

Tuesday - July 28, 1998 - 5:00 p.m.

Regular Meeting

Present: Mayor Leni Sitnick, Presiding; Vice-Mayor Edward C. Hay Jr.; Councilman M. Charles Cloninger; Councilman Earl Cobb; Councilwoman Barbara Field; and Councilman Thomas G. Sellers; City Attorney Robert W. Oast Jr.; City Manager James L. Westbrook Jr.; and City Clerk Magdalen Burleson

Absent: Councilman O.T. Tomes (participated in meeting by speaker phone from 6:07 p.m. - 6:40 p.m.)

## **INVOCATION**

Mayor Sitnick gave the invocation.

## **I. PROCLAMATIONS:**

### **A. PROCLAMATION PROCLAIMING SATURDAY, AUGUST 8, 1998, AS**

#### **"VOLUNTEER AWARENESS DAY"**

Mayor Sitnick read the proclamation proclaiming Saturday, August 8, 1998, as "Volunteer Awareness Day" in the City of Asheville. She presented the proclamation to Ms. Cindy McMahon, Volunteer Center Coordinator of the United Way, who briefed the Council on some of the activities taking place during the day.

## **II. CONSENT:**

### **A. RESOLUTION NO. 98-92 - RESOLUTION AUTHORIZING THE CITY MANAGER TO ENTER INTO A CONTRACT WITH GENESIS GROUP INC. FOR THE RE-DESIGN OF PRITCHARD PARK**

Summary: The Parks and Recreation Department was directed to select design services of an interdisciplinary firm to provide a complete scope of planning, design and construction drawings to redesign Pritchard Park. The Pritchard Park Task Force and staff have selected Genesis Group, Inc. through the request for proposal process.

Over the past several years with the discussion and eventual construction of the new transit center on Aston Street in downtown Asheville, interest in redesigning Pritchard Park has been rekindled. In August 1997, staff from the Parks and Recreation Department created a Task Force composed of citizens representing different interests in downtown. The Pritchard Park Task Force solicited citizen input in November 1997 during a public meeting before sending out a Request for Proposal for professional design services. After narrowing the field and interviewing four firms, Genesis Group, Inc. was selected as the most qualified firm and recommended the City enter into a contractual agreement for the requested design services. The following individuals were involved in the process of selecting the top ranked design consultants: Susan Roderick (Quality Forward), Adina Goodwin (Tree Commission), John Rogers (Rogers Associates), Councilwoman Barbara Field, Al Kopf and Alan Glines (Parks and Recreation Department), Danie Johnson (Danie A. Johnson, AIA Architect), Alex Gourlay, (Chairman of the Pritchard Park Task Force), Lou Millin (Realtor), Jonathan Brown (City Seeds non-profit organization) and James Cheeks (former Traffic Engineer).

This resolution is to authorize Genesis Group, Inc. to begin a single contract, two part process to redesign Pritchard Park. The first part of the contract will provide public input opportunities via a public workshop and meetings for individuals and groups with specific -2-

interests to meet with the design consultants. Interim designs and a final park design solution will be

presented to the public for input and eventually to City Council for approval. The second part of the contract will provide drawing plans, specifications for materials, and construction documents for this final park design. After the contract is signed, Genesis Group Inc. has proposed a five month design process. The construction is expected to be completed by private contractors in July of 1999, prior to the Bele Chere festival. Funds set aside to construct the new park plan consist of a total of \$200,000.

The fees for the execution of the contract include:

Services for public process, final design and construction drawings \$31,410

Reimbursable expenses (Not-to-Exceed) \$ 7,170

Sub-Consultants fees \$25,646

Total Fees for Services \$64,226

The Parks and Recreation Department recommends that authorization be given to the City Manager to enter into this contract with Genesis Group, Inc. for the redesign of Pritchard Park.

#### **RESOLUTION BOOK NO. 24 - PAGE 445**

#### **B. RESOLUTION NO. 98-93 - RESOLUTION AUTHORIZING THE CITY MANAGER TO SUBMIT AN APPLICATION TO THE N.C. GOVERNOR'S HIGHWAY SAFETY PROGRAM FOR FIVE COMPUTERS AND FIVE SPEED DETECTION DEVICES**

Summary: The consideration of a resolution to authorize the City Manager to file a grant application with the N.C. Governor's Highway Safety Program for five computers and five speed detection devices.

The Asheville Police Department requests approval for the City to submit a grant application to the N.C. Governor's Highway Safety Program. The application requests assistance to the City to purchase equipment to support the department's traffic safety program; specifically five in-car computers and five speed detection devices.

The application requests federal funding in the amount of \$37,500. The granting agency requires a local match in the amount of \$12,500, for a total project cost of \$50,000. Second and third year funding may be available.

#### **RESOLUTION BOOK NO. 24 - PAGE 446**

#### **C. RESOLUTION NO. 98-94- RESOLUTION FINDING THE RIGHT-OF-WAY KNOWN AS MILLER AVENUE NOT PART OF AN ADOPTED STREET PLAN**

Summary: The consideration of a resolution finding the right-of-way known as Miller Avenue not part of an adopted street plan.

The right-of-way known as Miller Avenue as shown in Plat Book 32, Page 32, is not part of an adopted street plan in accordance with General Statute 136-66.2. Peggy M. Bridgeman has requested that City Council adopt a resolution stating such.

According to North Carolina General Statute 136-96, a right-of-way not utilized within 15 years of dedication can be abandoned through a recording of a Declaration of Withdrawal.

To proceed with this process, Peggy Bridgeman sole heir of Joel R. Miller and owner of PIN Nos. 9755.17-01-1345, 1236, 1138, 1120, 1023, 3353, 3255, 3156, 3049 and 3041 has requested that the City of Asheville verify if the specific rights-of-way are or are not part of the City's adopted street plan. The statute requires that the City adopt a resolution stating the right-of-way to be abandoned is or is not part of a proposed street plan. The unused right-of-way is not part of any such plan and is not a City maintained right-of-way; therefore, the City has determined that all necessary requirements of the statute will have been met by adopting the resolution, thus allowing Peggy Bridgeman to withdraw this specific right-of-way.

The Public Works Department staff finds that the right of way known as Miller Avenue from the intersection with Summit Avenue and Maude Avenue, in their entirety, as shown on Plat Book 32, Page 32 is not part of an adopted street plan and recommends the adoption of this resolution.

#### **RESOLUTION BOOK NO. 24 - PAGE 447**

#### **D. RESOLUTION NO. 98-95 - RESOLUTION SETTING A PUBLIC HEARING ON AUGUST 25, 1998, TO CLOSE AN UNNAMED ALLEY BETWEEN MILLER AND POND AVENUES**

Summary: The consideration of a resolution setting a public hearing to permanently close an unnamed alleyway between Miller and Pond Avenues.

A petition has been received from First Citizens Bank & Trust Company requesting that an unnamed alleyway between Miller Avenue and Pond Avenue be permanently closed to public use.

The petition received includes the affidavit of First Citizens Bank and Trust Company, owner of parcels 9654.05-09-7679,7851,8772, and 8970. First Citizens Bank and Trust Company owns all of the property with frontage on the unopened alleyway between Miller Avenue and Pond Avenue that has been petitioned to be closed.

