



**CITY COUNCIL MEETING**  
**Wednesday, September 5, 2018**  
**103 Water St. Elephant Butte, NM 87935**  
**ACTION MINUTES**

**CALL TO ORDER AND PLEDGE OF ALLEGIANCE**

Mayor Kent called the Meeting to order at 2:00pm, and Councilor Atwell led the Pledge of Allegiance.

**ROLL CALL**

Clerk Apodaca called the roll.

Mayor Kent, Mayor Pro Tem Skinner, Councilor Lafont, Councilor Trager and Councilor Atwell were all present. Clerk Apodaca declared a quorum was present.

Also, in attendance were 20 members of the public and 1 members of the Press

**STATEMENT OF OPEN MEETINGS RESOLUTION AND THREE MINUTE LIMIT PER SPEAKER ON ALL ISSUES**

**PUBLIC COMMENT**

No Public Comment at this time.

**BOARDS AND COMMITTEE REPORTS AND APPOINTMENTS**

Gerald Lafont made motion to appoint Jessica Newberry as Deputy Clerk. Mayor Pro Tem Skinner seconded, motion carried 4-0-0.

**PRESENTATIONS**

Judge Dalrymple administered Oath of Office for Deputy Clerk to Jessica Newberry.

Judge Dalrymple administered Oath of Office for Court Clerk to Jessica Newberry.

Manager DuVall administered Oath of Office for Deputy Chief of Fire to Doug Kohler.

Manager DuVall administered Oath of Office for Deputy Chief of EMS to Brittney Flora.

**APPROVAL OF AGENDA**

Mayor Pro-Tem Skinner made motion to approve agenda as submitted. Council Lafont seconded, motion carried 4-0-0.

**MAYOR AND COUNCIL REPORTS:**

Mayor Pro-Tem Skinner reported she was Elected J Powers Commission Chair.

Councilor LaFont – reported he attended the South Central Transit Association meeting.

Councilor Trager had nothing to report at this time.

Councilor Atwell had nothing to report at this time.

Mayor Kent reported we are moving forward with Elephant Days. We will be placing on the September 19<sup>th</sup> agenda the refinance for the Loan for the Hospital.

## **CITY MANAGER REPORT**

City Manager, David DuVall stated he would like to congratulate and to say Thank You to the City Staff for all their hard work.

## **CLERK-TREASURER REPORT**

Melissa Apodaca had nothing to report at this time.

## **FIRE CHIEF REPORT**

Chief Boone had nothing to report at this time.

## **CODE ENFORCEMENT REPORT**

Code Enforcement Officer Spencer reported she continues to work with Code Enforcement she is working with the EB Days committee and with the SDR uniforms.

## **CONSENT ITEMS**

**Mayor Pro-Tem Skinner made a motion to approve the Consent Items: Approval of Meeting Minutes; August 15, 2018. Councilor Lafont seconded.**

**A Roll Call Vote was held:**

**Mayor Pro Tem Skinner voted yes.**

**Councilor Lafont voted yes.**

**Councilor Trager voted yes.**

**Councilor Atwell voted yes.**

**Motion carried.**

## **REGULAR ITEMS**

### **DISCUSSION/POSSIBLE ACTION – APPEAL OF CITY MANAGERS DECISION REGARDING PAYMENT OF UTILITY BILL.**

Mayor Kent

We have a Mr. Marshal Neel sent an email stating he would like to know the process for appealing the decision that the City Manager made on their account and at that point I did respond via email stating that we would be reviewing the appeal and it would be put on the agenda for today's meeting. We are going to treat this as a Quasi-Judicial hearing. We will be swearing in the City Manager and Mr. Marshall Neel. Mr. Marshall Neel will be speaking. We will have Mr. Marshall Neel sworn in and we will allow Mr. Marshall time to present his case and we will allow time for the City Manager to present what his decision was and after hearing both sides we will close the discussion on both sides and then they will vote weather we are going to uphold the Manager's decision or not. We will start with Mr. Neel, if you'll step forward, we will swear you in and I will have the City Clerk swear you in.

Morgan Spencer Code Enforcement Officer

Is it alright if I can get sworn in as well?

