

City of Elko)
County of Elko)
State of Nevada)

SS April 17, 2013

The City Council of the City of Elko, State of Nevada met for a special meeting beginning at 3:00 p.m., Thursday, April 17, 2013.

This meeting was called to order by Mayor Chris J. Johnson

NOTE: The order of the Agenda has been changed to reflect the order business was conducted.

Mayor Present: Chris J. Johnson

Council Present: Councilman John Rice
Councilman Rich Perry
Councilwoman Mandy Simons

Council Absent: Councilman Robert Schmidlein

City Staff Present: Curtis Calder, City Manager
Delmo Andreozzi, Assistant City Manager
Shanell Owen, City Clerk
Scott Wilkinson, Development Manager
Don Zumwalt, Police Chief
Jeremy Draper, Civil Engineer
Diann Byington, Recording Secretary

ROLL CALL

PLEDGE OF ALLEGIANCE

COMMENTS BY THE GENERAL PUBLIC

Pursuant to N.R.S. 241, this time is devoted to comments by the public, if any, and discussion of those comments. No action may be taken upon a matter raised under this item on the agenda until the matter itself has been specifically included on a successive agenda and identified as an item for possible action. **ACTION WILL NOT BE TAKEN**

Mike Lattin, Canyon Construction, said the next agenda item was consideration in appealing the airport decision from District Court. He complimented the city on their effort in the dispute. He handed the Mayor a check for \$351,000.00. He said the city won round one based on points and we are headed into round two.

I. NEW BUSINESS

- A. Review, discussion, and possible action regarding the “Notice of Appeal” recently filed by Defendant Canyon Construction Company, including possible authorization to the City Manager and Special Legal Counsel to defend the appeal, file a cross-appeal, and/or file an independent appeal, and matters related thereto. **FOR POSSIBLE ACTION**

Mayor Johnson read an email from Councilman Schmidtlein.

Mayor Johnson, pertaining to the upcoming Special Session on Wednesday, April 17, 2013, I would like for you to read this email for the record that due to my affiliation with Canyon Construction Company, currently Vice President, Principal, Partner and the named defendant involved in tonight’s discussion I am disclosing my direct involvement with said current lawsuit, *The City of Elko vs. Canyon Construction*, therefore it is best that I do not show up public or anywhere near City Hall premises. I will disclose and recuse myself from tonight’s meeting. Regards, Councilman Schmidtlein.

Mayor Johnson said it was huge for Mike Lattin to present the check to council. He was surprised by the check. He wanted to stop for a minute and see where everyone was really at and asked Mr. Lattin his thoughts.

Mike Lattin said you guys won it. That was the award. He doesn’t think anyone questions the arbitration panel’s decision made or the dollar amount awarded.

Councilman Rice wasn’t sure if council should open the check. The amount (\$351,000.00) was not reflective of any numbers in the award.

Councilwoman Simons said she thought that was Mr. Lattin’s figure of half of what was awarded.

Mr. Lattin said that was what the arbitration panel recommended. We want to give reference to what the panel’s recommendations and thoughts were. He thought Brian Oreck and Knight Piesold very likely will come up with their share of the other half. The city can rest assure that they will get their money.

Councilman Rice thought we could move forward and take action on the agenda item even with the check in hand. This check is not related to the action to be taken tonight. He appreciates this and sees it as a gesture. You have filed a notice of appeal.

Mr. Lattin said there are no strings attached on that check.

Mayor Johnson said you decided to file an appeal. Will you move forward with the appeal or are you done?

Mr. Lattin answered we are not done. We are not questioning the money. There are no strings attached with that. The city is free to do whatever you want with it.

Mayor Johnson said this was a complete surprise.

Councilman Rice said he is cautious with his thanks to Mr. Lattin without consulting with counsel. He wasn't sure what it meant. It is a step in the direction that the city has been looking for.

Councilwoman Simons said the citizens will get some of what they paid for back.

John Carpenter said he is surprised at the agenda. It doesn't have anything to say about if this should be settled. It only says if you can do anything on the appeal. He thinks it should be settled. Everyone has lost money on the appeal, especially the taxpayers. He is sure that Canyon has lost and also Knight Piesold. It is time to settle. Where is legal counsel? He was sure he has advised council on what to do here. To his knowledge this is the first time this has ever been agendized and had a meeting on it. The agenda is only half. We don't know what is going to happen. His opinion is the Supreme Court will not go against the arbitrators. He is certain the Supreme Court is not going to go against the justice that heard this the last time. We need to put an agenda out to accept his check. The decision said that Canyon and Knight Piesold were liable for the money. It was their suggestion that it should be divided in half between Canyon and Knight Piesold. The City was awarded another \$200,000.00 from Knight Piesold. If Canyon offers you \$351,000.00 no strings attached, you guys need to settle this thing. It isn't right to lose the taxpayers money. This could go on forever. The lawyers have found the cash cow here and they will play it for all its worth. Settle this thing and get out of it. The taxpayers have the best chance for a lawsuit because the arbitrator said what was done here was not within reason. It was carried out too long. The City is lucky to have the extra sales tax to spend on this thing.

Councilman Rice said unfortunately a card has been drawn from a different deck and laid on our table. We are here today because Canyon Construction appealed this and it is our responsibility to defend an appeal. We do have some options. He had hoped that Canyon would have presented this check before they decided to appeal. Even though we have heard from Mr. Lattin that there are no strings attached to this, we haven't heard that he will be dropping his appeal. Until we hear from that the only responsible thing we can do is act on this matter as it is posted. He wasn't sure what kind of assurance we could get. It would be imprudent on us not to act on this agenda item as long as we understand an appeal has been made and we have a responsibility to defend ourselves in that appeal.