#### **RESOLUTION BOOK NO. 24 - PAGE 448**

#### **E. MOTION SETTING A PUBLIC HEARING ON AUGUST 11, 1998, TO AMEND THE UNIFIED DEVELOPMENT ORDINANCE TO CLARIFY THE REQUIREMENTS FOR GRADING ALONG PROPERTY LINES**

#### **F. MOTION SETTING A PUBLIC HEARING ON AUGUST 11, 1998, TO AMEND THE UNIFIED DEVELOPMENT ORDINANCE TO IDENTIFY ACCESSORY STRUCTURES AS A PERMITTED USE, SUBJECT TO SPECIAL REQUIREMENTS IN ALL RESIDENSTIAL DISTRICTS, AND TO ESTABLISH STANDARDS FOR ACCESSORY STRUCTURES**

#### **G. MOTION SETTING A PUBLIC HEARING ON AUGUST 11, 1998, TO REZONE EIGHT LOTS ON MACE AVENUE FROM RS-8 RESIDENTIAL SINGLE-FAMILY HIGH DENSITY DISTRICT TO OFFICE DISTRICT**

#### **H. RESOLUTION NO. 98-96- RESOLUTION AMENDING THE CONTRACT FOR THE ASHEVILLE COMPREHENSIVE PARKING STUDY TO INCLUDE A TRANSPORTATION CORRIDOR ANALYSIS FOR THE BILTMORE VILLAGE AREA**

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Summary: The consideration of a resolution amending the contract for the Asheville Comprehensive Parking Study to include a Transportation Corridor Analysis for the Biltmore Village area.

The original contract cost for the Comprehensive Parking Study is \$92,400.00 (Downtown, Biltmore Village and West Asheville areas). Due to the need for a Transportation Corridor Analysis for the Biltmore Village

area, staff recommends that an amendment be issued to increase the contract by \$34,833.19. This will revise the contract to \$127,233.19. The funds to be used for the above amendment will be encumbered from account code 110-2501-418-3010.

The consultant will review and summarize the existing traffic and thoroughfare plans, conduct transportation analysis and develop recommendations and prepare a transportation plan which will compliment and extend the existing Biltmore Village Development Plan and the Asheville Thoroughfare Plan for this area..

#### **RESOLUTION BOOK NO. 24 - PAGE 449**

#### **I. RESOLUTION NO. 98-97- RESOLUTION AUTHORIZING THE CITY MANAGER TO ENTER INTO AN AGREEMENT WITH DAP SECURITY FOR SCHOOL CROSSING GUARDS**

Summary: The Asheville Police Department, through the use of a private contractor, provides school crossing guards at 22 sites in the City of Asheville. This service is during early morning hours and early afternoon hours, Monday through Friday.

Funds allocated in the line item 110-3503-421-3010C46201, Professional Services, in the amount of \$75,800.00. The only bid received was from DAP Security in the amount of \$74,527.20, for each academic year of 1998/99 and 1999/2000.

#### **RESOLUTION BOOK NO. 24 - PAGE 450**

#### **J. RESOLUTION NO. 98-98 - RESOLUTION AUTHORIZING THE CITY MANAGER TO APPLY FOR AND ENTER INTO AN AGREEMENT WITH THE N.C. DEPT. OF ENVIRONMENT & NATURAL RESOURCES TO DEVELOP THE FIRST PHASE OF THE MASTER STREET TREE PLAN**

Summary: The consideration of a resolution to apply for grant funds from the NC Dept. of Environment and Natural Resources to develop the first phase of the Master Street Tree Plan.

Funds are available through the State of North Carolina, Department of Environment and Natural Resources, Division of Forest Resources in the Urban and Community Forestry Grants Program, to improve urban forest resources.

The Parks and Recreation Department is responsible for developing a Master Street Tree Plan (MSTP) for street trees on City rights-of-way located within the City limits of Asheville. The existing inventory is almost fifteen years old and no longer accurately reflects the trees of the City. Phase I of the process will specifically identify the location, size, condition, and site conditions of trees located in the central district of Asheville. The MSTP will help serve as a critical link in developing a long term management plan for Asheville's urban trees, provide information for future tree planting and forestry planning, and provide educational and volunteer opportunities for community organizations.

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The Parks and Recreation Department is requesting \$10,000 in grant funds which requires a 100% match. Matching funds are currently available in the Park Maintenance and Public Facilities budget. In-kind match will include supplies, transportation, volunteer hours, and project management.

The Parks and Recreation Department recommends adoption of the resolution authorizing the City Manager to enter into this agreement if the City receives the grant award.

#### **RESOLUTION BOOK NO. 24 - PAGE 451**

**K. RESOLUTION NO. 98-99- RESOLUTION AUTHORIZING THE CITY MANAGER TO APPLY FOR AND ENTER INTO AN AGREEMENT WITH THE N.C. DEPT. OF ENVIRONMENT & NATURAL RESOURCES TO CONSTRUCT A GREENWAY TRAILHEAD AND RAMP SEGMENT ON THE BROADWAY GREENWAY**

Summary: The consideration of a resolution to apply for grant funds through the N.C. Dept. of Environment & Natural Resources to construct a greenway trailhead and ramp segment on the Broadway Greenway.

Funds are available through the State of North Carolina, Department of Environment and Natural Resources in the National Recreational Trails Fund Program (NRTFP) to provide trails for public use in North Carolina.

The Broadway Greenway represents the next section in the City of Asheville's urban trail corridor linking the University of North Carolina to the Downtown business district. Phase I of the corridor was completed in 1997 with the first section of the Weaver Blvd. Greenway. The next section of Weaver Blvd. will be completed in 1998/1999. The City has been working for some time to develop the Broadway Greenway along Reed Creek on the west side of Broadway. Eventually this corridor will link downtown neighborhoods to the Weaver Blvd./Glenn's Creek Greenway.

The focus of this grant will be the segment of greenway between Chestnut Street and Magnolia Street. The greenway begins at Chestnut Street where a large, five points intersection is located. The grade change from Chestnut Street to Reed Creek is very steep. A ramp will be needed to provide wheelchair and bicycle accessibility to the greenway. Since it is a large, busy area, the entrance will need a strong visual statement will need to be made to show where the greenway begins. The entrance will include signage, map, and benches. The funds from this grant will be set aside to assist with the construction of the trailhead and ramp, and to build a segment of the trail between Chestnut Street and Magnolia Street.

The Parks and Recreation Department is requesting \$30,000 in grant funds which requires a 20% match. Matching funds are currently available in the Capital Improvement Project budget designated for Broadway Greenway, in the Park Maintenance and Public Facilities Division. In-kind match will include labor, equipment, and project management.

The Parks and Recreation Department recommends the adoption of the resolution authorizing the City Manager to apply for and enter into this agreement if the City receives the grant award.

**RESOLUTION BOOK NO. 24 - PAGE 452**

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**L. RESOLUTION NO. 98-100 - RESOLUTION AUTHORIZING THE CITY MANAGER TO APPLY FOR AND ENTER INTO AN AGREEMENT WITH THE COMMUNITY FOUNDATION OF WESTERN NORTH CAROLINA TO FOR HISTORICAL GRAVE MARKERS AND AN EXHIBIT AREA AT RIVERSIDE CEMETERY**

Summary: The consideration of a resolution to apply for funding through the Community Foundation of Western North Carolina for historical grave markers and an exhibit area at Riverside Cemetery.

Funds are available through the Community Foundation of Western North Carolina to provide educational and preservation opportunities.

Riverside Cemetery is designated as a National Historic Site, and a local historic site within the Montford Historic District. It is also designated as a Buncombe County Treasure Tree Preserve. Besides burial services, Riverside offers variety of activities such as tours, genealogy studies, tree, flower and animal identification, and grave marker rubbings.

Historical grave markers and the exhibit area will be part of the Riverside Cemetery Tour Program, and will offer visitors a greater opportunity to identify historic grave sites and utilize both guided and self guided tours. Over 2,000 visitors a year will experience a unique educational and cultural history lesson about many of Asheville's most prominent citizens, and their contributions to our community.

The Parks and Recreation Department is requesting \$4,000 in grant funds. Supplemental funds are currently available in the Riverside Cemetery budget, and through private contributions. In-kind support will include labor and project management.

The Parks and Recreation Department recommends adoption of the resolution authorizing the City Manager to apply for and enter into this agreement if the City receives the grant award.

