

**MINUTES  
OF THE  
REGULAR MEETING  
CLAYTON CITY COUNCIL**

**TUESDAY, January 17, 2012**

1. **CALL TO ORDER & ROLL CALL** – The meeting was called to order at 7:02 p.m. by Mayor Geller in Hoyer Hall of the Clayton Community Library, 6125 Clayton Road, Clayton, CA. Councilmembers present: Mayor Geller, Vice Mayor Medrano, Councilmembers Pierce, Shuey and Stratford. Staff present: City Manager Gary Napper, City Attorney Mala Subramanian, Community Development Director, Maintenance Supervisor John Johnston, and City Clerk Laci Jackson.
2. **PLEDGE OF ALLEGIANCE** – led by Mayor Geller.
3. **CLOSED SESSION** – None.
4. **CONSENT CALENDAR-** It was moved by Councilmember Pierce, seconded by Councilmember Stratford, to approve the Consent Calendar as submitted (Passed; 5-0 vote).
  - (a) Approved the minutes of the special and regular meetings of December 6, 2011.
  - (b) Approved Financial Demands and Obligations of the City.
  - (c) Approved Clayton Community Library closures on certain Sundays in calendar year 2012.
  - (d) Approved the 1<sup>st</sup> Quarterly Investment Reports for FY 2011-12 (July-Sept.).
  - (e) Adopted Resolution 01-2012 in compliance with AB 936 declaring no loans between the City of Clayton and the Clayton Redevelopment Agency were forgiven in whole or in part during calendar years 2010 and 2011.
  - (f) Approved the appointment of Alyse Smith to the citizens advisory Trails and Landscaping Committee for the term of office from January 18, 2012 through December 31, 2013.
5. **RECOGNITIONS AND PRESENTATIONS**
  - (a) Recognition of Virginia Siegel and Lorraine Mole for their leadership and service on the Clayton citizens advisory Trails and Landscaping Committee. The Mayor announced that since neither of these women could attend the meeting, their recognitions would be sent to them.
  - (b) Certificates of Recognition to “Do The Right Thing” students of the month for exemplifying “Kindness” during November and December 2011.

Mayor Geller recognized Molly Moylan and Jack Dress from Mt. Diablo Elementary School; Sierra Heuser and Brett Riessen from Diablo View Middle School; and Ben Linzey and Zoey Dow from Clayton Valley High School.

## **6. REPORTS**

- (a) Planning Commission – No meeting held.
- (b) Trails and Landscaping Committee – No meeting held.
- (c) The City Manager had no report.
- (d) City Council

Councilmember Shuey stated the County Board of Education approved the Clayton Valley Charter High School formation by a unanimous vote. He thanked the community for supporting this proposal. The Charter Executive Board has already met and the sub-committees are forming. He asked anyone interested in serving on a sub-committee to visit the Charter's facebook page, or its official website. He stated he had discussions with Councilmember Medrano and wants to reach back to the District to partner together in supporting the tow public schools in Clayton, Mt. Diablo Elementary and Diablo View Middle School.

Councilmember Pierce attended a Transportation Authority meeting, and the Clayton Counts Down. She thanked the Council and volunteers for their work on that event. She attended an ABAG joint meeting with the MTC planning committee. She also met with the E-Bart policy advisory committee. Last, she stated ABAG is having their installation of officers at which she will be installed as Vice President for the next two years.

Councilmember Stratford noted the "Do the Right Thing" program is emphasizing Self-Discipline for the month of January. He attended the Habitat Conservancy meeting and thanked everyone for their work on the Clayton Counts Down- New Year's Eve event.

Mayor Geller attended the Mayor Conference and the County Board of Education hearing on the Charter school appeal.

- (e) Other – None.

## **7. PUBLIC COMMENTS – None.**

## **8. PUBLIC HEARINGS – None.**

## **9. ACTION ITEMS**

- (a) Consideration of a contract modification request by LSA Associates in the amount of \$48,525.00 for extraordinary work beyond the scope of its original contract to prepare an Environmental Impact Report for the proposed Clayton Community Church mixed land use project on approximately 2.3 acres of private properties generally located at 6055 Main Street.