Mayor Kent

Yes

City Clerk Apodaca, sworn in all testifying parties.

Mayor Kent

Mr. Neel please state your name and address and then you may present your case.

Marshall Neel

My name is Marshall Neel and I reside at 4218 Skyview Crest Road North West in Albuquerque. Um, first, thank you all for allowing us the time to hear our side of the case, um. We were shocked and dismay, ah, my son acquired his grandfather's home here in Elephant Butte about 5 years ago who abandon it. Um, it it, the water was turned off the power is turned off, it was literally abandon for almost 1 year when he rented it to, to Megan Thompson who, who's been his tenant for 4 years now. When, when he came down to give her the keys and go through the, the place, we went, we came down we turned on the water and turned on the power um the assumption was obviously mistakenly that we turned on the water the water go's somewhere and every bill I ever had the sewer is part of the water as well as the solid waste, um, so we did that, we, we turned over the keys and we turned on the power and it's been that way 4 years and we got a bill, my son got a bill for \$2,000.00 for 5 years, with, with what I thought was a very strong letter accusatory letter, uh, as if he is somehow dodging his bill. He has no reason to dodge the bill. He has a lease, of a lease, the tent pays sewer, the box sewer, the sewer box is checked, um, she agreed to pay the sewer, we are gladly pay the sewer, um, and investigating this there was never a bill sent. There was never a bill sent. Um, what I like to do, I can, I can approach it a number of ways, I can go through the notice of non-payment item by item and, and the City Manager's determination item by item or, um, I'd rather just address the foe. I think that's less accusatory, less finger pointing. I would just rather go through the foe because I think, in my job as a compliance officer for a bank and as attorney I'm trained in looking at code and trained in looking at the law and I think this law was, this ordinance was passed in 09, I believe. Ordinance No.119 and, it looks to me that it was set up in anticipation of the sewer system and focuses on connecting people, and forcing people to connect to this system and what happens if they don't connect? And what has to happen to connect, um, rather then, now that it's matured, what happens when there is a change of ownership? So, I like to go through the code, I think you will find it instructive, I'm going to be instructive and constructive I don't want to be critical but I don't think he owes this.

This isn't a court of law this is a quasi-judicial hearing, but in a court of law there is a lot of things that would come into play, that, that frankly we would use as affirmative defenses against this that I mentioned. This is, I've highlighted, the stuff in pink is all red tag notices, when we got this bill and there is all these red tag notices and I called the lady and said, and "Did they tag the house for non-payment"? She said, "The city truck drives by here every day". "No one has ever stopped by, no one has ever stopped in, and no one has ever done a thing". And so, it's built up, there is \$460.00 of late charges and a bill has never been sent.

So I like to go through the Code. I'll try to be brief cause it's a lot, so the, the, if I'm mistaken, all I go out of the City Manager's determination was 51.44, a violation of code 51.44 that says that the owner pays the owner is responsible, liable. And I'll read it; the owner pays wastewater service furnished by the City whether or not the owner is the user or consumer shall be liable for the payment all rates and charges, that's 51.54.

Now when I look at, as an attorney, I look at code, code is read this is approved by the City it's obviously your code, um, enacted way back when. You have to look at the language, words are important. The code says what it says, that's all that it says no more no less.

So when I read this code, I say, okay the owner preferences were wastewater services are furnished not where wastewater services are connected because there are instances when you are not connected but there you are still charged. There are standby fees and other reasons you are not connected but, but the wastewater services are furnished. Um, liable for payment of rates and charges, what this sections says is the owner is liable for payment of rates and charges, that puts an notice on the city to send a bill, to tell the owner what the rates and charges are when it's due, when it's past due, well what happens? So this, this obligates the owner to pay.

Luckily we have a section 51.33 for payment process. Know if this 51.44 obligates the owner to pay doesn't operate in a vacuum it has to operate with other section of the code that fill in all the blanks. This is the first one, the payment process. Each connection to the sewer shall have a customer account

set up of a payment of the administrative set up fee, so the customer account is set up; here is something the council should really consider. A couple of the correspondences that we received refer to 51.17 and 18 as well as section of fees. I apologize, that I do not have all the sections in front of me.

