

PIEDMONT CITY COUNCIL

Special Meeting Minutes for Saturday, December 12, 2009

A Special Session of the Piedmont City Council was held on December 12, 2009, in the City Hall Council Chambers at 120 Vista Avenue. In accordance with Government Code Section 54954.2(a) the agenda for this meeting was posted for public inspection on December 8, 2009.

CALL TO ORDER

Mayor Friedman called the special meeting to order at 2:05 p.m. with the Pledge of Allegiance.

ROLL CALL

Present: Mayor Abe Friedman, Vice Mayor Dean Barbieri and Councilmembers John Chiang, Margaret Fujioka and Garrett Keating

Staff: City Administrator Geoff Grote, City Attorney George Peyton, Finance Director Mark Bichsel, Public Works Director Larry Rosenberg, Recreation Director Mark Delventhal, City Clerk Ann Swift and Recording Secretary Chris Harbert

PUBLIC FORUM

There were no speakers for the public forum.

SPECIAL SESSION

The Mayor announced that the purpose of the special session is to resume consideration of staff's December 7 recommendation that the Council appropriate \$1,004,832 from the General Fund Reserve for projected construction costs required to complete the Piedmont Hills Underground Utility District. Per Council's direction of December 7, the City staff reviewed the four financial options available to the Council to address the problems created by cost overruns in the Piedmont Hills Underground Utility District, summarized the issues before the Council, distributed a map indicating the sections within the district where underground trenching remains to be done and highlighted the potential debt service/construction/litigation costs to the City if funds are not appropriated to complete the undergrounding project – an estimated low of \$6,680,487 to a high of \$10,225,564. The four options presented were:

Option 1 – Stop Construction & Terminate the Project (total required appropriation \$699,832)

Option 2 – Stop Construction & Initiate Additional Assessment Proceedings (partial appropriation required \$844,832)

Option 3 – Complete Construction with “Not to Exceed” (total required appropriation \$1,217,850)

Option 4 – Complete Construction (total required appropriation \$1,004,832)

Each option included pro and con arguments.

Correspondence was received from: Steve Sidney & Carolyn Schuman; Thomas Kronemeyer; Nick Levinson; Mark D'Ambrosi; Raymond, Mariam & Sydney Marshall; Joseph Hurwich; Deanna Davis; Lynn & Jim Saunders; Lonnie Simonson; Andy Madeira; Rabbi Judah Dardik; Ryan Gilbert; Timothy Rood; Rabbi James Brandt & Joe

Hurwich; Guy Saperstein; Elizabeth Schultz; Jeff Wieler; Steve Sidney; Aaron Salloway; Stephen & Lynn Dee; Kathleen Quenneville; Robert Phelps; Nancy McEnroe; Robert Fisher; Arthur Flegal; Bob Leslie; Len Gilbert; David Brown; Timothy Rood; Jamie Pehanick; Len Gilbert; Stan & Pauline Moy

Public testimony was received from:

Julie Waters questioned the Council's commitment to full public disclosure and discussion of this matter in noting the short amount of time given for public notification and input.

Robert Phelps, George Childs, Aaron Salloway, Mike Savage, Bob Tuck, Jerry Miller, Timothy Rood and Steve Sidney all voiced strong opposition to staff's recommendation, with most indicating a preference for Option 1 or 2, citing the following reasons: (1) issues of fairness; (2) doubts regarding the eventual real costs for project completion; (3) uncertainty as to whether a City lawsuit against project engineers to recoup overrun costs will prevail; (4) the fact that according to City policy, City funds are not to be expended on behalf of privately initiated undergrounding projects; and (5) the necessity of avoiding a bad precedent for future utility districts. In addition, many speakers suggested that the City: (6) hire an independent consultant to examine the situation and propose solutions rather than relying on City staff given that staff mistakes are partially responsible for this disaster; (7) require Piedmont Hills to conduct a second ballot assessment to reflect the true cost of project completion; (8) undertake a thorough re-examination of the City's utility undergrounding policy and contractual procedures; (9) require members of the Piedmont Hills District to cover all project overrun costs not recovered from lawsuits against responsible parties; and (10) take appropriate action against staff for mistakes and dereliction of duty.