Mayor Geller asked all speakers to refrain from speaking about the merits of the project and to focus discussion on the contract modification on the agenda when providing public comments.

The Community Development Director stated this item is before the Council because of a request by the Clayton Community Church. The EIR consultant is LSA Associates, hired in July 2010 after staff determined a full EIR would be required for the project. There were eight categories of potential significant adverse impact identified to be addressed in the EIR. The Draft EIR was completed and put out for a standard 45-day public review period, from May 12- June 27, 2011. As a result, there were 304 comment letters and e-mails received during this comment period, and another 200 plus letters

and e-mails received after the close of the comment period. This was a very large number of letters and emails to receive. The California Environmental Quality Act (CEQA) process does not require the letters and e-mails submitted after the official comment period be responded to. LSA sorted through the 304 letters and emails received during the comment period and determined that 88 included comments that needed to be responded to. In total, there were 315 distinct comments to respond to in order to satisfy CEQA requirements.

The Community Development Director stated in LSA's contract document they established a budget of \$21,800 (part of total budget) for responding to the comments submitted on the Draft EIR. After closure of the public comment period, LSA contacted staff about the budget amount set aside for this aspect of the work and stated the number of comments and related responses were almost unprecedented in their professional experience. Out of the approximately 100 EIR's LSA's Berkeley office has done in the last decade, this project has generated the second largest number of letters and the fifth highest number of distinct comments. The number of comments and required responses far exceeded what staff or LSA had anticipated. Staff discussed with LSA representatives measures to economize this effort like using master comments where there were clear themes present and ensuring duplicate comments were sorted out. LSA and staff worked to try to cut down the work and make the process as efficient as possible. LSA's contract includes fairly standard language which allows them to request a contract modification for extraordinary work preparing the EIR, including preparing responses to comments. LSA determined they would need to seek a contract modification. Staff asked LSA to include and they provided a detailed explanation in the contract modification to understand why they were making this request.

As part of discussions with staff, LSA chose 12 EIR projects and looked at the number of comments requiring responses and the staff time to respond to those comments. They noted on average the cost was \$339 per comment to respond. Based on discussions with staff on ways to be more cost effective, they looked at a smaller sample and took an adjusted average of \$215 per response. Given this church project has 315 responses, the adjusted cost would be \$67,725 based on the lower amount. LSA agreed they would work with the lower figure, the \$21,800 in the current contract for responding to comments would be deducted so they would be requesting an additional \$45,925. as part of the contract modification. Coupled with this request and based upon public interest in the project, staff asked for one additional public hearing for the Planning Commission and one City Council public hearing be added for an addition \$2,600. Accordingly, LSA is requesting a contract modification of \$48,525 to cover the responses and the two additional meetings.

Community Development Director Woltering indicated that staff has consistently been holding back 10% of individual invoices from LSA in a retention account to ensure the City receive a Final EIR, including responses to comments to its satisfaction. Staff specifically included this provision in the LSA contract as a management tool. The contract allows retention up to \$12,500.; presently, the retention amount is approximately \$11,500. In addition, staff has held back the payment of invoices totaling approximately \$7,800 until this matter of the contract modification is resolved,. Staff has worked with LSA and Church representatives and has tried to keep the Church representatives informed and aware of this issue. Staff asked LSA to provide the rationale for the requested contract modification, and this information was given to the Church in writing several times and discussed with Church representatives in a meeting at City Hall attended by Mr. Clore of LSA Associates and the City's Community Development Director.

The Community Development Director stated it is staff's belief that LSA has the standing to make this request, based on the provisions described in LSA's original contract. Both LSA Associates and the City have the right to terminate this agreement with 10 days written notice without cause. He stated LSA has performed well and has provided acceptable evidence and rationale to support the firm's request for the contract modification.

