

PIEDMONT CITY COUNCIL

Special Meeting Minutes for Saturday, February 6, 2010

A Special Session of the Piedmont City Council was held February 6, 2010, 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 February 4, 2010.

CALL TO ORDER

Following a 9:00 a.m. Closed Session to review and evaluate the performance of Department Heads and the City Administrator held pursuant to Government Code Section 54957, Mayor Friedman called the meeting to order at 11:00 a.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 and City Clerk Ann Swift

SPECIAL SESSION

After a 55 minute recess to correct an audio problem with the meeting feed to the Conference Room and TV audience, Mayor Friedman reconvened the meeting with the Public Forum.

PUBLIC FORUM

Dawn Margolin requested that the City develop a public alert system to notify residents when special and/or emergency meetings are scheduled and held on short notice. She also requested that such meetings be held in the City's larger facilities, such as the Veterans Building or Community Hall, so that all residents who wish to attend such meetings can be accommodated in the same room as the Council.

REGULAR AGENDA

The Council considered the following items of regular business:

Closed Session Report

Mayor Friedman briefed the audience on last Monday evening's and this morning's closed session deliberations. He stated that at Monday's closed session, the Council met with the City's litigation counsel with regard to the Piedmont Hills Utility District. The Council is confident that it has identified the parties responsible for the construction cost overruns and has initiated legal action to recover all City funds appropriated or which may be appropriated in order to complete project construction. This morning's closed session focused on a review of City Department Heads' performance relating to the management of the Piedmont Hills District project. The Council agreed to hire an outside counsel to conduct a review of the senior staff involved in the undergrounding project to determine what errors, if any, were made by staff and what, if any, disciplinary actions should be taken. The Council

also reaffirmed an earlier City Administrator decision to change the project management staff for this project.

Public testimony was received from:

Joe Hurwich requested the Mayor to specifically identify the project engineers to be sued in connection with the Hills project and inquired if the City is considering initiating a lawsuit against outside counsel who advised the City with regard to the City's execution of the project construction contract. He also inquired why it has taken the Council so long to evaluate the performance of senior staff with regard to this project.

Walter Schey strongly criticized the Council for hiring outside counsel to evaluate staff performance in this matter, believing that such expenses are unnecessary and unwarranted given the Council's responsibility and duty to oversee City staff. He felt that an outside counsel investigation of staff should only be conducted when there is a concern over criminal conduct.

Maria Faer urged that the charge given to the outside counsel evaluating staff performance as well as the counsel's final report be made a part of the public record. She also urged the Council to review its own policies and procedures with regard to contract agreements and obligations.

David Alexander urged that an independent audit be authorized to examine the Piedmont Hills undergrounding project.

The Mayor responded that Harris & Associates and Robert Gray & Associates are the two engineering firms that the City has initiated legal action against. The Mayor declined to comment with regard to potential actions against outside counsel in order to protect and preserve the City's rights. The Mayor stated that Council review of staff performance is ongoing and it is premature to report on this issue at this time, noting the long record of exceptional service the City's senior staff has provided the community over the years and the fact that City staff was provided with erroneous advice and information from the above-mentioned engineers. With regard to an outside review of staff performance, the Mayor stressed the importance of abiding by civil service rules with regard to pursuing any disciplinary actions against employees to protect the City from potential liability exposure. He added that outside counsel will report directly to the Council.

**Piedmont Hills
District
Appropriation**

The City Administrator stated that since the Council's December 12, 2009, appropriation of \$1,004,832 which was believed to be sufficient to complete the construction of the Piedmont Hills Utility Undergrounding Project, several new and unknown conditions have come to light; namely, a significant difference in the actual amount of linear feet of trench required to complete the project versus the amount of trenching indicated in the project's plans. In addition, missing and incorrect data in the utility plans as well as a miscalculation of contract work credits have also contributed to completion costs in excess of that estimated last December. As a result and through extensive negotiations this week with the new project engineer (Coastland Engineers) and contractor (Valley Utility), it has now been determined that \$1,060,000 in City funds will be required to complete the project. This amount is based on a negotiated agreement with Valley Utility to complete the project for a "not to exceed" cost of \$1,127,013. If approved, this funding will be appropriated from the Capital Improvement Reserve and will be deducted from those CIP projects which were frozen earlier in the year. The City Administrator stated that the City has two basic options -- continue and complete the project or stop the project until such time as other sources of funding are available. The Administrator reiterated his December 2009 comments and opinion that not completing the project will ultimately cost the City much more than the requested appropriation. He emphasized that the requested appropriation in no way negates the City and Council's position that City funds should not be used to finance privately-initiated utility undergrounding projects. However, the unfortunate circumstances surrounding this project necessitate the recommended extraordinary action.

