



City Council  
of the  
City of Las Cruces

Regular Meeting

November 19, 2012

1:00 P.M.

Council Chambers, City Hall

**MEMBERS PRESENT:**

**STAFF:**

- 14 Mayor Ken Miyagishima
- 15 Councillor Miguel Silva, District 1
- 16 Councillor Greg Smith, District 2
- 17 Councillor Olga Pedroza, District 3
- 18 Councillor Nathan Small, District 4
- 19 Councillor Gill Sorg, District 5
- 20 Councillor Sharon Thomas, District 6

- Robert Garza, City Manager
- Harry (Pete) Connelly, City Attorney
- Esther Martinez-Carrillo, City Clerk

DRAFT

**I. OPENING CEREMONIES**

Mayor Miyagishima called the meeting to order and asked for a moment of silence. Mayor Miyagishima led the Pledge of Allegiance.

Presentation of Certificates of Appreciation/Proclamations.

Councillor Thomas presented a Proclamation to Kevin Bixby and declared November 19, 2012 as Southwest Environmental Center's 20 Years Recognition Day.

Councillor Thomas presented a Proclamation and declared November 24, 2012 as Small Business Saturday.

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**II. CONFLICT OF INTEREST INQUIRY BY MAYOR AS REQUIRED BY LCMC SECTION 2-27(E)(2). *At the opening of each council meeting, the chairperson shall ask if any member of the city council, city manager, or any member of the city staff has any known conflict of interest with any item on the agenda.***

Mayor Miyagishima asked if anyone had any conflicts with anything on the agenda?

1  
2 None given.

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6 Mayor Miyagishima read a Closed Meeting Statement and said the City Council of Las Cruces met  
7 in Closed Session at 1:03 p.m. on November 14, 2012. The following members were in attendance:  
8 Councillor Thomas, Councillor Smith, Councillor Pedroza, Councillor Silva (arrived at 1:15 p.m.),  
9 Mayor Miyagishima, City Manager Robert Garza, Assistant City Manager Mark Winson, Assistant  
10 City Manager Brian Denmark, City Attorney Harry (Pete) Connelly, Proprietary Funds Supervisor  
11 Maria Villa, Government Funds Supervisor Melissa Nelson, and the Moss Adams CPA Firm  
12 personnel of Wayne Brown, Ryan Cultmeyer, Larry Carmody and Lupita Martinez. The meeting  
13 adjourned at 2:05 p.m. and only the limited items stated in the posted notice were discussed which  
14 was the Audit Exit Conference for the City of Las Cruces FY12 Audit.

15  
16 **DRAFT**  
17

18 **III. PUBLIC PARTICIPATION**

19  
20 Fred Stern, Member of the Public presented some information to Council and said I am a local artist  
21 and I'd like to make a proposal for a free public event called El Mundo Nuevo at Young Park on  
22 December 21<sup>st</sup> and 22<sup>nd</sup>. I create rainbows and this event would carry with it a sense of a new  
23 beginning from the story of Noah, Genesis 9:13. This event would take place over two days and it  
24 would serve as a fundraiser for the Children's Crisis Center and Jardin de Los Niño's

25  
26 Sonny Miller, Member of the Public presented handouts to Council and said this is regarding noise  
27 enforcement and the Noise Ordinance. I moved here last year from Tucson, Arizona and I have been  
28 to the Codes Enforcement Department several times regarding people not having their dogs on a  
29 leash, noise and people driving with dogs in their lap but nothing has changed. One of my neighbors  
30 had two dogs and he never cleaned up after his dogs so it smelled really bad so I had to cancel my  
31 Fourth of July cookout. I have also noticed that businesses in this town waste tons of water with their  
32 sprinkler systems. I think the Codes Department and Animal Control need to be overhauled and this  
33 City needs to become more proactive. I also want to mention that the City's Fire Department is very  
34 professional and answers any questions you ask them.

35  
36 Mayor Miyagishima said last year I think Codes responded to 10,000 meetings with various calls and  
37 constituents and gave out about 1,000 citations.

38  
39 Kimball Hakes, Member of the Public said I am the Chair of the Las Cruces Home Builders  
40 Association Government Affairs Committee and I am also a local home builder. I know it is kinda  
41 late in the game but we are asking that Council reconsider their decision to increase impact fees due  
42 to our current economy. There currently isn't that much work out there and I have contractors

1 calling my office every day looking for work. There are a lot of buyers out but they are unable to buy  
2 a home because their finances are very tight and the ones that do qualify, just barely qualify so  
3 additional impact fees would put some families over the edge. Many cities that have faired well  
4 during the economic downturn have done so because they have low impact fees. I am here today  
5 asking for help and asking Council to reconsider the increase of impact fees in January 2013. I'm  
6 not asking that you eliminate the impacts fees, just that you delay implementing them. I would  
7 propose that you meet with the members of the Home Builders Association at a time that is  
8 convenient to you and then to further discuss this issue.

9  
10 Mayor Miyagishima said the road and drainage impact fees that you are talking about are supposed  
11 to take effect on January 1, 2013 but it isn't really an additional fee because in the past, developers  
12 have had to include the cost of roads so this would eliminate that cost. The drainage fee, we've had  
13 several difficulties with getting developers to build arroyo crossings in order for us to build the roads  
14 so those are some of the reasons why we had to impose these fees.

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16 Councillor Small said I think it was previously discussed that we would have a work session  
17 regarding this issue.

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19 Mayor Miyagishima said we are still looking at when we can schedule that meeting.

DRAFT

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23 **IV. ACCEPTANCE OF AGENDA: THOSE ITEMS ON THE AGENDA INDICATED BY**  
24 **AN ASTERISK (\*) ARE ON THE CONSENT AGENDA AND WILL BE VOTED ON**  
25 **BY ONE MOTION.**  
26

27 Councillor Smith Moved to Approve the Agenda and Councillor Small Seconded the motion.

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31 Mayor Miyagishima called for the roll on the Motion to Approve the Agenda and it was  
32 Unanimously Approved. 7-0

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35  
36 **V. CITY COUNCIL MINUTES**  
37

38 \*(1) Regular Meeting of October 15, 2012

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1 **VI. RESOLUTION(S) AND/OR ORDINANCE(S) FOR CONSENT AGENDA**

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3 \*(2) Resolution No. 13-068: A Resolution Establishing Dates for Holiday Observance for City  
4 Employees in 2013.

5  
6 \*(3) Resolution No. 13-069: A Resolution Providing for Determination of Reasonable Notice of  
7 Meetings of the City Council and its Boards and Committees for Calendar Year 2013.

8  
9 \*(4) Resolution No. 13-070: A Resolution to Accept Grant Funding From the U.S. Department  
10 of Justice, Office of Community Oriented Policing Services (COPS) in the Amount of  
11 \$35,792.00, Ratify the City Manager's Signature on the Cooperative Agreement, and Adjust  
12 the FY 2013 Budget.

13  
14 \*(5) Resolution No. 13-071: A Resolution Authorizing the City of Las Cruces, on Behalf of its  
15 Police Department, to Accept Emergency Preparedness Equipment Valued at \$179,460.00  
16 Pursuant to a Grant Funded by the United States Department of Homeland Security, Office  
17 of State and Local Government Coordination and Preparedness Through the New Mexico  
18 Department of Public Safety, Office of Emergency Management and the Dona Ana  
19 County/City of Las Cruces Office of Emergency Management for FY 2010 and to Ratify the  
20 City Manager's Signature on the Agreement to Accept the Equipment.

21  
22 \*(6) Resolution No. 13-072: A Resolution Authorizing the Las Cruces Museum of Nature and  
23 Science to Accept a Grant Award from Bureau of Land Management (BLM) in the Amount  
24 of \$50,000 with a \$50,000 In-Kind Match Requirement and to Adjust the FY 2013 Budget.

25  
26 \*(7) Resolution No. 13-073: A Resolution Approving a Budget Adjustment to the Adopted  
27 FY2013 City Budget for Various Funds Related to U.S. Department of Housing and Urban  
28 Development Programs, to Correct Initial Grant Amounts at the Beginning of FY2013. The  
29 Budget Adjustments Apply to Both the Community Development Fund (FUND 2000) and  
30 the HUD Special Projects Fund (FUND 2010).

31  
32 \*(8) Resolution No. 13-074: A Resolution Authorizing the Las Cruces International Airport to  
33 Accept a New Mexico Department of Transportation, Aviation Division Grant in the Amount  
34 of \$8,998.00 with a Local Match Requirement of \$1,000.00 for Airport Maintenance  
35 Supplies, to Ratify the City Manager's Signature on the Grant Agreement, and to Adjust the  
36 FY 2013 Budget.

37  
38 \*(9) Council Bill No. 13-017; Ordinance No. 2672: An Ordinance Approving a Zone Change  
39 from R-1A (Single-Family Medium Density) to R-3 (Multi-Dwelling Medium Density) on  
40 6.00 ± Acres of Land Located on the Northwest Corner of Espina Street and Idaho Avenue;  
41 1240 S. Espina Street. Submitted by the Immaculate Heart of Mary Cathedral, Property  
42 Owner (Z2855).

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**VII. \*APPEAL PROCESS\***

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Council members shall not privately discuss with any interested person or persons the merits of a case which is, or may be pending before the City Council. If there have been any such discussion or discussions, they should be disclosed by the appropriate Councillor(s) or individuals at this time.

Appeals to be presented before the Las Cruces City Council shall follow the procedure outlined in LCMC 1997, Section 38-13.

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Mayor Miyagishima said I will ask again if any member of the City Council, City Manager, any manager, any member of city staff, has a known conflict of interest regarding this particular appeal which is the Planning and Zoning decision on, to allow adult entertainment establishment located at 2221 Westgate Court, Parcel 02-18451.

Councillor Pedroza said no.

Councillor Small said none.

Councillor Smith said none, but Mr. Mayor I do have a question about my participation, should I ask that now or should I....

Mayor Miyagishima said sure, please.

Councillor Smith said thank you. If my fellow Councillors feel that I have violated the prohibition against our speaking on the merits of this case, I will recuse myself from it. The reason this may be necessary is that if that prohibition is perceived to extend any time before the Planning and Zoning Commission meeting of September 25<sup>th</sup>, on September 7<sup>th</sup> I responded to an email from a Las Cruces resident and that email has been included in the packet. Including that email, I communicated privately with approximately seven citizens on this topic before it came before the Planning and Zoning Commission. I also spoke with a City employee and someone under contract with the City at some point in that time period, as well as with two other Council members within a day or two after the Commission's decision and before we knew if that decision was being appealed. All of this occurred under, or excuse me, before the rules regarding such cases were shared with me and before the Commission's decision was appealed. Since that point I have responded to all inquiries and comments about this case with an explanation of why I cannot comment and none of these instances have I indicated how I thought I might vote and to be perfectly honest, I still do not know how I

1 might vote because the answers to some questions I expect to ask in the proceedings today could  
2 provide me with new understandings and different reasons to vote yes. So I ask if the Council feels  
3 I should recuse myself?

4

5 Mayor Miyagishima said Councillor, just for clarification, so this information that you discussed was  
6 before it had even went to the appeal process, before it was even heard by the Planning and Zoning?

7

8 Councillor Smith said yes sir.

9

10 Mayor Miyagishima said I think that is okay.

11

12 Councillor Smith said alright. Thank you sir.

13

14 Mayor Miyagishima said Councillor Silva.

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16 Councillor Silva said Mr. Mayor, I also feel that I have no conflict of interest. My comments were  
17 also made before it even came to the Planning and Zoning or whether there was an appeal made, you  
18 know I did make a public comment, actually I made two public comments publically but both of  
19 them were done before the appeal, before it was even filed for appeal, so I don't feel that by any way  
20 shape or form that would shake my decision on the final decision.

21

22 Mayor Miyagishima said I appreciate you bringing that up Councillor. I did recall seeing those in the  
23 local newspaper. I believe that was in response to the appeal or to the hearing of the Planning and  
24 Zoning.

25

26 Councillor Silva said it was prior to that Mayor.

27

28 Mayor Miyagishima said okay, my question to you is do you feel you can be fair and impartial?

29

30 Councillor Silva said yes I can.

31

32 Mayor Miyagishima said okay, what does the Council have to say?

33

34 Inaudible

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36 Mayor Miyagishima said good, okay, thank you for disclosing that Councillor. With that, we will  
37 go to item number ten which is Resolution 13-075. I need a motion and second please.

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41 **VIII. APPEAL – (No Public Input/Comment Will be Allowed for Item #10)**

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1 (10) Resolution No. 13-075: A Resolution Reversing the Decision of Denial by the Planning and  
 2 Zoning Commission on September 25, 2012 for a Special Use Permit Application to Allow  
 3 an Adult Entertainment Establishment to be Located at 2221 Westgate Court, Parcel 02-  
 4 18451, in an M-2 Industrial Zoning District Within the City of Las Cruces. The Appeal  
 5 Seeking This Action Was Submitted by Ms. Karen Wootton, Legal Counsel for the  
 6 Applicant, Ms. Mariah Hernandez for Central Park, LLC. (SUP-12-03).

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 8 Councillor Small Moved to Approve Resolution No. 13-075 and Councillor Sorg Seconded the  
 9 motion.

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13 Mayor Miyagishima said very quickly before we begin, many of you have either emailed the Council  
 14 or tried to contact the Council. One of the things that we as City Councillors do, we have really three  
 15 roles, we play the executive, we are the executive branch, the legislative branch and at times quasi  
 16 judicial branch and today we will be acting that quasi judicial manner. We will be listening for this  
 17 appeal and therefore we can't have any discussion or what they call ex-parte communication to bias  
 18 one way or another so we apologize for many of you who probably emails went unanswered, from  
 19 early as the last hour ago people were trying to communicate to Council. The other thing is this is  
 20 an appeal process, we are going to hear probably the attorney on behalf of the applicant, what they  
 21 felt, what they want to appeal, or what they want to be heard. We're not going to reopen the case,  
 22 we're not allowed to do that, that's why we can't allow public input, you had that opportunity back  
 23 at the original Planning and Zoning meeting so that's the reason why we're not, we don't, we're just  
 24 not arbitrarily saying that you cannot speak to us, its because that is the way the process is. Again,  
 25 we apologize for that as well. So with that, Robert, I will turn it over to you, are you going to have  
 26 staff make a presentation or is the applicant's attorney going to go first and then we'll go from there?  
 27

28 Robert Garza, City Manager said thank you Mr. Mayor. Actually, there will be no staff presentation,  
 29 we would just like to invite Ms. Karen Wootton who is representing the appelland, to come forward  
 30 and the show will be hers. We do have staff, the Planning Department, who are here to just help  
 31 facilitate if you need to bring up documents or maps or whatnot but they won't be presenting.

32

33 Mayor Miyagishima said okay, thank you Robert. Excuse me Ms. Wootton, I'm going to need you  
 34 to speak directly into the mic.