David Clore, LSA Associates, stated they could not have foreseen this many comments on the EIR. In comparison, he noted no letters from other agencies or environmental groups were received. He stated the Community Development Director did research and noted in the staff report that other Planning Directors in the area had seen EIR Consultant costs for this type of project from \$150,000-\$250,000. He stated that LSA is striving to finish a CEQA document in this case that will be as legally defensible as possible. This budget modification would bring this EIR cost to \$182,025.

Councilmember Shuey asked if LSA was considering the comments outside of the comment period. The Community Development Director stated LSA was only responding to the comments received during the official public comment period which require responses pursuant to CEQA.

Edward Grutzmacher, Attorney for the law firm of Meyers Nave,, representing the Clayton Community Church, stated the Church would like to keep from incurring unanticipated costs. He stated the Church wants to be fairly treated. The Church believes the process is becoming burdensome. He stated no one wants this to go forward into litigation, but the Church will continue to defend its rights under law.

Mr. Grutzmacher stated the Church was happy when the City hired LSA to do the EIR work, but its representatives did not anticipate this 300% cost increase for responding to the comments received on the Draft EIR. He stated LSA justifies the cost by a per comment statistic and there does not seem to be any correlation to the complexity of responding to comments. He acknowledged LSA agrees with the use of the master responses. He stated the Church believes the City Council should hold LSA to their original contract.

Mayor Geller opened the item at this point for general public comments.

Glenn Miller stated in the past the City has not selected higher cost consultant proposals and limited amendments for cost increases. What is different here?

Brad Briegleb, member of the Clayton Community Church and the Church Leadership Council, stated he is asking the City Council to deny the requested modification to LSA's contract. He stated that when LSA submitted its original proposal to the City they should have recognized there would be large number of technical issues and intense public scrutiny within their contractual responsibilities. He stated the reason people hire experts is because they know what they are getting in to and they should be held to the contract.

Pete Laurence stated the cost goes up for a project when it is controversial. He stated the taxpayers should not pay for this as suggested by the attorney for the applicant. And, he stated that he takes offense to the citing of the RILUPA law by the Church's representative, given the early stage of this proposal and the agenda item, a request for contract modification by LSA.

Bill Walcutt stated he was disappointed the Clayton Community Church was asking the City and the Environmental Consultant to absorb costs and work for free. He stated this project has potentially significant impacts to the City that must be studied and this is the

cost of doing business. LSA has done a good job so far in addressing the concerns identified in the Draft EIR, but there are approximately 300 comments that have to be considered. In his 11 years on the City Council, the City never asked a consultant to work for free. He stated LSA should complete the EIR, but the citizens and the City should not be asked to cover costs of this project.

Gary Hood encouraged the Council to ensure that the applicant pays all costs for the project. He stated this is the cost of doing business and it is a vital piece of property to this town. He did not want comments on the project to be treated by simple master comment reply; each deserves attention.

The City Attorney stated the Council has options including, they can choose to approve staff's recommendation to approve the contract modification or they could deny the request in which case LSA may choose to terminate the contract. LSA is required to ask in advance for a contract modification and have it approved before they can charge for the time incurred.

Upon request, Mr. Clore explained the table provided from his firm that is attached to the staff report in which costs are broken down based on the number and resulting work effort associated with responding to comments on 12 representative Draft EIRs. He stated the table included is a table of empirical data and shows the 12 largest responses to comments efforts worked on by his LSA office in the last 10 years. He stated it is absolutely true that for the smaller cases with a smaller number of comments, the per comment cost is higher. He stated each one of those projects included the use of master responses. He stated LSA looked at the empirical data to figure out what it will take to complete this project. He stated he is almost certain it will not be much less than this number to finish the project and if anything it is going to take more time and could be more costly than his budget modification figure.

Councilmember Shuey asked what was the rationale for using the cost per comment approach? Mr. Clore stated they were looking for methods to estimate the dollar amount cost that it might take to finish the responses and provide supporting documentation for their position.

Councilmember Shuey stated he is unclear, other than the volume, why LSA didn't anticipate the larger work effort in this area because in the contract LSA assumes an intense level of analysis for the topics.

