

**CITY OF MILWAUKIE  
CITY COUNCIL MEETING  
DECEMBER 17, 2002**

**Call to Order**

The 1900<sup>th</sup> meeting of the Milwaukie City Council was called to order by Mayor Bernard at 6:00 p.m. in the City Hall Council Chambers. The following Councilors were present:

Mary King  
Larry Lancaster

Jeff Marshall

**Staff present:**

Mike Swanson,  
City Manager

Larry Kanzler,  
Police Chief

Gary Firestone,  
City Attorney

John Gessner,  
Planning Director

Alice Rouyer,  
Community Development/  
Public Works Director

JoAnn Herrigel,  
Program Specialist

**PLEDGE OF ALLEGIANCE**

**PROCLAMATIONS, COMMENDATIONS, SPECIAL REPORTS, AND AWARDS**

**Citizen Commendation for Paul Hubbard**

Kanzler presented 13-year-old Paul Hubbard with an Award and Commendation for his bravery and selflessness when confronted by a criminal who forced his way into their home on August 1, 2002.

**Recognize Robert Mendenhall for Services as Interim Building Official**

Rouyer recognized Robert Mendenhall for his services as Interim Building Official.

**Recognize Off-going Councilors**

Councilors Mary King, Jeff Marshall, and Brian Newman were recognized for their service to the community as Milwaukie City Councilors. Newman, who served since 2000, resigned effective midnight December 15, 2002 to take a seat on the Metro Council. King and Marshall, both elected in 1998, chose not to run for re-election.

**CONSENT AGENDA**

**It was moved by Councilor Marshall and seconded by Councilor King to approve the Consent Agenda that included:**

1. **City Council Minutes of December 2 & 3, 2002;**
2. **Resolution 30-2002: A Resolution of the City of Milwaukie, Oregon, Recording the Certified Election Results for the November 5, 2002 General Election; and**

### 3. Intergovernmental Agreement with Clackamas County Regarding Repayment of Operations, Maintenance and Capital Improvement Costs at the Kellogg Creek Wastewater Treatment Plant.

The motion to adopt the Consent Agenda passed unanimously.

#### AUDIENCE PARTICIPATION

**Annaliese Hummel**, Monroe Street, Milwaukie, urged the City Council to adopt a resolution against war in Iraq and the Patriot Act similar to one recently adopted by the Eugene City Council. She currently pays the City of Milwaukie about \$1,100 in property taxes annually, and she wants to know what is done for her as a resident. There are still no traffic calming devices on Monroe Street, which she feels are needed to decrease or slow traffic particularly at the 28<sup>th</sup> Avenue intersection. Hummel thinks her utility bill is enormous. She contributes to the health of the community by not using fertilizers on her lawn or dumping chemicals and believes she should be rewarded with a lower rate.

**Linda Hatlelid** read a statement prepared for Mayor Bernard and Councilors King, Marshall, and Newman. In voting to authorize the intergovernmental agreement with the City of Portland for the Johnson Creek Boulevard Improvement Project Phase III, these Council members sold out the neighborhood for the almighty dollar. The project has become a monster from what was originally proposed 15 years ago. After many meetings with the neighborhood, Portland is still not addressing residents' design concerns. Milwaukie cannot afford to take over Johnson Creek Boulevard from Clackamas County, and Hatlelid suggested letting the County keep the road to avoid future maintenance costs. The most recently signed intergovernmental with the City of Portland has major deletions and mathematical errors that need to be corrected. Hatlelid maintains all of the improvements can be done in the 40-foot right-of-way, which would decrease the amount of right-of-way acquisition and reduce the financial impact on both the City and the property owners. All of this right-of-way purchase is not mandatory to receive federal funds; it is a waste of tax money.

#### Budget Committee Applicant Interview

The Council interviewed Keith Dow for a vacant position on the Budget Committee.

#### PUBLIC HEARING

#### Title 3 Water Quality Resource Regulations, Applications ZA-02-05 and CPA-02-03 -- Ordinances

**Mayor Bernard** called the public hearing on the proposed legislative zoning ordinance and comprehensive plan amendments to order at 6:50 p.m.

The purpose of the hearing was to consider code amendments that would implement Title 3 water quality resource regulations. **Mayor Bernard** reviewed the conduct of the hearing.

Conflicts of Interest: No councilor declared any potential or actual conflicts of interest. No member of the audience challenged any councilor's ability to participate in the decision.