35

36 Karen Wootton said thank you. First I want to address the procedural issue that the Mayor was  
 37 speaking about. I understand that the City Attorney's Office position about the procedure, I don't feel  
 38 that Section 38-13 is clear enough. My understanding is that this issue in terms of whether an appeal  
 39 of a special use permit is record only review or not, has never come up in the history of the City of  
 40 Las Cruces. So, by making this decision today you are setting the first precedent. I have some  
 41 concern because the way the issue came to my attention was the announcement in the paper basically  
 42 from the City Manager. My working presumption is that this is a decision that the City Manager has

1 made with the advise of the City Attorney's Office but officially I think this Council needs to make  
2 that interpretation. If that is going to be your interpretation, I believe you should clarify that  
3 particular provision of your Code because it does not say that clearly enough to put reasonable  
4 people on notice that, that is how the matter will be heard.

5

6 Mayor Miyagishima said excuse me Ms. Wootton, can you speak specifically what it is that you are  
7 referring to please?

8

9 Karen Wootton said well if you look at 38-13, no where in this section, and it deals with appeals and  
10 several subsections, no where in here does it say that it will be record only review. It does say that  
11 the Council will look at the record but it doesn't explicitly say that no additional evidence will be  
12 considered. The issue here to my mind is that you could have people that were not on notice that they  
13 would not be allowed to give input here that would have anticipated that they would be allowed to.  
14 Constitutionally in terms of a safe approach, there is no question in my mind that people don't have  
15 the right to get up and say everything again that they said at the Commission meeting. I have  
16 reviewed those minutes, they are nearly verbatim. I was there, I am comfortable with that, but  
17 somebody who was there and feels that their testimony is not properly summarized or given, should  
18 have the opportunity to say that. Similarly, within the scope of the appeal that we filed, if someone  
19 has new evidence, I think they need to have an opportunity to at least make a record about what kind  
20 of evidence they have. There is no question in my mind that you don't have to listen to more  
21 depictive testimony or relevant testimony. The appeal raises the issue that on the record there is  
22 insufficient evidence to deny the application so the more moral debate about adult entertainment  
23 doesn't need to be heard. I think by any interpretation of the record but I am concerned that people  
24 at least have some kind of opportunity to make an offer proof to Council if they do believe they have  
25 new relevant evidence, just because that section does not say "record review only" and if you look  
26 at the context of my twenty years in this city and zoning hearings, this has never come up, people  
27 I think are very accustom to the Commission being one level and then a whole new full blown  
28 hearing at City Council. So, I'm concerned that people may have a sub-issue due process right  
29 concern that I don't want to side track the subsantive issues on this appeal.

30

31 Mayor Miyagishima said I appreciate those comments, I'm going to refer to you as Counselor, but  
32 I think for us arbitrarily pick and say we won't hear parts on the moral side of it, I think we will  
33 either hear it all or just stay limited to what information we have access to, I reviewed the entire  
34 almost three hours of the Planning and Zoning Meeting and I think what would be fair, it seems with  
35 your concurrence, is to allow Council then to ask any questions that they may have seen or read  
36 about in the minutes, if that is okay with you and we just go from there.

37

38 Karen Wootton said I certainly don't have any objection to that but I feel for my client's protection  
39 I can't acquiesce to anything that doesn't allow some opportunity for public input just because if you  
40 look at the language in 38-13, there is no where in here that explicitly says "no additional public  
41 input would be allowed" so I just don't think it is clear enough to eradicate all questions about  
42 subsantive process.

43

1 Mayor Miyagishima said I appreciate that.....

2

3 Karen Wootton said I mean the Council has the authority to interpret its ordinance but I have to make  
4 a (inaudible).

5

6 Mayor Miyagishima said well we'll defer that to Council here but can I ask what specifically you  
7 want to discuss as far as the appeal, what parts of the Planning and Zoning decision did you want us  
8 to look at as far as the appeal is concerned?

9

10 Karen Wootton said well, if I can, a couple of related procedural points, and then I'm glad to just  
11 briefly outline it. You all do have, I think, a complete record....

12

13 Mayor Miyagishima said I would prefer if you would just go right to what areas you would like to  
14 have us look at as far as the appeal.

15

16 Karen Wootton said well...

17

18 Mayor Miyagishima said I appreciate your earlier comment, your opening comments, I'll let Council  
19 defer to that here in just a moment but if you could tell us what specifically you would like for us  
20 to look at, what you felt the Planning and Zoning did not address properly?

21

22 Karen Wootton said well, first of all they failed to follow constitutional law. Non-controversial  
23 speech is not in need of any protection so it is only when we have constitutional, we only need  
24 constitutional protection when we have controversial speech which includes expressive conduct.  
25 Adult entertainment has been held to be protected expressive conduct. The findings of the  
26 Commissioners, those who spoke prior to voting against the application, made it clear that they were  
27 not finding evidence that the applicant had not met a requirement of the SUP. That was not their  
28 grounds, they ignored the constitutional protection. The proposed use is when a zone of protection  
29 between the Constitution and the State laws. State laws govern what can be indecent dancing and  
30 indecent waitressing, that is your benchmark, you can't do those, this applicant can't violate those  
31 laws. So, in between that parameter and the constitutional protections for adult entertainment, this  
32 is what the application is asking to do.

33

34 There is a lot of input in your record about secondary effects, and I think there was some  
35 misunderstanding in that record about how that works. There is no question that the Supreme Court  
36 allows municipalities to look at secondary effects but they are to look at secondary effects when they  
37 enact the regulations. That's what the City did when they enacted the Zoning Code that we have that  
38 allows this use under a Special Use Permit and put out what the requirements are for a Special Use  
39 Permit for adult entertainment. The City doesn't get to case by case argue about those secondary  
40 effects except as they relate to that particular application and that particular property. None of the  
41 evidence, whatsoever, that the Commission heard showed that this applicant failed to meet that. The  
42 SUP process is suppose to allow public input about that. When you have a concern about excluding  
43 or including things, even though the rules of evidence don't apply at the Commission level or here

1 in a zoning case, relevancy is always relevant. So you do have the authority and I think the  
2 responsibility to some extent to sort through what people want to talk about and what they put in the  
3 record and you have the ability to say "no that's irrelevant and we're not going to hear anymore of that,  
4 if you have evidence about factual issues related to the application that's what would be allowed."  
5

6 Here the property was specifically purchased because it qualified for this use and the application met  
7 completely the requirements for the use. We do have objections to certain conditions that are still  
8 proposed in your packet. There are others that I won't address that the applicants are prepared to  
9 meet. The no special events condition we have concerns with, the reason given for that is that special  
10 uses can cause noise, that is the same reason that there are regulations governing special outdoor  
11 event applications. There is nothing about this use or this property that is special, is being singled  
12 out because it is a constitutionally protected controversial use so that condition we consider  
13 inappropriate constitutionally objectionable. The other is the signage for no truck parking, initially  
14 certainly my clients thought it was not really their job to put up street signs based on speculation that  
15 trucks might park illegally but they were willing to concede to that at the Commission level. Now  
16 it became the whole other side of 17<sup>th</sup> Street, twice as many, very far away from their property, we  
17 think that is just unreasonable, they're still willing to do that and to agree on the cul-de-sac where  
18 their business is actually located but not to extend it to the other side.  
19

20 Finally, the daily clean up is a problem, my clients understand and I have discussed with them that  
21 they can be liable for a nuisance if they don't supervise their patrons in a reasonable way to prevent  
22 litter on adjacent property owners, every property owner has that, the presumption that seems to be  
23 there, the people who patronize this particular business are bigger litter bugs, bigger scofflaws, and  
24 will go around trashing everyone's property, I think is not rational but to have my client have this  
25 City impose a responsibility on them to basically trespass on other people's properties or even to try  
26 to talk to them about it and go clean mess-up everyday and presume that it's from their patrons, I  
27 think is unreasonable. They are aware of their obligations as property owners and that they could be  
28 liable but we think the City of Las Cruces should leave that a civil matter as it is with every other  
29 property owner who conducts any business where people can litter.  
30

31 I want to go back to the procedural issue briefly, we did try to bring the issue up with the Council  
32 in terms of the interpretation of Section 38-13 and I appreciate the comments and how difficult it is  
33 for the Commission to get the public to distinguish between quasi judicial and legislative and  
34 administrative functions and I don't have any concerns about you know, in particular I thought  
35 Councillor Smith's email response that was in the packet was perfectly appropriate, he basically told  
36 them "I have to look into this" and I'm confident that Councillor Silva can distinguish between his  
37 personal views about what he wants to see coming here and understand what his role is in voting on  
38 the Council. But I do disagree with the idea that before the Commission hearing is the particular time  
39 point, I think that the Council has to try to be sensitive at all times when someone approaches them  
40 with anything that is quasi judicial even though someone may say "hey I here there is an application  
41 pending" already you're in that mode. I don't have concerns here that, that was a problem but we  
42 don't have a process in your Code for how things are brought to the Council's attention prior to a  
43 hearing, similar to a pre-trial motion. We tried to address that with the Council by communicating

1 with the Council in writing, copied to the City Attorney, in a document that would have been  
2 publically available, not ex-parte, its intended to be a part of that process. My understanding is that  
3 the only reason that the City Attorney's office refused to allow us to do that is because our client is  
4 represented by counsel so they were, we think, misconstruing a set of rules that govern who can  
5 communicate with another party represented, to my mind you're tribunal, not a party here, but  
6 anyone else, if our clients weren't represented the communication can just go forward whether the  
7 Council answered or not, so it's just another issue I think if you're gonna look at your appeals and  
8 make decisions about how you're gonna proceed, you need to clarify if there is going to be some  
9 formal way that people can effectively communicate information to the Council ahead of a hearing  
10 like this. I do have copies of the correspondence between our office and the City Attorney's office  
11 that I would like to have in the record. I understand the City Attorney is probably going to object to  
12 that and you'll just have to make a decision but at least as an offer of proof, I do have that today, I  
13 have enough for the record and for the Council to make clear that we did try to object to that in time  
14 for the Council to be prepared to consider our concerns about those procedural issues ahead of the  
15 hearing.

16  
17 Mayor Miyagishima said okay, your concerns are noted Counselor, what I think also what I want to  
18 clarify to members of the public is that in addition to your appeal, that doesn't automatically mean  
19 your liquor license is approved. That's the next item, so I may suggest to members of the public who  
20 wish to speak, they have their right to speak on that public hearing on whether or not the liquor  
21 license should be approved. So that way there I think if we stay focused on these six items that I  
22 wrote down, I think is probably enough information for Council to ask you questions about and then  
23 depending on the outcome of that, if they wish, if members of the public wish to speak at your public  
24 hearing for your liquor license then I think that might be appropriate for them to express their  
25 concern whether or not how they feel about the liquor license.

26  
27 Karen Wootton, well again, the liquor license is a completely separate issue from the zoning so that,  
28 nothing that might occur during that liquor license hearing would cure any violation for this hearing.  
29 Its completely legally separate and there are even narrower basis for this Council to consider  
30 disapproving the liquor license, particularly as here, the zoning for the property, regardless of the  
31 Special Use Permit allows that use. I'm just going to make a few more concluding comments and  
32 then I'll stand for questions, the comments of the Commission, of the people who voted against the  
33 application, were clear that they did not find that there was anything in the application that failed to  
34 meet the special use requirements. They were clearly, I think well intentioned, but very deliberately  
35 ignoring our client's Constitutional Rights and deliberately depriving them of their Constitutional  
36 Rights if that decision were allowed to stand. It may be that every member of this Council has  
37 personal objections to adult entertainment being in Las Cruces and you may be concerned that a vote  
38 in favor of the Special Use Permit looks like an endorsement of adult entertainment but to uphold  
39 the 1<sup>st</sup> Amendment, you have to act as a fact finder and look at the record that demonstrates  
40 consistently in every aspect that my clients have met all the requirements for a Special Use Permit.

41  
42 There was input given to the Commission to not let threats of litigation dissuade them from

1 disapproving the application. It is always concerning to me when people use phrases like "legal  
2 retaliation" when someone talks about asserting their rights but I do want to be very clear here and  
3 I think its been clear in the public discussion about our position, if the Council were to disapprove  
4 the application, uphold the Commission, our clients have the right and I do expect, would appeal that  
5 case to the District Court. The District Court will reverse in my opinion but they will only reverse  
6 and remand and tell the Council what you did wrong and send it back for a rehearing. Under State  
7 law that can be an endless loop so to protect my client, the only thing I can do is recommend that  
8 they also simultaneously with an appeal, file a federal lawsuit and pursue the remedies under Section  
9 1983 of the Civil Rights Act. Through that Act, the Federal Court would have the power to enjoin  
10 you from stopping them from going forward. They would have the power to award damages  
11 including lost profits for delay because of the unlawful decision as well as an award of attorney's  
12 fees. So, I believe this project will go forward one way or another. It is a question whether taxpayer's  
13 dollars are going to be spent fighting it. If you have any questions?

14

15 Mayor Miyagishima said thank you Counselor on that. So regarding the, let me just kinda briefly  
16 review the six items that Ms Wootton had asked to look at the appeal. One was the constitutional  
17 law or the non-constitutional law portion of it, requirements of the Special Use Permit, the secondary  
18 effects of such, the objections to the conditions such as having no special events, that it causes noise,  
19 the next one is signage, that no trucks are allowed to park there, and the last one is, I believe. the  
20 Commission required a daily clean-up and she thought that was not fair as opposed to other  
21 businesses. So, I'm going to ask if Council can just focus on those six items and either can address  
22 those, ask staff questions if they need some information but primarily address those to either staff  
23 or to Ms Wootton. So I'll start with Councillor Smith.

24

25 Councillor Smith said thank you Mr. Mayor. Then if I may, I'll wonder into this territory. During  
26 the..

27

28 Mayor Miyagishima said excuse me for interrupting. I apologize. I just, when I had asked Ms  
29 Wootton to list the items she asked for the appeal, I just took for granted, I have these three here and  
30 I'm sorry but we are just going to have to stick to these three. One is the lack of substantial evidence  
31 to support the denial which is probably a combination of such, two, the failure of the Commission  
32 to correctly apply the Design Code Standards, three, the violation of the applicant's Rights under the  
33 1<sup>st</sup> Amendment and 14<sup>th</sup> Amendment of the United States Constitution. So, we must limit to those  
34 three. Again, it's the lack of substantial evidence to support the denial which you could also take into  
35 account some of the questions or comments that Ms Wootton had said. Two, the failure of the  
36 Commission to correctly apply the Design Code Standards which to me would probably be items five  
37 and six. And then the last one is the violation of the applicant's Rights under the 1<sup>st</sup> Amendment and  
38 the 14<sup>th</sup> Amendment of the United States Constitution. So if we could just focus on those three, and  
39 I'll keep you.....

40

41 Councillor Smith said thank you Mr. Mayor.

42

43 Mayor Miyagishima said I'll keep you, I'll guide you on that Councillor.

1

2 Councillor Smith said then regarding the lack of substantial evidence, you know, I might get  
3 interrupted but I would think that the question then regarding this secondary effects that were  
4 mentioned a number of times would fit into that lack of substantial evidence, would it not? No.

5

6 Mayor Miyagishima asked what would be your specific question?

7

8 Councillor Smith said oh, well I'll go ahead and read through it. There were mentioned several times  
9 at the Planning and Zoning Committee meeting and Deputy Chief Miller indicated that our Police  
10 Department was essentially prepared for those secondary effects even though there were reports from  
11 other cities that they were a problem. So my question then is, are, is there a way for us to get more  
12 information about the secondary effects since that does, I would think, speak to the lack of  
13 substantial evidence regarding the decision.

