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City of Las Cruces[®]
 PEOPLE HELPING PEOPLE

Council Action and Executive Summary

Item # 6 Ordinance/Resolution# 12-106

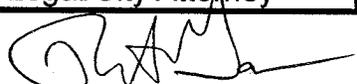
For Meeting of _____
 (Ordinance First Reading Date)

For Meeting of January 3, 2012
 (Adoption Date)

TITLE: A RESOLUTION REPEALING CITY COUNCIL RESOLUTION NO. 06-221 AND AUTHORIZING STAFF TO NEGOTIATE THE PURCHASE OF MESA DEVELOPMENT CENTER, INC. BASED ON AN APPRAISAL TO BE PREPARED BY ROBERT PENDER.

PURPOSE(S) OF ACTION:

To repeal Resolution No. 06-221 and to authorize staff to negotiate the purchase of Mesa Development Center, Inc.

COUNCIL DISTRICT: 5		
<u>Drafter/Staff Contact:</u> Marcia B. Driggers	<u>Department/Section:</u> Legal/City Attorney	<u>Phone:</u> 541-2128
<u>City Manager Signature:</u>		

BACKGROUND / KEY ISSUES / CONTRIBUTING FACTORS:

On October 13, 2011, the Board of Commissioners for the City of Las Cruces Utilities met in closed session to discuss the purchase or acquisition of real property or water rights owned by Mesa Development Center, Inc. ("Mesa Development"), a New Mexico Public Regulation Commission regulated water utility. The Utilities Board reviewed Council Resolution No. 06-221 which authorized staff to negotiate the purchase of Mesa Development based on a water system appraisal reconciliation final report prepared by Thomas McGuckin, a New Mexico State University economics professor, affiliated with the Center for Public Utilities at New Mexico State University.

Negotiations to acquire Mesa Development have been stalled for years in large part due to ongoing litigation with Moongate Water Company. In 2006, state district court Judge Robert Robles ruled that Moongate had an exclusive service area as against the City within one-half (1/2) mile of Moongate's infrastructure. This ruling potentially meant that Moongate could claim the exclusive right to provide water utility service within Mesa Development's service area if the City acquired it because Moongate encircles within one-half (1/2) mile of most if not all of Mesa Development's existing service area. The City Attorney's Office could not recommend that staff proceed to negotiate the acquisition of Mesa Development if there was a possibility that Moongate would claim an exclusive right to serve within Mesa Development's former service area after acquisition by the City.

(Continue on additional sheets as required)

The City appealed Judge Robles' decision in 2007 and the New Mexico Court of Appeals ruled in August 2011 that Moongate did not have an exclusive service area against the City, which means that, if the City was to acquire Mesa Development, Moongate could not claim that it had the exclusive right to the service area thereby ousting the City from what it had purchased. Moongate filed a Petition for Writ of Certiorari with the New Mexico Supreme Court on October 19, 2011 seeking review of the August 2011 Court of Appeals' decision. The Supreme Court has not yet decided whether Moongate will be permitted to appeal. If the Supreme Court declines the appeal, the Court of Appeals' decision on exclusivity stands. If the Court of Appeals accepts Moongate's appeal, a decision upholding or reversing the Court of Appeals' decision on exclusivity may not be made for two to four years.

The Utilities Department has recently secured an appraisal of Moongate Water Company, Inc., prepared by Robert Pender, who is one of only about 25 accredited senior appraisers for public utilities as certified by the American Society of Appraisers. A comparison of Mr. Pender's appraisal of Moongate with the earlier appraisals of Mesa Development has pointed to deficiencies with the earlier appraisals, which appraisals were reconciled in 2005 by Thomas McGuckin with the Center for Public Utilities. Neither Vincent Barrett, the appraiser previously hired by the City to appraise Mesa Development, nor Thomas McGuckin, a New Mexico State University economics professor with the Center for Public Utilities, previously hired by the City to reconcile Mr. Barrett's appraisal and Mesa Development's own appraisal, were public utility appraisal specialists.

