TIME & PLACE: The Mayor and the City Commission of the City of Truth or Consequences in the County of Sierra and State of New Mexico met in Special Session in full conformity with the law and ordinances of said Commission in the Commission Chambers of said City, on Friday, August 17, 2007 at 8:00 A.M.

PRESIDING OFFICER: The meeting was called to order by Mayor Montgomery who presided and Mary B. Penner, City Clerk acted as Secretary of the meeting.

ATTENDANCE: Upon calling the roll the following Commissioners were reported present:

Hon. Lori S. Montgomery, Mayor
Hon. Jerry D. Stagner, Mayor Pro-tem
Hon Jimmy L. Rainey, Commissioner
Hon. Evelyn B. Renfro, Commissioner
Hon. Freddie J. Torres, Commissioner

Also present:

Jaime Aguilera, City Manager
Gregory B. Neal, HS Motorplex Development
Bill Humphries, HS Motorplex Development
Jay Rubin, City Attorney
Linda Bauer, Asst. City Manager
Mary B. Penner, City Clerk

QUORUM: There being a quorum present the Commission proceeded with the business at hand.

CONSIDER PURCHASE AGREEMENT HS MOTORPLEX: City Manager Aguilera stated that staff would like to recommend that they consider the item under Closed Session first. He indicated he does not know if they actually need to go into Closed Session because all of the issues have been addressed, so if the Commission wants to discuss these in open session since it is going to be a public document anyway...they can do that or they can go into closed session, and they need to go into closed session for the last item for the purchase for the sewer plant property, but in the interest of the people in the audience Jay and I thought that it would be better to address the easier document first which would only have that one change.

Mayor Montgomery...so you're recommending not going into closed and doing A-1.

City Attorney Rubin stated it is really their choice, and indicated they basically had the same agreement Tuesday night and added two provisions and they are set forth on page 3 on sub-paragraph 6 and that additional language that they felt was appropriate, and
almost the same identical language on page 5.

He stated he left this up to the Commission's option whether they felt comfortable with adding these two changes and comfortable with the rest of the document they could vote on that in open, or however if they had some issues that you wanted to discuss with him in closed session they can go into closed session.

Commissioner Rainey recommended that they stay in open session and do that portion with Commissioner Stagner agreeing.

City Manager Aguilera stated he will ask Jay to explain the...

Mayor Montgomery...so we're doing A-1 – Consideration Sole Source Negotiation with Hot Springs Motorplex.

City Attorney Rubin stated the main change was again on page 3 sub-paragraph 6 – Existing revenue sources, and you will see there is actually a couple of small changes at the top in the beginning part of that paragraph and the main change is where they added in the second half of that paragraph...where it is underlined. (Complete copy attached hereto and made a part hereof.)

He indicated it is clearly that even after they have the FBO transfer that the City will still be receiving the existing revenue sources, and that he thought was important and had that in there and worked with their Attorney on that and they are the ones that drafted this and obviously they are in favor of that.

City Manager Aguilera stated before you go on Jay...and by the way I checked the budget and the rental revenue from the hangars is $29,000 plus and another $2,200 in revenue from other land that they rent...so it's about $31,000 altogether. He indicated their subsidy of the Airport is $75,000 and gaining about $105,000.

Commissioner Stagner asked...that does not include the revenue on some of these deals that could possibly come on line...

City Manager Aguilera stated it does not include the 15% revenue that will come on line.

City Attorney Rubin...this is all separate.

Commissioner Stagner...right I understand that...but there is also some hangars out there that some of those leases that were virtually free are going to come on line...and they're will be some negotiations on those, right...

City Manager Aguilera stated those will continue be to 100% to the City.

City Attorney Rubin stated the language appears two pages later under collection of rents.

"Commissioner Stagner moved approval of the Airport Development Agreement with HS Motorplex."

Seconded by Commissioners Renfro/Rainey/Torres.
Motion carried unanimously.

Consider Purchase Agreement for sewer connection with HS Motoplex—
OPTION AGREEMENT

Between the City of Truth or Consequences and Hot Springs Motorplex Development, LLC.

Key Points:

1. Hot Springs will pay a fee for the exclusive option to acquire certain "rights."

2. This fee is payable in installments totaling $200,000.

3. The option expires after a maximum of 210 days, unless extended (for additional fees).

4. Before the option expires, Hot Springs must decide whether to forfeit the option or exercise the option.

5. If Hot Springs forfeits the option, it loses all fees paid to date.

6. If Hot Springs exercises the option, it must pay more in order to receive the "rights."

7. The "rights" are connections to the City's water and sewer system, also called "taps" or "service agreements."

8. Hot Springs is not buying the City's water rights or its sewer effluent.

9. Hot Springs is paying up front to reserve capacity in the City's water and sewer system for Hot Springs' future use in its project.

10. Hot Springs is not buying all of the capacity in the City's water and sewer system. It is buying only part of the capacity. The City can do whatever it wants with the remaining capacity.

11. If the City expands its capacity, Hot Springs would have a reservation for a share of the expanded capacity unless the City needs it.

12. Hot Springs is paying fair market value for these taps: $3000 per sewer tap and $6000 per acre foot of water connections.