#### **RESOLUTION BOOK NO. 24 - PAGE 453**

#### **M. RESOLUTION NO. 98-101 - RESOLUTION APPROVING THE ACQUISITION OF A UTILITY BILLING SYSTEM**

Summary: The consideration of a resolution authorizing the acquisition of a utility billing system.

On November 25, 1997, the City entered into a Software License and Services Agreement with H.T.E., Inc. to acquire a computer hardware/software system to meet most of the City's central computer automation requirements and to ensure Year 2000 compliance/compatibility. That acquisition was financed through a master lease with Ontario Leasing which the City uses to acquire virtually all our computers and related equipment. The hardware has been installed and "live" operation of many of the software applications modules began on July 1, 1998. Implementation of the remaining application modules will continue through the remainder of 1998. The original Software License and Services Agreement included an option to acquire H.T.E.'s utility billing software at a later date at a guaranteed price.

The resolution authorizes the City Manager to execute a Supplement to H.T.E., Inc. Software License and Services Agreement which exercises the City's option to acquire the utility -7-

billing system. The resolution also authorizes the City Manager to add the utility billing system to the City's master lease agreement with Ontario Leasing.

The total cost of the utility billing system and associated training and technical support is \$156,000.00. This cost will be spread over five years by the master lease. Funding for the first year of the lease has been appropriated in the FY 98-99 budget.

Staff recommends City Council adopt the resolution which authorizes the acquisition of a utility billing system.

#### **RESOLUTION BOOK NO. 24 - PAGE 454**

#### **N. RESOLUTION NO. 98-102 - RESOLUTION SETTING A PUBLIC HEARING ON AUGUST 11, 1998, TO CONSIDER AN ORDINANCE ESTABLISHING A MORATORIUM ON ADULT ESTABLISHMENTS**

Summary: On April 14, 1998, Council adopted an ordinance amending the UDO to temporarily converting adult establishments from use by right, subject to special requirements, to conditional uses. This is done in order to help preserve the status quo while Senate Bill 452 was being considered in the North Carolina General Assembly. You may recall that SB 452 was designed to return a measure of control over adult businesses to local governments. This bill has now been passed by both houses of the General Assembly and was sent to the Governor for signing on July 9.

Our temporary ordinance has a self-executing expiration date of 30 days after SB 452 becomes law. This means that the ordinance will expire in early August, and adult establishments will revert to uses by right, subject to special requirements. Accordingly, Council should consider taking some action soon.

One of the features of the new law is that it permits the enactment of a temporary moratorium of reasonable duration in order to preserve the status quo while appropriate studies are conducted and the scope of potential regulations is deliberated.

Under the prior law, the primary means of regulating adult establishments, including the adoption of moratoria, was through the zoning ordinance. Any zoning ordinance or amendment requires consideration of the proposed ordinance by the Planning Commission, notice and a public hearing. Recent North Carolina case law suggests that adult establishments may be regulated under the general police power, and the new law codified this. Accordingly, in order to enact a moratorium under the new statute, neither consideration by the Planning and Zoning Commission nor a public hearing are statutorily-required procedures.

The types of regulations that the new law permits a city to consider include: (a) clothing restrictions; (b) registration and disclosure requirements for owners and employees; (c) limits on hours of operation; (d) exterior advertising; and (e) age restrictions; among others.

With those things in mind, it appears that a moratorium may provide the City with the necessary "breathing space" to do the appropriate studies and draft some proposed regulations. Six months is probably a reasonable time to complete this work, and extensions are possible. Although a public hearing is not required, it may be advisable to schedule one in order to avoid due process-based challenges as much as possible.

Adoption of a general moratorium on sexually-oriented businesses or adult establishments located within the jurisdiction, and direct staff to report to Council before the end -8-

of the year with proposed new regulations. It is also recommended that a public hearing be held in connection with the adoption of such a moratorium.

#### **RESOLUTION BOOK NO. 24 - PAGE 455**

#### **O. RESOLUTION NO. 98-103 - RESOLUITON AUTHORIZING THE CITY MANAGER TO ACCEPT A GRANT FROM THE U.S. DEPT. OF JUSTICE, OFFICE OF COMMUNITY ORIENTED POLICING SERVICES, FOR THE HIRING OF FIVE NEW POLICE OFFICERS**

Summary: On January 22, 1998, the Police Department submitted a grant application to the US Department of Justice, Office of Community Oriented Policing Services. This application requested federal assistance to the City to hire five new police officers. These new officers will be assigned to the South Market/Eagle Street and contiguous areas to provide highly concentrated law enforcement and public services. The application has been approved and the grant award document has been received.

The award provides three years federal funding in the amount of \$323,925. The granting agency requires a local matching contribution of \$107,975, for a total project cost of \$431,900 for the three year term. The first year's match is \$19,075; second year is \$41,840; and, third year is \$47,060.

City staff recommends City Council adopt (1) a resolution authorizing the City Manager to accept a grant from the US Department of Department of Justice, Office of Community Oriented Policing Services, to fund five new police officer positions; and (2) a budget amendment to appropriate funds to the project.

#### **RESOLUTION BOOK NO. 24 - PAGE 456**

**P. ORDINANCE NO. 2501 - BUDGET AMENDMENT IN SUPPORT OF A GRANT RECEIVED FROM THE U.S. DEPT. OF JUSTICE FOR THE HIRING OF FIVE NEW POLICE OFFICES**

Summary: See Item "O" above.

**ORDINANCE BOOK NO. 17 - PAGE 122**

**Q. MOTION APPOINT LAVERNE LANEY TO THE FUTURE OF THE CIVIC CENTER TASK FORCE**

**R. MOTION SETTING A PUBLIC HEARING ON AUGUST 11, 1998, TO REZONE 15 LOTS ON BURTON STREET FROM COMMERCIAL BUSINESS II TO HIGHWAY BUSINESS**

**S. RESOLUTION NO. 98-104 - RESOLUTION NAMING THE NEW BUS TRANSIT FACILITY ON COXE AVENUE AS THE "ASHEVILLE TRANSIT CENTER"**

Summary: The City of Asheville and the Asheville Transit Authority have completed construction of a new transfer facility for their bus passengers and along with the North Carolina Department of Transportation and the Federal Transit Administration dedicated the new facility with a ribbon-cutting ceremony on July 23, 1998. -9-

A sign has been erected with the name of the facility as the "Asheville Transit Center" where regular transit service began on July 24, 1998, the 20<sup>th</sup> anniversary of Bele Chere. Staff has drafted a resolution for Council consideration to officially name the facility "Asheville Transit Center."

The Asheville Transit Authority and the City Planning staff recommend that the City Council adopt a resolution in order to officially name the new transfer station as the "Asheville Transit Center".

**RESOLUTION BOOK NO. 24 - PAGE 457**

Mayor Sitnick said that members of Council have been previously furnished with copies of the resolutions and ordinances on the Consent Agenda and they will not be read.

Councilman Sellers moved for the adoption of the Consent Agenda. This motion was seconded by Councilwoman Field and carried unanimously.

**III. PUBLIC HEARINGS:**

**A. PUBLIC HEARING RELATIVE TO AMENDING THE UNIFIED DEVELOPMENT ORDINANCE TO ADD ENCLOSED BREEZEWAYS TO THE DEFINITION OF "BUILDING"**

**ORDINANCE NO. 2502 - ORDINANCE AMENDING THE UNIFIED DEVELOPMENT ORDINANCE TO ADD ENCLOSED BREEZEWAYS TO THE DEFINITION OF "BUILDING"**

Mayor Sitnick opened the public hearing at 5:04 p.m.

City Clerk Burleson presented the notice to the public setting the time and date of the public hearing.

Mr. Bruce Black, Urban Planner, said that the current definition of Building does not allow for two buildings to be connected by an enclosed corridor and, for purposes of Structure Size Standards in the UDO, to be treated as separate buildings.