Rod Thompson, a member of the Piedmont Hills District, voiced his anger that he was forced to participate in what he believed was a poorly conceived project and criticized the City for its gross negligence and incompetence in managing the contract. He stressed that the City is obligated to deliver utility undergrounding to district residents and strongly objected to any attempt to obtain additional funding from district residents to cover cost overruns.

Lonnie Simonson, Donald Fones, David Brown, Carl Anderson, Mary Hedley, Jeff Wieler and Peter Harvey all voiced support for staff's recommendation, stressing (1) that project cost overruns are not the fault of district residents; (2) district members have placed trust in the City to complete the project; (3) the best and least costly solution to this horrendous problem is for the City to complete the project and pursue legal damages against responsible parties to recoup project overage costs; and (4) delaying or terminating project completion will have severe financial consequences for the City.

Judge Anderson also advised that the district is committed to raising additional funds to help cover cost overruns, but the fundraising effort has been hampered by resident uncertainty as to whether the City will proceed with completing the project. Later in the meeting with regard as to how much additional money should be contributed by district

members, Steering Committee Member Francoise Putting suggested that the City first determine how much money it will recoup from legal action against responsible parties as well as the actual cost of project completion, then come back to district residents with a monetary figure that is fair.

Maria Faer urged the need for the City to investigate the legal issues involved in special benefit assessment districts before approving any expenditure of City funds on behalf of the Piedmont Hills District. She also recommended that the issue of whether public funds should be appropriated to this district should be placed before the electorate.

Doug Smith suggested that the City form a special assessment district composed of Piedmont Hills property owners willing to help cover project overrun costs so that these residents would have the benefit of deferral for these additional costs.

The Mayor initiated Council discussion of the issues involved with an apology to residents for this unprecedented situation. During discussion, the Council supported completing the project through an appropriation of City funds, stressing that this option is the least costly for the City in the long run, for the reasons cited in the staff reports as well as to mitigate losses in order to have the best argument for cost recovery in litigation. The issue of whether the Council should complete the project with or without a "not to exceed" agreement with the contractor was also discussed, with Council agreement that Option 4 reflects a realistic cost expectation for the remaining "rock work." The Council stressed to staff the need to advise the contractor that it expects the project to be completed in accordance with the estimates provided in Option 4 and not the "not to exceed" Option 3.

The Council also acknowledged its commitment to vigorously pursue legal action against those parties it believes responsible for project overruns in an attempt to fully recover expended City funds.

The Council also agreed that members of the district should also be responsible for assuming some of the costs of project overruns in excess of its already pledged \$100,000 amount. There was considerable discussion regarding how much of the overage should be covered by supplemental district monies, when these monies should be provided to the City, whether these additional funds could be required or just requested and whether receiving additional monies from the district would jeopardize or reduce the amount of money the City could receive as a result of successful litigation against responsible parties. When discussing the timetable for receipt of additional district funds, it was recognized that the undergrounding trenching needs to be completed by January 15, 2010 in order to comply with PG&E's schedule; otherwise the project would be delayed for several months, which would have additional financial and legal ramifications. In the end, the Council agreed that it would request district members to cover those overage costs not recouped from litigation against responsible parties.

The Council also voiced its support for a thorough examination of the circumstances that led to this problem, with Councilmember Chiang suggesting that the following issues be specifically addressed:

- City's underground policy and future approaches;
- The City's specification and bidding processes;
- The governance for all capital improvement and undergrounding projects;
- Funding of future public/private partnership projects in terms of risk sharing;
- City contracting approaches;

The Council agreed that the Council's Audit Committee (Councilmembers Barbieri and Chiang) should undertake this examination and report its findings to the Council no later than April 30, 2010. At that time, after a public hearing on the report's findings and recommendations, the Council could then determine if additional analysis by an outside consultant should be conducted.

The Council considered and revised through a series of amendments, the following resolution authorizing the expenditure of City funds to complete construction of the Piedmont Hills Utility Undergrounding Project.