14

15 Mayor Miyagishima said I think, and I'll turn this over here to the Attorney in just a second, I think  
16 what they were trying to get at Councillor is they were trying to say "well if it was open then this  
17 might happen, this might happen" and I'm often reminded of a situation, I wasn't there of course in  
18 1968 when then Attorney General Bobby Kennedy told a current County Sheriff who was going to  
19 arrest these protestors, that he wanted to arrest them because he thought they were going to picket,  
20 they were going to cause a big ruckus and Bobby Kennedy said "why don't you read the Constitution  
21 of the United States because you can't do it just because you think it is going to happen" I think that  
22 is what they were trying to get at but I'll turn that over to City Attorney Connelly to expand on that.

23

24 Harry (Pete) Connelly, City Attorney said Mr. Mayor and members of the Council, the secondary  
25 effects were considered by the Council when they passed the ordinance. That's why the Council put  
26 the adult entertainment in a particular zone away from all the various things they put it away from,  
27 to minimize the effects, very much like the Supreme Court said in Renton, that you did not use the  
28 ordinance to stifle free speech so the secondary effects have already been considered by this Council  
29 when you placed the restrictions on to allow for this type of business which you, Council, had to  
30 allow to exist in the city.

31

32 Councillor Smith said alright, thank you Mr. Connelly. So can you give me a time-frame for when  
33 that was put in effect, was that like late 1980s, early 1990s, is that correct?

34

35 Harry (Pete) Connelly said the ordinance was passed in 1994.

36

37 Councillor Smith said thank you very much. And so in our roles today we then are looking at the  
38 secondary effects that basically put that into effect in 1994 and subsequent secondary effects are not  
39 part of our consideration.

40

41 Harry (Pete) Connelly said secondary effects should not be part of your consideration.

42

1 Councillor Smith said alright, thank you sir. I don't seem to have any other questions at this point,  
2 thank you.

3

4 Mayor Miyagishima said thank you Councillor. Mayor Pro-tem Thomas and Councillor Small.

5

6 Mayor Pro-tem Thomas said thank you Mr. Mayor. I have another question about secondary effects.  
7 It is my understanding that a city has to show that there is some nexus between the establishment and  
8 the secondary effects and they can do that either by conducting their own study or looking at studies  
9 that have been done in other places that are relevant to our particular case. Do I understand that  
10 correctly?

11

12 Harry (Pete) Connelly said yes Councillor.

13

14 Mayor Pro-tem Thomas said and what did we do, did we do a study on secondary effects or did we  
15 look at similar situations and use that as our guidelines?

16

17 Harry (Pete) Connelly said Mr. Mayor and Councillor Thomas, we looked at the Renton case and  
18 all of the studies used in the Renton case and the ordinance that is presently before you was enacted  
19 for the Renton matters.

20

21 Mayor Pro-tem Thomas said I'm not clear when I look at our ordinance. What I understand is that  
22 municipalities generally choose either to try to put all these kinds of establishments in the same area  
23 or they try to disburse them. Our ordinance seems to be trying to do both at the same time. Can you  
24 explain what the rationality is behind our particular ordinance.

25

26 Harry (Pete) Connelly said Mayor and Mayor Pro-tem, the Renton decision was followed by the City  
27 Council when they enacted this ordinance. In any M1 area we're in you meet these requirements, M1  
28 or M2, you may place an adult entertainment facility so long as you meet the conditions and that is  
29 the issue here in the particular case you have, in this particular M1, M2 zone, the applicant appellant  
30 met all of the conditions for placing the Special Use Permit and allowing it to be in that area.

31

32 Mayor Pro-tem Thomas said so our ordinance really is kind of a combination, we said, we said M1  
33 or M2 that would be, you know, we wanted them collected in certain places but we also have the so  
34 many feet from this and so many feet from that which also applies to where they locate as well, those  
35 two conditions are both in our ordinance and that is what we are looking at.

36

37 Harry (Pete) Connelly said Mr. Mayor and Mayor Pro-tem, the issue, the matter stated is correct. The  
38 special permit is a matter of making sure that the applicant meets those restrictions. If the applicant  
39 meets those restrictions, the applicant would have a reasonable ground of expectancy that the permit  
40 would be issued.

41

42 Mayor Pro-tem Thomas said thank you.

1  
2 Mayor Miyagishima said thank you Mayor Pro-tem, thank you Mr. Connelly and just for those of  
3 you who would like to just take a look at it, obviously the City Attorney and myself and City  
4 Manager, we've had a chance to obviously review the, of course, the 1<sup>st</sup> Amendment and it is here  
5 under the time, place and manner restrictions. That was what was negotiated a while back, back in  
6 1994 and the four things they had to look at, the Supreme Court said, had to be content neutral, be  
7 narrowly tailored, serve significant government interest and leave open ample alternative channels  
8 for communication. That's why it was moved years ago, for those members of the public here who  
9 weren't here in Las Cruces back in the mid 90s, the adult bookstore that is currently off of Westgate  
10 was located on Amador and it was because of that, that's what was brought up and that is what Ms  
11 Wootton is referring to, the City then had to go back and change their zoning and that's where they  
12 decided to have it put so it was out of the way, but it was still allowed in that area and that is what  
13 I think Mayor Pro-tem Thomas was trying to look at, what (inaudible), what items was looked at as  
14 far as how it was determined and that was actually from the 1<sup>st</sup> Amendment so I just wanted to.....

15  
16 Mayor Pro-tem Thomas asked can I comment on that?

17  
18 Mayor Miyagishima said sure, of course.

19  
20 Mayor Pro-tem Thomas said the last, what, could you read those four things again?

21  
22 Mayor Miyagishima said leave open ample alternative channels for communication.

23  
24 Councillor Thomas said yeah, so, my understanding of that is, I mean, is that you can't, you can, you  
25 can look at these secondary effects but you can, and you can mitigate against them but you can't  
26 totally deny.

27  
28 Mayor Miyagishima said here, it says right here, the mere existence, and this was talking about how  
29 some people felt, such zones were offensive to some people and it said to maintain the 1<sup>st</sup>  
30 Amendment of the United States Constitution you can't make the entire country an unrestrictive free  
31 speech zone so that's when they narrowed it down to this particular area. Okay. Okay, next was  
32 Councillor Small then Councillor Sorg.

33  
34 Councillor Small said thank you very much Mr. Mayor. And I believe my question is going to be  
35 directed to the staff and Ms Harrison-Rogers and/or others from Community, from Planning and  
36 Zoning or who have been there. The question, yes, Mr. Mayor.

37  
38 Mayor Miyagishima said you are just going to ask questions about the appeal, yes?

39  
40 Councillor Small said correct and this is related to the appeal, that it was base, inappropriately off  
41 of the, off an incorrect interpretation of the standards and I guess my question is due to the fact that  
42 Burn Lake is obviously the closest public park and there are easements which the City has negotiated

1 through State law with Elephant Butte Irrigation District and all of the laterals that are now public,  
2 essentially parks for folks to be able to utilize, I wonder if, I guess there's really a two part question,  
3 one, what was the area of Burn Lake where that was measured from the proposed business site that  
4 got the fifteen hundred plus foot....

5

6 Mayor Miyagishima said excuse me, Councillor. I'm sorry, I'm getting advise from our Counsel that  
7 the questions you are asking are not germane to this particular item...

8

9 Councillor Small said I guess I would not quite understand since the Counsel appealing this is saying  
10 that the Standards were misapplied, this is one of the Standards, that it be located a minimum of one  
11 thousand feet, in this case from a property line of a public park or recreational facility and I'm  
12 unclear cause there is both a public park very near by and the question about whether the recreational  
13 facility applies to the lateral.

14

15 Mayor Miyagishima said I'm gonna allow the City Attorney to comment on.

16

17 Harry (Pete) Connelly said Mr. Mayor and Councillor Small, the matter states that staff measured  
18 all the requirements and that they were met and that's what the record shows, the EBID laterals etc  
19 are not dedicated parks to the City.

20

21 Councillor Small said they are recreational facilities that folks are able to utilize in a walking, biking,  
22 whatever manner and that is explicitly through State law, I believe.

23

24 Harry (Pete) Connelly said that is correct but it is not within the park and the three or the restrictions  
25 measured which staff has basically said they meet all and it's all in the report that's before you.

26

27 Councillor Small said thank you very much Mr. Connelly and I am the first to sing the praises and  
28 to rely concretely upon staff's determinations and measurements. However, given this case and given  
29 the fact that I did not see the recreational facility nature of lateral discussed, I think it is a germane  
30 question and it's one that needs to be established for clarity on this matter.

31

32 Mayor Miyagishima said I'm just going to ask staff to again address what is in the record and I  
33 believe I do recall seeing that on the video when I watched the video, it did bring up about the  
34 distance to Burn Lake and such so.

35

36 Susana Montana, Planner said thank you Mr. Mayor, Councillor, Susana Montana for the record.  
37 What we did was we looked at the southern most property line of the subject property and using our  
38 GIS measurings device to the northern most property line of Burn Lake facility as its, the database  
39 and polygon is located on our GIS system so that as the (inaudible) distance was measured.

40

41 Councillor Small said thank you very much and I thank you Ms Montana and that does establish that  
42 at least to the property line as contained on the GIS polygon for Burn Lake the smallest possible

1 distance was measured and taking that measurement and so that was to be expected so thank you.  
2 It still does not establish the issue of whether or not the EBID lateral is going to be considered as a  
3 recreational facility. I feel confident on the issue related to Burn Lake but I'm still unclear as it  
4 relates to EBID and whether or not the lateral is construed as a recreational facility.

5

6 Harry (Pete) Connelly said in my opinion the EBID lateral may be used for recreation but is not a  
7 recreational facility. The EBID lateral basically is used primarily for the movement of water in the  
8 ditch and it is not a recreational facility.

9

10 Councillor Small said thank you very much and I guess, you know, this is, and I understand this, this  
11 is kinda in the, you know, it's, it's unfolding quickly. I think you could make the same argument for  
12 parts of Burn Lake that are primarily a flood control facility, by the way, which I strongly support  
13 as part of El Molino, there is a number of different detention facilities whose primary purpose might  
14 be something, might be said to be something other than recreation; however, it does not, in many  
15 cases those, they're actually usage, of course, you know, the water flows for x number of days but  
16 people are walking, biking, using them as recreational facilities for quite a lot longer so I don't, I  
17 guess I'd be interested in, to understand clearly what the determination is and what's it based upon  
18 to determine that question and I would also add an apology in the sense that I understand that some  
19 of that might be difficult to, to marshal in the context of a couple of minutes of a conversation up  
20 here on the dias nonetheless I think it is an important conversation and point that would need to  
21 make clarified.

22

23 Mayor Miyagishima said thank you Councillor. Next we have Councillor Sorg and Councillor  
24 Pedroza.

25

26 Councillor Sorg said thank you Mr. Mayor. My first question, I'm not, I'm not a hundred percent  
27 sure if this is substantial evidence question or not, I noticed in the P & Z transcript that there was this  
28 business called CSR Garage that made a, well let me back up a little bit here, in our zoning decisions  
29 we make in this city, we do take in account adjacent or neighboring properties and, and we do  
30 consider their requests in their, in their, in our decision making. So, I'm asking if it is appropriate  
31 for us to be able to consider the request from the CSR Garage in this case, claiming that they will  
32 loose money if this business was placed next to their business?

33

34 Mayor Miyagishima said I'll turn that over to Pete.

35

36 Harry (Pete) Connelly said Mayor and Councillor Sorg, the answer is no.

37

38 Councillor Sorg said okay. The second question is constitutional. The 1<sup>st</sup> Amendment of the Bill of  
39 Rights of our Constitution says that Congress shall make no law abridging the freedom of speech  
40 and I left out the parts that don't pertain to this case. In the case, in this situation is says Congress  
41 shall make no law, does that exclude local governments, city councils, and if not, is there a case that  
42 proves that?

1  
2 Mayor Miyagishima said I can answer that one, Councillor. If you recall when we took our Oath of  
3 Office, not only do we promise to uphold the ordinances of the City of Las Cruces, States of New  
4 Mexico and laws of the State of New Mexico but also the Constitution of the United States.  
5  
6 Councillor Sorg said well that's true but it does specifically say Congress shall make no law, I  
7 assume there's some case law that says that, that includes local government, would there not be?  
8  
9 Mayor Miyagishima said I will defer that to Pete.  
10  
11 Harry (Pete) Connelly said Mr. Mayor and Councillor Sorg, I will site to you from the case of  
12 Renton.  
13  
14 Councillor Sorg said okay.  
15  
16 Harry (Pete) Connelly said so that I think it will be abundantly clear. "That we find that the Renton  
17 Ordinance represents a valid government response to the admittedly serious problems created by  
18 adult theaters. Renton has not used the power to zone as a pretext for suppressing expression but  
19 rather is sought to make some areas available for adult theaters and their patrons while at the same  
20 time preserving the quality of life in the community at large by preventing those theaters from  
21 locating in other areas" which is basically, you cannot zone out an adult business that is allowed in  
22 by the 1<sup>st</sup> Amendment of the Constitution, not by law but by interpretation of the Supreme Court of  
23 the 1<sup>st</sup> Amendment.  
24  
25 Councillor Sorg said okay, thank you very much.  
26  
27 Mayor Miyagishima said thank you Pete.  
28  
29 Councillor Sorg said I'm not quite done yet, though.  
30  
31 Mayor Miyagishima said oh, okay.  
32  
33 Councillor Sorg said can we make statements at this time or is it only questions?  
34  
35 Mayor Miyagishima said I prefer you just make, ask questions.  
36  
37 Councillor Sorg said okay, I'll defer then.  
38  
39 Mayor Miyagishima said thank you. Councillor Pedroza.  
40  
41 Councillor Pedroza said thank you Mr. Mayor. I am going to begin with a comment and I do have  
42 a question, the comment will be leading to, can you understand me? Yes, okay. I think that as well

1 as the, the, the constitutional protections under free speech, there is also another principal that is very  
2 important and that to me is determinative and that is the separation of church and state. I think that  
3 many, many people find things offensive as I do, as I do, but at the same time...

4

5 Mayor Miyagishima said excuse me Councillor, I'm sorry, I've been asked that you're kinda getting  
6 off subject.

7

8 Councillor Pedroza said oh, no, not at all.

9

10 Mayor Miyagishima said well we're getting separation of church and state, if you could focus on the  
11 1<sup>st</sup> Amendment that would be great. I'm just telling you what our Attorney is asking.

12

13 Councillor Pedroza said I see, okay, but what I want to do is give an example, just a very brief  
14 example, for instance if we were in another country where it is considered immoral for a women to  
15 go out into public without covering everything except her eyes, that is a moral statement or a  
16 statement of morality rather, and our country, great as it is, and because it is great, says that the  
17 government is not the one who is going to establish what is moral and what is not. And I think that's  
18 in part was some of the reasons why, you know, we're saying we don't want this, this leads to  
19 immoral behavior, etc, etc, but that may not be in the purview of the City Council to determine, if  
20 there was a law that was established, a zoning law, and the applicant complied with all of the  
21 different little requirements then you know it can't be said that because of that, that because of the  
22 immorality he has to be denied his right to build. However, just as the Police Department, at the  
23 meeting, said that they would be watching and that they would be enforcing all of the, not to say that  
24 there are going to be, we're not predicting that there's going to be lots of violations of law and maybe  
25 there are, but one of things that I'd like to ask the applicant is this, my experience was with  
26 employment law with the Fair Labor Standards Act, with all the others, etc, etc, and the common  
27 belief is that in these establishments, whether they are moral or immoral, there is some amount of  
28 exploitation of women and what I would like to ask you is this, in several of the cases that I've  
29 prosecuted I was given the right after I prevailed on behalf of my clients to for the next few years,  
30 three in some cases or more, the employer had to allow me to review his payroll records on a yearly  
31 basis. Would your client be willing to allow me to do that?