Under fee requirements, the administrative set up fees defines as a one-time charge for setting up the customer account. A one-time charge for setting up the customer account. Throughout the code it talks about the property, it talks about the, the dwelling, the connection; there is a one-time service fee, when the connection happens. The connection happens within six months of notice of availability. So as soon as the City says, ok you have sewer available you got six months to fill out the service agreement and that is a onetime fee. The only time transfer of ownership is mentioned in the code at all, is in the section on voluntary termination and that basically says, that if Mr. Dowd should sell his property he has to contact the city and say I'm out turn me off, I've sold it. Other than that there is no provisions that in the code for what happens in a change of ownership it looks like the code doesn't anticipate a change of ownership because it was done early on in the process. But, so, I'm not sure that, I don't find authority in the code to charge a new owner that fee, the \$42.00 fee. That's just my opinion of course but that's something you ought to look into because if you are proposing to do with this young man, uh, uh, he'd pay it but, you know having to refund that would be a terrible miss.

So, you got this payment process, it's in the code, we're going by the code and were going to tear the code apart because this is the law. And, so, each connection should have a customer account set up now this happens within six months the owner has to set this up this aunt who owned the property at the time paid the fee, she hooked up to the sewer we know that because she borrowed the money from him to do that

So we are aware there is sewer and our hopes were eventually, he would be able to purchase this property, so he loaned her the money to get very thing set up and be on the level with the City if and when he ever did all that.

The next thing is the City will mail monthly bills to the owner of record, bills will due and payable 15 days after mailing. This is very interesting and I've never seen this mail and monthly are the key words here. The city will mail monthly bills to the owners of records neither of those terms are defined and the code by mail, USPS mail probably, monthly means every month. So every month the City has an obligation to mail a bill, the owner of record. And the mailing part is important. It has to mail if there is a due date by the billing date. Then we go to 51.41 delinquent charges if any charges. If any charges have not been paid within 30 days after the charges due which is 15 days after it was mailed, if anybody hasn't paid in 30 days after due it's delinquent. After the sewer account has been designated delinquent the City can begin penalty lien and foreclosure. So everything is tied to mailing the bills. Let's think about this, so, you produce a bill on the first, you mail it on the first payment is due on the 15<sup>th</sup> and delinquent on the following month. What happens in real life if that bill is never mailed? When is the payment due? how much is the payment? What is the date the payment? Without mailing the bill there really no due date, so there can't be not late charge. Theoretically, none of these bills were ever mailed; payments were never due in payable according to the code. And that's the code, um, I've never seen that, usually you say, "Accounts are billed monthly", or you now, I'm digging in deep to the find the meaning of the code. What if you mail it a week late? But then the bill says, it due a certain date, but then you really have for another week and then you end accessing a late charge not in not compliance with the code. So there is a lot wrong with that terminology, everything hinges on the mailing and if you don't mail anything it all falls apart. For some reason this went on for 5 years without ever having a billed mailed. That's beyond me. That has to be a computer thing or an over site, but here's what happens you could see could see down here were all the action was Mr. Dowd acquired the property nothing really happens, there are no late charges, there is no water during this period of time so you would think there are not sewer charges and probably go by this property and say its vacant. All of a sudden the late charges start right here, theatrically, this would be 90 days past due at the time Megan was in and turns on the water, but, what happens if you don't mail and no due date and no delinquencies date, and then the account doesn't age, no aging. Can't say the account is past 90 days