Mike Lattin said that the appeal is going ahead. He disagreed with John Carpenter. From a public standpoint, we are so far into this thing. He encouraged council to appeal.

Councilman Perry asked Brian Oreck from Knight Piesold what his intent on this was since he was the other party in it. We are here because someone filed an appeal otherwise this thing was going to be paid and over.

Brian Oreck, Knight Piesold, answered they have been trying to settle this from the start. They issued papers to confirm arbitration. We would have brought you a check if we thought it would mean anything.

Councilman Perry asked if it was their intent to appeal this.

Mr. Oreck answered he hasn't spoken to his attorney about this but he doesn't see any benefit for them to appeal the decision since they filed to confirm.

Councilman Perry said he wants this to be over and we need to move on.

Councilwoman Simons agreed with Mr. Carpenter. This was the award and we would like to receive the award. If someone files an appeal it is to your benefit to defend the appeal. We thought it may have been over but if someone files against you have to do something about it.

Mr. Carpenter asked what happens when the city files the appeal.

Councilman Rice answered we have not filed an appeal.

Mr. Carpenter said the city is going to file something; maybe a countersuit. What happens? Then we are off to the races again. You can take no action and put this thing back on the agenda since you only need three days. Put it back on the agenda and put something there to settle this. Put Mike on the spot as to what he is going to do. If he then comes to the meeting and says he will give you the \$351,000.00 and I am not going to withdraw my appeal then you don't have any alternative. He has already put his money up so let's put his mouth where his money is and settle this. You can table this tonight with instructions to put it on the agenda.

Councilman Rice said we are under timeline constraints. Mr. Lattin has stated twice in this meeting that he has no intention of withdrawing his appeal.

Mayor Johnson said in order to file a cross appeal we have to do that before the 19th.

Mr. Carpenter said the city waited until the last minute. If you don't settle this thing you are going to have a taxpayer lawsuit against you. You can call a special meeting and you can do it tomorrow.

Councilman Rice said to Mr. Carpenter, we are friends and he has respect for him. We have a couple of options he would like to present. 1) A cross appeal; 2) in conjunction with a cross appeal we should also consider providing instruction to our counsel for an independent appeal. A cross appeal gives us a chance to defend our appeal and it preserves our rights to other matters that might occur. We have to remember that the City of Elko did not file an appeal. The City of Elko and everyone gathered here today was ready to end this. It's unfortunate that Mr. Lattin has chosen to continue in this effort and to continue to require that the citizens of the City of Elko invest money in defending his appeal. This is Mr. Lattin's doing and not ours. The original arbitrators found that Mr. Lattin provided the city with a sub-standard product. We asked them

and they did not agree with the settlement. We have to act now because Mr. Lattin has chosen to file this appeal.

Councilman Perry agreed with Councilman Rice. That is why we are here.

Mayor Johnson said that the chances are slim that the Supreme Court would change the decision. I would support that the city just file a cross appeal and not an independent appeal.

Councilwoman Simons agreed. To overturn the decision is a pipedream. We should defend ourselves because it would be irresponsible not to.

Councilman Perry said he hopes it is rejected and done with.

**** A motion was made by Councilman Rice, seconded by Councilwoman Simons, to instruct counsel to file a cross appeal.**

After the motion and before the vote, Councilman Perry asked if Mr. Lattin changes his mind on this he assumes we can both remove this and it is done with.

Mayor Johnson suggested making that part of the motion.

Councilman Rice amended his motion to **“...instruct counsel to file a cross appeal from Canyon’s Notice of Appeal and if Canyon Construction chooses to withdraw the appeal the City would convene once again to withdraw our Notice of Cross Appeal.”**

The motion passed. (4-0)

Councilwoman Simons confirmed her second stood.

After the amended motion and before the vote, Mr. Lattin said this will not be near the cost of the original litigation. According to his attorney it will be well less than \$100,000. This is a drop in the bucket. Dollars are not really a consideration here. A person has to do what he has to do. Don’t let the dollars and cents influence your decision. What is a cross appeal?

Mayor Johnson said a cross appeal would be part of what yours is. If your appeal is not upheld then the City’s cross appeal would automatically go away vs. the city having their own independent appeal.

Councilwoman Simons said it preserves our right to say whatever you are asking for may apply to us.

Mr. Lattin said talking to attorneys too much costs in the long run. Decide what you want to do and go tell your attorney.

Councilwoman Simons said for the city, the cost is always an issue. You don't agree but that is how she handles things. She doesn't feel an independent appeal is the right thing to do because it would just perpetuate this but she feels it is costly and she doesn't want to do it to our citizens.

Mr. Lattin said he is spending his own money and he has the right to do that any way he wants. City Council is also spending some of his money too. We want our chance to argue our position in front of the panel. He felt the panel erred when they said they reviewed his request for attorney fees. They said they already considered it when they didn't have any knowledge of it. The District Court judge said they did err. Once the error had been found then it should have been remanded back to the panel to correct the error. We want our opportunity to argue our case in front of the panel which he thinks under Nevada Rules of Civil Procedure Rule 68. They are entitled to have it considered. What was the intent when the arbitration panel recommended a 50/50 split? Is that what they truly wanted to see? That is what we are asking for.

Mr. Carpenter said he thought the city has given Canyon Construction a way out and he hopes Mr. Lattin takes it. For him to ride out this stuff it will cost the tax payers 3-4 times what it will cost Canyon Construction because of the hourly rate the city attorney charges. He hopes Canyon Construction reconsiders this on the basis of a good citizenship and get this settled.

Council voted on the motion.

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There were no public comments.

There being no further business, Mayor Chris Johnson adjourned the meeting.

Mayor Chris Johnson

Shanell Owen, City Clerk