this evidence and Mr. Herrera will testify to the revenue and the expenditures. He said the public hearing on the report is "the whole ball of wax," the merits of the ordinance, how it is working and how it should be tweaked.

Responding to Councilor Dominguez, Mr. Katz said yes we could be amending the ordinance, and this is the reason for the request to publish notice of the public hearing in October, noting amendments have been proposed through the committee process.

Responding to Councilor Dominguez, Councilor Wurzbarger said Item 4(c) is a stand alone item and not based on anything new we're going to do, it's based on the Court order. And now that we know what it cost, then we can make a decision on what we need to do in response to the Judge's Order.

Mayor Coss said we will now have the public hearing on Items 4 (a) and (b), and then vote.

PUBLIC HEARING ON ITEMS 4(a) and (b)

Mayor Coss gave each person 3 minutes to speak to the ordinance.

Dena Aquilina said this Ordinance has made a slight improvement in short term rentals in her neighborhood, although 2 have been added, so she is more surrounded than she was before. She said a lot of the complaints don't reach the City. A lot of things happen late at night, and there is no one to call at the City, so they don't really hear about it. She thinks you would have a different feel about this if you lived in a place where the houses are very close to one another, and there is a constant turnover in the neighborhood, instead of having real neighbors who vote, volunteer and are part of the community.

Corina Nolting, 322 Sanchez, said this ordinance is very important. She suggested to the Governing Body to advertise properly and that the points be made as to what is going to transpire here, so that people are somewhat educated before they come here. She said many people come without any notion of what is going to be discussed. She said there have been changes in her neighborhood that have been very bad for their neighborhood. She would like to see a change in the way that this is handled. Also, there a telephone number should be advertised where people can call to make a complaint. She said many of the neighbors have no idea where to call to complaint. She is in favor of the ordinance and believe it is important for the integrity of the City because the neighborhoods are suffering at this time.

Charlie Goodman, CEO, qualifying broker and owner of Kokopelli. He said Kokopelli currently manages 125 properties which are affected by the Short Term Rental Ordinance. He said he hasn't received a single complaint during the time the ordinance has been in effect. He said he agrees with Councilor Ortiz, that the money the City collects for this, while it is used and designated specifically for the enforcement of the ordinance, City staff could be used elsewhere more favorable than supporting this Ordinance. He agrees that there have been some benefits. He said Kokopelli has complied with "most of those." It would seem that fire extinguishers which they had in all the properties, low flow toilets and the appropriate things are important. He said they had 20 houses which were affected by that. He said it isn't significant in terms of benefit in terms of what has occurred as the result of this. He said a great deal of his time is spent complying with the ordinance – monthly reports and such which the City requires. He said three studies were done prior to adopting the Ordinance. The first was done by the property management companies which estimated there were about 300 short term rentals that would be effected. He said Karen Walker did a study and came up with about 300. He said the City commissioned Barraclough to do a study which came up with about 300. He said "then the dust settled," and 350 permits were issued. He said he believes the Council thought this was a huge problem and that there were hundreds more than the cap of 350, which was chosen because it exceeded the 300 number that everybody came up with. He said the way the ordinance was structured, "we were, in effect going to be put out of business by 2013 with the sunset provision." He said several things have happened. He said the grandfather class was rolled over and allowed to flow in perpetuity, and the permits now flow with the land and not the owners. He said the only remaining issue is the fee. He said when the Judge ruled, she said there was "no substantial evidence to support the fee." He said with no substantial evidence to support the fee, the City is in the position where they can't create evidence after the fact. He would hope the Council would consider the fact that the ordinance is not really accomplishing a lot, there aren't that many complaints. He said Tomas said about 20% of the complaints were about parking and things like that, but his firm sees none. He is a little complaints by where the complaints come from, but maybe they're going to all the other people that were there.