Staff Report: **Gessner** presented the staff report in which the City Council was requested to adopt ordinances amending the zoning ordinance and the comprehensive plan by establishing water quality resource regulations. He provided a brief overview of the process that began with a Metro Functional Plan requirement to implement regional water quality standards. He summarized the 1990 Natural Resource Overlay Zone, the proposed vegetated buffer, and relaxed regulations for applications that do not negatively impact resources. He explained that the proposed amendments apply only to new development and do not take property. No changes are required for existing yards, gardens, or buildings. He summarized the outreach efforts involved in developing the proposed regulations.

The City Attorney recommended several changes to the ordinance distributed in the Council packet. **Gessner** discussed a change to Section 322.6 – Activities Permitted under Type II Review – based on public comment. Section A would be amended to read: "improvement of existing public and private utility facilitates where..." The purpose of this amendment is to clarify the type of work that must be reviewed. The City's ability to regulate consistent with Council intent would not be impaired. Planning Commission Chair Hammang indicated his support for this amendment.

**Councilor Lancaster** asked if the City Council would see future actions related to the Metro Functional Plan.

**Gessner** said the Functional Plan is dynamic at the regional level. At some time, the City Council will consider Goal 5, upland habitat regulations, and Title 7, affordable housing.

Correspondence: None.

Testimony in support: None.

Testimony in opposition: None.

Neutral testimony: None.

Additional Staff Comments: None.

Questions of Clarification: None.

**Mayor Bernard** closed the public testimony portion of the hearing at 7:10 p.m.

It was moved by Councilor King and seconded by Councilor Marshall to read the ordinance amending Ordinance 1712 by adopting amendments that implement regional water quality resource regulations for the first time by title only with changes recommended by staff. Motion passed unanimously. The ordinance was read for the first time by title only including the following changes:

**Section 1.** The findings of fact in support of these amendments contained in application ZA-02-05 are incorporated by this reference and are hereby adopted.

The application and proposed amendments are consistent with Zoning Ordinance 902-Amendment Procedure, 905-Approval Criteria for All Amendments, and 1011.5-Legislative Actions as shown in Attachment 5.

**Section 2.** Milwaukie Municipal Code Section 19.322-Natural Resource Overlay Regulations, including subsection 19.322.1 through 19.322.18 is repealed.

**Section 3.** Milwaukie Municipal Code Section 19.807-Destruction of Nonconforming Structure or Use is repealed.

**Section 4.** Milwaukie Municipal Code Section 19.103-Definitions is amended as shown in Attachment 1.

**Section 5.** Ordinance 1712 and Milwaukie Municipal Code Title 19 are amended by adoption of the new Chapter 322-Water Quality Resource Regulations as shown in Attachment 2.

**Section 6.** Water Quality Resource Maps adopted by reference through the new Milwaukie Municipal Code Section 19.322.1(F) are shown in Attachment 3.

**Section 7.** Ordinance 1712 and Milwaukie Municipal Code Chapter 19 are amended by adoption of the revised Section 807 (Milwaukie Municipal Code Section 19.807)-Destruction of Nonconforming Structure or Use as shown in Attachment 4.; and

Attachment 2; 322.6A Improvement of existing public utility facilities where...

It was moved by Councilor King and seconded by Councilor Marshall to read the ordinance amending Ordinance 1712 by adopting amendments that implement regional water quality resource regulations for the second time by title only with changes recommended by staff. Motion passed unanimously. The ordinance was read for the second time by title only including the following changes:

**Section 1.** The findings of fact in support of these amendments contained in application ZA-02-05 are incorporated by this reference and are hereby adopted.

The application and proposed amendments are consistent with Zoning Ordinance 902-Amendment Procedure, 905-Approval Criteria for All Amendments, and 1011.5-Legislative Actions as shown in Attachment 5.

- Section 2.** Milwaukie Municipal Code Section 19.322-Natural Resource Overlay Regulations, including subsection 19.322.1 through 19.322.18 is repealed.
- Section 3.** Milwaukie Municipal Code Section 19.807-Destruction of Nonconforming Structure or Use is repealed.
- Section 4.** Milwaukie Municipal Code Section 19.103-Definitions is amended as shown in Attachment 1.
- Section 5.** Ordinance 1712 and Milwaukie Municipal Code Title 19 are amended by adoption of the new Chapter 322-Water Quality Resource Regulations as shown in Attachment 2.
- Section 6.** Water Quality Resource Maps adopted by reference through the new Milwaukie Municipal Code Section 19.322.1(F) are shown in Attachment 3.
- Section 7.** Ordinance 1712 and Milwaukie Municipal Code Chapter 19 are amended by adoption of the revised Section 807 (Milwaukie Municipal Code Section 19.807)-Destruction of Nonconforming Structure or Use as shown in Attachment 4.; and

**Attachment 2; 322.6A** Improvement of existing public utility facilities where...

It was moved by Councilor King and seconded by Councilor Marshall to adopt the ordinance amending Ordinance 1712 by adopting amendments that implement regional water quality resource regulations including the staff recommended changes. Motion passed unanimously.