because it's not even due, it was never due in payable, because the bill was never mailed and that was the case of this whole five years were the bills were never mailed therefore, they were never past due so it's conceivable to, and I don't know how the mailing fits in here, but, I could see, I could see in my brain if it's not aging then it's not going to be in a past due report. It's not going to show up as delinquent were just going to work it. I was going to drive by on the door and say, "hey", you know this place was vacant; it was going south Megan rescued it for us she painted it, pulled all the carpet out and really done a lot to the property and continues to do that. Um, somebody should of knocked on the door and said, "Did you know, no one is paying the sewer", and she would of said, "Oh my god"! We would of solved the problem. This would of be solved early on. With a knock on the door. Its one half miles down the road and somebody drives by every day and somebody can just say, "Hey, what's up". She'd gladly given you guys our address we'd of seen though it years ago. There are legal things about this in a civil suit that comes to my mind that say, you can't ambush somebody after this long period of time. I'm just blind sided with this. His aunt is dead the City Manager said, "we can't contact her". And that's the whole purpose behind the laches wait so long he can't defend himself. Witnesses are denied, records are lost, there is no way he can defend himself. So, um, obviously not billing the account for 5 years and then ambushing him like this, we'd argued that the City doesn't have clean hands. The clean hand in a civil court says, you cannot collect. Your hands aren't clean, it can easily been thrown out of court. This is fraud, this is the definition of fraud, according to Mr. Dowd that all these bill have been sent. And the red door hangers, after all of this he is refusing to pay. Which is not the case this is a mistake, now there are two water companies, City Manager pointed out that that's a source of common misunderstanding. He expects that Mr. Dowd would have known to go to the city to set up the sewer. He went to the water company that services his property and they said nothing about sewer. If it's a common misunderstanding, it cannot be common knowledge. The only party to the dispute that has had the ability to solve this over 5 years is the city. You got it in your system, every month somethings going on in the system, this is a print out from it. But nobody did anything. No body caught it, no body contacted us, and nobody did a thing. Now I got the form, (application form), we are going to stop on our way out. Cody has got the form. He has got the two fees, even though I do not agree that he has to pay the \$42.00. I think if anybody really looks into this he will get that back, because I am not sure it's authorized in the code. I say that sincerely, not because we don't want to pay the \$42.00, I think it's a fraud and the code can really be improved and close some of the loop holes. Now that you are in an advanced sewer system and properties are changing hands, I don't think it [the code] protects the city. Just, for thought. But, um, um, he's, he's darn sure not going to pay any late charges, because he had no knowledge of this what so ever and neither did Megan [the tenant]. The late charges, if you don't send a bill, you don't have a payment due, so you can't have a late charge. And, you know, I think a court of law would dig into the words in this matter, the terminology here and find, yea, if you never mail a bill, what does that look like when you don't mail a bill. It's not due, according to the code, not according to me, but. So, Ill also point out that from the stand point of ridiculous, the water and sewer codes take in 10.99 of your general ordinances, it sets the maximum penalty for the ordinance of \$500.00, "a fine not to exceed \$500.00 or 90 days in jail, or both, unless it specified differently in a particular section." The water and sewer both say, that same thing, "a maximum fine of \$500.00 or 90 days in jail, and then there's another sentence down there, "Every day is a separate violation." This is 1418 days, that's \$709,000 in penalties, and 364 years in the county jail. For something he had no idea was going on. The only people who knew this was going on were the people looking at this print out, this account online. This could have been solved, instead of crime of punishment attitude, this could have been solved with a knock on the door, saying "hey what's going on, we need to get you guys set up for the sewer." Or the New Mexico Water Company should have said "Hey, you might have sewer, go check with the city." I don't know the arrangements the City has with the other water company, but maybe a sign saying they may need to connect to sewer. It is confusing with 2 water companies. We don't think it is fair, we think he was ambushed, we think it could have been solved years and years ago. We don't think the late fees are justified, is bills are mailed with returned mail; you have to deal with that, and find out. His aunt was alive, up until 2 years ago; she could have been contacted; now she can't be. We just think it's not fair. I have a lot more on the code, but that's digging pretty deep and I won't take your time on that. What we would like to do it pay, and get him set up for him to get the bills, pay the \$55.00 for deposit and the \$42.00 fee, start fresh. He would even pay, we would consider this letter from Code Enforcement to be a bill, which it is not, and he would pay the last 3 months of this

bill. He would even pay the 1<sup>st</sup> 3 months when Megan [the tenant] moved in, which is 90 days. We feel the city could have found this problem and corrected it. He will pay the 1<sup>st</sup> 3 months and the last 3 months, but everything in between we don't believe is justified because of the time frame.

Mayor Kent asked if anyone has if any councilors have questions for Mr. Neel, which they did not. Mayor Kent thanked Mr. Neel and instructed the City Manager Mr. Duvall to continue.