Councilmember Shuey asked if this was one of the highest levels of comment letters they had seen? Mr. Clore stated LSA worked on a private school expansion in a residential area of Oakland which received more letters. When asked further about whether his firm's requests for contract modifications were typically approved, Mr. Clore stated in none of the cases described in the table being considered did LSA get paid less than was negotiated with staff.

Councilmember Shuey asked on average how many times LSA comes back to clients for contract modifications? Mr. Clore estimated that contract modifications are requested on about 10% of their contracts.

Councilmember Shuey asked how often LSA comes in under budget? Mr. Clore responded seldom.

Vice Mayor Medrano stated that in July 2010 when LSA was hired they were selected because of their expertise over other consultants. He stated they knew this project would be controversial and underestimated the effort to respond to comments. He stated the

dollar amount being requested is outrageous and he wants to see them go back to the table with the Church and work something out. He stated it isn't fair to the applicant, and the City shouldn't pay for it either.

Councilmember Shuey asked Ed Grutzmacher if he received the letter from the City Attorney? Mr. Grutzmacher responded yes. Councilmember Shuey stated in Mr. Grutzmacher's letter he had asked the City to pay for these additional costs and an attorney should have known that this would be a gift of public funds. Mr. Grutzmacher responded he made a mistake and that he had followed the wishes of his client in adding that language; it was a lack of client control.

Councilmember Shuey asked him how much additional cost the Church felt was appropriate for responding to the comments? Mr. Grutzmacher stated the Church is willing to work with a contract amendment but he stated the Church isn't prepared to give a dollar amount.

Councilmember Shuey asked if the Church had an alternative to the proposal submitted by LSA Associates? Mr. Grutzmacher stated the Church and LSA had agreed on the 7 master comments for responding to the comments.

Councilmember Shuey asked if the Church was asking for a meeting with LSA to meet and confer? Mr. Grutzmacher stated the Church and LSA met and made some progress but not enough.

Councilmember Pierce asked if the additional work did not amount to the total amount of \$48,525. being requested in the contract modification would the Church be billed? Mr. Clore responded the Church would only be billed for actual time and materials incurred up to that amount

Mayor Geller asked if this was LSA's last offer? Mr. Clore stated his staff spent a lot of time on this and he is skeptical that this price would even cover actual costs for preparing the responses.

Vice Mayor Medrano asked if LSA is willing to work with the project applicant to resolve the lack of agreement on expected cost of this work effort? Mr. Clore stated he would be more inclined if he saw a way to thematically or mathematically reduce the price, but he is highly disinclined to talking more about it.

Mayor Geller asked if this is the final cost adjustment LSA would asking for? Mr. Clore responded LSA knows what the objective is now and this would be the final cost adjustment. City Manager Napper clarified the cost adjustment being considered at this time only focuses on preparing the responses to comments and the two additional meetings being suggested by staff.

Councilmember Shuey asked how many projects LSA has sought to have a contract price amended where they were declined? Mr. Clore responded one or maybe two. Councilmember Shuey then asked if LSA terminated those contracts? Mr. Clore stated LSA did not renew its contract with one of the agencies.

Pastor Shawn Robinson, Clayton Community Church, stated the Church sat down with LSA and thought they had made some reasonable requests about master responses, and this would be given more consideration in terms of cost containment. When this did not happen, he thought this situation needed to be brought to the attention of the Council.

Councilmember Shuey commented if LSA decided to terminate the contract then it could end up costing even more money. He asked if the Church was prepared for that? Pastor Robinson stated the Church is prepared to go the distance with the project, but is hopeful LSA would not terminate the contract. But either way, the Church will be moving forward.

Vice Mayor Medrano stated he would like to see LSA try to work something out with the applicant and that he doesn't feel good about approving this level of increase.

Councilmember Stratford stated he feels for the Church because of the extra resources being requested. He stated he understands the desire to bring the cost down, but it seems like LSA has looked at the comments and has listened to the concerns of the Church in a sit-down discussion. He stated he is not sure what sitting down again with the Church would do, other than asking LSA to absorb more of the cost by not being paid for the work. He also stated LSA feels the work is going to exceed the dollar amount given in the proposed contract modification. Consequently, he is inclined to approve the contract modification with the outside hope the costs come in lower.