**ORDINANCE NO. 1912:**

**AN ORDINANCE OF THE CITY OF MILWAUKIE, OREGON, AMENDING ORDINANCE 1712, CHAPTER 100-DEFINITIONS AND 322-WATER QUALITY RESOURCE REGULATIONS, BY ADOPTING CERTAIN AMENDMENTS THAT IMPLEMENT REGIONAL WATER QUALITY RESOURCE REGULATIONS.**

It was moved by Councilor Marshall and seconded by Councilor Lancaster to read the ordinance amending Comprehensive Plan, Objective #2 -- Natural Resource Areas for the first time by title only. Motion passed unanimously. The ordinance was read for the first time by title only.

It was moved by Councilor Marshall and seconded by Councilor Lancaster to read the ordinance amending Comprehensive Plan, Objective #2--

**Natural Resource Areas for the second time by title only. Motion passed unanimously. The ordinance was read for the second time by title only.**

**It was moved by Councilor Marshall and seconded by Councilor King to adopt the ordinance amending Comprehensive Plan, Objective #2-- Natural Resource Areas. Motion passed unanimously.**

**ORDINANCE NO. 1913:**

**AN ORDINANCE OF THE CITY OF MILWAUKIE, OREGON,  
AMENDING THE MILWAUKIE COMPREHENSIVE PLAN.**

Any party with standing may appeal the decision of the City Council to the State Land Use Board of Appeals according to the rules adopted by that Board. The written decision will contain an explanation of the appeal rights. Questions may be directed to the Planning Department.

**OTHER BUSINESS**

**Portland General Electric Franchise Agreement**

Herrigel provided the staff report in which the City Council was requested to adopt an ordinance granting a nonexclusive franchise to Portland General Electric (PGE) for 10 years to erect, construct, maintain and operate an electric power system within the City of Milwaukie. The current franchise expires on December 31, 2002. PGE would not agree to change the 3.5% franchise fee, but it did agree to a clause that allows the City to establish a 1.5% privilege tax. Herrigel noted several non-substantive modifications to the proposed ordinance: add word "nonexclusive" to the ordinance title; Section 9(H) to read, "the obligation to pay the franchise fee imposed by Section 9(A) shall survive expiration of the agreement as long as PGE continues to exercise the rights granted in Section (1)...; Section 11(B)(2) the placement and operations of the wireless communications facilities will be consistent with all safety and other applicable regulations, and (3) PGE agrees to the amount of compensation from the third party. The third party shall be contractually responsible for compliance with all safety and other applicable regulations..." In response to a question from Councilor Lancaster, Herrigel explained the franchise agreement would not be affected if PGE is sold.

The group discussed the franchise fee and the feasibility of establishing a privilege tax. **Councilor Lancaster** would prefer coming to an agreement rather than adding a tax.

**Annette Maxon**, PGE representative, said the Oregon Public Utilities Commission (PUC) determines service rates and allows a 3.5% operating expense. Anything in excess of 3.5% would print on customers' bills as a separate line item as outlined by Oregon Revised Statutes. PGE will not agree to pay a franchise fee to Milwaukie that is greater than that paid to other communities. She noted the benefits of establishing a privilege tax that could be designated for specific projects such as Milwaukie's riverfront

development. The tax would increase Milwaukie's annual franchise revenue by about \$240,000.

**Firestone** added a privilege tax would not have to be approved by the voters.

**Swanson** understands the additional line for the 1.5% is PGE's choice and is not the state saying thou shalt not. He asked PGE counsel if the company would only charge the additional 1.5% if it were printed on bills as a privilege tax.

PGE legal counsel said the PUC allows 3.5% and anything above that must be a pass through; this is a mandatory provision. It would print on customers' bills as a separate item.

**Councilor King** recommended pursuing the privilege tax proposal.

**Councilor Lancaster** said the new City Council should make the decision. On the face of it, he is opposed to charging residents more money.