Jim Mericle, 610 Canyon Road, Unit C, said he is one of those hated vacation owners. He said he and his wife spend a month here each year, and the rest of the time they have it available for rent through El Casa de Santa Fe. He said he never understood why the restrictions were put on the property, and asked if that has made a difference. He said that restricted their income, but not so much this year because of the economy, but in previous years it put a restriction on the income at the same time the City imposed the very large fee. He asked if the City considered using the Lodger's Taxes we're paying as part of the money that goes into City to help support staff time, rather than a separate fee, as well as buying a business license. He said the vacation rentals bring in a lot of benefits to the City. They bring people who want to have a Santa Fe experience, or tourists who want to explore the City beyond Cerrillos Road or the Plaza, and who will be spending money here. He said two women talked about not having neighbors. He doesn't understand why this is a problem for him as a buyer. He said their neighbors sold it to somebody who's not going to live there. He said this seems to be a whole different issue. He said imposing a restriction won't bring a person to live there in and of itself, and having this ordinance doesn't change their neighborhood issues one way or another. He agrees that it is good to have the rentals regulated in the sense that you know what's there, they're following Code, paying taxes. It does bother him that someone with a unit adjacent to them can rent all they want, but he can't rent his all he wants. He said there is discrimination throughout the bills to the property owners who pay property taxes, lodging taxes and yet are restricted on how much we can rent our places. .

Bruce Kingley, 209 Chapelle Street, said he is on the opposite side. He has vacation rentals which are legally zoned in the BCD. He said this bill has helped him. He started 10 years ago and has gone from revenues of \$100,000 annually to close to \$1 million in 2005. Then, as the vacation rentals increased, his revenues dropped. However, over the past year he is up \$70,000, which has allowed him to hire 2 new people to work. He said if you search Santa Fe vacation rentals on Google on the top 4 websites, there are more than 600 listings, noting there is some overlap. However, he doesn't believe there are only 350 rentals, and believes there are a lot more. He said this doesn't count Craig's list and other places where you can find vacation rentals listed. He is competing with people who are blatantly ignoring the limits and are renting unknown amount of times in a year. He said in looking the website, you can see 18 reviews for one property in one year, and if you have 18 reviews, that means 30 people have stayed at your property, because not that many people push reviews. He said overall he is happy and he would like to see more enforcement.

Stefan Huber, General Manager, Inn at Loretto, said he is also President of the Santa Fe Lodgers Association, and on the State Board. He is here on behalf of two constituents which is his own property that he operates and the entire Lodgers community of Santa Fe. He said the ordinance is very important. He said they understand that property rentals are necessary and that we have to live together in the symbiotic world. However, occupancy levels in the City have been dwindling. He said the Inn at Loretto, one of the most successful in town, is running a little more than 60% occupancy this year, with a deficit in rates to last year of about \$30 on average. He said, regarding oversight, if the City earned \$197,000 in tax you would have a revenue basis of \$2.8 million. If you divide that by 348 property rentals and 365 days, that is \$22 per day. He said the City could earn more revenue from all of the property rentals if you would use the dollars generated from the permits a little better. He said he is particularly interested in

how the oversight is enforced, and how to enforce the maximum days it can be rented. He said it seems there are more rentals than we see.

END OF PUBLIC HEARING ON ITEMS 4(a) and (b)

MOTION: Councilor Wurzburger moved, seconded by Councilor Calvert, to approve the request to publish in Item 4(b)

VOTE: The motion was approved on the following Roll Call Vote:

For: Councilor Bushee, Councilor Calvert, Councilor Dominguez, Councilor Ortiz, Councilor Trujillo, and Councilor Wurzburger.

Against: None.

Absent: Councilor Chavez

**c) HEARING ON REMAND OF GOODMAN V. CITY OF SANTA FE, INCLUDING
REFUND CLAIMS FILED BY 176 SHORT TERM RENTAL PERMITTEES.
(FRANK KATZ)**

A copy of a Memorandum dated August 17, 2009, to the Santa Fe City Council, from Charles Goodman, President, Kokopelli Property Management, regarding refund claim for one hundred seventy-six \$1,000 short term rental permits, is incorporated herewith to these minutes as Exhibit "11."

