

MINUTES-October 21, 2024
REGULAR CITY COUNCIL MEETING
COUNCIL CHAMBERS-
1111 AVE E, WISNER, NEBRASKA 68791

The City Council of the City of Wisner, Nebraska met in regular session in the Council Chambers at the City offices in Wisner, Nebraska, on Monday, October 21, 2024, at 7:00 P.M. according to the notice published in the Wisner News Chronicle issue of October 17, 2024, a copy of proof of publication is attached to these minutes. Notice of the meeting was posted in three public places which are the Wisner Post Office, Wisner Public Library, and the Wisner City Office. Notice of the meeting and the agenda were mailed or emailed to the mayor and all members of the City Council. A true copy of their signed acknowledgement of the receipt of the advance notice of this meeting and the agenda is filed in the office of the City Clerk/Treasurer. An agenda for the meeting was kept continuously current, and was available for public inspection at the City Offices three days before the meeting date. Agenda subjects were contained at least twenty-four hours prior to the meeting. The mayor presided and the City Clerk/Treasurer recorded the proceedings of this meeting. All proceedings hereafter shown were taken while the convened meeting was open to the attendance of the general public.

Mayor Soden called the meeting to order, and announced the location of the posted Open Meeting Act, pursuant to Section 84-1412(8) of the Nebraska Open Meetings Act. Mayor Soden also announced that this meeting is being recorded.

Present on the roll call: Cathy Gobar, Barry Meyer, LJ Parker, Jay Meyer, and Mayor Terry Soden.

Staff present: Randy Woldt, City Administrator/Utility Superintendent, Stephanie James, City Clerk/ Treasurer, Sammye Nyman, Care Center Administrator, and Doug Salmen, Chief of Police.

AGENDA ITEM NO. 1 – CONSENT AGENDA – AGENDA, MINUTES OF THE OCTOBER 7, 2024 REGULAR MEETING, AND CARE CENTER, CITY, & CITY/RURAL FIRE BOARD SEPTEMBER 2024 FINANCIAL REPORT. Moved by Barry and seconded by Parker to approve the consent agenda as presented. Roll call: Ayes: Barry, Parker, Jay, Gobar. Nay: None. Absent: None. Motion carried.

AGENDA ITEM NO. 2 – WATER TOWER PROJECT – DISCUSSION AND POSSIBLE ACTION REGARDING FINAL PAYMENT – NICK GERARD. Mayor Soden opened the floor to Nick Gerard. Mr. Gerard said that he is here to request the remainder of the payment that is being assessed for us under the claims for liquidated damages. It seems like there's been quite a few discussions here about that. In fact, there was some reference to us as a contractor being penalized for the project, which I'm assuming at this time the lawyer has advised you, you cannot do that. That is illegal to penalize us. And so, I'm not sure who was using that language or where it came from. Matthew Munderloh, city attorney for the City of Wisner stated that's probably how it was reported in the newspaper. Mr. Gerard stated he believes it was in the minutes of the city and that's something that can be dissected if we get to that level. Mr. Gerard went onto explain that the other thing is that it looks like what was missing from the discussion with liquidated damages, it was expressed what's in the contract that's clear and accurate, looks

like that was all part of the information. There are two things with liquidated damages in order for them to be assessed and for that clause in the contract to stand and your attorney can guide you on this. One, actual damages have to be difficult to prove, any losses the city incurred from our delays to use a set number like what's in that contract, like you could say I don't know how much it cost us, there's no way for us to prove, and if it fails on that, assessing these damages fails, it's not real deep law. In this business, that's how it works, federal, state level all around. The second thing is the damages have to be reasonable. So, says we go to court, I sue for it and you go in and say we're charging you seventeen percent of a contract for liquidated damages and that's reasonable. You have to believe that that case, if you plead it and we'll be sided with you, with the courts that they won't agree with that. I'm inclined to say they're not going to agree with that. That's if we don't even circle all the way back and look at this project from the beginning, from before it bid.