13. For the optioned share of the City's current capacity, Hot Springs would pay a total of $2,755,728 for sewer and $4,080,000 for water.

14. The purchase price would be paid over time on a "take down" schedule. Hot Springs can use only the amount of taps/connections that it has paid for.
City Manager Aguilera stated the previous paperwork they received on Thursday...but in the meantime he was having conversations with the developer about some concerns he had and he proposed some changes that they agreed to in the color highlighted version.

He stated one of the main concerns he had was they were entering into an agreement that was 11 years into the future and they weren’t getting paid until 11 years into the future for the majority of this which meant about 5 million dollars that would be owed soon... would be owed at time of actually taking out the permits and wouldn’t be paid until 11 years from now.

City Manager Aguilera stated they are actually discounting the rate over the 11 years, so he asked them if they could reduce the term to two years and they ended up at 3 years from the day of signing and 3 years later they will have to come up with the 6 million dollars for the full purchase price of the sewer and water rights.

He referred to page 2, and indicated there is an added sentence ...or such amount as may be determined in accordance with exhibits A & B, and the reason they added that sentence is because another concern I had was they had been using the amount of 850 acre feet of water rights that they owned in excess, and I told them that I’m not sure that’s an exact number and it actually changes depending on how many visitors they have in the winter and summer and so forth, and they left that number a little more nebulous and said to be determined, and in schedule A it will reflect to be determined.

City Manager Aguilera stated since then I have done some more research and have more exact numbers...and we actually have in reserve about 1,100 acre feet of water rights because they are only pumping out 1,438 acre feet a year, and they own 2,742 acre feet so 11-1,200 acre feet they would still have in reserve which is way more than what they were talking about initially...so that’s why that sentence is there.

On page 3 all of the options have been taken out because it will now simply say...that they will close on page 4 you will see where they will close with 6 million six hundred and thirty-five thousand dollars on February 13, 2011.

On page 6...I was concerned that somehow something might be misconstrued that because of buying future water rights and future sewer rights that when they developed or sold land to be developed that somebody might get the idea that all fees have been waived and because they pay for water rights and nothing else is due. So he had them put this paragraph in that says this only pertains to the water rights and doesn’t pertain to any other permit fees or street cut permits or any other regulations that may exist having to do with development.

On page 9...I was concerned that what if they can’t perform because EPA changes the rules and says now you can’t operate your sewer plant at this capacity...you have to reduce the capacity or something...or whatever. So they inserted this paragraph that essentially says...if something happens that the City is not responsible for then they are off the hook, but they will make every effort to get back into operation as soon as possible in order to complete the contract...so that helps them in case of any catastrophe or a federal or state regulation that may come down.

On Exhibit “A” page 11 is where they inserted the language about
approximately 850 acre feet and then they will buy 80% of what they actually come up as being available so that means the dollar amount would change.

Commissioner Renfro stated when there is a development they ask that they donate so many water rights to the City...we are retaining those right...those are going to be...that could create some problems for us if we don’t retain them.

City Manager Aguilera...and that’s why I put that paragraph in about any other regulations, fees having to do with developments still apply.

Commissioner Renfro, yea...but somebody will be keeping track of any water rights that they obtain through development and make sure that they don’t get involved or transferred over to...in other words...

City Manager Aguilera stated at the time that they actually close on this deal they will set the number of water rights...right now for example they are this amount. He indicated they were using 1,438 minus the 2,700...if they were to close today that’s the amount that they would fix and if they close in 30 days and they gain some more water rights then those come into play, but then they are fixed at that point and that’s the end of it.

He stated the agreement also talks about future water rights...and they can buy...they have the first right of refusal for up to 95% of any future water rights that they gain, but there is also verbiage in there that allows them request those for other uses in other parts of the City.

Commissioner Renfro...okay just...

Commissioner Stagner correct me if I’m wrong...they are purchasing a big chunk of our water rights and our sewer rights, but at some point in the future if some other developer comes in and says I want this and they are not using it then we have the right to move that back over to that other developer.

City Manager Aguilera stated they have the ability to ask them...on the 80% there is two options...there is the 80% of current rights and current sewer capacity...on those we don’t that is why we kept back 20%, so the thinking is this 20% will get us through until they expand the sewer plant for any other development...they have voluntarily said that they would be willing to give some of that up...but it’s not written. On the 95% which is the 2nd phase...future expansion so anymore water rights they buy or any sewer expansion they have the right to take some of that back for development as long as it does not interfere with their development in proximity to their development.

Mayor Montgomery...okay that is the question that I had when I was reading through this...on the summary page it says as the City expands its capacity HS would help reservation for its share of the expanded capacity unless the City needs it, and it’s in here somewhere. My question is how or who determines whether or not the need of the City validates them not exercising that option or not exercising all of that option.

She stated what she is asking is...if we determine that if the need of the City is that good enough to make that release...or is it
something...or do we have to prove something else or...I guess it just seems a little...

Commissioner Renfro stated that was my concern because I didn’t want the City tying its hands to other developments where they might need the sewer capacity or the water...that was my concern.