A copy of a Memorandum dated August 24, 2009, to the Santa Fe City Council, from Charles Goodman, President, Kokopelli Property Management, regarding refund claim for additional short term rental permits..

Frank Katz, City Attorney, presented information from the materials in the Council packet and from his Memorandum dated August 21, 2009, regarding the remand of Goodman v. City of Santa Fe, which is on pages 77-79 of the Council packet for Item 4(c).

Mr. Katz said in Goodman, the Court affirmed the City's ordinance, and the only question was the fee. He said the evidence we presented showed expected revenues, and that was submitted prior to our knowing the total revenues. He said that indicated revenues of \$277,000 and expected expenses of \$230,000. The Court was concerned that this showed excess revenues based on our own numbers. The Court was also uncertain as to how we calculated the numbers, and the Judge ultimately concluded that she agreed with the Plaintiffs that the \$1,000 is not supported by substantial evidence, and remanded it to

the City Council for further consideration of the license fee. Mr. Katz said the Plaintiffs then filed a Motion For Reconsideration, asking for clarification, asking whether the Court meant there was no fee, and the Court did not reconsider that, and said that all issues regarding any refund should be presented to the City Council, and both parties should be afforded the opportunity to address the claims.

Mr. Katz said the issue before the City Council is to look at the expenses, and the amount of fees, to see whether there is a refund due. He said the Ordinance provides only that the fee shall be used for enforcement and regulation under the Ordinance, and State law allows the City to impose a fee only which is justified by the expenditures necessary for the regulation.

Mr. Katz referred to Exhibits "9" and "10," indicating revenue and costs, respectively. He said the operating costs run from January 30, 2008, the effective date of the ordinance, through August 1, 2009. He said the first three months were spent in creating the documents which were needed, determining how to do this, obtaining the necessary equipment to do the processing, and getting geared up to accept applications when the ordinance went into effect on May 30, 2008. He said May 30th to August 1st were spent processing applications, fire inspections and getting it together. He said most of the permits were granted in August and somewhat later, and are still being granted – people are still applying.

Mr. Katz said staff is recommending the ordinance be amended to impose the fee on a January 1st basis, so there would be no additional fee imposed between now and January 1, 2010. He said they asked each person who worked on this how much time they spent working on it. He said there were two full time Land Use people, but there were a lot of people in the Land Use Department that participated in developing the forms and such. He said Alfred Walker, a prosecutor, has spent time in Municipal Court prosecuting. All of the expenditures totaled \$228,744.98.

Mr. Katz said the Fire Department hired 2 temporaries to work for 10 weeks and supplemented that with additional Fire Department staff, estimating expenditures of \$36,700. Mr. Katz said the Finance Department had to process the fees, but that didn't take a lot of time and was only \$1,000. This gives a Short Term Rental Operating cost total of \$310,869.98.

Mr. Katz said there were 298 existing and new permits were issued at \$1,000, which is \$298,000. There were 38 additional permits for properties with more than one rental units at \$250 which is \$9,500. He said the accessory and contiguous units produced \$500 at 27. This is a grand total of \$321,000 which is amazingly close. He said if the Council adopts the Ordinance which has been approved for publication, there won't be another fee imposed until January 2010 which will be at a lower rate. He said his recommendation is that there be no refund, and it would be very *de minimus* any way.

Mr. Katz said there is a case the Judge quoted in her decision which says it is not required that it come out exactly even. He said we are close enough that he doesn't believe a refund is appropriate. He said the lawyer who represented the Plaintiffs in District Court is here this evening, and he probably would like the opportunity to address the issue and to question Tomas about the fees, and asked that the Council allow that.