Mr. Gerard went on to say, I advised your engineer not to do it the way it was done because it would cost you guys money. I have that in an e-mail and it was basically said no, we're not going to do that. It should not have been bid this way. That's why you only got 2 bidders on the job. Another project was attempted to be done this way down the road in Seward, Nebraska. They got zero bidders, same engineer, they went out, rebid it, finally split it up like your project should have been and they got one bidder and it's really not going well. But that's their project, not your project. But it's an example of the situation. If you look at the bids and seen had the project been bid appropriately there would have been significant savings. You bid a job to build water tower on land you did not own. You didn't advise the contractors that. In fact, I didn't know about it. The first, the pre-construction was scheduled on July 14th. I got a notice it was cancelled on July 13th. I was not told why things happened. Wasn't real alarming at that point. But then as time goes on and there's tons of information out there, you guys have records, I have records, I was finally told that the city did not own the land for this project and was acquiring new land. It was implied the city thought that we're going to get the land. It was done. Then it turns around, the land that this tank was designed for couldn't even be bought and I get an e-mail that the tanks moved, not a huge amount, but it's changed. The site's changed, the conditions have changed there. We had to re-engineer the foundation on that because we had designed it for the other spot. I didn't ask for any money to re-engineer it because I did that work before I got a notice to proceed. The other delays, of course all went on when we were dealing with COVID and if you guys think your food and groceries and things going up five, ten percent during COVID was significant. When we start going back and looking at what these delays from when this was bid to when we got a notice to proceed on a new site. How much that cost, it cost me, it cost my subcontractors, it cost everybody a shit ton of money, to be quite frank, because I guarantee the inflation on pipe fittings, labor, fuel, paint, all that stuff. So, this job already cost me more money than should have because of the delays on the front end. Not by us. And all that becomes relevant. I mean, even if you ignore the two factors that you have to stand by, that you're going to enforce the liquidated damages and I don't think they'll hold up in court. I'm really confident and as much as I despise lawyers, that's my next step if we don't get paid for the work we did. And another thing I asked when these delays started happening, I asked for a partial notice to proceed, which was to allow us to start doing the water like work, which is actually what was the major delays on the project that was a subcontractor of people we had to count on to do. And then, you know, everybody did their best effort, but things were

pretty difficult at that time to try and get done. But had I got that partial notice to proceed, that would have eliminated these delays because while the land issue was still being juggled, probably 85% of the water line work could have been done. So, I made efforts for this job to go better than it did and I was ignored. Our subcontractor got the water line and you've got a water tower there that's working, doing its job. It's going to last 100 years. And now we're being thrown under the bus and trying to take money out of our pocket, our employee's pocket. And I think it's honestly ridiculous. If there were some losses, which doesn't seem to have been ever discussed in anything I found, cost to run certainly if you had \$340,000 in losses because of our delays and that will be interesting to see in your budget and expenditures because that's a couple \$100,000, a \$150,000 a year. I mean that that would show up I think in your accounting and your budget if there were that kind of losses somewhere.

Councilman Barry stated I just wanted to know when was this job bid compared to when we acquired the land because that seems to be a big deal. Mr. Gerard stated the bid date was 5/27/2020. My steel prices, and I was going to bring that chart. That's another point from when this was bid to when we got the notice of award, steel prices doubled. My raw material prices doubled. Mr. Munderloh stated I'm sorry to interrupt, much of your presentation sounds very similar if not identical to what we heard on the Zoom call many months, if not years ago, when you asked for a change order to change the dates of substantial completion from July 15th of 2021 to October 1st of 2022 and the date of readiness for final payment from August 15th of 2021 to November 30th of 2022, do you agree? Mr. Gerard agreed. Mr. Munderloh went on to say is it true that there was no further request for a change order after those dates were established? Mr. Gerard agreed. Mr. Munderloh asked why. Mr. Gerard stated because doing a change order at that point, what difference would it have made, if we'd asked for one on that date, how would it have changed anything with the project? Mr. Munderloh said isn't that the procedure that you ask when you ask for more time? Mr. Gerard said not to provide me notice to proceed for nine months, expect me to hold my prices, backdate the notice to procedure, attempt to backdate it. That's not the procedure. We can talk about all these things that went on and resulted in this project being slow, or we can go back to the very two simple points I started with. The clause in the contract won't stand. You have to pass both of those. Mr. Munderloh said according to you, the contract is with respect to liquidated damages, it's not enforceable. Mr. Gerard agreed. Mr. Munderloh said you signed it, but it's not enforceable. Mr. Gerard said by law, those clauses aren't enforceable, but it does not meet those due criteria. It's very very basic. Mr. Munderloh said with respect to the way that it was bid, I can appreciate that you disagree with the way that it was bid, but you bid on it that way anyway. Mr. Gerard said that it cost the city money and why you didn't get the bidders. That's just the point of the trajectory of this whole project. Councilman Barry said that you were talking about a nine-month delay but the change order was fourteen and a half months more time, so that's way more than a nine-month delay. Mr. Gerard said I'd have to look at those dates. Mr. Gerard said it might be because I'm not sure where that comes from because of where everything was shifted. And that may be exactly accurate. Mr. Munderloh said maybe you've seen this, I put together a summary with the dates that the council discussed in July. I think it's probably available on the table. Mr. Gerard said that was our belief, we believe that was a reasonable time to get it done. But again, we were working in circumstances. We can talk about all the things that went wrong, whether we want to blame back and forth. Councilman Barry stated the last three or four