Resolution 101-09

WHEREAS, the City has entered into a Contract with Valley Utility for construction work relating to the Piedmont Hills Underground Utility District ("District"); and

WHEREAS, unanticipated additional costs relating to such construction work have arisen, including costs relating to excavation of rock; and

WHEREAS, City has used all of the monies raised through the issuance of bonds for such construction work; and

WHEREAS, City has attempted to locate additional sources of funds to cover such additional construction costs, including donations from homeowners within the District; and

WHEREAS, it has become clear that in order to complete the construction work so that the overhead utility lines can be finally removed and transferred underground and the supporting poles removed, it will be necessary for the City Council to appropriate City funds to pay for the construction work pursuant to its Contract with Valley Utility; and

WHEREAS, the City Council recognizes that there is a clear and important public purpose in completing the construction work in the District to allow the undergrounding of utility lines as originally planned; and

WHEREAS, there is a specific and important public purpose in providing additional safety to the residents of Piedmont by removing the danger of having overhead live utility lines and poles falling across and blocking the public streets and sidewalks during a major earthquake, firestorm, major rainstorms and flooding or other calamitous events, which blockage of public streets and sidewalks can endanger human lives by preventing or impeding the ability of people to escape those dangerous circumstances; and

WHEREAS, there is an important public purpose in improving the beauty and appearance of the City by removal of unsightly utility poles and lines; and

WHEREAS, the City Council also realizes that there is an important public purpose served in appropriating the necessary funds to complete the construction work for the District in order to avoid exposing the City and its taxpayers to potentially valid legal claims from homeowners in the District, as well as potentially valid legal claims by Valley Utility, which could between them well exceed \$6,000,000, far in excess of the appropriation needed to complete such construction work; and

WHEREAS, the City Council also recognizes that appropriating the necessary funds now to complete the construction will serve an important public purpose of saving the taxpayers substantial additional expenses which would probably occur if Valley Utility were to permanently cease work on the project due to lack of funding and the City were required to find a new contractor at a future date, probably at a cost far in excess of the amounts which are proposed for Valley Utility to complete the work now; and

WHEREAS, the City Council also acknowledges that such an appropriation by the City is contrary to the adopted policy of the City regarding undergrounding utilities, specifically that *“No General Fund monies shall be used to assist in the formation of a private undergrounding district except direct costs associated with the assessment of city owned property located within a private undergrounding district and indirect costs for staff time required to process undergrounding applications”* but still believes that the specific and important public purpose of completing a partially constructed project in the public streets requires a deviation from the existing policy; and

WHEREAS, the City Council is committed to a full public review of the existing underground utility policy, the process for development of plans and bid specifications for further undergrounding projects, and the process for estimating costs related to such projects is committed to avoiding the risk of any such appropriations in the future; and

WHEREAS, while it is recognized that the completion of such construction work will benefit the individual homeowners in the District, this in no way diminishes the public purpose of the benefits that completion of such construction work will provide to all residents of Piedmont, most particularly the public safety benefits and substantial savings in expenditure of taxpayer’s funds that will be provided; and

WHEREAS, the City Council appreciates the agreement by Valley Utility to not exceed the \$875,000 cost guarantee for remaining rock work in the District, the Council expects this work to be done consistent with the amount that staff, the City engineer and Valley Utility have estimated within the amount appropriated below; and

WHEREAS, to mitigate the costs necessary to complete the District construction project, it is appropriate to complete this District construction project as soon as reasonably possible; and

WHEREAS, while the City Council requests that any funds expended by the City for completion of the construction project that are not recovered from legal actions against responsible parties be contributed by residents of the District.

RESOLVED: That the Piedmont City Council directs its Audit Committee to work with City staff and outside advisors to investigate and prepare a report on the City process in relation to the contracts executed regarding the Piedmont Hills Underground Utility District by no later than April 30, 2010, so that the City Council and the public can engage in appropriate measures to avoid risk to the City in the future; and

RESOLVED FURTHER: That the City Council directs staff and outside legal counsel to pursue any and all legal actions and causes of action against any person, party or entity responsible in any manner for the cost overruns the District has encountered; and

RESOLVED FURTHER: That the City Council finds that for the reasons set forth heretofore that appropriation and expenditure of City funds for completion of the construction work on the Piedmont Hills Underground Utility District serves an important public purpose; and

RESOLVED FURTHER: That the City Council hereby appropriates and authorizes the expenditure of up to \$1,004,832 to be paid for the completion of all construction work for the Piedmont Hills Underground Utility District.

Moved by Barbieri, Seconded by Chiang

Ayes: Friedman, Barbieri, Chiang, Fujioka, Keating

Noes: None

Absent: None

(0088)

The Mayor requested that staff provide weekly updates to the Council regarding project status and costs.

ADJOURNMENT

There being no further business, Mayor Friedman adjourned the meeting at 5:30 p.m.