David Duvall, City Manager

Essentially Mr. Neel states the Mr. Dowd lent money to his Aunt to get the sewer service installed. That shows awareness of the sewer. As far as the information about the 6 month connection, that strictly if you go from septic to sewer and you have 6 months to comply with connecting. Bills were sent, red tags posted, and we were very fair in our determination of the fee. We did not account for the \$500.00 penalty fee, we waived all of that, and we changed our start date to the time of actual service with New Mexico Water to today. We did not charge a standby fee for the year prior when he acquired the property in September 2013. You have that documentation in front of you for your own reference.

Morgan Spencer Code Enforcement Officer

As you know, I am doing investigations on people to non-payment. I went after the one that was the biggest, and this is it. You have made this ordinance for a reason, it is very clear, it is cut and dry. You have had some very strong words said to you today by Mr. Neel, [to Mr. Neel, thank you for coming]. I think it is important that this ordinance has been in place since 2009. It is the responsibility of the property owner to know this ordinance, it is not the responsibility of the City to hold hands and explain the ordinance to them. With those strong words from me, I would like to continue with my involvement with this situation.

Once I obtained this file, I realized that Anne Pratt is the predecessor to the property, the previous owner, was somehow related to Mr. Dowd. How? I didn't know until today when Mr. Neel explained that to the Council. I feel it's important that everyone on the Council know that letters were mailed, which we have documentation of that. We have documentation of her last known address and that she had paid before. There was a septic tank on the property previous, that was decommissioned, and it is well known to a family member of Cody Dowd that there was a sewer bill to the city. Especially, I am going to reiterate what Mr. Duvall said, that if he fronted her the money, then he is well aware that the city has a sewer system. It's very serious to me, only because there is a handful of these accounts, and the ordinance is very clear that the Owner, the property Owner, is responsible for the bill.

I have a copy of the Warranty deed from September 2013 that was filed with the Sierra County Tax Assessor, tax clerk that shows that he obtained ownership then. In response to the letter, uh, to Mr. Dowd, Mr. Neel (who is not the property owner) is saying that he doesn't owe us that because he was never billed him. We billed the owner that turned in the application to us [Anne Pratt]. So they are saying she was responsible for that payment at the time that she owned it. We have property liens from the City of Elephant Butte on this property that have since expired. The property lien was current when Mr. Dowd took ownership of that property. The property lien was filed in 2014 and there was a previous one to that as well. So Mr. Dowd, had he gotten a Title Search. Had he done the correct Real Estate transactions, would have known there was a property lien on this property from the City of Elephant Butte to Anne Pratt for non-payment.

The Warranty deed is very clear, showing Anne Pratt to Mr. Dowd, not Anne Pratt to Mr. Neel. Mr. Neel is representing Mr. Dowd but I want to make it clear this is for Cody. In addition to this letter, we [the City] have received an IPRA request so Mr. Neel will be receiving all copies of the letters that were mailed to Anne Pratt. So he is more than welcome to have copies of that, not just with the [IPRA] request, we would have been happy to share that with him.

I feel it's important that the Council, uh, take into consideration his offer to pay, but also take into account this ordinance has been around for a long time. It is very clear that owners need to pay. The

fact Mr. Dowd was mailed specifically, doesn't negate the fact that he has a bill for the city services. There is no septic, the water has to be going somewhere.

In addition to that, we called the NM Water Department because the statement from Mr. Neel to the City was that "If there was water, then there has to be sewer." And yes all of us understand that there are 2 water companies here, and unfortunately some people do not know that we do not service the entire city. It is not our responsibility to tell them that, they are property owners; they need to know where to look. Ordinances, and they are responsible for their property on other legal matters, they need to be responsible for the wastewater and their water. Upon calling NM Water they provided the City a statement of the date that the water service was started/initiated on their property. In response to that letter, Mr. Duvall decided that instead of charging Mr. Dowd for that entire time he has owned the property, which was September 2013, that the City is willing to use the same date as NM Water which is September 2014. So, that gives him a year of no charges for service and no penalties to pay to the city.