Public Hearing

Tom Simons, 286 Los Pinos Road, said he is an attorney representing Kokopelli Property Management and the applicants for refund, which now total about 190. He said they are applying for a refund of the entire \$1,000 fee for each of the people they represent. He said he has provided a Memorandum regarding their position with regard to this issue [page 70-76 of the packet for Item #4]. He said it is their position that the case law establishes that if there is a lack of substantial evidence, there is reversal and you can't go back and rebuild a record that was fatally defective.

Mr. Simons directed the Council to page 70 of materials in the Council packet, where they ask 6 simple questions and provide six simple answers from their point of view. Mr. Simons reviewed the 6 questions and answers. Please see page 70 of the packet for the text of the questions and answers. Mr. Simons said this is their analysis of the issues.

Mr. Simons said he has questions of Tomas Herrera. He said he was provided with the materials concerning cost, and he does have questions.

CROSS EXAMINATION OF THOMAS HERRERA BY TOM SIMONS:

Tomas Herrera was sworn.

Mr. Simons said, "Mr. Herrera we have a list of costs of rental operating which I guess is page 81 of the materials that were provided to the Council. Do you recognize that document."

Mr. Herrera said, "I do."

Mr. Simons said, "And that document provides for the total short term rental operating costs of \$310,869.98. Is that right."

Mr. Herrera said, "Correct."

Mr. Simons said, "And is that an accurate determination of those costs."

Mr. Herrera said, "It is."

Mr. Simons said, "Okay. If we look at page 5 of the materials that the Council got, it has costs to August 1, 2009, and that is the same date that we are talking about for page 81. Right."

Mr. Herrera said, "I'm sorry, your question again."

Mr. Simons said, "Is this also relating to the cost of the short term rental operating to August 1, 2009."

Mr. Herrera said, "It is."

Mr. Simons said, "Okay. And, in that case, you have a figure of \$355,960. Is that correct."

Mr. Herrera said, "It is, but that number is incorrect."

Mr. Simons said, "Okay. Now, as to each of the numbers on page 81 of the materials, do you have backup data to support each one of these figures."

Mr. Herrera said, "I do."

Mr. Simons said, "Okay. And, let's just take the group of people that you had a salary cost. Do you have timesheets where people contemporaneously made timesheets showing what they were working on, and that in fact, they were working on short term rentals."

Mr. Herrera said, "I don't, no."

Mr. Simons said, "What do you have to support these figures for salary costs."

Mr. Herrera said, "Each person gave me the time that they worked on it, and I calculated the fees from there."

Mr. Simons said "So, recently, you went to each one of these people and asked them, over the last 18 months, how much time they spent on this project."

Mr. Herrera said, "Correct."

Mr. Simons said, "And did they refer to any underlying documents before giving you these estimates."

Mr. Herrera said, "I had actually everybody's time up until January 30, 2009. I just needed an update from that time to now."

Mr. Simons said, "Okay. But were they giving you that time on a monthly basis, or did they just give it to you when you asked them here recently."

Mr. Herrera said, "Just the total."

Mr. Simons, "Okay. And all you had was the total cost for that person that was from your accounting records. Right."

Mr. Herrera said, "Correct."

Mr. Simons said, "Okay. Now then. We have 350 applications approximately that are being processed and you're saying that you spent, that the City spent \$104,000 during this time on Mary Ann Seiderer and \$80,000 on you."

Mr. Herrera said, "Correct."

Mr. Simons said, "During this period of time, just to process 350 applications."

Mr. Herrera said, "It was a little more than just processing applications. It included inspections, enforcement, auditing of management companies, there was quite a little bit more than just processing the permits."

Mr. Simons said, "Okay. And, in your case, are you trained as a bookkeeper or accountant?"

Mr. Herrera said, "No."

Mr. Simons said, "In your case, did you keep contemporaneous records showing how much time each day you spent on this, or was this full time for this entire period."

Mr. Herrera said, "Full time, for myself and Mary Ann Seiderer."