In order to clarify this to the user of the Unified Development Ordinance, it is proposed that the definition be edited as follows (*new language in italics*):



**BUILDING** means any structure having a roof supported by columns or by walls, and intended for shelter, housing of enclosure of persons, animals, property or business activity, The connection of two buildings by means of an open porch, breezeway, passageway, carport or other such open structure with or without a roof shall not be deemed to make them one building.

*The connection of two buildings by an enclosed corridor connector where the buildings connected are not less than fifty feet apart at all points, and the connecting corridor is not less than fifty feet in length nor more than fifteen feet in inside width, one story in height, and the outside walls of which contain not less than thirty percent glazing, shall not be deemed to make them one building provided the corridor has no other use than as a passage from one building to the next.*

The edited definition extends the same size calculation provisions for structures connected by an open corridor, breezeway etc. to structures connected by enclosed corridors meeting the provisions of the definition. These provisions are meant to preserve the bulk and -10-

massing of the particular zoning districts wherein the size of buildings is limited in the UDO, while still allowing some latitude in design, especially for those uses where two separate structures would be appropriate for the given site, but because of the nature of the intended end users, it is undesirable to allow them to be exposed to the elements in making necessary trips from one structure to the other.

Planning and Development staff recommend approval of the amendment as outlined herein.

At their meeting of July 1, 1998, the Planning and Zoning Commission voted unanimously to recommend this amendment to the Asheville City Council.

Upon inquiry from Vice-Mayor Hay, Mr. Black explained how the ordinance would be enforced.

Mayor Sitnick closed the public hearing at 5:15 p.m.

Mayor Sitnick said that members of Council have previously received a copy of the ordinance and it would not be read..

Councilwoman Field moved for the adoption of Ordinance No. 2502. This motion was seconded by Councilman Cloninger and carried unanimously.

#### **ORDINANCE BOOK NO. 17 - PAGE 124**

At 5:15 p.m., Mayor Sitnick announced that Council would take a short break in order to contact Councilman Tomes so he could participate by speaker phone on this issue. Unfortunately due to technical difficulties, Councilman Tomes could not be patched into the meeting.

#### **B. PUBLIC HEARING RELATIVE TO REZONING 216 SHELBURNE ROAD FROM RM-6 RESIDENTIAL MULTI-FAMILY LOW DENSITY TO INSTITUTIONAL**

Mayor Sitnick said that on July 27, 1998, the City Clerk received a letter from David R. Payne, attorney representing Trinity Baptist Church, which reads as follows: "Please be advised this is a formal request to continue this matter for two weeks. The church initially continued this matter as a result of a recommendation from the planning and zoning department."

Mr. Payne said that due to a matter that has required him to be out of state, he has not had an opportunity to discuss some issues he would like to with his client and also since there is a valid protest petition, he would like for all Council members to be present to hear his case.

Councilman Sellers moved to continue this public hearing, without further advertisement, until August 25, 1998. This motion was seconded by Councilman Cobb.

Ms. Ann Anderson, 147 Shelburne Road, said that the neighborhood could not afford an attorney and wondered if they needed one to settle this matter. She did not feel that this matter should be postponed since the neighborhood had only days within which to get a protest petition submitted. She said they have waited six months for this issue and would like Council to settle this matter today.

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Mayor Sitnick said that the neighborhood does not need to hire an attorney and noted that the last time the matter was continued was to explore whether or not there could be a conditional use permit issued rather than a rezoning. That issue has now been settled and the only issue before Council is the rezoning.

Ms. Jessie Corpening, resident on Shelburne Road, urged City Council to hear this matter and vote today since the neighborhood has been waiting for six months.

Mayor Sitnick said that City Council is sensitive to the amount of time which has elapsed, but felt that they also need to honor the request of the attorney.

The motion made by Councilman Sellers and seconded by Councilman Cobb carried unanimously.

**V. UNFINISHED BUSINESS:**

**A. RESOLUTION NO. 98-105 - RESOLUTION RELATIVE TO THE DISPOSTION OF CERTAIN CITY-OWNED REAL PROPERTY**

Ms. Charlotte Caplan, Community Development Director, said that this is consideration of disposition of certain City-owned real properties acquired under redevelopment in light of current downtown market conditions.

City Council requested appraisals of the properties located at 5, 7 1/2, 9, & 11-13 Biltmore Avenue, the parking lot on the east side of South Lexington Avenue and the property at 135 Cherry Street following a report on the current status of the properties.

Appraisals have been obtained on the properties which reflect the following values:

<b>Address</b>	<b>Market Value</b>	<b>Leased Fee Value</b>
5 & 7 1/2 Biltmore Avenue	\$340,000	\$300,000
9, 11 & 13 Biltmore Avenue	\$470,000	\$380,000
E/S South Lexington Ave.	\$65,000	No lease
<b>Total Downtown Properties</b>	<b>\$875,000</b>	
135 Cherry Street	\$105,000	No lease
<b>Total All Properties</b>	<b>\$980,000</b>	

The Market Value represents the estimated unencumbered fee simple value. The Leased Fee Value represents the estimated value of the City's interest in the property subject to existing leases.

The highest and best uses of the properties are all commercial with the Biltmore Avenue properties best suited for retail, the South Lexington Avenue property best suited for parking and the Cherry Street property best suited for office.

The purpose of the appraisals was to assist in making the determination whether to sell the properties or to hold them the intent being to achieve the highest return to the City. The question of whether to offer the contiguous properties as one parcel also was put to the appraiser. It is the appraiser's opinion -12-

that no advantage would be obtained by combining the contiguous parcels. Each parcel is appraised and considered separately.

The Biltmore Avenue properties are located in a prime commercial area but, they are encumbered by below market leases. The effect of the leases on the value of the properties is reflected in the difference between the market value and the leased fee value. The leased fee value was determined by using the Discounted Cash Flow (DCF) or Present Value method. The DCF method calculates the present value of the cash flow plus the capitalized resale value realized by holding the properties for ten years as an investment less any refurbishment expenses. The DCF method takes into account the existing rents and assumes a discount rate of 13%. It also assumes an expenditure of \$55,350. on 5 Biltmore Avenue and \$21,970. on 9 Biltmore Avenue for refurbishment. The Biltmore Avenue properties are a good investment and therefore very marketable properties. However, since the current leases expire in the year 2000, that invites the question of whether to hold the properties for two years and then sell them. In such case if a value appreciation of 8% annually, a discount rate of 13% and a capitalization rate of 11.5% is assumed the present value of the future sale price plus the discounted cash flow for 5 - 7 1/2 Biltmore Avenue for a holding period of two years would be \$347,616 or a 16% increase over the current lease fee value of \$300,000. For 9 - 13 Biltmore Avenue, the present value of the future sale price plus the discounted cash flow would be \$443,627 or a 17% increase over the current lease fee value of \$380,000. Staff recommends holding the Biltmore Avenue properties until the current leases expire and then offering them for sale at that time. In the interim rental rates for those units not under lease should be increased to market rate incrementally over the two year period.

The parking lot on South Lexington Avenue is a metered lot and is currently being managed by Parking Services. Since the appraisal indicates that parking is the highest and best use for the property, staff recommends the lot be retained for parking.

The Cherry Street property is being used by Neighborhood Housing Services. It has been a part of the Head of Montford Redevelopment Project strategy to cooperate with NHS in the improvement of the Montford community. Provision of office space to NHS at affordable rates has been in the furtherance of a public purpose. With close-out of the Head of Montford Redevelopment Project in sight, staff recommends offering 135 Cherry Street for sale. The sale will be pursuant to provisions of the General Statutes.

Community Development staff recommends that: (1) 5 - 7 1/2 Biltmore Avenue (PIN 9649.18-40-2028) and 9 - 13 Biltmore Avenue (PIN 9649.18-40-1091) be held for 2 years before being offered for sale; (2) the parking lot on the east side of South Lexington Avenue (PIN 9649.18-40-1018) be retained for public use; and (3) 135 Cherry Street (PIN 9649.17-21-0243) be offered for sale.