months we couldn't get clean water through the pipe to fill the stand pipe if I remember right, it kept coming back substandard. Mr. Gerard stated that the contractor didn't get the pipe. Councilman Barry said that was quite a bit of time.

Mr. Munderloh asked Mr. Gerard do you disagree with the calculation of liquidated damages? Mr. Munderloh went on to say I understand that you disagree about the permission and the contract, but that aside, do you agree that they're calculated correctly? Mr. Gerard agreed. Mr. Gerard stated as we discussed liquidated damages, there's another issue with the validity of and to be honest, it's gone different ways in different courts. But whether liquidated damages can be charged after a substantial completion date is between substantial and final because you have actually acquired a substantial full use of the product. It's functioning, it's doing everything it was supposed to do. Mr. Gerard then asked did you guys lose the sale of water at any time during this project? Mr. Gerard said if there were additional expenses related to it, it would be very easy to calculate, and that's what's fair to go after is additional expenses that are truly incurred. That's the law, it's not really a gray area. Councilman Barry said I'm not going to discuss the law, that's why we got our attorney here, but seems to me you're arguing the amount of the damages. Mr. Gerard disagreed. I've seen no claims for actual damages, which is really the only conversation that could be had. Councilman Barry asked why would you sign a contract that says there will be damages knowing that if you didn't intend to pay them if they were? Mr. Gerard said it's irrelevant. If it's not enforceable in the contract by law, it's not my law, it's your State of Nebraska law to federal law to Kansas law. Councilman Barry said I don't know the law, but if I sign a piece of paper, I'm going to pay so much money and I don't pay it, I'm going to get taken to court or pay it and you sign that contract. That's what I'm looking at. And I do agree with Matt, our attorney, that you could have asked for another change order. We might or might not have granted it, but you didn't ask. Mr. Gerard said correct, but yet again, I'm asking what it would have changed in the scope of the project. Councilman Barry said you're asking what did we lose? Mr. Gerard said essentially, yeah, that's the simplest way, I mean, I've had a project when they went over 30 days one time that town was unable to sell to one of their customers because of it and they come back and said this is what it cost us. We had to buy wholesale from this and to do it and they said this is what it cost us because of that. Councilman Barry said I'd have to concur with our attorney. Mr. Munderloh stated here's what I'm going to recommend, if you're finished, then I'm going to recommend that we go into closed session at some point. That could be now or that could be toward the end of the meeting and we can have a discussion in closed session just between us and proceed from there. Mr. Gerard asked is there any other questions anyone has for me?

Mr. Gerard said there is another thing I would like to mention you just keep in mind is there were two occasions that we did not get paid for five to six months for our work and by rights we could have issued stop work during that time and not done anything. Mr. Munderloh asked when were those times? Mr. Gerard said our July pay application was 2022 was not paid till December and then November was not paid till June 2023. And I'm sure if anybody did not pay their water bill in that time period, they probably would have their water shut off. I know on one of them, our office called up here, the answer we got was city had not received it and that may be, and the engineer said he sent it. Regardless, we went another six months without. Our subcontractors were paid, our people were paid, our bills were all paid. We went six months

without that money. Councilman Barry said we'll go into closed session at some point tonight, you said, Matt, so, you don't want to pay any liquidated damages? Mr. Gerard stated no, but like I said, if there is a claim that you know of and you want to discuss expenses, cost, let's have that conversation. There has never been anything presented to us such as if we don't get this online, I can't do this and this. We've had towns where they couldn't build any new houses because they didn't have the water, they had a moratorium. There were things like that in place that they couldn't issue a building permit. Mr. Munderloh said I just want to make sure I understand this is a correct summary of your argument that you agree that the \$346,500 in liquidated damages is a proper calculation, you agree with that, but you disagree about the enforceability of the liquidated damages clause as written in the contract. Mr. Gerard agreed.