The Finance Director then distributed and reviewed a financial report detailing the revenue received and costs incurred/pending involved with the project, a breakdown of City costs that would be incurred if the project is terminated, completed or suspended as well as payments made to Harris & Associates and Robert Gray & Associates. In addition, the report indicated that the engineering plans specified 13,667 linear feet of trench while the actual trench footage based on field measurements is 15,210. The Mayor then summarized the meetings he and Councilmember Chiang held this week with staff, the City engineer and Valley Utility in reviewing project costs and negotiating with the contractor and engineer significant cost reductions. In the end, Valley Utility has agreed to complete the project for a cost not to exceed \$1,127,013, with the understanding that the actual completion cost could be less if hard rock work and street paving costs are less than anticipated. The Mayor also summarized his extensive involvement in project review and negotiations over the last week in recommending that the Council

impose a moratorium on all future utility undergrounding districts until such time as clearly defined policies and procedures are developed for managing the contracting and oversight of such projects. He also advised that the Hills project construction has been stopped pending the outcome of today's meeting.

At the Mayor's request, Mr. John Benedict of Valley Utility explained the "not to exceed" agreement and voiced his guarantee that all of the remaining work necessary to complete the project will be performed at or below the \$1,127,013 cost figure. This commitment cap will be placed in writing. Mr. Benedict reiterated his intention to make every effort to complete the project below the \$1,127,013 amount if possible, citing in particular the potential for paving cost savings.

Public testimony was received from:

Jeff Wieler suggested that: (1) the Council's audit committee, rather than outside counsel, conduct the staff performance evaluation; (2) an independent outside audit investigation of the project be authorized; and (3) a citizens committee be appointed to develop a new undergrounding contract administration policy.

Dawn Margolin, Kathy Kelleher and Maria Faer urged the Council to defer action on the appropriation request to allow more time for examination and the gathering of additional information to better evaluate other possible options in addition to those proposed of either project termination, completion, suspension. Ms. Faer also requested that a written legal opinion be prepared on whether a special assessment district can accept public dollars to fund the cost of that district. She also inquired re the degree of likelihood that the City will recoup the funds it appropriates on the district's behalf.

Jonathan Davis urged that the project be terminated and the City proceed with litigation against the responsible parties. He also supported the formation of a citizen committee to investigate what went wrong with the project.

Joe Hurwich urged that the project be terminated because of the ever-changing financial information being presented to the community. He also questioned some of the cost figures cited in the Work Stoppage Cost Report with regard to termination and completion costs.

Leon Bloomfield suggested that the Council consider a short-term project suspension to allow district property owners an opportunity to commit to

funding project cost overruns. He also urged the Council to immediately impose a moratorium on any more expenditure of City funds in connection with the Sea View/Hampton Utility District.

Sandy Margolin also urged that City funds not be appropriated to complete the project and that district property owners be required to finance cost overruns. He criticized the Council for failing to anticipate the potential of project cost overruns and for allowing the City, as opposed to the district, to be responsible for such a liability.

Robert Phelps agreed with Messrs. Hurwich, Bloomfield and Margolin, citing concerns that the expenditure of public funds for a private benefit is unfair and possibly illegal. He voiced concern that the district's inability to raise more than \$103,000 is an indication that district property owners are not committed to completing the project. He also questioned the veracity and reliability that the project can or will be completed for the amount cited by the contractor.

George Kersh urged the *Piedmont Post* to cover the issues surrounding this matter in more detail to keep residents better informed.