Upon inquiry of Councilman Cloninger, Ms. Caplan said that it is the staff's responsibility to work with the present tenants to increase the rents incrementally over the two year period. Ms. Caplan said that staff is aware of Habitat's concern in that their rent has been low for the past eight years and now that their lease has expired, naturally they are concerned about whether their business can sustain a higher rate. She said that staff will be negotiating that rent with them and the rent will not suddenly increase to the maximum market rent. The state of the building will be taken into consideration and it is not in staff's interest to dispossess them and try to find another tenant for just two years. -13-

When Ms. Caplan said that if an agreement on the rents could not be reached, staff would be prepared to come back to Council. Councilwoman Field felt that it would be a difficult precedent to set in that everyone who doesn't agree with negotiations of staff would come to City Council. Council has have never looked at

rental properties, however, they have given some policy decisions.

Councilman Cloninger responded that the City is looking at the possibility of selling the property in two years and we are talking about a non-profit organization.

Vice-Mayor Hay asked that during the course of negotiations regarding the rent with Habitat, in particular, that staff report back to the Housing & Community Development Committee.

After a brief discussion, it was the consensus of Council that at the end of the two year period, City Council would consider selling the Biltmore Avenue properties. As a result, the resolution would be amended to read: (1) 5 - 7 1/2 Biltmore Avenue (PIN 9649.18-40-2028) and 9 - 13 Biltmore Avenue (PIN 9649.18-40-1091) not be offered for sale for a period of two years; (2) the parking lot on the east side of South Lexington Avenue (PIN 9649.18-40-1018) be retained for public use; and (3) 135 Cherry Street (PIN 9649.17-21-0243) be offered for sale.

Vice-Mayor noted that the proceeds from the sale of 135 Cherry Street will go back to program income for the Community Development Block Grant program.

When Mayor Sitnick asked if Neighborhood Housing Services has expressed an interest in purchasing 135 Cherry Street, Ms. Caplan said that she believed they are looking at that possibility.

Mayor Sitnick said that members of Council have been previously furnished with a copy of the resolution and it would not be read.

Vice-Mayor Hay moved for the adoption of Resolution No. 98-105, as amended. This motion was seconded by Councilman Cloninger and carried unanimously.

## **RESOLUTION BOOK NO. 24 - PAGE 458**

### **B. RESOLUTION NO. 98-106 - RESOLUTION APPROVING ORDER ON CONDITIONAL USE PERMIT**

City Attorney Oast said that is consideration of a resolution approving an Order containing Findings and Conclusions relative to the conditional use permit application for the proposed duplex on London Road in Shiloh. The proposed Order is based on information presented at the public hearing in this matter held on June 23 and continued to July 14, and should be self-explanatory.

He said the basis for the denial is that the proposed conditional use would tend to injure adjacent or abutting property values and would also not be in keeping with the character of the neighborhood as to appearance or quality of construction. He said those seemed to be the two factors that Council centered most on and those are the two he has indicated as the basis for denial. He felt that all the other criteria for a conditional use permit had been satisfied, but it only takes one reason to deny the conditional use permit. -14-

In order to give effect to Council's vote to deny the permit, it will be necessary to make determinations relative to the conditional use standards. The Order is a proposal only, and can be modified to suit Council's particular desires. Once the findings and conclusions are finalized, adoption of the resolution is recommended.

City Attorney Oast said that a copy of the resolution and order was furnished to neighborhood representatives.

Mayor Sitnick said that members of Council have been previously furnished with a copy of the resolution and it would not be read.

Vice-Mayor Hay moved for the adoption of Resolution No. 98-106. This motion was seconded by Councilman Cobb and carried on a 4-2 vote, with Councilmen Cloninger and Sellers voting no.

**RESOLUTION BOOK NO. 24 - PAGE 459**

**C. SECOND READING OF ORDINANCE NO. 2500 - AN ORDINANCE GRANTING A FRANCHISE TO BRENMOR CABLE PARTNERS, L.P. (D/B/A INTERMEDIA)**

**RESOLUTION NO. 98-107 - RESOLUTION AUTHORIZING THE CITY MANAGER TO EXECUTE A SETTLEMENT AGREEMENT WITH BRENMOR CABLE PARTNERS, L.P. (d/b/a INTERMEDIA) AND TCI COMMUNICATIONS INC., REGARDING FRANCHISE FEES**

Mayor Sitnick said that the public hearing on this matter was held on June 23, 1998, and the first reading was held on July 14, 1998.

Ms. Patsy Meldrum, Assistant City Attorney, said that on July 14, 1998, the City Council adopted on first reading the ordinance granting a cable television franchise to InterMedia. The City Council has previously been furnished with a copy of the ordinance with a drafting date of 6/2/98. The adoption on first reading included new language for Section 2 of the ordinance and a new Section 12.E.

The new Section 2 preserved the right the City has with respect to the possible non-payment or underpayment of franchise fees or franchise taxes under the 1967 cable television franchise. The new Section 12.E. included the language regarding Internet access to schools and public libraries.

The City Manager and the City Attorney's Office recommend consideration of the second reading of the ordinance granting the franchise to InterMedia.

At this time, 6:07 p.m., Councilman Tomes participated in the meeting via speaker phone.

Councilwoman Field said that she and Vice-Mayor Hay have met with the Attorney Joe Van Eaton (attorney brought in by Citizens of Media Literacy) and Paul Congo. Mr. Van Eaton said that he felt like basically the City had a good franchise agreement. Several questions arose which she has researched as follows:

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(1) What is the impact of AT&T's takeover of TCI and will the City have the opportunity to approve the transfer and what are the implications? Answer: In talking to staff, the relationship with AT&T to TCI is so many steps back from our contract with Brenmor that more than likely we will not have the opportunity to approve the AT&T's takeover of TCI.

(2) The 1967 franchise requires free drops plus inside wiring for City Hall, Police and Fire Departments and schools. Was inside wiring ever installed, if not, the operator could be held in non-compliance. Answer: Our consultants, Rice, Williams, did a compliance survey, and found that they were in compliance with everything except the franchise fee.

(3) Internet access for schools and libraries. InterMedia could provide Internet access in some neighborhoods but not others. Amendment to franchise agreement obligates them to provide free Internet access only to those schools and libraries in sectors where the Internet is activated. Answer: In talking to staff, in the regulatory agreement in Section 34, it does not allow them to discriminate and only provide a service in one neighborhood and not the other. If we requested them to provide the service, they must provide it within the City limits equally.

(4) Proposed franchise does not specify a PEG access origination site or InterMedia's obligation to link to a

PEG access origination site established by the City. This means that PEG access could only originate from InterMedia's premises. Answer: The origination sites are listed in Exhibit "A" and it does say that these origination sites and specifically that a PEG origination site will be provided for. There was some concern that it did not say "provide and activate" and I have checked with InterMedia and they are willing to add the words "and activate" so that all of the origination sites will be provided and activated.

(5) Only four fibers for I-net. Most I-nets are being built with 12 fibers, thereby enabling three pathways for voice, video and data - each requiring four fibers - two incoming and two outgoing. This allows simultaneous usage of I-net at maximum speeds for voice, video and data. If voice, video and data must share pathways, the performance is degraded. Answer: Councilwoman Field read what Rice, Williams has said: "I-net designs vary across the country with most franchising authorities not receiving I-nets in renewals. The designs vary based on local needs, topography of the city and cable plants and costs. Some I-nets provided by cable companies are designed with a backbone of 6-12 fibers. On these designs, all users share the same 6-12 fibers. The I-net in Asheville has a much more fiber-rich architecture with 4 fibers designed from the City Hall to each location. The backbone fibers varies by location but starts with 82 fibers and in many locations has 32 or more. Of the 21 sites, all sites are served by a backbone of at least 12 fibers, except for two sites with a backbone of 8 and two sites with a backbone of 6. If the sites on the distribution part of the I-net link from the backbone fiber to telephone junction box in the building should require access to more than four fibers, additional fibers can be connected to the larger backbone. This type of design is used in new I-nets and offers substantial capacity. The overall number of fibers in the backbone and distribution parts of the I-net and the redundancy built in the design is affected by real future needs and how much a community is willing to pay. Voice, video and data are often placed on the same fiber and the performance is not degraded."