The Utilities Board publicly discussed this issue of securing a new appraisal at its Board meeting on Thursday, November 17, 2011. Grover Pettes and members of his family who own Mesa Development attended the Board meeting. The Utilities Board approved Utilities Board Resolution No. 11-12-023 at its Board meeting on November 17, 2011, which Resolution recommended that the City Council repeal Council Resolution No. 06-221 and authorize staff to negotiate the purchase of Mesa Development Center, Inc., based on an appraisal to be prepared by Robert Pender.

The Utilities Department staff believes that an appraisal of Mesa Development by a public utility appraisal specialist will provide a more accurate and defensible valuation of the company.

SUPPORT INFORMATION:

1. Resolution.
2. Exhibit "A", Utilities Board Resolution No. 11-12-023.

SOURCE OF FUNDING:

Is this action already budgeted? N/A		
	Yes	<input type="checkbox"/> See fund summary below
	No	<input type="checkbox"/> If No, then check one below:
	<i>Budget Adjustment Attached</i>	<input type="checkbox"/> Expense reallocated from: _____
		<input type="checkbox"/> Proposed funding is from a new revenue source (i.e. grant; see details below)
	<input type="checkbox"/> Proposed funding is from fund balance in the _____ Fund.	
Does this action create any revenue?		
	Yes	<input type="checkbox"/> Funds will be deposited into this fund: _____ in the amount of \$ _____ for FY _____.
	No	<input checked="" type="checkbox"/> There is no new revenue generated by this action.

BUDGET NARRATIVE

N/A

FUND EXPENDITURE SUMMARY:

Fund Name(s)	Account Number(s)	Expenditure Proposed	Available Budgeted Funds in Current FY	Remaining Funds	Purpose for Remaining Funds
N/A	N/A	N/A	N/A	N/A	N/A

OPTIONS / ALTERNATIVES:

1. Vote "Yes"; this will approve repeal of Council Resolution No. 06-221 and will authorize staff to negotiate the purchase of Mesa Development Center, Inc. based on a new appraisal.
2. Vote "No"; this will not approve repeal of Council Resolution No. 06-221 and will not authorize staff to negotiate the purchase of Mesa Development Center, Inc. based on a new appraisal.
3. Vote to "Amend"; this could modify the terms of the resolution and instruct staff to seek alternative direction.
4. Vote to "Table"; this could postpone the resolution per the Council's discretion and provide further direction to staff.

(Continue on additional sheets as required)

REFERENCE INFORMATION:

The resolution(s) and/or ordinance(s) listed below are only for reference and are not included as attachments or exhibits.

1. Resolution No. 06-221.

(Continue on additional sheets as required)

RESOLUTION NO. 12-106**A RESOLUTION REPEALING CITY COUNCIL RESOLUTION NO. 06-221 AND AUTHORIZING STAFF TO NEGOTIATE THE PURCHASE OF MESA DEVELOPMENT CENTER, INC. BASED ON AN APPRAISAL TO BE PREPARED BY ROBERT PENDER.**

The City Council is informed that:

WHEREAS, On October 13, 2011, the Board of Commissioners for the City of Las Cruces Utilities met in closed session to discuss the purchase or acquisition of real property or water rights owned by Mesa Development Center, Inc. ("Mesa Development"), a New Mexico Public Regulation Commission regulated water utility; and

WHEREAS, the Utilities Board reviewed Council Resolution No. 06-221 which authorized staff to negotiate the purchase of Mesa Development based on a water system appraisal reconciliation final report prepared by Thomas McGuckin, a New Mexico State University economics professor, affiliated with the Center for Public Utilities at New Mexico State University; and

WHEREAS, negotiations to acquire Mesa Development have been stalled for years in large part due to ongoing litigation with Moongate Water Company. In 2006, state district court Judge Robert Robles ruled that Moongate had an exclusive service area as against the City within one-half (1/2) mile of Moongate's infrastructure. This ruling potentially meant that Moongate could claim the exclusive right to provide water utility service within Mesa Development's service area if the City acquired it because Moongate encircles within one-half (1/2) mile of most if not all of Mesa Development's existing service area; and

WHEREAS, the City Attorney's Office could not recommend that staff proceed to negotiate the acquisition of Mesa Development if there was a possibility that Moongate would claim an exclusive right to serve within Mesa Development's former service area after acquisition by the City; and