32

33 Mayor Miyagishima said excuse me.

34

35 Councillor Pedroza said or if not me....

36

37 Mayor Miyagishima said excuse me Councillor, I'm being told that, that, that's not germane to the  
38 issue.

39

40 Councillor Pedroza said it is a question.

41

42 Mayor Miyagishima said yeah, I understand and I apologize for the interruptions, but keep in mind

1 that depending on how this, this appeal process goes, it could be going to a different level and any  
2 comments that are made could be used against the City Council so I'm just relying on our staff, our  
3 legal staff and we've been suggested that.....

4

5 Councillor Pedroza said okay, I retract the request for the condition but please keep it in mind. That's  
6 all I have.

7

8 Mayor Miyagishima said okay, thank you Councillor. Councillor Silva.

9

10 Councillor Silva said thank you Mr. Mayor. I will stay within the context of the three items that were  
11 addressed or at least I will try to and if I swerve off (inaudible). There were two things within the,  
12 the conditions, and I believe what I am going to be talking, probably falls under number two of the  
13 Design Code Standards. I'm in agreement with the applicant in regards to the outdoor special events  
14 and, which is item two and item six with regards to the trash, for me it is hard to believe, it hard to  
15 under, I mean, for us to regulate somebody for outdoor events and then reduce it to noise impacts,  
16 and I know I may go off here but for some reason I, to me that's more, it's not in the line of  
17 promoting pro-business or providing business in terms of being healthy businesses, especially  
18 number six, how many other businesses in town do we required that they clean up within a three  
19 hundred or two hundred mile radius, not that I can recall of any, but I'm in agreement with the  
20 applicant that number two and six are probably unfair conditions placed on this process. As regards  
21 to the application and so forth or the appeal, Pete I think this one falls within one and two, but I'm  
22 a little baffled still, when I look at the requirements that need to be made regarding the thousand feet  
23 from the property line and it's the, which is, the signage and so forth, the one that's baffling for me,  
24 and to me this seems to fall within the Design Code Standards and the lack of substantial evidence,  
25 I think there is a true paradox in our ordinance because it says "there must be a minimal five hundred  
26 feet from the property line of an established liquor license" and I know and I was reading the notes  
27 of the Planning and Zoning meeting and there was a point there they were talking about the operation  
28 and the applicant said "we're not here to talk about the operation" but if you look at the business  
29 model that is being presented to us, it involves one of a liquor license, it doesn't make any sense to  
30 me that you have to deny a business within five hundred feet of being in a property line yet we're  
31 going to turn around and, potential they're applying for a liquor license so there is a paradox there  
32 of some sort, I don't see how that, I mean, I don't, to me that falls under number one and two and  
33 there is a paradox there in our ordinance of us moving forth with this, I can under, I think, I can  
34 understand if they were saying there was a need for this type of business or so forth and regardless  
35 of whether, and I know they're two separate items, this item and the item that we are going to be  
36 voting for and after word but it is one of those things I feel like a parent that says "you don't do that"  
37 yet they turn around and do just what you told the kid not to do, so there is a paradox here and I think  
38 for me that falls within that (inaudible) that the applicant was talking about and that's the one that  
39 concerns me the most. Mr. Connelly if you could address that or how do we....

40

41 Harry (Pete) Connelly said Mr. Mayor and Councillor Silva, the first, and I'd like to back up a little,  
42 what was passed by the Planning and Zoning Commission was ordinance, or pardon me, what was

1 proposed before the Planning and Zoning Commission was a Special Use Permit which the Planning  
2 and Zoning Commission then added conditions to, the conditions were placed on it and it was  
3 approved by the Planning and Zoning Commission. The Planning and Zoning Commission then  
4 passed the entire ordinance or denied, sorry forgive me, denied the entire matter. What you are being  
5 asked to do is reverse the entire decision. The best I can say is the, if you will remember the  
6 Courthouse and the western bar that was across the street from the 3<sup>rd</sup> Judicial Courthouse.

7

8 Councillor Silva said I don't believe....

9

10 Harry (Pete) Connelly said there was a condition placed on them which was enforceable and was  
11 done but the problem we have here today is this is a reversal of a decision and not the ability of  
12 Council to make a deal with the applicant. Either you affirm it or you deny it.

13

14 Councillor Silva said so a quick question Mr. Mayor and Mr. Connelly. Is, so are we starting from  
15 scratch now with no conditions and if we decide to put on conditions, it's a whole, as I'm  
16 understanding it....

17

18 Harry (Pete) Connelly said what you are starting with is what the Planning and Zoning Commission  
19 denied.

20

21 Councillor Silva said which included the conditions.

22

23 Harry (Pete) Connelly said including the conditions.

24

25 Councillor Silva said so what you are telling me now, and I apologize for interrupting, I just want  
26 to make it go quick, what you are telling me now is we're not here to negotiate yes or no, we have  
27 to look at the entire package as is.

28

29 Harry (Pete) Connelly said correct.

30

31 Councillor Silva said okay, thank you.

32

33 Mayor Miyagishima said okay, sure.

34

35 Karen Wootton said I disagree with Mr. Connelly on that issue. We have discussed that in the past.  
36 If you look again at your ordinance language which is.....

37

38 Mayor Miyagishima asked what are, what are you disagreeing with Ms Wootton?

39

40 Karen Wootton said the idea that you can't reshape the conditions and that we are either stuck with  
41 a denial and all of these conditions or we get all of these conditions. That's not reasonable under  
42 your Code, it doesn't say that, it says that you can make a change in the order so the idea that you  
43 can't strike certain conditions and leave others, I believe is inconsistent with 38-13, it's inconsistent

1 with substantive due process rights, it's inconsistent with rational basis for any kind of administrative  
2 quasi judicial decision....

3

4 Mayor Miyagishima said I would concur with what you said earlier in discussion, it was discussed  
5 that we could either keep all, lets say the six that you gave, we keep all five, all four, all three, all  
6 two, or all of them we not..so....

7

8 Karen Wootton said you can strike some of those and leave others....

9

10 Mayor Miyagishima said we could do that. But I would like to expand on what Councillor Silva was  
11 saying, I'm going to ask our Attorney their thought, I thought this is where you were going  
12 Councillor Silva and you may have, it's my understanding that, that if they were to be granted a  
13 liquor license or, okay, if I understand it correctly, the current Eros, it would actually, by having this  
14 business come in to play it would then make them a legal nonconforming use, it would actually cause  
15 them, if they were to sell it they would have to disclose to a future buyer, you know, what was legal  
16 is now technically, or what was totally unrestricted now has a legal nonconforming use meaning they  
17 don't conform to the rules so the question should be to Pete, would that be something that could be  
18 looked upon either favorably or unfavorably, it doesn't have any matter. You see what I'm saying,  
19 so basic, I guess in essence by allowing this business to go forward which was record, I did see this  
20 in the, in the video, there was a question was brought up by allowing this business to move forward  
21 it would then in essence make the Eros legal a nonconforming use, whereas right now it is totally  
22 okay.

23

24 Harry (Pete) Connelly said the simple answer, if I may Mr. Mayor and Councillor Silva, is the  
25 alleged damage to the other property cannot be considered in this matter because it is not a damage  
26 and if it isn't damage there probably is some form of fixing the damage but there is no damage at the  
27 present time to the other property. There is a speculation.

28

29 Mayor Miyagishima said thank you, thank you Pete. Okay, any more questions Councillor Silva?

30

31 Councillor Silva said well, getting back to what we were just discussing, if, I mean if, I'm reading  
32 here in the options and alternatives of voting, it does say "vote to amend or would reverse the  
33 Planning and Zoning denial" so to me it means we could, as you were saying Mr. Mayor, on the  
34 conditions.....

35

36 Mayor Miyagishima said yeah, and, and, and that's what I was mentioning to Ms Wootton, I didn't  
37 have a chance to clarify a little bit but in discussions with the City Manager and the City Attorney,  
38 we could either, using the six that was disclosed by Ms Wootton, we could either keep all six and  
39 still approve and these six conditions remain or maybe strike one, or two, or three, or all of them.

40

41 Councillor Silva said that's not what I heard from Mr. Connelly.

42

43 Mayor Miyagishima said yeah, I know, but I wanted to clarify that.....

1 Councillor Silva said that's why I was asking for clarification also....  
2  
3 Mayor Miyagishima said and that, I know, don't tell, well, we're clarifying that right now.  
4  
5 Councillor Silva said cause it says in number three we can amend it but...  
6  
7 Mayor Miyagishima said but as long as it doesn't.....  
8  
9 Councillor Silva said that's why I asked the question.....  
10  
11 Mayor Miyagishima said but obviously some of these are, are key components (inaudible) to be  
12 reversed such as number one, whether or not it's constitutional, so we can't keep that and, and pass  
13 it, you know what I'm saying...  
14  
15 Councillor Silva said I was talking about the conditions, not the three items.  
16  
17 Mayor Miyagishima said okay, that's, that's strictly up to the Council.  
18  
19 Councillor Silva said but Mr. Connelly said we could not amend it. It's all or nothing if I heard  
20 correctly.  
21  
22 Harry (Pete) Connelly said Mr. Mayor and Councillor Silva and Ms Wootton, since I can't be the  
23 descending person because there is only two of us and that makes us equal Steven. It's my opinion  
24 that it's all or nothing and I might add also that in the Notice of Appeal which is what controls, there  
25 is no objection in the appeal to any of the conditions imposed and the conditions imposed were  
26 imposed and if they are passed and she doesn't like them perhaps we could come back is they could  
27 seek to reduce those conditions at another hearing before the Planning and Zoning Commission or  
28 re-application to reduce conditions. At the present time it's the decision of the Planning and Zoning  
29 Commission that you can either affirm or reverse, pardon me, you can either deny the appeal or grant  
30 the appellants request that it be overturned.  
31  
32 Mayor Miyagishima said I stand corrected, thank you Pete.  
33  
34 Karen Wootton said Mr. Mayor, if I may clarify, I don't see how I could possibility for an appellant  
35 object to a condition on an application that was denied, that's irrational to me, looking back at it,  
36 when I am preparing a Notice of Appeal, not knowing that staff is going to put all these  
37 recommendations in the proposed resolution reversing it and I was looking at 38-13 paragraph G  
38 which explicitly says that on an appeal Council can make any change in the order so I just do  
39 strongly disagree with that and I really discourage you from looking at it that way. It would be a  
40 shame if we almost got out of litigation over these issues based on you all feeling caught up in a  
41 restrictive interpretation that I believe is a pantingly inconsistent with the language in your ordinance  
42 that I had to look at in preparing an appeal for my clients.  
43

1 Mayor Miyagishima said thank you Ms Wootton, and, and if you really focused on the, even when  
2 I first started off I mentioned six items, if you really look at the last three; four, five and six, because  
3 number two is just a requirements of the Special Use Permit, it really focuses on the Special Use,  
4 objections to special use events cause it causes noise, signage and daily clean up so I think it would  
5 be prudent for Council if they were to move forward, either keep all three as mentioned by the City  
6 Attorney or deny all three in its decision so we'll just keep that in mind. Okay. Okay, next question,  
7 members of Council. Councillor Small.

8

9 Councillor Small said thank you Mr. Mayor. I guess, I, I, always appreciate more explanation  
10 especially from our legal team, both to the last issue that was just raised because it seems to be there  
11 is conflict within the Code so to speak as to what the proper course is. I understand the  
12 recommendation as it currently stands. I do appreciate Mr. Connelly and others attention to the  
13 matter that I posed at the beginning which is one of the requirements of the Special Use Permit is  
14 that it be more than one thousand feet away from the border of a recreational facility, border the  
15 property, and although the interpretation was given that because it's EBID that, that's not a  
16 recreational facility. There is agreements in place between the City and the State, or between the City  
17 and EBID through State sponsor and past legislation that identify that as a recreational facility and  
18 that is extremely germane and I would appreciate a more in depth interpretation of that issue. Thank  
19 you.

20

21 Harry (Pete) Connelly said Mr. Mayor and Councillor Small, I can explain it very simply, even if it  
22 is there, lets say it is a recreational facility, it was never brought up before the Planning and Zoning  
23 Commission that there was an objection to it and you are constrained to only be what is before  
24 Planning and Zoning. You are not allowed to go beyond the record and basically say I found a church  
25 independently of the zone...

26

27 Councillor Small said I, and I appreciate that very much Mr. Connelly; however, it goes to Ms.  
28 Wootton's statement at the beginning which is, and I agree and understand the distinction between  
29 church and state and some of these others are very strong and that testimony was not going to be  
30 heard today; however, it was very clearly spelled out that if there was evidence to be presented that  
31 was germane to this issue, it was her feeling, and I would agree because you can't say that a law was  
32 in, that no one was looking at the law when it was, when the case came up so therefore we can't look  
33 at the law when the case comes up again. It just strikes me both on a logical level and also in view  
34 of some of the statements here that today that if I'm trying to constrain my inquire to the specific  
35 issue as spelled out in our Municipal Code for that requirement and simply to say that it, because it  
36 wasn't discussed in the way that I'm discussing it does not make it any less germane or a germane  
37 I guess is the best way to put it. Thank you.

38

39 Harry (Pete) Connelly said Mr. Mayor, one, if I may, Councillor Small I know that if you take your  
40 example and run it out, the sidewalk would prohibit this from being because the sidewalk you can  
41 react to, recreation on, you can have public people on it, gatherings, you could have a church service  
42 on the sidewalk and if that is the case we have no recreational facility in the City that is the City's

1 and we have no control over State land or EBID land at all even though it is within our jurisdiction  
2 so it's very hard to reach out and go, and the other issue is the issues are solely controlled here by  
3 the appeal and there is nothing in the appeal that says that it is too close or was it ever raised in the  
4 notice that there is an issue with that, this is an independent matter that is being raised on appeal and  
5 that there is no evidence before you that the ordinance has not been complied with....