Mr. Munderloh asked Mr. Gerard if he is continuing to sign contracts with liquidated damages provisions? Mr. Gerard said yes, they are not enforceable. Mr. Munderloh stated that I can't, and I won't speak for the council or the mayor on this, but on the other hand, my experience has been that most contractors ask for change orders when they need more time. They don't fail to ask for change orders and then complete the contract, what years later, and then come back and say that the liquidated damages clause is not enforceable. Mr. Gerard agreed that is fair. That doesn't mean I'm incorrect and it also doesn't mean that the you know, like I said, what would it have changed for more time? If you told me no, you said if I asked for more time, you told me no, then what's that do? Then honestly, I'm pissed off the rest of the time I'm working on the job. Although it probably didn't feel like it here because of the contractor stuff, my concern is getting the job done, and like I said, this was your only project. It probably didn't feel that way, but having round and round and driving up to city council meetings and talking about the stuff and, and honestly maybe a little too honest, I really found our conversations and getting through the issues with the pipe pricing stuff, I found the conversations pretty unpleasant. I didn't want to have those conversations. So, I probably did avoid asking for a change order because I didn't expect anything reasonable to come out of it. Councilwoman Gobar asked Mr. Gerard if council ever denied him a change order? Mr. Gerard stated it was for the price increase for the pipe fittings. That all that stuff that went up and which was actually a pretty small thing compared to the cost increase on the job. I didn't feel like any discussion about a changer order for more time was going to be met reasonably. Councilman Barry stated I don't think we can go much further here, we talked about it, we've discussed it, and we heard your side. Mr. Gerard asked if he should hang around in case council has any other questions. Mr. Munderloh stated you're welcome to, but just for the sake of full transparency, probably what's going to happen is I'm going to tell the city council to give me a few weeks and I'll write up a memo for them to look at and they'll make a decision at a subsequent meeting based on that memo. Mr. Gerard said if any questions come up in the meantime, I guess you have my e-mail through Randy through the lawyer directly, I'll do my best.

AGENDA ITEM NO. 3 – RESOLUTION NO. 2024-9 – YEAR-END CERTIFICATION OF CITY STREET SUPERINTENDENT FORM 2024. Mayor Soden introduced Resolution No. 2024-9 entitled: Signing of the year-end certification of city street superintendent form 2024. Mayor Soden then asked for a motion to approve Resolution No. 2024-9. Moved by Barry and seconded by Gobar to approve Resolution No. 2024-9 to approve the signing of the year-end

certification of city street superintendent form 2024. Roll call: Ayes: Parker, Jay, Barry, Gobar. Nay: None. Absent: None. Motion carried.

Mayor Soden declared Resolution No. 2024-9 adopted.

AGENDA ITEM NO. 4 – DISCUSSION AND POSSIBLE ACTION REGARDING CASHING IN OF CD #2421 ARPA FUNDS. Stephanie James, City Clerk/Treasurer stated that CD matured on the nineteenth. We have ten days to renew it. If you see in the financials, the water department needs money and we've designated these ARPA funds to go towards the water treatment plant. So, I just put on there if you guys want to cash it in and put it back into the water fund to help cover some of the costs that have been spent on the water treatment plant. Councilman Barry asked what the amount is on the CD. Mrs. James said the CD was renewed in the amount of \$219,368.30, but there will be some interest on there. Moved by Gobar and seconded by Jay to cash in CD #2421 ARPA Funds to be put into the water department to help cover some costs of the water treatment plant. Mr. Woldt stated that is what those funds were designated for. Roll call: Ayes: Jay, Barry, Parker, Gobar. Nay: None. Absent: None. Motion carried.

AGENDA ITEM NO. 5 – DISCUSSION AND POSSIBLE ACTION REGARDING SALARY FOR CITY ADMINISTRATOR/UTILITY SUPERINTENDENT. Councilman Barry stated that he put this on the agenda. I've checked around Pender and Stanton. We gave the salaried workers a 3.5% increase and everybody else in the city got about a six to ten, and I checked on wages that everybody's getting in Stanton and Pender, and we are under the other towns that are very similar in size. So, I recommend that all the salary workers going back to when we gave the raises, they did have it in the budget for 6.2% and we changed it to 3.5 for the salary workers. I think we should go back to the 6.2% for the salaried workers instead of the 3.5%, get them on the even keel with Stanton and Pender and that's what I recommend and I'll make a motion if I have to. Mrs. James said the recommendation is fine right now, then an amended ordinance can be brought forth at the next council meeting for final approval. Councilman Barry stated that he recommends that we change the salary workers from 3.5% to 6.2%. This would be retroactive to the original ordinance date. No action taken at this time.