(6) There is no I-net design specified. Purely designed I-net could lack redundancy if the site goes down it could bring down the entire network. Answer: From the description, there is indeed a design for the I-net.

(7) I-net opt out clause. If the N.C. Public Utilities Commissions or the FCC ever requires cable companies to register as common carriers for I-net service, InterMedia can opt out of the I-net requirement. The City will be faced with options of shutting down the I-net or contracting with InterMedia to apply for the common carrier fee. Answer: Assistant City Attorney -16-

Patsy Meldrum explained that in Section 15B there is language that if the City's use of the institutional network results in any unreasonable interference with the cable system or requires receipt of additional licenses or authorizations from any entity or governmental agency, including, without limitation, public service commission approval, then what happens is the cable company gives the City written notice. They give us notice and then the City has the opportunity to seek that license or that authorization. The City is the one with the option, not the cable company. If the City fails to do it, then the cable company can still do it themselves if they want. She also checked to see what the experience has been with utilities commissions in states requiring this. Rice, Williams informed us that there is a number of institutional networks that have been operating in North Carolina for a number of years and that so far the N.C. Utilities Commission has made no move to have requirements like this for institutional networks. Rice, Williams also serves other governmental authorities in a number of states and they are not aware of any other utility commission in the United States which has required this. If indeed a license is required in the future, the City is the one with the option, not the cable company. Councilwoman Field said that in order to clarify that, the cable company is willing to add language that they would make reasonable efforts to assist the City with securing the licenses or authorizations required.

(8) Cable companies will try to get away with \$5 automatic late fees, but a case was just lost against the City of Baltimore on this issue. Their \$5 late fee violates the state usury law. Answer: The cable company has a set way of dealing with late fees. Councilwoman Field's concern was that since the cable company bills in advance, at the end of 30 days you are not really late. The cable company has a policy (which they are willing to give us a copy of) that they don't even begin to issue the late fees until 45 days after the bill is late

and then the first thing is they call you to tell you it's late. If you don't respond to that, then they send you a letter telling you are late. If you don't respond to that, they send a truck around and they put a door hanger on your door stating that they are about to cut off your cable. It takes about 90 days before they actually get to a point where they actually cut off your cable. She personally felt that if it costs \$10 to write a business letter, she did not feel that \$5 on an automatic late fee is that significant. Assistant City Attorney Meldrum said that she spoke with an attorney in the Consumer Protection Division of the N.C. Attorney General's Office who is of the same opinion that the state usury laws in North Carolina are limited to loans or extensions of credit and would not apply to cable bills. There is some language in there relating to the utilities commission and what the interest rate telephone companies can charge to customers when they refund payment, but not for cable companies and what their maximum rate is.

(9) There are other cities in the country that have TCI and InterMedia who have had some safety violations. Answer: Rice, Williams and their engineers did a full inspection of their physical plant and they found a few minor violations (some drop sites were built many years ago and the Electrical Code has changed). As a result of that, the City requested and the cable company has agreed to add language that upon completion of the rebuild the cable company will furnish the City with a report on the audit of the drop sites.

Mayor Sitnick said that with regard to the refund request requirement and the fact that subscribers pay in advance for the service, if you for some reason don't call for a refund, then in effect, the cable company is being paid for a service that has not been provided.

Councilwoman Field said that if she agreed with the franchise agreement then the issue for her became the franchise fee. Therefore, she received more information on the franchise fee and developed Exhibit "A" (unaudited), which is attached hereto, and reviewed it with the Council. The bottom lines are as follows:

(1) If we go back 7-1/2 years at 6% on everything (except home shopping, advertising and bad debts on basic only) there would be a fee owed to the City of \$944,341. -17-

(2) If we go back 7-1/2 years at 6% on everything (except home shopping, advertising, bad debts on basic and installation/other - because the Court may rule that the description in our franchise reads that the City will get fees paid on all recurring expenses) there would be a fee owed to the City of \$650,303.

(3) If we go back 7-1/2 years at 5% on everything (except home shopping, advertising and bad debts on basic only) there would be a fee owed to the City of \$382,647.

(4) If we go back 7-1/2 years at 5% on everything (except home shopping, advertising, bad debts on basic and installation/other - because the Court may rule that the description in our franchise reads that the City will get fees paid on all recurring expenses) there would be a fee owed to the City of \$137,616.

(5) If we go back 3 years at 6% on everything (except home shopping, advertising and bad debts on basic only) there would be a fee owed to the City of \$236,656.

(6) If we go back 3 years at 5% on everything (except home shopping, advertising and bad debts on basic only) there would be a fee owed to the City of \$103,379.

Councilman Field said that Mr. Van Eaton recommended that the City not to go court but if we did, we might win in State Court, but we would lose in Federal Court. To go to court we would have to spend at least \$100,000 on lawyer's fees. She therefore, came to the conclusion that the cable company has agreed to pay \$175,000 and the savings of \$100,000 to go to court, plus the fact that it will take approximately four years to go through the court system, she wasn't sure what changes the City would have to get 6%. The federal law says that you cannot get more than up to 5% of their total revenues.

Upon inquiry of Councilman Tomes relative to the AT&T takeover, Ms. Meldrum said that the City does have

in their regulatory ordinance some provisions about approval of transfers and what it depends upon is whether or not the ownership or a certain percentage of the control is affected. But, likely the type of merger that has been discussed, if it occurs, because AT&T has attempted to merge with other cable companies before and it has not happened, then the information that we have is that it is so far removed from the ownership or control of our own cable system that it would not trigger our transfer approval requirements. Based on the information we have, that type of merger of those two systems would not trigger our transfer approval clause.

Ms. Meldrum explained in detail the design of the institutional network.

At this time, 6:40 p.m., Councilwoman Field moved to excuse Councilman Tomes. This motion was seconded by Councilman Sellers and carried unanimously.

Mayor Sitnick noted that it was clear that the cable company was out of compliance with their fee payments and noted that the City did not charge them a late penalty fee.

Because Councilwoman Field feels that the franchise agreement is a good agreement and with the additional information she has received and reviewed at length, she moved to add the consideration of authorizing the City Manager to execute a settlement agreement with Brenmor Cable Partners, L.P. (d/b/a InterMedia) and TCI Communications Inc. regarding franchise fees to the agenda. This motion was seconded by Councilman Cloninger and carried unanimously.

Councilwoman Field said that she talked with representatives of InterMedia and they are unwilling to raise the settlement agreement more than their offer of \$175,000. The cable company thinks they can win as does Mr. Van Eaton.

Mayor Sitnick then read the following letter dated July 23, 1998, from Adelaide Worth Daniels Foundation: "I am writing to indicate my willingness to fund a technical assessment of -18-

existing infrastructure and current and future community networking needs, so that the City Council, the City Manager, and the City's legal staff can have all the information they need to assure that the contract they negotiate for cable television service is the best one possible for our community. Through my efforts with the Community Resource Network, I am working on a major project that I hope will greatly improve services to children and families, and maximize the effectiveness of the many agencies and organizations that serve them. A key component of our effort is improving people's access to information. As you likely know, quite a bit of public and private investment is going into building a strong communications network across western North Carolina. The Institutional Network and Public, Educational & Governmental cable television access channels can complement the many initiatives under way and be key elements in helping us achieve our goals. Recent consultations with attorney Joseph van Eaton and public access executive Paul Congo have shown that there are many nuances to the relationship between a cable television provider and the community it serves. It would be a shame to have our community prematurely locked into a long-term agreement that could prevent us from reaching our full potential. I think our community would be well served if City Council delayed acting on the contract currently before them, and give us an opportunity to have an independent expert conduct an in-depth evaluation. We need clarify on numerous matters - our existing facilities and infrastructure, our needs for additional enhancements, the method by which the public is given access, and many others. Through the Community Resource Network I am prepared to contract with and pay for the appropriate expert to conduct an assessment to help us achieve this clarity. I realize that time is of the essence. I believe we can accomplish such an evaluation within 90 days. Please consult with the other City Council members and urge them to delay their action so that we can get all of the information we need." The letter was signed by Adelaide. She said that the Adelaide Worth Daniels Foundation is willing to pledge up to \$25,000 to hire such a consultant to evaluate all of the questions and help us continue our evaluation.