As far as the Ordinance is concerned regarding the penalties, it is very clear in there that non-payment penalties on a monthly basis are assessed. You're going to get a penalty fee. Mr. Duvall is correct in saying we did not Cite Mr. Dowd. We feel it doesn't need to go to court; he just needs to pay for services that were rendered. Also in our ordinance, there are no free services rendered. Mr. Neel has made comment about decommission of the septic tank, and everything, to get the City [bill] started, and said the ordinance is made for new services. No... This is a good ordinance, this ordinance is strong, and it shows that property owners are responsible. Whether it's initially connecting to our sewer, or attaching later on in life when that sewer has been there for years.

We have people that pay their bills. I don't think, in my opinion, that Mr. Dowd shouldn't have to pay because he did not receive a bill, his aunt did. He is the owner, since 2013, we have proved that. I think our ordinance is strong, and I think he needs pay.

Mayor Kent asked the Council if there were any questions for Mrs. Spencer,

Councilor Edna Trager:

Were their bills, once Ms. Pratt passed away, what was happening for requests for payment?

Morgan Spencer

The letters were being sent out and a property lien was assessed. We did not know she passed away. In the ordinance says, if there is a change of ownership, the owner needs to come in the owner needs to tell us.

Mr. Duvall:

Along those same lines, Mrs. Pratt passed away 2 years ago [2016] and the property changed hands 4-5 years ago [2013]. So, something on conveyance of language of bills needing to be paid. Let's take for instance if the property went to probate at the time of death, those were never addressed properly apparently.

Mayor Kent

What is the amount on for 2013?

David Duvall

1 year of standby fees were waived \$2061.30 for 2013 to date.

Mayor Kent

So you charged them the \$1,745 vs the 2061.

David Duvall

Yes that's the same date as the water bill. [2014]

Mayor Pro-tem Kim Skinner

I have a question, how much would the fees be less the penalty charges?

Mr. Neel

It would be \$460.00. The amount that was waived was when there was no water service.

David Duval

We still have a standby sewer service.

Mayor Kent

We still have a standby sewer service. Did that answer your question [Skinner]?

Mayor Pro-Tem Kim Skinner,

Yes. It would be 1745 less \$460.00

Mayor Kent

So for services rendered would be \$1285.42. Any other questions? (Mayor Kent proceeded to ask each councilor if they had questions, and they all replied "no".

Mayor Kent

Now that we have heard from everyone I am now going to enter into a Roll Call Vote for each councilor. Did the Managers decision should be upheld or not?

**City Clerk Melissa Apodaca (called each Councilor for a Roll Call Vote)**

**Mayor Pro-Tem Skinner "I think the managers decision should be upheld, however, the penalties should be waived.**

**Councilor La-Font: "I agree"**

**Councilor Trager: "I agree the penalties should be waived"**

**Council Atwell: "I agree"**

Mayor Kent then stated Vote Carried and stated the managers decision will be upheld with the exception of the \$460.00 being deducted from it which will be **\$1285.42**

**APPROVAL TO APPLY FOR CITY CREDIT CARD TO CITY CLERK MELISSA APODACA.**

**Councilor Pro Tem Skinner made a motion to approve Approval to apply for City credit card to City Clerk Melissa Apodaca... Councilor Lafont seconded.**

**A Roll Call Vote was held:**

**Mayor Pro Tem Skinner voted yes.**

**Councilor Lafont voted yes.**

**Councilor Trager voted yes.**

**Councilor Atwell voted yes.**

**Motion carried.**



**DISCUSSION / POSSIBLE ACTION – MOU-SIERRA VISTA HOSPITAL.**

**Councilor Pro Tem Skinner made a motion to approve Approval MOU-sierra vista hospital. Councilor Lafont seconded.**

**A Roll Call Vote was held:**

**Mayor Pro Tem Skinner voted yes.**

**Councilor Lafont voted yes.**

**Councilor Trager voted yes.**

**Councilor Atwell voted yes.**

**Motion carried.**

**ADJOURNMENT:**

**Meeting adjourned at 3:03pm.**

*Minutes approved and adopted at the meeting of the City Council on September 19, 2018*

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Jessica Newberry, Deputy Clerk

Attest:

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Melissa Apodaca,  
Clerk-Treasurer

**Final Page of City Council Meeting Minutes for September 5, 2018**