George Childs thanked the Mayor and Councilmember Chiang for their efforts in trying to resolve this situation as well as the contractor for agreeing to a "not to exceed" agreement. He reiterated his outrage over the errors which have caused the City to take the unprecedented action of bailing out a privately initiated undergrounding project benefitting 144 households at the expense of the entire community. However, he supported completing the project as the least expensive option available to the City.

William Childs concurred with his brother's comments.

Dudley Westler urged that the project be suspended until non-City funds are obtained to finish the work. He suggested that Hills District residents should be required to sue project engineers to obtain the funds necessary to complete the project.

Carl Anderson and Marion Keyworth urged the Council to complete the project, emphasizing that district residents are not responsible for project mismanagement or cost overruns and in addition to assessments, have raised over \$100,000 to help keep the project going.

Cathy Girr suggested that a Civil Grand Jury be convened to investigate City staff responsibility for engineering and contractor vetting and selection as well as project management and oversight.

Julie Watters reiterated her previous requests that an independent audit be authorized to investigate the project. She also requested the Council to direct staff not to destroy any records associated with this matter.

Hal Marcus requested the Council to continue its recent more active oversight of City matters, voiced concern that the Council was so late in learning of the project's severe financial problems and shared Mr. Hurwich's concerns over the figures cited in the Work Stoppage Cost sheet.

Dan Phillips voiced frustration that the severity of the project's problem were not discovered or publicly disclosed earlier in the process as well as staff's failure to alert the Council of project difficulties and possible overruns six months ago.

David Alexander reiterated his previous request that consideration be given to pursuing legal remedies for the poor advice given to the City by outside counsel. He also agreed with the need for an independent, outside audit to investigate the circumstances surrounding this debacle. He cautioned re the legality of approving the proposed appropriation recommendation and urged that district residents be required to either fund project overruns or agree to terminate the project.

Guy Saperstein was confident that City funds appropriated for this project will be recovered from the at-fault project engineers. Therefore, he felt that suspending the project and requiring district property owners to cover overrun costs now could reduce the damages received from successful litigation against the engineers as well as risk potential litigation claims from the project contractor. He agreed that completing the project is the least expensive option available to the City.

Walter Schey opposed the expenditure of City funds on an outside audit.

Kathleen Quenneville requested that a report be issued detailing the impacts the December and currently proposed appropriations will have on the City's operating/capital improvements budgets and reserve funds if the City is not successful in its litigation efforts. She also encouraged the Council to take more time in considering possible options before taking action on staff's recommendation.

Burr Nash urged the Council not to appropriate City funds for the benefit of a special district.

Aaron Salloway concurred with suggestions that an independent review of the issues related to the project contract be authorized.

Rick Schiller inquired why the project was not stopped and district residents informed when it became apparent that incurred costs were greater than estimated so that the financial burden for project continuance did not have the option of taxpayer funds.

Sunny Bostrom suggested that the City retain project managers for large-scale construction projects.

Marc Bryan supported project completion provided additional negotiations are held with the project contractor, with the assistance of resident construction professionals, to complete the project with existing funds.

The Mayor closed the public hearing and the Council then engaged in a lengthy question and answer session with the project contractor, project engineer and City staff regarding details of the proposed "not to exceed" agreement, the nature and extent of remaining work, legal questions and opinions related to the proposed appropriation and significant City liability exposure if the project is terminated.

Councilmembers Fujioka and Keating voiced support for temporarily suspending the project to allow time for district property owners to commit to providing \$500,000 in additional contributions (approximately \$3,472 per household) and for the project contractor to agree to \$150,000 in additional contract price reductions. Councilmember Keating also suggested that the project boundaries be adjusted to exclude the remaining trench work in Calvert Court as a further cost saving measure and that an additional examination of the legal issues concerning City appropriation of funds to special assessment districts be performed. Councilmember Fujioka suggested that a subcommittee of the City's Audit Committee be created to include the appointment of a citizen member to insure an independent and transparent review of the Hills Project matter and that pro bono services of an outside project manager be retained to oversee project completion when it is resumed. Councilmember Fujioka also voiced support for the Mayor's suggestion that a moratorium on future utility undergrounding districts be imposed until policy issues and contract procedures and administration practices are thoroughly reviewed.