**It was moved by Mayor Bernard and seconded by Councilor King to read the ordinance granting Portland General Electric a nonexclusive 10-year franchise for the first time by title only with the amended language. Motion passed unanimously. The ordinance was read for the first time by title only with the following changes:**

**The title of the ordinance shall read as follows: An Ordinance of the City of Milwaukie Granting Portland General Electric Company a Nonexclusive Franchise for Ten Years to Erect, Construct, Maintain and Operate an Electric Power System within the City of Milwaukie and Setting the Terms and Conditions of the Franchise.**

**Section 9(H) to read as follows: The obligation to pay the franchise fee imposed by Section 9(A) shall survive expiration of this agreement as long as PGE continues to exercise the rights granted in Section 1....**

**Section 11(B) shall read as follows: PGE shall allow third parties to place wireless communications facilities on PGE poles provided that (1) the placement will not interfere with PGE's operations, (2) the placement and operations of the wireless communications facilities will be consistent with all safety and other applicable regulations, and (3) PGE agrees to the amount of compensation from the third party. The third party shall be contractually responsible for compliance with all safety and other applicable regulations....**

**It was moved by Mayor Bernard and seconded by Councilor Lancaster to read the ordinance granting Portland General Electric a nonexclusive 10-year franchise for the second time by title only with amended language.**

It was moved by Councilor Marshall and seconded by Councilor Lancaster for the purpose of discussion to table the PGE franchise agreement until the new City Council is seated.

Councilor Marshall sensed some apprehension in approving the 10-year agreement and felt the new Council would more appropriately consider it. The new Council's vision for the community may be different as it works to deal creatively with budget issues.

Councilor Lancaster was not in favor of postponing the decision if PGE has no intention of accepting a franchise fee in excess of 3.5%. If it is simply an exercise in futility, he prefers moving forward.

Swanson said his question to PGE counsel was for the purpose of clarifying that it is PGE's choice to handle the 1.5% in this manner. He advised that extending the decision beyond this meeting would only mean more time spent in negotiations.

Councilor Lancaster said it appears PGE's decision is purely political and allows any increase to appear as an additional line item labeled privilege tax. At face value, this is a tax increase for residents.

The motion to table adoption of the PGE franchise ordinance failed 1 – 3 with the following vote: Councilor Marshall aye; Mayor Bernard, Councilor King, Councilor Lancaster nay.

The motion to read the ordinance for the second time by title only with the amended language passed 3 – 0 – 1 with the following vote: Mayor Bernard, Councilor King, and Councilor Lancaster aye; no nays; Councilor Marshall abstained.

The ordinance was read for the second time by title only with the following changes.

The title of the ordinance shall read as follows: An Ordinance of the City of Milwaukie granting Portland General Electric Company a Nonexclusive Franchise for Ten Years to Erect, Construct, Maintain and Operate an Electric Power System within the City of Milwaukie and Setting the Terms and Conditions of the Franchise.

Section 9(H) to read as follows: The obligation to pay the franchise fee imposed by Section 9(A) shall survive expiration of this agreement as long as PGE continues to exercise the rights granted in Section 1....

Section 11(B) shall read as follows: PGE shall allow third parties to place wireless communications facilities on PGE poles provided that (1) the placement will not interfere with PGE's operations, (2) the placement and

operations of the wireless communications facilities will be consistent with all safety and other applicable regulations, and (3) PGE agrees to the amount of compensation from the third party. The third party shall be contractually responsible for compliance with all safety and other applicable regulations....

It was moved by Mayor Bernard and seconded by Councilor Lancaster to adopt the ordinance granting Portland General Electric a nonexclusive 10-year franchise with the amended language. Motion passed 3 – 0 – 1 with the following vote: Mayor Bernard, Councilor King, and Councilor Lancaster aye; no nays, Councilor Marshall abstained.

**ORDINANCE NO. 1914:**

**AN ORDINANCE OF THE CITY OF MILWAUKIE GRANTING PORTLAND GENERAL ELECTRIC COMPANY A FRANCHISE FOR TEN YEARS TO ERECT, CONSTRUCT, MAINTAIN AND OPERATE AN ELECTRIC POWER SYSTEM WITHIN THE CITY OF MILWAUKIE AND SETTING THE TERMS AND CONDITIONS OF THE FRANCHISE.**

**Intergovernmental Agreement with City of Lake Oswego for Dispatch Services**

**Kanzler** provided the staff report in which the City Council was requested to adopt a resolution authorizing the City Manager to sign an intergovernmental agreement (IGA) with the City of Lake Oswego to merge the 2 dispatch centers at Lake Oswego and for Lake Oswego to provide dispatch and 9-1-1 communication services to Milwaukie. He discussed HB 3977 implications to Milwaukie's dispatch center and the quality of service available from the Lake Oswego Center. He briefly discussed the cost savings and enhanced technology that would be available if the dispatch centers merged.

**Councilor Lancaster** commended the chief on his hard work to leverage resources.

**Mayor Bernard** added that state funding opportunities could be withdrawn from centers such as Milwaukie's and would likely result in a future financial burden for Milwaukie.