6  
7 Councillor Small said thank you and you raise two points Mr. Connelly and I appreciate them. The  
8 second point we simply disagree on because yeah it is germane and it's still, it's right there in the  
9 requirements for this SUP. The first point that you raised which is if the logic is extended to cover  
10 any place where someone may ride roller skates or a bike or what have you, I didn't bring that up and  
11 I limited it specifically to EBID for the reason there is a recreational use of those trails specifically  
12 agreed to by the City of Las Cruces and EBID through State statute that it was a very intentional act  
13 to locate those as recreational facilities and something I strongly support, that it, it promotes a lot of  
14 things that we've tried to do as a Council to identify those recreational facilities deals with issues of  
15 liability and what have you so I don't wish to expand that logic, I don't think it's proper to expand  
16 that logic and say that it's suspect because it deals with a specific case on the lateral that there is a  
17 rational behind why that could be a recreational facility. So again I, I don't mean to say that it isn't  
18 worthy of reflection, that there might be more information to bring to, I don't mean to put you on the  
19 spot to be very clear and candid. I do think it is an issue that, you know, has substance and barring  
20 within the code and I'd appreciate an explanation that doesn't rely upon (a) that it wasn't discussed  
21 the same way the first time around because it is part of the Code and (b) that it is just like every other  
22 sidewalk because it isn't, there, it is a specific entity and while it is not City owned, there is a very  
23 clear City agreement to use it as a recreational facility. Thank you. And I don't know if there is other  
24 staff, if there is others to be able to clarify that point but until I'm convinced that it not a point, I just  
25 don't know what to say, I mean it's right there in the ordinance and it needs to be addressed. Thank  
26 you.

27  
28 Mayor Miyagishima said thank you Councillor. I would probably not ask staff to clarify that point,  
29 I mean Pete clarifies that for the entire City of Las Cruces zoning staff, what he says has to go, I  
30 mean as far as what's allowed and what's not allowed because obviously he's, who helps defend the  
31 City in the event of a lawsuit. Councillor Pedroza.

32  
33 Councillor Pedroza said yes, thank you. Just very briefly, I believe that Ms Wootton kinda opened  
34 the door to this when said that people's substantive due process rights had been violated by saying  
35 that they could not bring in additional evidence of anything and had not been given notice of exactly  
36 what it was that was going to be allowed or disallowed. I think Mr. Councillor Small's point is very  
37 valid point and it's entirely possible that because of our inexperience with this type of proceeding,  
38 we're really not ready at this point to, to give a final decision to the question of "what is a  
39 recreational facility and what is not" certainly is not clear, the question of whether somebody's  
40 substantive due process rights have been violated still needs to in my mind a little more clarification  
41 and I would like to see those things addressed. Plus one other issue which is the question of whether  
42 or not, I think the matter before us is the entire denial, excuse me, yes, the entire denial with the

1 conditions that were attached but I've heard arguments that goes the other way as well. Personally,  
2 I don't feel that I have sufficient information in which to say yes I've got a definitive answer to this.  
3 I would like some clarification, I don't know, today or when. Thank you.

4

5 Mayor Miyagishima said just for clarification Councillor, definite, you wanted information on what  
6 constitutes a recreational park, or I'm sorry....

7

8 Councillor Pedroza said yes, in part I would like clarification on what constitutes a recreational  
9 facility. I would like some clarification about what matters are going to be allowed in, in other  
10 words, what is review on the record and also possibly a small brief on the substantive due process  
11 of the parties, both parties, and I'd like to know who the parties are to, but the, as to who is going  
12 to be allowed to bring up what evidence and if someone has new important evidence, why or why  
13 not they're going to be allowed to bring it up.

14

15 Mayor Miyagishima said right, we'll take that into consideration but I will just mention that  
16 obviously it would be unfair if we were to now allow those members of the public who are here to  
17 make public comments when its been advertised many times over that no public comment would be  
18 allowed, then you see, yeah, so, okay, okay I understand, Councillor Smith.

19

20 Councillor Pedroza said I'm not saying that.

21

22 Mayor Miyagishima said oh, okay, thank you. Councillor Smith.

23

24 Councillor Smith said thank you Mr. Mayor. It looks to me like there is sufficient questions that we  
25 may be discussing an action that would put this off to another time and I would like to say that there  
26 are members here of the public who have remained calm and not made noises during this proceeding  
27 and I just want to thank you for that and I know it is a very emotional issue and it is fraught with all  
28 kinds of questions about how we do our business so if indeed we are going to proceed with the  
29 possibility of delaying this to another point I would like the opportunity to ask if there could be some  
30 other things specified but I think both Councillor Small and Councillor Pedroza mentioned some  
31 things that they would like more clarification on and I can't say that I specifically have other areas  
32 that I would like clarified but I think before we go into something that can't be discussed further, if  
33 there are other questions that the Councillors would feel would be helpful, I would like that  
34 opportunity to be offered to the Council before we go further. Thank you sir.

35

36 Mayor Miyagishima said thank you Councillor. Earlier I made a comment about the different roles  
37 that we exercise. I think had this been a legislative issue we'd probably could table it but I don't  
38 believe we can table it in a quasi judicial matter as an appeal but I'll turn that over to our City  
39 Attorney, whether or not, if we can, I'll just let him answer that.

40

41 Harry (Pete) Connelly said Mr. Mayor although one of the options is to table, the issue is that we  
42 have as staff no available information to come forth other than what is in the record. You can ask

1 the applicant to substantiate what the applicant would like to do but the record is the record and it  
2 is very difficult to delay again the applicants right to a decision. The applicant came forth, staff  
3 presented everything that's before the Commission. The very issues you've raised now were never  
4 raised before the Commission and you are now starting to act like a trial court and ask for additional  
5 information which may not be correct. So it's your call.

6

7 Councillor Smith said thank you Mr. Connelly and thank you Mr. Mayor. I just wanted to put that  
8 opportunity out there if indeed we were headed down that path. Thank you.

9

10 Mayor Miyagishima said thank you Councillor Smith. For clarification Ms Wootton, my question  
11 is do you object to a putting off?

12

13 Karen Wootton said absolutely I would object. The concern I have, the questions you are raising and  
14 even the question that I raised about due process, these are decisions that this Council has to make  
15 so you may want additional information but your right or obligation, basically, you can go into closed  
16 session and deliberate and you can talk about it but you need to make those decisions, you need to  
17 decide what your ordinance means in terms of what process is due in an appeal to the extent there  
18 is a recreational facility question in your mind and about what that means, if you're going to follow  
19 the process that you're limited to the record that you have then again that's a question that you can  
20 make today but you have to make it on your record. If you have concerns about that definition and  
21 what you want to do is get more information about what is an appropriate definition and what's the  
22 impact on your Code, well that's a work session, that's an ordinance amendment, that's not a quasi  
23 judicial issue so none of the questions you are raising are really things where you need more  
24 information, you want to reflect on those, well that's what you do here before you make a decision  
25 either in the open meeting or you do have an explicit right under the Open Meetings Act for quasi  
26 judicial deliberations to do that in closed session but we need a decision today. Thank you.

27

28 Mayor Miyagishima said thank you Ms Wootton. Councillor Small.

29

30 Councillor Small said thank you Mr. Mayor and thank you Ms Wootton for detailing and I appreciate  
31 the way that you presented and made very clear on things and unfortunately I share some of the same  
32 concerns with some of the advise that we've been given about some of the various issues. One in  
33 particular which I have raised and I apologize for raising but I don't, it seems to me again to have  
34 a very solid grounding in the explicit language of our Code as it pertains, it doesn't just say to a  
35 public park which obviously the issue was dealt with, with Burn Lake, that is not a reason the  
36 requirements are met by the SUP application so that is not an issue. However, in our Code which as  
37 everybody knows no one up here on the dias, at least in the elected sense, had any input into, this was  
38 done back in 1989 and then updated in 1994 but if we're to refer strictly to that Code, it says a  
39 recreational facility. Now, I've attempted to make very clear why I question whether or not the lateral  
40 that runs along the west side of Burn Lake and comes, that is in that area, can or cannot be  
41 considered a recreational facility and I think it is an issue that, you know, that any kind of, and I  
42 don't want litigation but you know someone who could be out there could say "well this is a reason

1 for litigation from an opposing perspective” and I think what is being suggested and what I would  
2 hope potentially could see is a very clearly reasoned documented brief on why or why not that’s to  
3 be considered a recreational facility for purposes of this SUP application. It either is a recreational  
4 facility for the City of Las Cruces where we then have more things to discuss or it is not a  
5 recreational facility for the City of Las Cruces because of whether it is shared and it’s the law says  
6 it is a recreational facility that we can use because it’s owned by EBID then it’s not a recreational  
7 facility for Las Cruces to be considered within this SUP application,

8

9 I don’t think that I have the confidence to say that an answer can be given back to me is, is carefully  
10 and concisely reasoned and that has brought all information to bear to answer that question. Now if  
11 that question isn’t germane then I apologize but it seems to me that it is clearly grounded within this  
12 ordinance and this discussion of the SUP application and I appreciate very deeply as Councillor  
13 Smith said that the patience, Ms Wootton your patience and everybody’s attempt to get things right  
14 but again it is just hard to, I’ve tried to layout my reasoning and my thinking on this issue and it  
15 doesn’t seem like we have a substantive well reason concise and cited response one way or the other.

16 Thank you.

17

18 Mayor Miyagishima said thank you Councillor. If I may ask, did you want comment on anything that  
19 the Councillor said?

20

21 Karen Wootton (inaudible)

22

23 Mayor Miyagishima said we’re not catching you on the, for some reason.

24

25 Karen Wootton said what you have I believe is the record in front of you where your staff has never  
26 interpreted EBID laterals as recreational facilities in the history of administrating this ordinance so  
27 for you to today introduce EBID facilities as a new issue, regardless of whether you are on record  
28 only review or taking new evidence, I think is prejudicial and arguably arbitrary and capricious  
29 because you do, even though the City Council doesn’t make each of those decisions as an ordinance  
30 is interpreted on a day to day basis and hearing after hearing after hearing your staff never looked  
31 at it that way, no one involved in the process to date every looked at it that way, I’ve been doing  
32 zoning for a very long time and I’ve never heard anyone talk about any EBID lateral as a recreational  
33 facility so even though at some level and some instances you all determine what your ordinance  
34 means there is very good case law that when you have consistently interpreted something one way  
35 you can’t on an ad hoc basis just on one particular case change that so that’s why I think your  
36 concern about it is legitimate and you can look at the definition in your Code and seek to clarify that  
37 in the future just like I think you absolutely should take a look at your Code provisions about an  
38 appeal and make some legislative decisions about how you want this process to work and clarify it  
39 for the future yet today you have what you have where you are and you can’t make those kinds of  
40 interpretations, they’re really legislative, and apply them to my client ad hoc today as a surprise for  
41 this particular case.

42

1 Councillor Small said thank you and Mayor if I might, and I think it's again well reasoned and well  
2 stated. I'm on the record specifically and I believe this Council in different instances the MPO and  
3 other ways as identifying these four recreational purposes. You know we extolled the benefits for  
4 connectivity within the community for a lot of other reasons so you know I appreciate, again I think  
5 it is well stated but this isn't the first time that I in particular have looked at these as key recreational  
6 parts of our community and connecting a lot of different things including pedestrian travel  
7 throughout the community and again I am perfectly okay with the interpretation that comes back but  
8 simply the fact that the question wasn't asked at some point in the same way it is being asked now  
9 doesn't mean that it's at least as far as I can see, doesn't mean that it's not germane, given the  
10 lengthy history that we have looking at these in those ways. You know I've worked with residents  
11 for installing, you know, the pedestrian only or bike only entrances onto these facilities and  
12 prohibiting, you know, the motorized vehicles because residents have complained about that but they  
13 want to be able to run along it so there's, there are basis to look at it in that way. Thank you.

14  
15 Mayor Miyagishima said thank you for those comments Councillor. I'm going to ask staff if they  
16 wouldn't mind providing us, Council, seeing that a decision does need to be made today, what  
17 guidance or judgement did you use in determining that the EBID lateral is not a recreational facility?  
18 Because I don't believe there is specific part that says what a recreational facility is and there maybe  
19 but if you can just kind of tell us how you came up with the conclusion that it is not a recreational  
20 facility.

21  
22 Katherine Harrison-Rogers said I am going to look at Pete and make sure that I answer this very  
23 clearly. Again Katherine Harrison-Rogers for staff. When looking at those measurements, we were  
24 looking specifically at City owned and maintained facilities. Short and succinct.

25  
26 Mayor Miyagishima said okay, thank you. Brian, did you want to comment on that?

27  
28 Brian Denmark, Assistant City Manager said yes, thank you, thank you Mayor, members of the  
29 Council. In conference with staff its come to my attention that there were two steps that had to be  
30 done in order to make a specific section of EBID lateral into a recreational facility. The first thing  
31 that would need to be done was a Memorandum of Understanding between the City and EBID which  
32 was completed and approved by City Council. The second item requires a Special Use Permit to  
33 actually designate a specific link into a recreational facility and it is my understanding from staff that,  
34 that has not occurred. Therefore, from staff's perspective it hasn't been defined designated a  
35 recreational facility. Thank you.

36  
37 Mayor Miyagishima said thank you for that clarification Brian. Comments, Councillor Smith.

38  
39 Councillor Smith said thank you Mr. Mayor. I'm at the point where I have to say that each of us on  
40 this Council has taken an Oath of Office essentially to uphold the Constitution and laws of this land,  
41 this State and this City. We're also obliged to make and amend to ordinances or laws that govern  
42 what we do as civilized members of this community but in so doing we are always constrained to

1 keep our laws consistent with those of our State and of our Country. Thus, we cannot change State  
2 and Federal law and we are not permitted to change our own laws in instances such as those in which  
3 we find ourselves today. We're only permitted to address the questions of whether our laws as  
4 previously established were followed. We do not in this instance have the luxury of interjecting our  
5 own personal believes, our wishes, or our fears. Given what has been shared with us I believe we  
6 would be acting in error if we upheld the Planning and Zoning Commission's denial of Special Use  
7 Permit to this applicant. During the public input of the Commission meeting reference was made to  
8 Pottersville in the 1946 film "It's a Wonderful Life". Regardless of what we do here today, I have  
9 great confidence that the future of Las Cruces will in no way resemble Pottersville. None the less we  
10 as citizens and leaders in this community do have to act in those ways which are consistent with our  
11 laws, with our hearts and with our community. So while this is not easy to say it is consistent and  
12 appropriate and in keeping with our Oaths of Office to assert that this applicant should be allowed  
13 to establish this business in this part of town where such establishments are allowed by our own  
14 laws. Thank you sir.

15

16 Mayor Miyagishima said thank you Councillor. Councillor Sorg.

17

18 Councillor Sorg said thank you Mayor, Mr. Mayor. I agree with those that oppose this kind of  
19 business in Las Cruces here and I understand how it degrades women and has the potential of  
20 increasing crime. I understand there are moral and religious reasoning for opposing a business like  
21 this but I have a problem, it's exceedingly troubles me, we have people that come and want to do  
22 things inside the Constitution as their right to do it such as flying the confederate flag, owning assault  
23 rifles and other guns yet when one disagrees with this kind of a business here it is as if the 1<sup>st</sup>  
24 Amendment did not apply to it or doesn't count. This is hypocrisy and I, I will not go along with  
25 hypocrisy. So what do we do, should we follow the Constitution, should we rewrite the Constitution?  
26 As far as the crime goes, I, I thought about this a lot and, and a the Police Department in our City is  
27 one of the finest in the State. I, I think I can trust them to abide, to keep the laws of our City and  
28 State and Federal Government in controlling any extra criminal activity that might occur at this  
29 establishment. So if we deny this zoning it will, oh I'm going to pass on that. I have a question, is  
30 it possible that we could pass an ordinance that would require licensings of these kinds of employees,  
31 dancers if you will, performers?