Mr. Simons said, "I see. Okay. Vehicles. What does the \$26,900 represent."

Mr. Herrera said, "When the ordinance was first put into place, it was in there that two vehicles be purchased for the 2 full time employees that were going to be working on the ordinance."

Mr. Simons said, "So, in order to do this, the City bought two brand new vehicles."

Mr. Herrera said, "Correct."

Mr. Simons said, "Okay, and do you have backup information for all these other costs."

Mr. Herrera said, "I do."

Mr. Simons said, "I do. You do. And could that be provided to us as a matter of a public record."

Mr. Herrera said, "I wouldn't be the one to provide it to you, but I'm sure... I don't see why not."

Mr. Simons said, "I have no further questions. I have nothing further, Mayor."

Jim Mericle, 610 Canyon Road, Unit C, said he also would like to see those documents and be able to get that in a written report. He said it seems like a lot of money to do what they did, and anything

that was done in order to get things ready should be costs that are amortized over a period of years, and not just all included in the first year of the fee as well under accounting practice, so that's something else to consider. He said, in terms of the refund of the fee, he has already paid it and it would be great to have a refund. He understands the City has very little money. He hopes to live here someday which is the reason he bought the home, so he would be open to having the money to be used to cover things going forward – carry forward the refund. He would be okay with that. He appreciates the work Kokopelli has done, noting he is not a party of that particular group. He would like a copy of the report which was given this evening relating to the 18 months, along with the expense report “and everything else,” and asked where he can get those.

The Public Hearing was Closed

Councilor Ortiz said, in terms of the way this is framed, he is unsure if we are doing a retroactive calculation of the fees as proposed by the Plaintiffs in Goodman v. City of Santa Fe litigation, or if we're really following the directive that the Court required us to do. He said he doesn't have the opinion in front of him, although the Council saw it in executive session.

Mr. Katz said the opinion is in the materials in the Council packet beginning on page 11.

Councilor Ortiz said the questions and answers given to us by the Plaintiffs seem to dictate only one result for us and that is that we have no evidence. Therefore, because we have no evidence, we have to remit the funds, and because we have to remit the funds, there is no way after the fact that we can somehow try and support the imposition of the fee. And yet, the Court specifically addressed that, saying, “The Court declines to address Appellants’ argument that reversal of the fee means that no enforceable permit fee has been in effect since enactment of the ordinance.” He said this argument was pled at the Court up above, and the Court made a specific finding that that was, in fact, not the case. And, according to Mr. Katz, when the Plaintiffs asked for reconsideration of that decision by the Court, because it was somewhat confusing, the Court just remanded the matter back to us for further consideration of the license fee.

Mr. Katz said this is correct.

Councilor Ortiz said the Court actually stated, “All issues regarding any refund should be presented to the City Council and both parties [presumably the City and the Plaintiffs] should be afforded an opportunity to address the claims.” He said this is specifically what the Court ruled on the Motion To Reconsider.

Mr. Katz said this is correct. He said the evidence before the Judge was clear that there were a whole bunch of costs, and the Judge was very clear that she was aware that the revenues projections were \$40,000 to \$80,000 more than the costs, and that's what bothered her. He said the Judge clearly knew, and expressed the feeling, that there was evidence for a portion of the fee, and because of the confusion of what was counted as fees and costs and what wasn't, the Judge sent it back for this determination. He said

his belief is that she had in mind a hearing of just the sort we had that explicated what the revenues actually were and what the expenses actually have been.

Councilor Ortiz said, given that was the charge from the District Court above us, and given the fact that we've been given information from our staff saying that everything that we raised we spent. And, the Plaintiffs, in getting a "second bite of this apple," have not advanced any alternative to the position they argued above, which is they are entitled to a full \$1,000, and asked Mr. Simons if this is correct, and he has no alternative argument.