Vice-Mayor Hay said that he voted against the franchise fee settlement on July 14, 1998, not because he thought the settlement was a bad one in light of all the different considerations, necessarily, but because he thought that the community believes that the City is giving the money away and that the City has not showed the community that this settlement is a good idea. He still felt that way. He said that our community advisors, including Joe Van Eaton, said that the franchise renewal is our major negotiating tool for increasing the amount of money the cable company is willing to pay in the franchise fee settlement. However, the message sent to the cable company today was that the franchise renewal issue is in jeopardy if they do not increase the franchise fee settlement proposal. The result was that the cable company did not offer any more.

Councilwoman Field also reviewed with Council Exhibit "B" attached hereto, which is a bare bones budget for public access. She tried to look at some possibilities of how we can get public access started with the money that we had in the present franchise agreement. TCI has committed to \$340,000 over three years for equipment and maintenance and we can either take that in money or in-kind. She said that the cable company would be willing to spread the \$400,000 over 9 years (instead of 8) which comes to about \$45,000 a year. That \$45,000 a year could be committed to public access and the public access community could raise the difference in money. She felt it would take at least a year to develop the public access portion with the public access community and the City. She was concerned about being put in a position where the City of Asheville pays for the entire infrastructure for public access and the I-net for the whole community and then a whole group of people take it over and use it. If the hospitals, schools or universities want to use our I-net then they need to bring some money to the table. Right now we have an I-net that will work for the City of Asheville.

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Mayor Sitnick agreed that we need to learn by our mistakes in the past regarding water and sewer and the fact that the Asheville taxpayer has indeed given a lot away and has subsidized the use of water and sewer by other entities. She would assume that whatever we do with the I-net there would be a fee for service and hook-up.

Councilman Cobb said that even though he made the motion to adopt the franchise on the first reading, he was agreeable to postponing taking action on it for 90 days to give the consultant hired by the Adelaide Worth Daniels Foundation time to review the language, making sure the franchise is clear, precise and understandable. He felt that (1) Asheville should have a state of the art system now with a 750 MHz system; (2) the cable company should pay the City 6% of all the money they bring in; (3) the cable company should not be charging a \$5 late penalty fee; (4) the pass through to subscribers should be lower; and (5) there should be senior citizen discounts.

Mayor Sitnick said that with the hundreds of letters, phone calls and e-mails she has received on this issue, not one has been in support of this cable contract or in settling for the fee settlement offered to the City. She fully supported the Foundation's offer to explore whether or not what we are doing now will serve us in the next millennium, given the technological advances that are occurring. She would not be intimidated by the cable company telling us they will not negotiate further. Personally she had faith in Ms. Meldrum being able to re-negotiate for the City and not having to spend the money on an outside attorney. Her concerns were: (1) that the cable company was willing to pay more than Congress required of them because they didn't want the City to look into whether or not their assessment of gross revenues was accurate; (2) PEG channels may not be defined enough and wasn't sure if there is enough money up-front for PEG channels; (3) working with a company that says they will give it something free and then charge you; (4) there should be no \$5 late fee especially because it hits the low income people; (5) there is no consideration for senior citizen rates; (6) not satisfied with the refund by request provision; (7) she doesn't like being billed in advance; (8) customers should have basic and expanded without paying for additional equipment; (9) problems with a company that causes the City to investigate and audit the fee settlement issues which cost the citizens and the rate payers money; (10) 12-year contract is too long given the way the telecommunication industry and the laws are

changing too quickly; (11) the City is paying for the I-net and another company owns it; and (12) unhappy with the fee settlement; . She would like to see this renewal postponed for at least a minimum of 90 days and suggested Council postponed it January 1999. This would allow the consultant to work with our staff and, if nothing else, reassure us that this is the best we can do.

Councilman Cloninger felt strongly that City Council should approve both the franchise agreement and the fee settlement agreement for the reasons stated two weeks ago. He said that this agreement has been analyzed many, many different ways and he has not heard how this latest evaluation will be any different from what has already taken place. To postpone another 90 days will cost the City money because of the new definition of gross revenues.

Upon inquiry of Councilman Cloninger, Ms. Meldrum said that the City is losing about \$30-40,000 revenue per year based on the change in definition.

Vice-Mayor Hay said that because the settlement agreement was voted down, he would support engaging outside counsel and filing suit.

Councilwoman Field felt that the cable company must be extremely confident of their position and the City may end up with very little or no money at all. She felt that if the City takes the \$175,000, part of that can go to the PEG channels to get started. If given a chance, she would change her vote to approve the settlement agreement.

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Vice-Mayor Hay said that he talked to the expert the Foundation has offered to pay for and felt that the Foundation's offer is very generous and their expert is probably very capable, however, he didn't hear back from her any ideas that we would be in any different place in 90 days than we are right now. He would not be interested in postponing this action for that reason.

Councilwoman Field had the same experience as Vice-Mayor Hay did when she spoke with their expert.

Vice-Mayor Hay said that there is a role to be played in terms of engaging what the City is going to do with our cable franchise and the rest of the community.

Mayor Sitnick understood that the offer was centered around the capabilities of I-net, that structure and the community resource network and how best we could plug into that.

Councilwoman Field moved to approve the second reading of Ordinance No. 2500, with the following amendments: (1) Amend Section 6 to read "... and a new term of seven (7) years and eleven (11) months, for a total of twelve (12) years, commencing on August 1, 1998, and ending on July 31, 2010,..."; (2) Amend Section 14 (c) to read "... in a minimum amount of \$45,000 per year or \$.20 per Subscriber per month, whichever is greater, for years 4 through 12 of this Franchise...."; (3) Amend Section 14 (f) to read "Upon completion of the rebuild, the Franchisee agrees to provide and activate public, educational and/or governmental access origination points..."; and (4) Add a new sentence to Section 15 (b) prior to the sentence beginning "In the event..." to read "...The Franchisee shall use reasonable efforts to assist the City with securing the licenses or authorizations required." This motion was seconded by Councilman Cloninger.

Mayor Sitnick said that the 1967 agreement was voted on by the people and according to what she has been able to determine, the people would not be voting on this.

City Attorney Oast said that he has copies of the resolution and settlement agreement for Council's consideration.

The motion made by Councilwoman Field to adopt Ordinance No. 2500 with the amendments and seconded by Councilman Cloninger carried on a 4-2 vote with Mayor Sitnick and Councilman Cobb voting "no".

Councilwoman Field moved to adopt Resolution No. 97-107, authorize the City Manager to execute a settlement agreement in the amount of \$175,000 with Brenmor Cable Partners, L.P. (d/b/a InterMedia) and TCI Communications Inc. regarding franchise fees. This motion was seconded by Councilman Cloninger.

Councilwoman Field said that this \$175,000 for the settlement agreement would not be passed through to the subscribers.