32

33 Mayor Miyagishima said Councillor, if it were to move forward, that is something that the Council  
34 would have to take in the future. We can't do that today but...

35

36 Councillor Sorg said not today, of course not.

37

38 Mayor Miyagishima said oh absolutely, oh yeah, absolutely. In fact the Mayor of Dallas has sent me  
39 their or given me their information on how they regulate things.

40

41 Councillor Sorg said well that's something that maybe we want to consider but as it sits right now,  
42 I can't see that we can vote against this denial.

1 Mayor Miyagishima said thank you. Councillor Small then Mayor Pro-tem Thomas.

2

3 Councillor Small said thank you Mr. Mayor. So I guess first Brian, I appreciate the direct response  
4 to my question. That is an interpretation that takes in the criteria into consideration criteria that  
5 determine whether or not that's a recreational facility, I guess, so it is, and really there's one, one is  
6 met and one is not and it's, I guess the interpretation that this does not fall as a recreational facility.  
7 I would very clearly and strongly would want to say that, that's the kind of explanation that I had to  
8 have before making any kind of decision on this. I think it was extremely insufficient to simply say  
9 that because something was not worded or because someone didn't want to deal with an issue that,  
10 that it would not be addressed. I'm a little upset about that but I think this is so important, there's  
11 folks who have invested so much of their time, money, effort and otherwise that people deserve a  
12 fair and clear response. I believe that I have received that fair and clear response and it's the issue  
13 that I find in the Code that is of the most importance. So, you know, I, it sounds like we are being  
14 able to speak, yes Mr. Garza.

15

16 Robert Garza said Mr. Chairman, Councillor Small I was just going to ask Pete Connelly to clarify  
17 within the record that the packet, there is a map and it has dimension lines on it, shows distance from  
18 the subject property to the areas that were measured for compliance with the issue you are talking  
19 about and one of those measurements is out to Burn Lake and this drain is just adjacent to the west  
20 side of that property so the dimensions that are shown in this drawing actually point to that trail that  
21 you were referring to and it's 1,531 feet and it is at the closest proximate distance to that site so  
22 looking at the map, while the other portions of that particular corridor are at or further than that  
23 distance and therefore the closest point of that trail or that corridor is 1,500 feet so regardless of  
24 whether we call it a recreation facility or not, even if it was I think its probably outside the distance  
25 requirement.

26

27 Councillor Small said okay. I appreciate that. I think it was so worthy of follow up but that also does  
28 address issues. I appreciate it. A, you know, it seems like we're kinda giving closing statements here,  
29 this is extremely concerning but you know there is, we're a country of laws, rules, and a Constitution  
30 for very important reasons. I can't say that I wish an establishment like this good luck but I also do  
31 not have the legal right to, to say, to bar them when they've met requirements set forth in a Code.  
32 Thank you.

33

34 Mayor Miyagishima said thank you Councillor. Mayor Pro-tem Thomas.

35

36 Mayor Pro-tem Thomas said thank you Mr. Mayor. I tried to look at this in terms of, again what's  
37 legal. I looked at the history with Eros Bookstore and the fact that the City did appropriately respond  
38 by according to the U.S., the United States Supreme Court, we cannot deny based on whether or not  
39 we like something. No obscene expression whether in the form of sexually explicit books,  
40 magazines, movies or dancing has traditionally been found to be entitled to such constitutional non-  
41 obscene protection so traditionally it's not, it's non-obscene and we can't say we don't, we won't  
42 allow this just because we don't like it. You know, it's their right. We can look at a secondary

1 effects, crime, prostitution, trafficking, that sort of thing and we can try to mitigate that effect as  
2 much as possible but again we can't cut off, we cannot say that this kind of establishment cannot  
3 exist anywhere. We just have to decide where it is going to cause the least damage so that's our,  
4 that's what we have to do. This is typically across the country done through zoning, this trying to  
5 mitigate the secondary effects and as I said earlier either some cities say all those kinds of  
6 establishments are going to be in this area and they try to have them all in one place so maybe they  
7 think that's an easier way to control the secondary effects or they try to disburse them, you know,  
8 based on the same rational I guess.

9

10 I want to respond a little to the public comment, I read everything that was said, I read all the  
11 minutes, you know, there were a lot of statements about property values and business and those kinds  
12 of things, again, we can only mitigate. There was a lot about women objects and exploitation and  
13 I know that many of you see people who are caught up in this kind of activity or get through this kind  
14 of establishment end up in other activities that are very harmful to them and their families but I don't  
15 think that we can say that these kinds of establishments are the cause. I think people get drawn to  
16 these establishments or to these kinds of harmful activities because their economic situation or their  
17 mental condition or I mean there are a lot of other reasons and if we want to help those people I think  
18 we should focus on improving economic conditions, you know, trying to keep jobs in the United  
19 States, get people employed, that kind of stuff. So, also there were a lot of comments about we don't  
20 want to be like El Paso. El Paso is the safest city in this country in its size, its class size, you know,  
21 sometimes Honolulu comes out as the safest in that particular size of city but quite often it's El Paso  
22 so I don't think that is a good example and they're our neighbor. The whole thing about the social,  
23 morals, civic impact, that's another discussion, that has to do with prohibition, illegalization, that,  
24 that has to do with something that's not part of this discussion, you know, we try to prohibit alcohol  
25 in this country at one point and had huge crime problems. So, so I feel very badly for people who end  
26 up in terrible situations because of getting involved with drugs or prostitution and I compliment  
27 those of you who work with those people and trying to help them straighten out their lives and get  
28 back on track and I think we should work on that and I think there are probably things the City could  
29 do to help make sure people have safe homes and good lives and economic stability but it doesn't  
30 have to do with this particular zoning case. So, so I agree that we have to say that the Planning and  
31 Zoning Commission did not make a correct decision.

32

33 Mayor Miyagishima said thank you Mayor Pro-tem. Councillor Pedroza.

34

35 Councillor Pedroza said thank you Mr. Mayor. I'm not trying to rush us or anything but I wanted to  
36 ask, it sounds like we are at the point almost of being ready for a vote and I wanted to be clear on  
37 exactly what it is that we are voting on. Do I understand correctly that if we move to reverse the  
38 Planning and Zoning Commission's denial that then what we are approving is the application with  
39 the conditions; is that correct?

40

41 Mayor Miyagishima said actually Councillor I'm glad you brought that up, I'll defer to the City  
42 Attorney but what I was going to ask is that when we do vote that you clarify we either keep the

1 conditions or remove them if we were to uphold or overturn the Planning and Zoning's decision.  
2  
3 Councillor Pedroza said that's precisely my question.  
4  
5 Mayor Miyagishima said yeah, just for clarification. We would most likely do that but...Pete.  
6  
7 Harry (Pete) Connelly said Mr. Mayor and Councillor Pedroza, it's up or down, it's in my opinion  
8 all the conditions and the issuance of a Special Use Permit is what's before you.  
9  
10 Councillor Pedroza said thank you.  
11  
12 Mayor Miyagishima said so Pete what you are saying is if we were to reverse the Planning and  
13 Zoning Council's decision then the other, those conditions such as the signage and trucks, all that  
14 goes away?  
15  
16 Harry (Pete) Connelly said no sir, they stay.  
17  
18 Mayor Miyagishima said okay, so then you would need Council then to clarify are they going to  
19 make that go away and still....  
20  
21 Harry (Pete) Connelly said no. The issue is it's you vote, you vote to overturn exactly what or vote  
22 to deny exactly what the Planning and Zoning Commission did and since there's a denial there's  
23 nothing to modify. If you had passed, and there were four conditions and you were trying to move  
24 one or two, that would be you could modify. But when it's "no", they said no to the motion plus with  
25 the conditions attached.  
26  
27 Mayor Miyagishima said okay, just for clarification, if they were to reverse the Planning and Zoning  
28 Council's decision and they wanted to still allow the special use events, the signage or do away with  
29 the signage, and do away with the daily requirement of clean up, then that would be an amendment  
30 to the motion. Is that what you are telling me?  
31  
32 Harry (Pete) Connelly said no. The new, lets assume you vote to overturn the Commission. When  
33 you overturn the Commission you will get, you will put in force the very vote that the Commission  
34 denied which is I deny the Special Use Permit you will approve the Special Use Permit with the  
35 conditions that the Planning and Zoning Commission imposed.  
36  
37 Mayor Miyagishima said okay, how does one, if it's possible, do away with the conditions that were  
38 imposed?  
39  
40 Harry (Pete) Connelly said you come back.  
41  
42 Mayor Miyagishima said come back when?

1 Harry (Pete) Connelly said you come back, the applicant would come back before the Planning and  
2 Zoning Commission....

3

4 Mayor Miyagishima said okay, gotcha.

5

6 Harry (Pete) Connelly said in attempt to get rid of the conditions.

7

8 Mayor Miyagishima said okay, got it, thank you Pete. Thank you for that....

9

10 Harry (Pete) Connelly said and I would say before we get started that Ms Wootton will violently  
11 disagree with my interpretation of what I just told you.

12

13 Councillor Sorg said Mr. Mayor.

14

15 Karen Wootton said well.

16

17 Mayor Miyagishima said hold on one second Councillor. Yes, Ms Wootton.

18

19 Karen Wootton said Mr. Mayor if I may. I mean, consistent with what Councillor Small was saying,  
20 I just want to read the language in your ordinance to you and you know it's something that the  
21 Council has to decide, right, you listen to your lawyers and I certainly encourage clients to take their  
22 lawyer's advise most of the time but you are a quasi judicial tribunal. Ultimately you decide what  
23 this language means so I'm going to read you paragraph G of 38-13 and the title of this paragraph  
24 is "Authority of the City Council". "When an appeal alleges there is error in any way, order,  
25 requirement, decision or determination by an administrative official, commission, committee or  
26 board in the enforcement of this ordinance or any other resolution, rule or regulation adopted  
27 pursuant to the above stated State Statutes" which I think is just an error in there "the City Council  
28 by a majority vote of all its members may, after all other procedures established by the provisions  
29 of this Code have been exhausted, reverse or affirm any order, requirement, decision or  
30 determination of an administrative official, commission, committee or board" and here is the  
31 language that I think is critical "or make any change in an order, requirement, decision or  
32 determination of an administrative official, commission, board or committee." To me that language  
33 is (inaudible) is, is unequivocal that you get to decide which if any of these conditions are  
34 appropriate. There are several we have no objection to but it's plain language in your ordinance. I  
35 don't, he's right, I mean, I do (inaudible) agree, I think it's the plain language of your ordinance that  
36 you do have that authority.

37

38 Mayor Miyagishima said thank you for those comments and your, and your concerns Ms Wootton.  
39 I, I have to always bite my lip here but I have to just share with you that, that many advantages to the  
40 City been self insured verses if you would say a County Commissioner and was covered under a  
41 insurance policy, when, when the City Attorney tells us something and we choose to go against his  
42 or her word and there is a liable, an issue, a claim that comes up, it's actually cause for a denial of

1 coverage if they were to go after you individually and that's where we have so many advantages to  
2 being self-insured. We don't have that rule here so I'm just going to strongly suggest that we do as  
3 our attorney suggests. I understand Ms Wootton's objection but he's our City Attorney, we should  
4 follow his advise. If that's, if the advise is that they have to come to another take it before Planning  
5 and Zoning and have them be the ones to remove it and if it has to come back to us again to  
6 subsequently remove it then I guess that's the procedure but I just want to point out that although Ms  
7 Wootton was a former Assistant County Attorney, we are obviously City Council and we should  
8 adhere to our City Counsel, a lawyer. So, with that I believe we have heard from Councillor Pedroza,  
9 Councillor Silva did you want to make any comments? No. Okay, so I believe we have enough  
10 information now to go ahead and make a decision. So with that there's been a motion and a second  
11 so I'm going to ask Esther if you'd please call for the, okay, just for clarification, a yes vote would,  
12 my computer just went off, a yes vote would reverse the Planning and Zoning's denial of the Special  
13 Use Permit and would allow the adult entertainment establishment to be built and operated at 2221  
14 Westgate Court. A no vote would uphold the Planning and Zoning Commission's denial of the  
15 Special Use Permit. Okay, so Esther.

16  
17 Esther Martinez-Carrillo, City Clerk said this is on Resolution 13-075. Councillor Silva.

18  
19 Councillor Silva said no.

20  
21 Esther Martinez-Carrillo said Councillor Smith.

22  
23 Councillor Smith said yes.

24  
25 Esther Martinez-Carrillo said Councillor Pedroza.

26  
27 Councillor Pedroza said yes.

28  
29 Esther Martinez-Carrillo said Councillor Small.

30  
31 Councillor Small said yes.

32  
33 Esther Martinez-Carrillo said Councillor Sorg.

34  
35 Councillor Sorg said yes.

36  
37 Esther Martinez-Carrillo said Councillor Thomas.

38  
39 Councillor Thomas said yes.

40  
41 Esther Martinez-Carrillo said Mayor.

42

1 Mayor Miyagishima said yes.

2

3 Esther Martinez-Carrillo said it passes six to one.

4

5

6

7 Mayor Miyagishima called for the roll on the Motion to Adopt Resolution No. 13-075 and it was  
8 was Approved. 6-1 Councillor Smith, Councillor Pedroza, Councillor Small, Councillor Sorg,  
9 Councillor Thomas and Mayor Miyagishima voted Aye. Councillor Silva voted Nay.

10

11

12

13 **IX. RESOLUTION(S) AND/OR ORDINANCE(S) FOR DISCUSSION**

14

15 **(11) BEFORE CONSIDERATION OF THE FOLLOWING RESOLUTION NO. 13-076;**  
16 **A PUBLIC HEARING MUST BE HELD.**

17

18 Mayor Miyagishima said this is a Public Hearing regarding the transfer of ownership and location  
19 of the State liquor license to Central Park, LLC doing business as the Bronx located at 2221  
20 Westgate Court. The public hearing is now on and is there any member here members of the public  
21 who wish to speak in against the issuance of or transfer of ownership for the liquor license. I'm going  
22 to start on my left hand side here, anyone object to the liquor license transfer, on my left, seeing none  
23 I'm going to start on my right, yes sir, in the red and then the gentleman in the back. Just need you  
24 to state your name and why you object to allowing the transfer of liquor license.

25

26 Roger Blair, Member of the Public said I'm Roger Blair, my address is 3510 Midnight Ridge Drive.  
27 I'm a recovering alcoholic, I've drank for 32 years and I've been sober for 20. Given the action you  
28 just took, I have seen the results from organizations like that and where the people end up, they end  
29 up in jails, they end up in, in institutions and in death. I've seen women come in who have been  
30 demeaned, who have gone through the kind of lifestyle that an adult entertainment organization  
31 provides. Typically they are under the influence, they use drugs, they've been involved with  
32 prostitution, they've had illegal children, the police have to deal with these people and many time  
33 because they get a DWI or something serious guess where they end up, they end up in twelve step  
34 programs. When you combine an adult entertainment organization with a sale and distribution of  
35 alcohol it's like taking gasoline putting a match to it and watch for the explosion. You are  
36 uncovering your future, you future Police Department will with much more explosion alright of  
37 crime, when you take young men who are lonely and you take young women who have no skills but  
38 the only way they can do it by displaying their bodies okay, that's gasoline and match. So before you  
39 approve this license you have to take the context of it into consideration of what you just passed.  
40 Alright, I'm looking at this as repractical situation, I've worked with alcoholics for 20 years okay,  
41 I've seen the results of, I've seen the results of it in terms of people coming from adult entertainment  
42 organizations, mainly strip clubs, tanked up with the alcohol, I'll tell you one, one story that just to

1 this, I've seen a lot of things but there's one person that I've met alright in this city which when they  
2 got loaded guess what they liked to do, they liked to get into the car like to drive it at 120 miles an  
3 hour down through the city stop lights and stop signs, it discourtes me to think about what would be  
4 one of your children, one of your grandchildren okay, when you combine these two elements with  
5 adult entertainment and the issuance of alcohol you looking for big problems (inaudible). Thanks  
6 a lot.