The remaining Councilmembers voiced support for the appointment of a citizen member to a subcommittee of the Council's Audit Committee to review the Hills project, provided said appointment doesn't jeopardize the City's litigation efforts and concurred with the Mayor's recommendation for a moratorium on the establishment of future utility undergrounding districts. However, this majority opposed project suspension in order to pursue additional funding from district residents and the contractor, stressing that significant contractor cost reductions are already incorporated into the proposed "not to exceed" agreement and additional up-front cost reductions are not realistic. With regard to additional district contributions and suspending the project until contributions are received, the majority voiced concern over the potential of jeopardizing potential monetary judgments against responsible parties. The Mayor stressed that project overruns are not the fault of district residents and it would be unreasonable to expect them to pay for others' mistakes. However, it would be appropriate that any City funds expended to complete the project that are not recovered from responsible parties, should be reimbursed by district residents.

In response to Councilmember Fujioka's request for additional contributions from the district and project contractor, Mr. Anderson responded that additional funds from district residents cannot be realistically expected until and unless the project is completed. Mr. Benedict reiterated he has already included significant cost reductions in the "not to exceed" agreement.

The Council majority also felt it was impractical and unrealistic to re-engineer or modify the boundaries of the district at this late stage and acknowledged that PG&E will not begin work if the project is suspended. The majority reiterated their strong belief that appropriating \$1,060,000 is the least expensive option for protecting the community, stressing that not completing the project exposes the City to significant liability risk.

Resolution 11-10

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; 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 and/or bondholders in the District, as well as potentially valid legal claims by Valley Utility, which could between them well exceed \$5,000,000, 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, additional costs have now been determined and agreed by Valley Utility and the City of Piedmont and the City Council appreciates the agreement by Valley Utility to not exceed the \$1,127,013 cost guarantee for the completion of all remaining work on the District; 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: the Piedmont City Council has previously directed that its Audit Committee 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: the City Council has retained 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 \$1,060,000 to be paid for the completion of all construction work for the Piedmont Hills Underground Utility District.

Moved by Barbieri, Seconded by Chiang.

Ayes: Barbieri, Chiang, Friedman

Noes: Fujioka, Keating

Absent: None

(0088)

Councilmember Fujioka made a motion, seconded by Councilmember Keating that (1) the Council authorize the creation of a subcommittee of the Council's Audit Committee that would include a member who is not a Councilmember; (2) the Council impose a moratorium on all utility undergrounding projects until such time as the City's undergrounding policies and contract administration procedures are thoroughly reviewed; and (3) the City retain the services of a project manager to supervise and oversee the completion of the Piedmont Hills Utility Undergrounding Project, with the understanding that every effort would be made to secure the project management services at no cost to the City. The Council discussed the proposed resolution, requesting that it be amended to: provide for consultation with the City's legal counsel prior to Audit Committee subcommittee formation and that membership not be necessarily limited to only one resident member; direct staff to prepare a draft moratorium directive for Council review and approval at the next meeting; and allow the Council to consider, rather than require, that the City retain the services of a project manager for the Piedmont Hills project. Councilmembers Fujioka and Keating agreed to the proposed amendments.

Resolution 12-10

RESOLVED, that the City Council directs staff to submit a proposal for instituting a moratorium on all utility undergrounding projects in Piedmont until such time as City undergrounding policies and contract administration procedures are thoroughly reviewed, with said proposal

to be submitted for Council review and action at the March 1 meeting;
and

RESOLVED FURTHER, that subject to legal counsel review, the City Council will consider authorizing the creation of a subcommittee of the Council's Audit Committee, which will include at least one resident who is not a Councilmember, to review issues related to the Piedmont Hills Utility Undergrounding Project; and

RESOLVED FURTHER, that the Council will consider retaining the services of a project manager to supervise and oversee the completion of the Piedmont Hills Utility Undergrounding Project, provided that acquiring such services will not delay completion of the project and efforts will be made to obtain said services at no cost to the City.

Moved by Fujioka, Seconded by Keating

Ayes: Friedman, Barbieri, Chiang, Fujioka, Keating

Noes: None

Absent: None

ADJOURNMENT

There being no further business, Mayor Friedman adjourned the meeting at 5:36 p.m.