Upon inquiry of Councilwoman Field about whether can the franchise fee be passed through the customers, Ms. Meldrum responded that it can. However, the \$175,000 settlement amount will not be passed through to the subscribers if the matter is not litigated. If, however, the matter does go to Court, it is her understanding that they would pass it through and they would use the FCC Order as a basis for that. Ms. Meldrum further stated that she reviewed the FCC Order and the City would argue that it should be distinguished on the facts. But, FCC Orders have tended to favor the cable companies in those type of situations. If we win in Federal Court, they would probably try to get authority through the FCC to do that pass through. -21-

The FCC would probably say that because they had not collected the fee, then why should they not be allowed to pass through the fee once they had to pay it. There is some language in there which would tend to support the cable company's view that they could pass it through.

Vice-Mayor Hay said that based on Ms. Meldrum's explaining the FCC Order, he would be in favor of changing his vote on the franchise fee settlement agreement.

The motion made by Councilwoman Field and seconded by Councilman Cloninger to authorize the City Manager to execute the settlement agreement was passed on a 4-2 vote, with Mayor Sitnick and Councilman Cobb voting "no".

## **ORDINANCE BOOK NO. 17 - PAGE 88**

## **RESOLUTION BOOK NO. 24 - PAGE 464**

At 7:48 p.m., Mayor Sitnick announced a short break.

### **V. NEW BUSINESS:**

#### **A. RESOLUTION NO. 98-108 - RESOLUTION ACCEPTING THE REGIONAL WATER AUTHORITY'S RECOMMENDATION TO ABANDON A SMALL SECTION OF WATER LINE ACROSS THE PROPERTY OF THE SWANNAOA BAPTIST CHURCH**

Mr. Tom Frederick, Water Resources Director, said that the Swannanoa Baptist Church has requested that the Water Authority abandon approximately a 325-foot section of existing 6-inch waterline on the Church's property in the former South Avenue in Swannanoa in order to accommodate the planned expansion of their building.

In 1990 the Authority installed a 6-inch waterline in South Avenue, in NCDOT right-of-way known as South Avenue, adjacent to the Swannanoa Baptist Church. In 1993 the Church petitioned NCDOT to abandon the section of South Avenue that runs through their property so that they could expand their building into the street right-of-way. NCDOT granted this request but failed to contact the City regarding the continued maintenance of the waterline. The planned Church expansion is over the existing waterline and the Church asked the Authority to abandon the 6-inch water through their property. Water Resources staff determined

that the waterline could be abandoned without adversely affecting other customers and with marginal affect on fire flow in the area.

The Water Resources staff recommended to the Water Authority that the City of Asheville waterline on Church property be abandoned subject to the Church compensating the City for the depreciated value of the line and the Water Resources Department's cost of plugging the line as required to abandon it. This total cost was determined to be \$5,465. The basis of the staff recommendation was to avoid setting a precedent of abandoning assets without compensation for its current asset value, and to allow reinvestment in the water system where there are needs. The Authority voted in favor of abandoning the waterline if the Church paid only the cost of abandonment, or \$2,048, subject to the approval of City Council. The City of Asheville is the owner of the waterline.

Water Resources staff recommended to the Regional Water Authority and recommends to City Council adoption of a resolution to abandon an approximate 325-foot section of existing 6-inch waterline on the Swannanoa Baptist Church property, subject to the Church paying -22-

\$5,465. The Regional Water Authority recommended adoption of the resolution, however, they recommended the Church pay only \$2,048.

There was some discussion on the amount the Church should pay for the section being abandoned.

Mayor Sitnick said that members of Council have been previously furnished with a copy of the resolution and it would not be read.

Councilman Cloninger moved for the adoption of Resolution No. 98-108, subject to the Church paying \$5,465. This motion was seconded by Councilman Cobb and carried on a 5-1 vote, with Vice-Mayor Hay voting "no".

## **RESOLUTION BOOK NO. 24 - PAGE 465**

### **B. RESOLUTION NO. 98-109 - RESOLUTION APPOINTING A MEMBER TO THE PLANNING & ZONING COMMISSION**

Vice-Mayor Hay said that Jim Torpey has resigned as a member of the Planning & Zoning Commission, thus leaving an unexpired term until August 14, 1999. City Council went through the interview process on July 21, 1998.

There was some discussion about applicants who currently serving on one board but would like to serve on a different one. It was determined that Council proceed as they have in the past and advise the applicant that if they are chosen to serve on the other board, that they would have to resign their position on the current board.

Mayor Sitnick nominated Susan Andrew.

Councilwoman Field nominated Lionel Williams.

Councilman Sellers nominated Jerry Bailey.

Susan Andrew received two votes, Lionel Williams received three votes, and Jerry Bailey received one vote. Another vote was taken with the results being Susan Andrew receiving two votes and Lionel Williams receiving four votes. The resolution will appoint Lionel Williams to serve the unexpired term of Mr. Torpey, term to expire August 14, 1999, or until his successors has been appointed.

**RESOLUTION BOOK NO. 23 - PAGE 466**

**VI. OTHER BUSINESS:**

**A. APPROVAL OF THE MINUTES OF THE REGULAR MEETING HELD ON JULY 14, 1998, AND THE WORKSESSION HELD ON JULY 21, 1998**

Councilwoman Field moved for the adoption of the minutes of the regular meeting held on July 14, 1998, and the worksession held on July 21, 1998. This motion was seconded by Councilman Sellers and carried unanimously.

**B. I-26 CORRIDOR; WNC AIR POLLUTION CONTROL BOARD; HEALTH ADVENTURE; AFFORDABLE HOUSING**

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Mayor Sitnick said that she has talked with Gordon Myers about the N.C. Dept. of Transportation making a presentation to City Council. Mr. Myers said that in about 2-3 weeks, they would be prepared to make that presentation.

Mayor Sitnick entered the following letter dated July 23, 1998, to Doug Clark, Chairman of the WNC Regional Air Pollution Control Board from her into the minutes: "This is to inform you of our great disappointment and displeasure with the way the Board's election of the new Chairperson and Vice Chair was handled by former Chair Tom Rhodarmer. We want to take this opportunity to express the dismay that the Asheville City Council members and I had when you did not see fit to allow an Asheville appointee to assume the Chairmanship, as was agreed to a year ago by the Board. We find it unprofessional and immature to deny the right of Asheville to assume the Chairmanship because some members of the Board have a personal gripe against a fellow member. This is a very disturbing turn of events and the City of Asheville and its citizens have been done a great disservice. In addition, conducting an election by secret ballot only serves to further erode the Boards credibility and effectiveness. By way of this letter, the Mayor and members of City Council hereby request that you reconvene and revote, and allow the City of Asheville its due turn in the role of Chair. We feel both of our appointees are capable and competent to serve in that role."

At the request of Mayor Sitnick, it was the consensus of City Council that the she write a letter to our legislators on behalf of City Council to support funding for the Health Adventure.

Councilwoman Field asked that the City find out more about the Ford Foundation, along with Fannie Mae and the Self-Help Credit Union, having \$200 Million they are putting together for affordable housing home ownership.

**C. COMMENTS BY KEITH THOMPSON**

Mr. Keith Thompson thanked Council and staff for their efforts in making sure that the decision for the Board of Adjustment was a clear one regarding the variance request on Merrimon Avenue. He said they had a petition with slightly under 800 signatures supporting the Unified Development Ordinance's protection of the provisions under Community Business I particularly regarding no drive-throughs in the CB I district and provisions that would limit adverse impact on safety on roads like Merrimon Avenue.

**D. CLAIMS**

The following claims were received by the City of Asheville during the week of July 10-16, 1998: Alice Peed (Streets), Ron Greene (Water), Rebecca P. Spencer (Water) and Rachel Miller (Water).

The following claims were received during the week of July 17-23, 1998: Linda Mitchell (Sanitation), Vicky M. Young (Police), John Young (Sanitation) and Julie Sibila (Water).

These claims have been referred to Asheville Claims Corporation for investigation.

**VII. ADJOURNMENT:**

Mayor Sitnick adjourned the meeting at 8:30 p.m.

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CITY CLERK MAYOR

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