7

8 Mayor Miyagishima said thank you Mr. Blair. Yes.

9

10 Ruben Ortega, Member of the Public said my name is Ruben Ortega and I'm a local pastor in the  
11 community and I appreciate the diligences that you have shown in the last issue that was just voted  
12 on. However, as I understood the conversation these are two separate subjects, two separate issues.  
13 As I have done my research I understand and I stand to be corrected if this is not true and I  
14 understand that this will be a precedence being set in our city today, that if it's voted that this  
15 business be able to also serve alcohol, is that correct?

16

17 Mayor Miyagishima said we're just dealing with the transfer of the liquor license. The reversal has  
18 already been approved so if I can have you just focus on the liquor license and why you feel the  
19 Council shouldn't allow it to move forward.

20

21 Ruben Ortega said okay, for my clarification I just needed to know if this was the first time that both  
22 of these services will be combined together in our city?

23

24 Mayor Miyagishima said I couldn't tell you. I don't...

25

26 Ruben Ortega said okay, I understand that it is and because of that I'm strongly against it. I  
27 understand and as I grieve not only for our children, our future and our city with the last decision you  
28 made, I will submit, I won't move, I will still be a part of this community, I will still serve those that  
29 have been affected by it but the alcohol is a different issue. I would strongly encourage you to please,  
30 I have right now, I have six people that we're having to do in depth counseling for because of  
31 alcohol. There's enough places already that are serving alcohol here and so I would just ask you to  
32 please not afford another place like this, especially a combination of both services. I think it's  
33 detrimental to our city. I think it's a wrong decision on your part and so I'm not coming to morality,  
34 I'm not coming to that, I'm not quoting scripture to you, all I'm asking is to use common sense. The  
35 last meeting we had with the Commissioners it was stated and I really appreciate the representative  
36 of the Police Department that said we're ready and prepared to meet any other additional calls that  
37 we have to make, we are prepared to do that so my question is simply this why put a police officer  
38 in more harms way, why add to the crime in the community? You can vote against that, you can  
39 stand up against it and I just plea with you that we do that, thank you very much for your time.

40

41 Mayor Miyagishima said thank you Mr. Ortega. Lets see, anyone else on that second row, third row,  
42 fourth row, yes sir.

1 Michael Kramer, Member of the Public said good afternoon, my name is Michael Kramer and I live  
2 at 1815 Apollo. There are many reasons why I object to this establishment getting a liquor license  
3 but I'd like to address two of them specifically. As a youth pastor in town I deal with young people  
4 that have a lot of issues with drugs and alcohol is a big concern; however, the main concern I have  
5 is there has been some discussion, perhaps you could give me clarification on it, that there's an issue  
6 of how many liquor licenses are allowed to be here in the city and as we look at transferring things  
7 around from one establishment to another we're not traveling, transferring it from a like to a like,  
8 we're not going from one bar to another bar, we're going from a bar to an establishment that is also  
9 providing adult entertainment and so I don't know that they are exactly the same and I think there  
10 is an issue there. The other concern I have is that there has been quite a bit of conversation about the  
11 fact that trucks will be parking there, vehicles will be, there's a lot about the traffic issues, this is  
12 going to be, right, be the ten freeway, there's been a lot of comments about the fact that this business  
13 is trying to capture people who are going to El Paso so they don't have to travel from whatever towns  
14 they're coming north down through our town into El Paso, that they would capture them here. That  
15 means that we're talking about an establishment that's specifically looking to lure people who are  
16 driving to this establishment. Now I know that most people drive to bars then they drive home;  
17 however, this is trying to market to truck drivers who are passing through the city, it's marketing to  
18 people that are coming from other towns to come here specifically for the purpose of going to this  
19 establishment which means they will be getting into their cars and driving home drunk or possibly  
20 impaired. So these are concerns that I have and I would urge you to deny the liquor license for this  
21 establishment. Thank you for your time. I appreciate it.

22  
23 Mayor Miyagishima said thank you Mr. Kramer. Lets see, anyone else in the back row, the  
24 gentleman all the way to the end. Okay Russ, I'll let you do it this one time cause I was on my left  
25 hand side here but since you hurt your knee I'll give you a pass.

26  
27 John Powell, Member of the Public said my name is John Powell and I live at 675 North Miranda  
28 and I urge you to deny the transfer of the liquor license to the Bronx. Thank you.

29  
30 Mayor Miyagishima said thank you Mr. Powell. Yes sir, Russ. Ron were you wanting to speak too?  
31 Okay.

32  
33 Russ Warner, Member of the Public said thank you Mr. Mayor. Russ Warner. I think it's important  
34 and everyone to realize that the yes vote on that issue were ones on the legal side of the fence not on  
35 the moral side and when you get down to it, it boils down to you cannot decide what laws you want  
36 to enforce and what ones you do not want to enforce and I'm asking everyone today to just maintain  
37 your composure and control your emotions on this matter. Thank you.

38  
39 Mayor Miyagishima said thank you Russ. Ron. I believe Ron will be the last person if there's no  
40 body else to speak. Okay.

41

1 Ron Camuñez, Member of the Public said Ron Camuñez, thank you Mayor, City Council. I want to  
 2 remind you that our government and society was founded on divine wisdom. That's what the  
 3 Constitution is based on. It said George Washington once said "reason and experience both forbid  
 4 us to expect that national morality can prevail in exclusion of religious principals. The whole  
 5 Constitution is basic we are in doubt with unalienable about, unalienable rights which come from  
 6 about, from a supreme being, whatever that belief may be and so today you call to invite national  
 7 immorality and the apparent belief that compulsory exception of perversion will some how lead to  
 8 a society who's citizens are self-disciplined to sacrifice for the common good. I'll close with this  
 9 Benjamin Franklin says "we gave you a republic if you can keep it." So today there is a mixed  
 10 emotions here. In order to keep the Constitution that you all talk about, that you uphold, there is also  
 11 a belief and a religious part of that Constitution which many people have died for in the military and  
 12 aboard, here and in the beginning so lets not pervert the Constitution by using it as a legal battering  
 13 ground for what is really the facts here. Thank you very much.

14

15 Mayor Miyagishima said thank you Ron. Okay, there's nobody else; therefore, the public hearing  
 16 is now closed. I believe I'm going to need a motion and a second on this issue here. Can I get a  
 17 motion and a second for Council Bill 13 dash, excuse me, Resolution 13-076.

18

19 Resolution No. 13-076: A Resolution Approving the Transfer of Ownership and Location  
 20 of State Liquor License No. 28031 to Central Park, LLC D/B/A the Bronx, to be Located at  
 21 2221 Westgate Court, Las Cruces, New Mexico.

22

23 Councillor Pedroza Moved to Approve Resolution No. 13-076 and Councillor Sorg Seconded the  
 24 motion.

25

26

27

28 Mayor Miyagishima said motion made by Councillor Pedroza, second by Councillor Sorg. Is there  
 29 any comment or discussion from members of Council? Mayor Pro-tem then Councillor Smith.

30

31 Mayor Pro-tem Thomas said this is a question I have for Legal, is this not in some way similar to  
 32 what we just discussed if this, in order for this appellant to get this license transferred they have to  
 33 meet certain conditions and they've met all the conditions? Is that part of the discussion?

34

35 Harry (Pete) Connelly, City Attorney said Mr. Mayor and Mayor Pro-tem Thomas, the answer is yes.  
 36 The State is granted preliminary approval to license and the license in substance can be turned down  
 37 only for competent evidence that shows there is some problem with public morals or it's not zoned  
 38 correctly but there has to be certain evidence presented to the Council to turn it down.

39

40 Mayor Pro-tem Thomas said does the evidence have to be specific to this location or general  
 41 problems?

42

1 Harry (Pete) Connelly, City Attorney said it has to be specific to this location. In the packet before  
2 you there are staff reports, traffic.....  
3  
4 Mayor Pro-tem Thomas said police reports, traffic, all those things (inaudible). It's been through the  
5 whole process and all of those required sign-offs are there. So at the moment we have no evidence  
6 that has been presented to us that's specific to this location.  
7  
8 Harry (Pete) Connelly, City Attorney said or the applicant is, is not capable of having a license.  
9  
10 Mayor Pro-tem Thomas said or the applicant is not capable of having a license.  
11  
12 Harry (Pete) Connelly, City Attorney said does not, yes, like if the applicant is a convicted felon...  
13  
14 Mayor Pro-tem Thomas said I see.  
15  
16 Harry (Pete) Connelly, City Attorney said it cannot have a license.  
17  
18 Mayor Pro-tem Thomas said so the applicant has gone through the required fingerprints and  
19 background checks and those kinds of things.  
20  
21 Harry (Pete) Connelly, City Attorney said yes.  
22  
23 Mayor Pro-tem Thomas said okay.  
24  
25 Mayor Miyagishima said thank you Mayor Pro-tem. Pete, what about the issue was raised earlier but  
26 with this applicable the fact that by allowing a liquor license now deems the property next door to  
27 it a legal non-conforming use.  
28  
29 Harry (Pete) Connelly said Mr. Mayor, the, there's no evidence before the Council that, that is a fact  
30 or will happen so there is no evidence that it is damaging to that property.  
31  
32 Mayor Miyagishima said just for clarification, so your comment is that, that there is no evidence that  
33 would damage the property but of course there is, I believe, evidence that it would make it a legal  
34 non-conforming use, the business next door. Correct?  
35  
36 Harry (Pete) Connelly, City Attorney said Mr. Mayor, member of the Council, there is no evidence  
37 at this hearing before the court, before the Council, that there is any, any damage that would be  
38 caused by this issuance of this liquor license to that property.  
39  
40 Mayor Miyagishima said okay, alright, thank you Pete. Councillor Smith.  
41  
42 Councillor Smith said thank you Mr. Mayor. Just to clarify, during the Planning and Zoning

1 Commission meeting on September 25<sup>th</sup> a Mr. Schrader asked some very direct questions pertaining  
2 to the transfer of State liquor licenses from Taos to Las Cruces and Mr. Connelly, you have said  
3 that's all been complied with but I want to be sure since Mr. Schrader asked some very specific  
4 questions. One of them was about the morals of the community being part of State Statute 60-38-2  
5 the Liquor Control Act, so we are then to assume that the Liquor Board conducted a survey that Mr.  
6 Schrader suggested that is required.

7

8 Harry (Pete) Connelly said Mr. Mayor, Councillor Smith, that is correct.

9

10 Councillor Smith said thank you sir. I also so that our Police Department has conducted the criminal  
11 background check that Mr. Schrader stated was required but Mr. Schrader seemed to be prepared to  
12 ask a final question about the prohibition of owning both retail and wholesale liquor establishments.  
13 I'm assuming that determination can also be assumed to be done.

14

15 Harry (Pete) Connelly, City Attorney said Mr. Mayor, Councillor Smith, yes.

16

17 Councillor Smith said thank you sir. I will tell you that the question of alcohol use is one that is very  
18 difficult for me to discuss, not because of my own issues with it but because it has affected members  
19 of my own family and it has resulted in the death of people I know; however, I don't believe we once  
20 again have the opportunity or the luxury to say that in this particular instance we can deny that right  
21 to someone when we have multiple other situations given that right so I, I see us as in very similar  
22 situation to the previous agenda item where the Legal Departments have been met and we are bound  
23 by our own rules to follow through with what is again the right thing in this situation regardless our  
24 own personal feelings. Thank you Mr. Mayor. Thank you Mr. Connelly.

25

26 Mayor Miyagishima said thank you Councillor. Anyone else? Councillor Silva.

27

28 Councillor Silva said yeah Mr. Mayor. Earlier Mr. Mayor, my comments were minimal only because  
29 of our limitations as a role, as a body, as a quasi judicial body, so I was really limited on my  
30 comments in the prior item that we, was brought before us. However, this time, this is where I think,  
31 you know, the logical or really illogical, I don't know, one of the two, application of our zoning laws  
32 itself is a form of a paradox. I mean here we're saying that an adult establishment can be, they can  
33 receive a SUP which just happened but it has to be located a minimal of 500 feet from the property  
34 line of a liquor establishment. Meaning if there was a Circle K across the street or within 200 feet  
35 we could have voted no on that item prior. So now we're saying "oh it's okay now to give you a  
36 liquor license when you can't establish yourself within 500 feet," it doesn't make sense to me and  
37 so I have difficulty, had difficulty with the prior item, not only with that but also with the conditions  
38 that were placed which I didn't totally agree with, so I was, you know, I voted as I did but in this case  
39 I'm still having a hard time too because to me, as I mentioned, I think I used my example earlier it's  
40 like telling a child you can't do something and the adult does what he told the child not to do. So,  
41 I think for me, looking at what we just discussed, if we're looking at the criteria just like Pete said,  
42 you know, to me that tells me that they're not, I mean, you know, we don't award these

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1 establishments liquor license. I don't know, whether we pass or deny it, if we were to deny it the  
2 State Board, if I'm correct, still could go ahead and approve our decision so, thank you Mr. Mayor.

3

4 Mayor Miyagishima said thank you Councillor. You, what's that? You want to hear from Pete on  
5 that. You want to comment on that Pete?

6

7 Harry (Pete) Connelly said Mr. Mayor and Councillor Silva, this is a bad day to be the lawyer for the  
8 City.

9

10 Councillor Silva said somebody brought that dog earlier.

11

12 Harry (Pete) Connelly said the Supreme Court of the State of New Mexico in, I forgot, Portales Case,  
13 basically upheld that to deny a license you have to have competent evidence before the Board either  
14 as to the applicant or as to the location and if there is such evidence you may deny it. It does go to  
15 the State and the State, even if you deny it or you approve it, pardon me, deny it, it still goes to the  
16 State and the State does have the final authority on it. Our experience has been the Legal Department  
17 with the preliminary approval of the State, unless there is some disqualification of the applicant such  
18 as I mentioned to the Mayor, a felony or they're not entitled to a license or something or that the area  
19 where the license is to be located suffers from some abnormal crime rate or something to that effect,  
20 it cannot, you cannot deny it. And the last issue is that the, as a matter of right, the liquor  
21 establishment can be located on this space as a matter of zoning. There's no condition to it, it can  
22 go there as a matter, right so you can have a liquor license there and have a cantina or a food place?

23

24 Councillor Silva said Mr. Mayor, Mr. Connelly, can you define me the difference between criteria  
25 and condition? Could you explain to me the difference between criteria and condition?

26

27 Harry (Pete) Connelly said I'm sorry, I'm probably using them interchangeably. The criteria would  
28 be to deny it you have to have some competent evidence to turndown the application.