Mr. Simons said, "Well, I'll say it this way. Yes, it is our position that once a factual determination has been overruled on the basis of a lack of substantial evidence, then that is a reversed decision and you can't go back. And this happens all the time. It happens in lots of appeal situations, including appeal situations that you have. You can't go back and retroactively justify it, and that's exactly what's attempting to be done here. That's our position."

Councilor Ortiz asked Mr. Simons, if in fact, we were to look at what was introduced in the Court above, and look at the expenses for the Court above, if he would agree that the City collected more revenues than the \$277,000 that we reported to the Court were going to be the revenues we would collect."

Mr. Simons said, "Yes, but what I'm saying is.. I agree with that."

Councilor Ortiz asked Mr. Simons, "And would you agree then, that the expenses that were incurred were over and above the \$230,000 that were reported by us."

Mr. Simons said, "I cannot agree with that. What you have done is, after the fact, you have walked around to City employees and asked them how much time over an 18 month period that they have spent on this and they have given arbitrary answers which were then codified into this cost determination, which is completely invalid. And the whole idea is, that in order to make a permit fee, you have to do an analysis, make a determination of what that cost is going to be and then determine what the fee is, based upon that. And what this body did, was it made a determination of that fee based on arbitrary determinations. It just pulled out of the air \$1,000, and there was no basis for that at the time, and that is what the Court ruled lacked substantial evidence."

Councilor Ortiz pointed out that the Court also ruled that Mr. Simons, representing the Plaintiffs, weren't entitled to that refund of the full \$1,000 – the Court specifically ruled that, didn't they. Councilor Ortiz said, "The District Court specifically, on your Motion To Reconsider its opinion specifically denied your request to get the \$1,000 permit refunded to you, the same request that you're making here tonight."

Mr. Simons said, "Yes, but in part they did that because they did not believe that we could raise that in a motion for reconsideration, they say that right in the opinion."

MOTION: Councilor Calvert moved, seconded by Councilor Wurzbarger, to approve the staff recommendation for no refund.

CLARIFICATION OF THE MOTION: Councilor Ortiz asked what specifically is the recommendation on which the Council is being asked to vote, noting he is looking at the staff recommendation on page 79 at the conclusion of Mr. Katz's Memorandum.

Mr. Katz said his recommendation, given the numbers which he, Tomas and a number of others worked to ensure were very accurate, is that no refund be ordered, because the expenses to August 1, 2009, were very close to the amount of the fee; and given that we are at the end of August, that they probably will be greater than the amount of fees we have received, and they more than justify the fee, therefore there should be no refund.

DISCUSSION ON THE MOTION: Councilor Ortiz asked if the vehicles which were purchased were purchased directly from the proceeds of the fees or were they purchased with CIP funds, and repaid.

Jack Hiatt said no vehicles were purchased with CIP funds, and these vehicles were purchased from the proceeds of the revenue.

Councilor Ortiz asked how many vehicles were purchased.

Mr. Hiatt said he believes only one. He said there were three authorized FTEs, and one went to Fire Department, so there was only one inspector contemplated in the field.

Councilor Ortiz said he would like to avoid having to put our position back before the Judge, in terms of the decision that was made. He said, with regard to the costs averred to by City staff, some of the costs can be removed. He said he believes the Judge was trying to find some amount the City could justify which met the expenses we actually had. He said, while the majority of the expenses as listed are valid, he believes that some of the items could be removed. He said if these are removed, there is a disparity which would entitle the parties to a refund.

Councilor Ortiz said, if the City is going to entertain a refund, he believes the refund has to apply across the board to all of the permits which have been issued, and not just to those who are requesting the refund.

FRIENDLY AMENDMENT: Councilor Ortiz proposed, to arrive at a just and equitable solution, to amend the motion to remove the vehicle expenditure of \$26,900, remove the salary costs of approximately \$7,600 for the City Manager, City Attorney, the Assistant City Attorney, Jeanne Price and Melissa Byers, and to add as a condition that staff expense-out these particular line items from the recommendation from staff, and this amount of money, approximately \$34,000-\$35,000, be reallocated as a refund on an equal pro rata bases to the 332 permittees who applied for a permit under the program.