Mayor Montgomery...I mean if all of a sudden we had something come in to take care of the Spaceport and had 1,000 houses go up all of a sudden...is that a good enough reason for them to release those back to us, and I guess I was a little unclear of exactly...it just says we ask them and they give it to us.

City Manager Aguilera stated...it says providing evidence...

Mayor Montgomery stated but who determines what evidence is needed...that’s what I’m asking...who determines whether or not the evidence is good enough for the release.

Mr. Humphries came before the Commission and indicated the intent is that as long as the future need for other developments for that sewer and water does not directly impact or affect their property. He stated what that translates to if some other developer does not want to use those water rights or sewer rights on our property...we’re fine.

He stated they just don’t want anybody trying to come in and use it on their property and there is a specific reason for that...but if the City wants to use it for any other property adjacent to theirs...anywhere else in the City...not a problem...that’s the intent of the language...and the burden is on...there is no burden. All the City has to do is give them written notice that they need to use those future rights on some other development unrelated to their property then they will instantly release it.

Mr. Humphries indicated the only issue is as long as it does not affect their property or wanting to use it on their property...any where else is fine.

Mayor Montgomery...so... and Jay I will turn to you on that...I understand the intent and so forth, but they may or not be here.

City Attorney Rubin...I understand... now in the minutes I think the representative of Hot Springs is telling them how it is intended.

Mayor Montgomery...is that legal enough to fall back on...if it ever came to a legal...

City Attorney Rubin stated actually I would prefer that it would be a little bit stronger...never the less I suppose the minutes would be part of this meeting...so...I would prefer stronger language quite honestly.

Mr. Humphries stated they are happy to clarify on the record...if that’s the case I can state by clarification that HS Motorplex confirms that the intent of the language is that the City has the absolute right to simply put them on written notice that it needs the use of that excess or future water rights or future sewer capacity for projects that are unrelated to their property...unrelated to their property...they have the absolute right to request it and they will release it upon that request.
City Attorney Rubin let me ask the Commission a question...do they intend and I know you just got this yesterday...all these major changes...do you anticipate they are going to be approving this now or did they want more time like they did with the other contract.

It was the consensus of the Commission that they approve it today...as our time frame is getting pretty quick, and they agreed they can attach a declaration in writing and have them sign it.

Mayor Montgomery asked them if they would be willing to do that, and they agreed.

Commissioner Rainey stated in the contract it talks about water rights and a specific amount of water...and as they all know water rights does not mean water and to him it’s like a conflict...they agree to give them 20 acres or 100 acres of water and we don’t have that...we do have it in the water rights, but if it is not available in actual water going down a pipe what happens in that case?

City Manager Aguilera stated they have had that conversation but that is part of the force majeure issue, and indicated if the aquifer is dry and there is no more water then they are off the hook.

He stated they offered yesterday... and apparently they have 3 new wells on that site and offered for us to go in and test them and see if they are available, or how much they can produce and what the quality is, and indicated they will be doing that in the near future and they will need the specs on the drilling.

Mr. Neal would like to mention that they are going to make those 3 wells available through their grazing lease to the City to allow them to explore and determine flow rates and the quality of the water.

“Commissioner Stagner moved approval of the Option Agreement for Purchase and Sale of Water Rights and Sewer Rights along with a declaration to be signed regarding the lease of the water rights and sewer rights in the future if they are needed.”

Seconded by Commissioner Rainey.

Mayor Montgomery asked City Attorney Rubin if everything was okay on your part, and City Attorney Rubin stated he is fine if they are...and if they are satisfied...it’s fine with him and indicated it is a huge improvement of what they had on Tuesday.

Motion carried unanimously.

EXECUTIVE SESSION:

“Commissioner Rainey moved that the meeting be closed for Executive Session – Purchase, Acquisition or Disposal of Real Property or Water Rights 10-15-1H(8), Property purchase for sewer plant.”

Seconded by Commissioners Stagner/Renfro.
All responded Yes to a Roll Call Vote.

City Attorney asked of Mr. Neal when they anticipate signing the agreement.

Mayor Montgomery indicated as soon as they are finalized with the corrections she can sign them anytime.
Mr. Humphries asked if they could do that with City Manager Aguilera in his office since he has access to print out the documents in final form.

Motion carried unanimously.

OPEN MEETING: “Mayor Montgomery stated that the Commission was now in Open Session.”

CERTIFICATION “Commissioner Rainey certified that only matters pertaining to Purchase, Acquisition or Disposal of Real Property or Water Rights 10-15-1H(8), were discussed in Executive Session and no action was taken.”

Seconded by Commissioners Renfro/Stagner. Motion carried unanimously.

“Commissioner Rainey moved that they authorize City Manager Aguilera and City Attorney Rubin to negotiate on the purchase of the land for the sewer plant.”

Seconded by Commissioner Renfro. Motion carried unanimously.

ADJOURNMENT: There being no further business to come before the Commission the meeting was adjourned.

APPROVAL: PASSED AND APPROVED this 11th day of September, 2007, on motion duly made by Commissioner , seconded by Commissioner , and carried.

ATTEST:

MARY B. PENNER, CITY CLERK