Councilmember Pierce stated she heard what everyone had to say. She stated she thinks it is clear that in LSA's best professional judgment it will cost another approximately \$48,000 on top of budgeted amount to respond to the comments in a thorough professional manner. She stated if it takes less time there will be reduced charges. She stated she does not know many companies who would not be paid \$48,000 for this anticipated level of work. She stated LSA will be required to justify their costs and substantiate their billings. She stated LSA has a general idea of the technical level of the comments. She expects that all of the people in Clayton that took the time to prepare comments should be responded to respectfully and in a technically competent and thoughtful manner. She stated some responses may be more complicated than the others. She stated if LSA terminates the contract it will cost more to bring in another consultant, and in the interest of the protecting the Church from incurring additional costs, the Council needs to approve this contract.

Councilmember Shuey stated he did not like the tenor of the letter from the Church's attorney. He stated it was not acknowledged that staff had negotiated with LSA to reduce the cost of the contract modification substantially. He stated staff did an excellent job in working on this issue. He stated he heard what Councilmembers Pierce and Stratford said but he stated if a contract for \$48,000 is approved, LSA will spend it. He stated he believes LSA underbid the project but that the Church did not propose another option to solve the problem. He therefore recommends the Council approve a contract modification for up to \$30,000 for the response to comments effort and the two additional meetings anticipated by staff.

Mayor Geller commended staff for their work and Mr. Clore for his professionalism and the facts and figures. He stated LSA has reduced their price, based on the information provided in the table reviewed by Mr. Clore and staff. Mr. Clore and staff provided information and sat at the table with Church representatives to explain the rationale for the requested modification. He stated LSA has negotiated and made an attempt to compromise and he stands behind staff's recommendation.

**It was moved by Councilmember Shuey, seconded by Vice Mayor Medrano, to approve an amended contract amount of up to \$30,000.**

Councilmember Stratford stated he thinks this is just dragging out the process.

Councilmember Shuey stated he doesn't believe this delays the process at all and he does not think LSA will walk away from the project.

The City Manager asked and received clarification the motion was for \$27,400 for the extra draft EIR comments and \$2,600 for the extra hearings.

**It was moved by Councilmember Pierce, seconded by Councilmember Stratford, to introduce a substitute motion to approve staff recommendation with the contract modification of \$48,525.00 (Passed; 3-2 vote; Noes- Medrano and Shuey).**

*At the request of Mayor Geller, the Council took Item No. 9(d) out of order at this time.*

- (d) Consideration of the award of contract to Scoreboards.com in the amount of \$12,988.92 for the purchase of three (3) replacement scoreboards for installation at the three sports fields in Clayton Community Park.

Maintenance Supervisor Johnston stated the scoreboards at the Clayton Community Park have been up for 17 years. They were originally donated by CBCA and the City installed them. Over the last 5 years, upper scoreboards have not been functioning, and the lower scoreboard has required many repairs. He stated most manufacturers only offer a 5 year warranty on their boards. He stated the recommended replacement scoreboards are high tech, energy efficient (LED), and include wireless remotes. He stated All American Scoreboards have been easy for staff to work with and they would like to continue using their products. Staff contacted three companies with All American scoreboards. He stated electrical contractors will do the hard wiring for these boards, and an extra remote will be purchased. Staff recommends this upgrade be paid for from the Deferred Maintenance account.

Councilmember Shuey asked if these are for baseball only and asked if staff looked at a multi-sport scoreboard to include soccer?

Maintenance Supervisor Johnston stated staff had considered other scoreboards but there would be additional cost not only for the scoreboard but for the installation of new posts to mount the boards on.

Mayor Geller stated CBCA is looking for projects and might be interested in purchasing the scoreboards. The City Manager stated the contract could be approved tonight and CBCA could reimburse the City if they so desired.

The City Manager stated part of the goal of this project was to get these installed by the start of the Little League season in March/April.

The Council discussed the merits of looking at multi-sport scoreboards and noted some of the leagues might be willing to contribute money for the upgraded scoreboards. The Council asked staff to explore the options for multi-sport scoreboards and bring back the information at a later Council meeting.