AGENDA ITEM NO. 6 – MONTHLY POLICE REPORT – D. SALMEN. Doug Salmen, Chief of Police made available the monthly police activities report to the mayor and council. Chief Salmen stated, if you haven't heard, we were approved for the COPS Now Grant. Chief Salmen has a phone call in to get some guidance on the next steps for the grant. Chief Salmen has questions he would like to ask regarding the grant. Councilwoman Gobar asked if Tiffany is not with the city anymore. Chief Salmen stated she is on her honeymoon. Councilwoman Gobar asked who the gentlemen is that's picking up people at night? Chief Salmen stated his name is Chaz Brown. Councilwoman Gobar stated she has received seven calls from very very happy people that he is working. Chief Salmen stated that Chaz Brown was involved in a very interesting incident and will not go into details right now. The mayor is aware of it.

AGENDA ITEM NO. 7 - BUILDING PERMITS. Randy Woldt, City Administrator/Utility Superintendent, stated he has three building permits at this time. The first one is in the Grandview Addition to build a home on Lot 7, the second one is at 1500 24 Street in the Grandview Addition to build a home, and the last one is at 103 Avenue E to replace their concrete patio.

AGENDA ITEM NO. 8 - COMMUNICATIONS, REPORTS, COMMENTS BY COUNCIL, CITY OFFICIALS AND GENERAL PUBLIC.

- A. Mr. Woldt said that they turned in their lead service line inventory to NDEE by the 16th of October, we turned it in with two hundred twenty-eight unknowns out of six hundred seventy-eight total customers. Mr. Woldt went on to say that the way he understands it is that we have three years to figure out those two hundred twenty-eight unknowns out and that we have to show progress each year. So, we either need to start digging up curb stops or exposing them somehow or another so, my suggestion is to purchase a vacuum trailer that uses water to evacuate and expose the lines. My intentions were is to put 20,000 down this year and then try to get somewhere around that payment for the next three years. Total price for the vac trailer is around \$79,000. Councilwoman Gobar asked what the vac trailer does. Mr. Woldt said you take pressure washer and basically pressure wash down into the dirt and there's a big vacuum that sucks the mud out and that's the safest way to expose gas and water lines. Mr. Woldt will bring some more information to the next council meeting. Mr. Woldt gave an update on the tubes going down the park road. The second batch of tubes should be here tomorrow. Councilman Barry said that it will look different when people can mow that ditch. Mr. Woldt stated that there is one issue with this. The sewer line for one of the houses, may need to extend the sewer line down the west side of the storm sewer pipe in order to get it to flow right. If anybody ever builds on that side, they're going to have to figure out how to either extended the sewer line up that west side of that storm sewer or a pump system or something to make it work. Mr. Woldt said that he will do some more checking into this to see what can be done.
- B. Councilman Jay asked about a trailer that has been parked behind Two Blooms and a Bud all summer long. Mr. Woldt stated that the trailer is Bill Miners and that he owns that lot that it sits on.

At 7:40 PM it was moved by Councilman Barry to go into closed session to consult with the city attorney regarding the Wisner water tower project and Nick Gerard and seconded by Parker. Roll call: Ayes: Barry, Parker, Jay, Gobar. Nay: None. Absent: None. Motion carried.

Mayor Soden adjourned the closed session at 7:53 PM.

Moved by Gobar and seconded by Barry to come out of closed session. Roll call: Ayes: Barry, Parker, Jay, Gobar. Nay: None. Absent: None. Motion carried.

No action was taken at this time.

AGENDA ITEM NO. 9 - MOTION TO ADJOURN TO MEET IN SPECIAL SESSION ON MONDAY, NOVEMBER 4, 2024, AT 7:00 PM. At 7:53 PM moved by Parker and seconded by Gobar that the City Council adjourn to meet in special session on November 4, 2024 at 7:00 PM, in the Council Chambers at the City Office. Roll call: Ayes: Barry, Parker, Jay, Gobar. Nay: None. Absent: None. Motion carried.

Mayor

Attest:

City Clerk/Treasurer