29

30 Councillor Silva said wouldn't it be sufficient evidence that we, in this SUP it says "locate within  
31 500 feet" how can we grant someone a liquor license if you can't have that type of establishment  
32 within 500 feet?

33

34 Harry (Pete) Connelly said if the Police Department had rendered an analysis that this is a high crime  
35 rate and that liquor would maybe exacerbate the high crime rate, that would be a reason.

36

37 Councillor Silva said that's why I was asking if there is a difference between, you know, if there was  
38 a difference between criteria and condition. A criteria is a criteria that cannot be established, I mean  
39 like I said earlier, if there had been a Circle K across the street that had a liquor license we could  
40 have easily voted the last item down but it doesn't make sense to me that if part of our zoning says  
41 "you cannot have adult entertainment within 500 feet of a liquor license" then all of a sudden we're  
42 saying "well, we're going to bend the rules, you know, we're going to allow you guys" that, there,

1 to me that is illogical.

2

3 Mayor Miyagishima said thank you Councillor.....

4

5 Councillor Small said Mr. Mayor. I guess I appreciate very much Councillor Silva's line of questions  
6 and I guess I have somewhat similar question I guess, I'm asking for interpretation of the Code. Now  
7 is the Code here to say that you cannot have two adult entertainment establishments with liquor  
8 licenses within 500 feet of one another or is it there to say that you cannot have an adult  
9 entertainment location within 500 feet of a liquor license because if it's the latter I to find the same  
10 problem in finding a way and here, excuse me, I'll just pull the letter from Gaming up, it says "you  
11 can disapprove it if the issuance or transfer would be in violation of a zoning or other ordinance of  
12 the governing body." Our ordinance says that you can't have, that as Councillor Silva said, you could  
13 not, we could not allow an adult entertainment establishment to locate with 500 yards of a liquor,  
14 or a establishment with a liquor license. Here we're saying it's one in the same so it's zero feet  
15 difference between the two and there does seem to be fundamental conflict there between those parts  
16 of the Code.

17

18 Harry (Pete) Connelly said Mr. Mayor and Councillor Small, the, I find it very hard to believe that  
19 the State liquor license or the ABC would grant preliminary approval to it and our liquor, our M1  
20 ordinance provides that you can have a liquor establishment in a M1 ordinance. So you can move  
21 the liquor license to the place but you cannot move the use to the liquor license. For example, a  
22 church could move to this area and that would not be a violation but to look at it the reverse, you go  
23 out and you measure and it is not in violation of our ordinance to have a liquor license in this space  
24

25 Councillor Small said I guess, and thank you Mr. Connelly, and I apologize, I know we are kinda  
26 clashing a little bit today but the first point, the first point again is basing it solely off of someone  
27 else's due diligences which is not our, which isn't sufficient for us making a decision to say that  
28 someone else did their job right. The second part of it, if I understand correctly, says that it's all  
29 about the order in which these come. Now the question, and this would go back to the ordinance that  
30 governs this Special Use Permit is there's a, there's a basic conflict here between having an  
31 establishment within 500 feet of a liquor license. Now is that meant, I think the Mayor Pro-tem  
32 eluded to this earlier or I guess on the previous case by saying some parts of our Code seem to try  
33 and focus these together, somebody bid their idea back in 1994 was to keep these together but then  
34 one of the other ideas back in 1994 was to say that these could be no closer than 500 feet together.  
35 So you know I, I guess, could you say with assurance that this is meant to keep different adult  
36 entertainment establishments from locating within 500 feet of one another with liquor licenses or is  
37 it unclear about whether or not folks back in 1994, I don't know if folks here in the audience who  
38 have talked about being a part of forming these, could perhaps give us some additional information  
39 but in the absence of that, we need a clear answer on whether it prohibits that part of our ordinance  
40 or if this is about keeping two establishments from being that close to one another?

41

42 Harry (Pete) Connelly said Mr. Mayor, Councillor Small, the ordinance, like for example, in this

1 particular area, if you looked at it, this is probably one of the very few places you could let speak of  
2 the adult entertainment there, you could probably not have another adult entertainment location in  
3 this area. Then you would have to move to another M1 or M2 area, there are approximately two  
4 more areas in the City that would allow for adult entertainment establishments. Now having said  
5 that, a liquor license is basically can be in the M1 area and it can move itself into the adult  
6 entertainment area. It can move into there so it is not the same criteria, basically the State says this,  
7 our ordinance says in an M2 area you can have a liquor license, our ordinance going to the adult  
8 entertainment section says you can have an adult entertainment if you miss all the others, I mean if  
9 you fit all the other distances and you get your Special Use Permit. So this fits that and I can't say  
10 that the ordinance was designed to only have so many adult businesses, it's, if you meet the criteria  
11 for adult business you get it, if you meet the criteria for a liquor license then you should get the  
12 liquor license, it's the same expectation. Even though it's illogical I don't look at the law as being  
13 a very logical matter if its, law defies logic.

14

15 Councillor Small said sure, oh, yeah, okay. So you're saying with assurance that this does not violate  
16 the zoning requirement that it be, not be within 500 feet?

17

18

19 Harry (Pete) Connelly said yes sir.

20

21 Councillor Small said okay, thank you.

22

23 Mayor Miyagishima said thank you Councillor. Any other comments? Okay seeing none, Esther.

24

25 Esther Martinez-Carrillo, City Clerk said this is on Resolution 13-076. Councillor Silva.

26

27 Councillor Silva said no.

28

29 Esther Martinez-Carrillo said Councillor Smith.

30

31 Councillor Smith said yes.

32

33 Esther Martinez-Carrillo said Councillor Pedroza, absent.

34

35 Esther Martinez-Carrillo said Councillor Small.

36

37 Councillor Small said yes.

38

39 Esther Martinez-Carrillo said Councillor Sorg.

40

41 Councillor Sorg said no.

42

1 Esther Martinez-Carrillo said Councillor Thomas.

2

3 Councillor Thomas said yes.

4

5 Esther Martinez-Carrillo said Mayor.

6

7 Mayor Miyagishima said no.

8

9 Esther Martinez-Carrillo said motion fails three to three and one absent.

10

11 Mayor Miyagishima said okay.

12

13

14

15 Mayor Miyagishima called for the roll on the Motion to Adopt Resolution No. 13-076 and it Failed.

16 3-3 Councillor Pedroza was absent.

17

18

19

20 (12) Council Bill No. 13-016; Ordinance No. 2671: An Ordinance Amending and Repealing Las  
 21 Cruces Municipal Code Sections 28-1 Through 28-22; Amending and Repealing Las Cruces  
 22 Municipal Code Sections 28-51 Through 28-58; Adding New Las Cruces Municipal Section  
 23 28-59; and Repealing Las Cruces Municipal Code Sections 28-86 Through 28-91.

24

25 Councillor Small Moved to Adopt Council Bill No. 13-016; Ordinance No. 2671 and Councillor  
 26 Sorg Seconded the motion.

27

28

29

30 Jorge Garcia, Utilities Director gave an overhead presentation and said a lot of these changes are  
 31 clean up to integrate the Utility Ordinance with the Board Ordinance that created the Utilities Board  
 32 in 2007. This is only for Articles I and II and in the near future we will bring some changes to the  
 33 Wastewater and Sewer Ordinance and water conservation and make some changes to the Solid  
 34 Waste Ordinance to incorporate it into Chapter 8. We want to consolidate operational regulations  
 35 in the Utility Billing and Service Regulations document and provide clarification and changes to  
 36 outdated terminology. The major changes are to provide consistency with the Board Ordinance  
 37 reflecting the creation of the Utilities Board, approval of utility standards, determination of rates and  
 38 charges and the appeal process, service to comply with technical provisions, flexibility in the  
 39 requirements of the application for utility service and access to meters to emphasize safe access. We  
 40 want to incorporate payment schedules into the Utility Billing and Service Regulations document.  
 41 The Board proposed that the bill due date be changed from the current 15 days to 22 days but the  
 42 ordinance states 15 days so the Board couldn't implement that proposed changed so by moving this

1 to the Billing and Services Regulations, we would be able to implement the 22 days. The Utilities  
2 Board has reviewed these changes and has recommended approval through Resolution 12-13-011.  
3 The next steps are to have additional changes in other articles of the ordinance that will be presented  
4 to Council in the near future and the Solid Waste Ordinance that is currently under Las Cruces  
5 Municipal Code Chapter 25 will be updated and incorporated into Las Cruces Municipal Code  
6 Chapter 28.

7  
8 Mayor Miyagishima said overall I think this will be better for the residents.

9  
10 Councillor Silva said the big question I receive is why can't people who leave for the winter or  
11 vacate their property stop their trash service?

12  
13 Jorge Garcia said we have certain costs and if part of the population disconnects their service then  
14 the cost would have to be spread out among the remaining customers. That would be better handled  
15 through a Rate Case.

16  
17 Councillor Silva asked have we ever done any research regarding what those numbers would be?

18  
19 Jorge Garcia said we're gathering the numbers, now that we've done a better inventory since we  
20 went with the curbside recycling we'll have a better count of our part-time residents.

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21  
22 -----  
23  
24 Mayor Miyagishima called for the roll on the Motion to Adopt Council Bill No. 13-016; Ordinance  
25 No. 2671 and it was Unanimously Approved. 7-0

26  
27 -----  
28  
29 **X. BOARD APPOINTMENTS**

30  
31 None given.

32  
33 -----  
34  
35 **XI. NOTICE OF PROPOSED ORDINANCE(S) ----- 1.) *There will be no public discussion.***  
36 **2.) *A councillor may ask staff for clarification on the proposed ordinance(s).***

37  
38 (13) Council Bill No. 13-018; Ordinance No. 2673: An Ordinance Approving a Zone Change  
39 From A-2 (Rural/Agricultural) to an R-1A (Medium-Density, Single-Family Residential)  
40 District on a 2-Acre Parcel Located at 900 McCoy Avenue. Submitted by William D.  
41 Wright, Property Owner (Z2856).  
42

1 Mayor Miyagishima and Council agreed to bring this item back.

2

3 -----

4

5 **XII. CITY COUNCIL MEMBER BOARD REPORTS**

6

7 None given.

8

9 -----

10

11 **XIII. GENERAL DISCUSSION**

12

13 a.) Mayor

14

15 Mayor Miyagishima said I just want to say I'm proud of each of you for understanding the issue that  
16 was discussed earlier. I also want to wish everyone a happy Thanksgiving.

17

18

19

20

21 b.) City Council

22

23 Councillor Thomas said I just want to thank everyone who attended the reopening of Main Street and  
24 I would encourage people to participate in Small Business Saturday.

25

26 -----

27

28 Councillor Sorg said I just want to say happy Thanksgiving to everyone.

29

30 -----

31

32 Councillor Small passed out a letter to Council and said it was brought to my attention that the  
33 renewable energy credits are currently disallowed in our service territory for Purchase Power  
34 Agreements. I think this puts our economy at a disadvantage in the rapidly growing industry that  
35 takes advantage of our natural resources. I think there is an opportunity for us to petition the Public  
36 Regulation Commission to ensure that we are treated the same as folks within the PNM territory.

37

38 Mayor Miyagishima said I might encourage you to perhaps submit a resolution regarding this issue.

39

40 -----

41

1 Councillor Pedroza said I'm starting an intelligence gathering group to explore the issues with the  
2 renewable energy.

3

4

5

6 Councillor Smith said regarding the opening of Main Street, I know we are all grateful to Senators  
7 Bingaman and Dominici for making it possible with federal funds.

8

9 I am sending down two documents which one is in English and one isn't but this is an agreement that  
10 many people see who may be able to speak English but can't read it and based upon what they were  
11 told they would sign it. This past Friday I was at the one year celebration of the establishment of the  
12 reservation for the Fort Sill Apache and it is a 30-acre area but there aren't any Apaches living there  
13 yet. There have been some discussions whether or not we support things like having casinos there  
14 and my thought is it is a question of what is right. I would like to present to this group with moving  
15 forward with a resolution that would be in support of those rights being extended to that group on  
16 their reservation.

17

18 I also want to wish everyone a happy Thanksgiving.

19

20

21

22

23 Councillor Silva said I also want to thank everyone who came out to the reopening of Main Street  
24 on Saturday and Mr. Lujan deserves a lot of credit for all the work that he did in the Downtown area.

25

26 There has been a lot of effort in trying to make the canals and so forth appealing for recreation and  
27 it was nice to get an update that there is a Memorandum of Understanding in place but I think we  
28 need to take the extra step and complete it.

29

30 I was impressed with the four projects at \$275,000 that goes up to \$325,000 in grants that we  
31 approved today on our consent agenda. I want to congratulate Auguie and his staff for the work they  
32 do on getting grants for City programs.

33

34 Many of us are receiving items in our household containers regarding the garbage service and I really  
35 appreciate our staff doing this but one thing I would have added would be information regarding the  
36 recycling service.

37

38 An item that has come up recently is the Farmers Market lease of the Downtown area and I would  
39 support bringing all the people that are going to be affected to the table because as far as I know we  
40 are still working with the old contract and aren't even working on a new one.

41

1 Robert Garza, City Manager said the only thing I'm aware of is the draft resolution that has not been  
2 put on the agenda yet. It will give us direction in negotiating a little for the Farmers Market to use  
3 the space Downtown.

4

5 Brian Denmark, Assistant City Manager said staff is currently working on a draft and the resolution  
6 that was going to be brought forward is only giving the City the authority to negotiate to create the  
7 lease but it isn't ready in its final form yet because we're making sure that everyone involved has the  
8 opportunity to express their input before it is put together.

9

10 Robert Garza said the Farmers Market is currently working off an ordinance that sets aside  
11 Wednesdays and Saturdays so we'd like to negotiate a lease to delineate their use and make sure it  
12 is clear for everybody. We expect it to be a lengthy process and we want to make sure we have the  
13 direction of Council.

14

15 Councillor Silva said the Farmers Market meets regularly now and they have reached a point that  
16 they have now become a non-profit so they have made great strides this past year.

17

18 Regarding the Noise Ordinance, I don't know where that sits and I'm continually getting calls from  
19 residents regarding it so maybe we will want to put that on our 2013 agenda at some point.

20

21 There are Christmas lights up in the Downtown and I have to applaud El Paso Electric for  
22 committing themselves to \$75,000 over the next three years to making a premier and traditional  
23 Downtown Christmas event.

24

25

26

27 c.) City Manager

28

29 Robert Garza, City Manager said there is a work session next Monday and there is going to be a  
30 second topic regarding an update from El Paso Electric.

31

32 There are going to be impact fees going into effect January 1<sup>st</sup> and if Council wants to have a  
33 work session before that happens, the only opportunity for that would be on December 10<sup>th</sup> so we  
34 will set it up for that date.

35

36 On December 3<sup>rd</sup> the Mayor will be out of the country and the Mayor Pro-tem will be out of state  
37 so Council will need to select one of their members to Chair the meeting.

38

39

40

41 Esther Martinez-Carrillo, City Clerk said I just want to inform Council that the Attorney  
42 General's office will be conducting workshops regarding the Inspection of Public Records and

1 the Open Meetings Act on December 6<sup>th</sup> at 9:30 a.m.

2

3 -----

4

5 **Meeting Adjourned at 4:24 p.m.**

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