**Swanson** feels this is a positive move and noted 5 of the 6 Milwaukie dispatcher positions are fully covered. The sixth position will likely be covered next year.

It was moved by Mayor Bernard and seconded by Councilor King to adopt the resolution authorizing an agreement with the City of Lake Oswego for emergency 9-1-1 and dispatch services. Motion passed unanimously.

**RESOLUTION 31-2002:**

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MILWAUKIE, OREGON, AUTHORIZING AN AGREEMENT WITH THE CITY OF LAKE OSWEGO FOR EMERGENCY 9-1-1 AND DISPATCH SERVICES.**

### City Council Vacancy and Election

**City Attorney Firestone** summarized the decisions before Council as a result of Councilor Newman's resignation to take a Metro Council seat. Municipal Code provides for the Council's calling an election. In addition, Newman's resignation creates a vacancy, and the City Council may decide to appoint someone on an interim basis until the May 2003 election.

**Susan Stone**, Councilor elect, hopes the new Councilors will be afforded the opportunity to participate in the discussion and decision. In the past, the next highest vote getter has taken the interim seat, or the City Council has gone through an application and interview process.

**Brian Newman**, 10440 SE 24<sup>th</sup> Avenue, Milwaukie, felt it was in the best interest of the City Council to consider appointing Jeff Marshall to the interim position. Marshall has served Milwaukie residents with distinction since 1998. He identified several reasons for this recommendation: Marshall has been supported by the public in 2 elections; he is a veteran Council member and would provide institutional knowledge; he has volunteered at a time when volunteers are scarce; and he does not plan to run for office in May.

**Ed Zumwalt** believes there should be a Charter amendment that defines how Council vacancies are filled in this type of situation. He knows several people who would be interested in applying for the interim position.

**It was moved by Mayor Bernard and seconded by Councilor King to adopt a resolution noting a vacancy on the City Council and directing the City Recorder to call an election. Motion passed unanimously.**

#### RESOLUTION 32-2002:

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MILWAUKIE, OREGON NOTING A VACANCY ON THE CITY COUNCIL AND DIRECTING THE CITY RECORDER TO CALL AN ELECTION.**

**Firestone** outlined the options before the City Council to fill the vacancy created by Newman's resignation.

**Mayor Bernard** read comments into the record urging appointment of an experienced interim Councilor to make informed, critical budget decisions that will affect staff, citizens, and the general direction of the community.

**It was moved by Mayor Bernard and seconded by Councilor King to adopt a resolution appointing Jeff Marshall to fill the vacancy as interim Councilor.**

**Councilor Marshall** excused himself from the Council Chambers at 8:10 p.m.

**Councilor Lancaster** was opposed making a decision at this time and urged an open process, which in his perspective is the essence of good government. He felt the new Council should make the decision. He noted that Marshall has expressed animus against incoming Councilor Stone in the past. He did not wish to circumvent the appointment process and urged waiting until the new Council convenes in January.

**Councilor King** supported Marshall's appointment based on his expertise and citizen support. She understands he and Stone have had philosophical differences over the Traffic Safety Board, but she feels they can work together.

**Mayor Bernard** did not feel the process was being circumvented. He has talked with both Councilors elect Stone and Barnes and believes there is sufficient support to appoint Jeff Marshall.

The motion to appoint Jeff Marshall to fill a vacancy on the City Council passed 2 – 1 with the following vote: Mayor Bernard and Councilor King aye; Councilor Lancaster nay.

**RESOLUTION NO. 33-2002:**

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MILWAUKIE, OREGON, APPOINTING JEFF MARSHALL TO FILL A VACANCY ON THE CITY COUNCIL.**

**Councilor Marshall** returned to the Council Chambers. He accepted the interim Councilor appointment through the May 2003 election.

**Other**

Mayor Bernard, Councilor Marshall, and Planning Commissioner Rosemary Crites will host an event to discuss development possibilities with Milwaukie property owners.

**Swanson** recognized Herrigel and the Park and Recreation Board for planning the Winter Solstice and Christmas Fleet viewing event on the Milwaukie riverfront.

**Mayor Bernard** announced an executive session pursuant to ORS 192.660 to discuss real property.

**Councilor Marshall** wanted to make it clear he was not just trying to "hanging on" to his Council position. He had not intend to serve after his term expired, and he feels he accomplished what he and a large group of residents originally set out to do.

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**Adjournment**

**It was moved by Councilor King and seconded by Mayor Bernard to adjourn the meeting. Motion passed unanimously.**

**Mayor Bernard adjourned the meeting at 8:25 p.m.**

*Pat DuVal*

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Pat DuVal, Recorder