WHEREAS, the City appealed Judge Robles' decision in 2007 and the New Mexico Court of Appeals ruled in August 2011 that Moongate did not have an exclusive service area against the City, which means that, if the City was to acquire Mesa Development, Moongate could not claim that it had the exclusive right to the service area thereby ousting the City from what it had purchased; and

WHEREAS, Moongate filed a Petition for Writ of Certiorari with the New Mexico Supreme Court on October 19, 2011 seeking review of the August 2011 Court of Appeals' decision. The Supreme Court has not yet decided whether Moongate will be permitted to appeal. If the Supreme Court declines the appeal, the Court of Appeals' decision on exclusivity stands. If the Court of Appeals accepts Moongate's appeal, a decision upholding or reversing the Court of Appeals' decision on exclusivity may not be made for two to four years; and

WHEREAS, the Utilities Department has recently secured an appraisal of Moongate Water Company, Inc., prepared by Robert Pender, who is one of only about 25 accredited senior appraisers for public utilities as certified by the American Society of Appraisers. A comparison of Mr. Pender's appraisal of Moongate with the earlier appraisals of Mesa Development has pointed to deficiencies with the earlier appraisals, which appraisals were reconciled in 2005 by Thomas McGuckin with the Center for Public Utilities; and

WHEREAS, neither Vincent Barrett, the appraiser previously hired by the City to appraise Mesa Development, nor Thomas McGuckin, a New Mexico State University economics professor with the Center for Public Utilities, previously hired by the City to reconcile Mr. Barrett's appraisal and Mesa Development's own appraisal, were public utility appraisal specialists; and

WHEREAS, the Utilities Board publicly discussed this issue of securing a new appraisal at its Board meeting on Thursday, November 17, 2011. Grover Pettes and members of his family who own Mesa Development attended the Board meeting; and

WHEREAS, the Utilities Board approved Utilities Board Resolution No. 11-12-023, attached as Exhibit "A", at its Board meeting on November 17, 2011, which Resolution recommended that the City Council repeal Council Resolution No. 06-221 and authorize staff to negotiate the purchase of Mesa Development Center, Inc., based on an appraisal to be prepared by Robert Pender; and

WHEREAS, the Utilities Department staff believes that an appraisal of Mesa Development by a public utility appraisal specialist will provide a more accurate and defensible valuation of the company.

NOW, THEREFORE, be it resolved by the governing body of the City of Las Cruces.

(I)

THAT City Council Resolution No. 06-221 is hereby repealed.

(II)

THAT City staff is hereby authorized to negotiate the purchase of Mesa Development based on an appraisal to be prepared by Robert Pender.

(III)

THAT City staff is hereby authorized to do all deeds as necessary in the accomplishment of the herein above.

DONE AND APPROVED this _____ day of _____, 2012.

APPROVED:

Mayor

ATTEST:

City Clerk

(SEAL)

Moved by: _____

Seconded by: _____

VOTE:

Mayor Miyagishima: _____

Councillor Silva: _____

Councillor Smith: _____

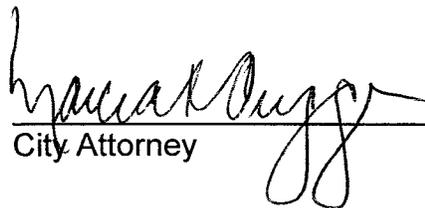
Councillor Pedroza: _____

Councillor Small: _____

Councillor Sorg: _____

Councillor Thomas: _____

APPROVED AS TO FORM:

Asst 

City Attorney

LAS CRUCES UTILITIES BOARD RESOLUTION NO. 11-12-023**A RESOLUTION RECOMMENDING REPEAL OF CITY COUNCIL RESOLUTION NO. 06-221 AND AUTHORIZING STAFF TO NEGOTIATE THE PURCHASE OF MESA DEVELOPMENT CENTER, INC. BASED ON AN APPRAISAL TO BE PREPARED BY ROBERT PENDER.**

The Board of Commissioners for the City of Las Cruces Utilities, on behalf of the City of Las Cruces, is informed that:

WHEREAS, on October 13, 2011, the Las Cruces Utilities Board of Commissioners met in closed session to discuss the purchase or acquisition of real property or water rights owned by Mesa Development Center, Inc. ("Mesa Development"), a New Mexico Public Regulation Commission regulated water utility; and

WHEREAS, the Board reviewed City Council Resolution No. 06-221 which authorized staff to negotiate the purchase of Mesa Development based on a water system appraisal reconciliation final report prepared by Thomas McGuckin, a New Mexico State University economics professor, affiliated with the Center for Public Utilities at New Mexico State University; and

WHEREAS, negotiations to acquire Mesa Development have been stalled for years in large part due to ongoing litigation with Moongate Water Company. In 2006, state district court Judge Robert Robles ruled that Moongate had an exclusive service area as against the City within one-half (1/2) mile of Moongate's infrastructure. This ruling potentially meant that Moongate could claim the exclusive right to provide water utility service within Mesa Development's service area if the City acquired it because Moongate encircles within one-half (1/2) mile of most if not all of Mesa Development's existing service area; and

WHEREAS, the City Attorney's Office could not recommend that staff proceed to negotiate the acquisition of Mesa Development if there was a possibility that Moongate would claim an exclusive right to serve within Mesa Development's former service area after acquisition by the City; and

WHEREAS, the City appealed Judge Robles' decision in 2007 and the New Mexico Court of Appeals ruled in August 2011 that Moongate did not have an exclusive service area against the City, which means that, if the City was to acquire Mesa Development, Moongate could not claim that it had the exclusive right to service area thereby ousting the City from what it had purchased; and

WHEREAS, Moongate has filed a Petition for Writ of Certiorari with the New Mexico Supreme Court on October 19, 2011 seeking review of the August 2011 Court of Appeals' decision. The Supreme Court has not yet decided whether Moongate will be permitted to appeal. If the Supreme Court declines the appeal, the Court of Appeals' decision on exclusivity stands. If the Court of Appeals accepts Moongate's appeal, a decision upholding or reversing the Court of Appeals' decision on exclusivity may not be made for two to four years; and

WHEREAS, the Utilities Department has recently secured an appraisal of Moongate Water Company, Inc., prepared by Robert Pender, who is one of only about 25 accredited senior appraisers for public utilities as certified by the American Society of Appraisers. A comparison of Mr. Pender's appraisal of Moongate with the earlier appraisals of Mesa Development has pointed to deficiencies with the earlier appraisals, which were reconciled by Thomas McGuckin with the Center for Public Utilities; and

WHEREAS, neither Vincent Barrett, the appraiser previously hired by the City to appraise Mesa Development, nor Thomas McGuckin, a New Mexico State University economics professor with the Center for Public Utilities, previously hired by the City to reconcile Mr. Barrett's appraisal and Mesa Development's own appraisal, were public utility appraisal specialists; and

WHEREAS, the Utilities Department staff believes that an appraisal of Mesa Development by a public utility appraisal specialist will provide a more accurate and defensible valuation of the company.

NOW, THEREFORE, be it resolved by the Board of Commissioners for the City of Las Cruces Utilities, on behalf of the City of Las Cruces:

(I)

THAT, the Board recommends that the City Council repeal City Council Resolution No. 06-221 and authorize staff to negotiate the purchase of Mesa Development based on an appraisal to be prepared by Robert Pender.

(II)

THAT, staff is hereby authorized to do all deeds necessary to accomplish the intent of this Resolution.

DONE AND APPROVED this 17th day of November, 2011.

By William M. Little
Board Chair

ATTEST:

[Signature]
Secretary

Moved by Ericson

Seconded by Hayes

APPROVED AS TO FORM:

[Signature]
Utilities Attorney

VOTE:

Chair Little:	<u>Aye</u>
Vice-Chair Hanson:	<u>Aye</u>
Commissioner Cadena:	<u>Aye</u>
Commissioner Ericson:	<u>Aye</u>
Commissioner Hayes:	<u>Aye</u>
Commissioner Pedroza:	<u>Aye</u>
Commissioner Sorg:	<u>Aye</u>