DISCUSSION ON THE FRIENDLY AMENDMENT BY THE MAKER: Councilor Calvert said if we do this, it would have to be refunded in proportion to the fee paid, noting not all fees were equal – \$250, \$500 and \$1,000.

Councilor Calvert said the expenditures listed are through August 1, 2009. However, he understands staff is expecting more expenses throughout the remainder of the year, and significantly less or no more revenue.

Mr. Katz said there is still room for more people to apply for short term rentals, and that could happen and we could have more fees. However, his guess is that this isn't likely to happen because of the time of the year, and there will be a substantial reduction of the fees on January 1, 2010. He said there may be more revenue, and there certainly will be more expense, but at this point that is unknown.

Mr. Hiatt said Tomas Herrera corrected him on his statement, and two vehicles were purchased for the listed cost.

Mr. Hiatt said he wanted to correct something Mr. Simons said. He said it is relevant that when the Governing Body considered adoption of the Ordinance that Jeanne Price and others did a great job of calculating the anticipated expenses, and the Governing Body relied on those figures in setting the fees.

Councilor Calvert asked Councilor Ortiz the reason for excluding all of the legal fees.

Councilor Ortiz said the basis for that is the testimony that was elicited from Land Use staff – Tomas is in the Planning and Land Use Department, so, he removed the expenditures from all departments not within Planning and Land Use.

FURTHER CLARIFICATION OF THE FRIENDLY AMENDMENT: Councilor Ortiz said, for the record, the total amount he is requesting to be withdrawn from the expenditures is \$34,514.28. He said there are 298 full permits at \$1,000, 38 one-quarter permits, which equal 9.5 full permits, 27 one-half permits, which equal 13.5 full permits. So, the total amount of full permits which would be entitled to a pro rata share is 321 permits. He said 321 permits divided into the \$34,514.28 would be the amount he would proposed be refunded for a full permit, and for a \$500 permit it would be one-half that amount, and for a \$250 permit, it would be one-fourth of that amount.

THE AMENDMENT WAS FRIENDLY TO THE MAKER AND SECOND, AND THERE WERE NO OBJECTIONS BY THE OTHER COUNCILORS.

VOTE: The motion, as amended, as approved on the following Roll Call Vote:

For: Councilor Calvert, Councilor Dominguez, Councilor Ortiz, Councilor Trujillo, and Councilor Wurzbarger.

Against: Councilor Bushee.

Absent: Councilor Chavez..

Explaining his vote: Councilor Ortiz said, in clarifying his vote, the math, if this motion passes, is that anyone who had a \$1,000 permit would be entitled to a refund of \$107.52, and anyone with a \$500 permit would be entitled to half that amount, and anyone with a \$250 permit would be entitled to a fourth of that amount, noting the numbers are subject to verification by City staff, and he votes yes.

Explaining her vote: Councilor Bushee said while she is comfortable with what Councilor Ortiz is attempting to do in concept, she is a little uncomfortable with the math on the spot, so she has to vote no.

Explaining his vote: Councilor Calvert said *mea culpa*, we're not approving the figures Councilor Ortiz came up with, we're just approving the proportionality that he made, and voted yes.

14. MATTERS FROM THE CITY CLERK

REQUEST FOR APPROVAL TO CHANGE MONDAY, NOVEMBER 9, 2009 REGULAR CITY COUNCIL MEETING TO TUESDAY, NOVEMBER 10, 2009

Yolanda Vigil requested the Council change the Council meeting from Monday, November 9, to Tuesday November 10, 2009, to allow the adoption of the Election Resolution within the time prescribed by law.

MOTION: Councilor Bushee moved, seconded by Councilor Calvert, to approve the recommendation to move the November Council meeting to Tuesday, November 10, 2009.