No action taken; referred back to staff.

- (b) Consider a series of actions to formally implement an "Exclusion" to the City of Clayton's existing contract with the California Public Employees Retirement System (CalPERS) to exclude all newly elected city council members from enrollment or participation in the CalPERS pension plan.

The City Clerk stated in August the Council gave staff direction to contact CalPERS and start the contract amendment for "Exclusion" of new City Councilmember and this is follow up action.

Mayor Geller stated he was sorry the Council used staff time for this particular issue. He stated had the Council known that they had a choice to opt in or out of the system from the beginning they could have chosen to not be part of the system. He stated people who are already part of the CalPERS system at some point in time must be part of the system in the future regardless.

**It was moved by Councilmember Medrano, seconded by Councilmember Pierce, to adopt the Resolution of Intent, Resolution 02-2012 (Passed; 4-1 vote; No-Geller)**

**It was moved by Councilmember Medrano, seconded by Councilmember Pierce, to have the City Clerk read Ordinance No. 438 by title and number only and waive further reading (Passed; 5-0 vote).**

The City Clerk read Ordinance No. 438 by title and number only.

**It was moved by Councilmember Medrano, seconded by Councilmember Pierce, to approve for Introduction and First Reading Ordinance No. 438 to Amend the Contract Between the Board of Administration of the California Public Employees' Retirement System (CalPERS) and the City of Clayton to provide for the exclusion of city council members hired on or after the effective date of this amendment to become members of CalPERS under the City's contract (Passed; 4-1 vote; No Geller).**

- (c) Consideration of a Resolution expressing the City's intent to serve as the Successor Agency of the Clayton Redevelopment Agency pursuant to Health and Safety Code Section 34171(j) and Section 34173, and to elect to retain the Affordable Housing assets and function previously performed by the Clayton Redevelopment Agency pursuant to Health and Safety Code Section 3416.

The City Manager stated the Supreme Court ruled Redevelopment Agencies expire as of January 31, 2012. The City as the parent agency can become the successor agency in order to control some of the decisions of the dissolution of the Agency. Staff forecasts the Enforcable Obligations for the Agency are around \$15.2 million though there are some questions as to whether the land for the fire station and the 2% election payments will be enforced. It is recommended the Council adopt the Resolution.

No public comments were received.

**It was moved by Councilmember Pierce, seconded by Vice Mayor Medrano, to adopt Resolution 03-2012 expressing the City's intent to serve as the Successor Agency and Successor Housing Agency of the Clayton Redevelopment Agency. (Passed; 5-0 vote).**

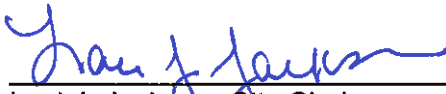
- (e) Determination of the date, time and location for the City Council's annual Goals and Objectives Setting Session with its City Manager.

The City Council reviewed and discussed their availability and dates to attend the special meeting.

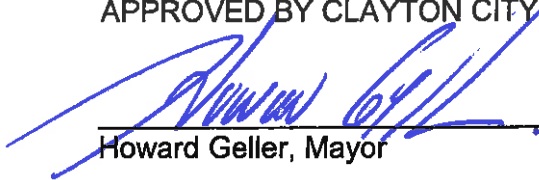
**It was moved by Mayor Geller, seconded by Councilmember Pierce to call a City Council special meeting for Monday, January 30, 2012 at 4:00 p.m. in the City Hall Conference room, 6000 Heritage Trail to discuss the annual Goals and Objectives with the City Manager (Passed; 5-0 vote).**

10. **COUNCIL ITEMS**- Councilmember Shuey asked that the Clayton Valley Charter High School core group be recognized at the next meeting.
11. **ADJOURNMENT**- On call by Mayor Geller the meeting adjourned at 10:30 p.m.

Respectfully submitted,

  
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Laci J. Jackson, City Clerk

APPROVED BY CLAYTON CITY COUNCIL

  
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Howard Geller, Mayor