VOTE: The motion was approved on the following Roll Call Vote:

For: Councilor Bushee, Councilor Calvert, Councilor Dominguez, Councilor Ortiz, Councilor Trujillo, and Councilor Wurzbarger.

Against: None.

Absent: Councilor Chavez

15. COMMUNICATIONS FROM THE GOVERNING BODY

A copy of "Bills and Resolutions scheduled for introduction by members of the Governing Body," for the Council meeting of August 26, 2009, is incorporated herewith to these minutes as Exhibit "13 "

Councilor Dominguez

Councilor Dominguez introduced a Resolution amending Table 22 of the Impact Fees Capital Improvements Plan and Land Use Assumptions for the Rufina Street connection. A copy of the Resolution is incorporated herewith to these minutes as Exhibit "14."

Councilor Dominguez reminded everyone about the Fore Kids Golf Tournament, urging everyone to participate, noting it is for a good cause. He thanked Councilor Ortiz for initiating this several years ago.

Councilor Dominguez reminded the public that school has started, and asked the public to be careful and aware of activity around schools, and asked the Police to spend time around the schools this week and next week to remind people to slow down, be careful and to show a presence at all the schools.

Councilor Calvert

Councilor Calvert had no communications.

Councilor Trujillo

Councilor Trujillo asked Mr. Buller for information on when the Rodeo Road landscaping will start.

Councilor Trujillo reiterated Councilor Dominguez's remarks regarding people slowing in school zones.

Councilor Trujillo wished his wife Amber, a happy birthday.

Councilor Wurzbarger

Councilor Wurzbarger reminded the Councilors about the email today from the 400th Anniversary to identify what we want to put in the box for the time capsule for the ceremony on Sunday.

Councilor Wurzbarger introduced a Resolution repealing Resolution 2003-104, and adopting a revised per diem & mileage policy to make the City consistent with the State. A Copy of the Resolution is incorporated herewith to these minutes as Exhibit "15."

Councilor Bushee

Councilor Bushee introduced the Busker's ordinance, which codifies what we have established administratively, with a few changes to the fees and such. A copy of the Ordinance is incorporated herewith to these minutes as Exhibit "16."

Councilor Bushee thanked all those who participated in staging the bandstand program on the plaza. It was an exceptional season.

Councilor Bushee reminded Mr. Buller that she has heard nothing from anyone with regard to Upper Galisteo near downtown, where the streets need repair and the sidewalks are not passable.

Councilor Ortiz

Councilor Ortiz had no communications.

Mayor Coss

Mayor Coss introduced an Ordinance authorizing leases of three tracts of land for the City/County Housing Authority project. A copy of the Ordinance is incorporated herewith to these minutes as Exhibit "17."

Mayor Coss introduced a Resolution in support of establishing U.S. Department of Peace and Nonviolence and a New Mexico office of Peace. A copy of the Resolution is incorporated herewith to these minutes as Exhibit "18."

Mayor Coss introduced an Ordinance on behalf of Councilor Chavez regarding pushcart vendors. A copy of the Ordinance is incorporated herewith to these minutes as Exhibit "19."

Mayor Coss remarked on the passing of Senator Kennedy last night, which is a great loss for the whole country.

I. ADJOURN

The was no further business to come before the Governing Body, and upon completion of the Agenda, the meeting was adjourned at approximately 10:25 p.m.

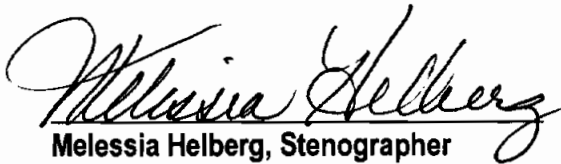
Approved by:

Mayor David Coss

ATTESTED TO:

Yolanda Y. Vigil, City Clerk

Respectfully submitted:


Melessia Helberg, Stenographer