



**CITY OF CORNING  
CITY COUNCIL MINUTES  
TUESDAY, FEBRUARY 9, 2010  
CITY COUNCIL CHAMBERS  
794 THIRD STREET**

**A. CALL TO ORDER: 6:30 p.m.**

**B. ROLL CALL:**

**Council:**

**Becky Hill  
Ross Turner  
Toni Parkins  
John Leach  
Gary Strack**

**Mayor:**

All Councilmembers were present except Councilor Hill.

The **Brown Act** requires that the Council provide the opportunity for persons in the audience to briefly address the Council on the subject(s) scheduled for tonight's closed session. Is there anyone wanting to comment on the subject(s) the Council will be discussing in closed session? If so, please come to the podium, identify yourself and give us your comments.

Mr. Bucky Bowen and Mr. Dean Cofer addressed the Council questioning whether the Closed Session is a performance evaluation or was related to the payment of the City Attorney's retirement that is agendaized as item K-16 on the Regular Agenda. Mr. Bowen referred to Gov't. Code Section 54950 when stating his belief that discussion of Mr. Fitzpatrick's retirement in closed session does not fall under the classification of performance evaluation and could influence the Council's vote on the agendaized item (K-16). He and Mr. Cofer both stated their belief that this would not be legal. Mayor Strack stated that any decision relating to Item K-16 would be discussed in the public meeting. Mayor Strack stated that the City Attorney would provide guidelines to the Council on what they could legally discuss in closed session.

**C. ADJOURN TO CLOSED SESSION: 6:31 p.m.**

**PUBLIC EMPLOYEE PERFORMANCE EVALUATION:**

**Pursuant to Government Code 54957**

**Title: City Attorney.**

**Councilor Hill entered the Closed Session at 6:37 p.m.**

**D. RECONVENE AND REPORT ON CLOSED SESSION: 7:30 p.m.**

Mayor Strack stated that Council met in Closed Session for evaluation of the City Attorney and the Council gave him a good evaluation. He stated that the Council also looked at a letter received from outside Counsel relating to Item 16 listed on the Agenda.

**E. PLEDGE OF ALLEGIANCE: City Manager Stephen Kimbrough led the Pledge of Allegiance.**

**F. PROCLAMATIONS, RECOGNITION'S, APPOINTMENTS, PRESENTATIONS: None.**

Linda Lima, representing the Senior Center presented the Fire Chief with a signature card thanking he and the Volunteers for the hard work done for the Seniors and their donation of food.

**G. BUSINESS FROM THE FLOOR:**

Ron Walker addressed the Council on behalf of his Aunt, Gladys Nelson and Gary Price regarding his perception of a violation of their rights by the Corning Police Department. He also

stated he was taking civil action against a local resident, Sherry Searcy for what he believes to be a violation of his civil rights. Mayor Strack acknowledged receipt of a letter from Mr. Walker.

Another resident, Ruby Ann Tapp asked if the City had a "Noise Ordinance"; City Manager Kimbrough stated that it is listed in the zoning codes, not in the Municipal Codes, however the Police Chief stated that this is addressed in the Penal Codes. The resident stated that the Police Department has made numerous calls, some late at night, most recently at 9:50 p.m. on January 1<sup>st</sup> and again at 12:20 a.m. to Mrs. Nelson's residence at 918 Almond Street stating they have received complaints about noise at her residence. There was no music playing what so ever. Mrs. Nelson is ill and these disturbances are not good for her. These complaints keep coming from the same individual and this is harassment.

A meeting was scheduled with Police Chief Cardenas and Ms. Tapp to discuss this issue.

Kenneth Olgle from the First Christian Church addressed the Council regarding a barbecue/cook out for the poor and the community; do they need any type of permit for this? They were informed that the Parks are not reserved, it is on a first come, first serve basis. Mr. Olgle stated that they are also asking for sanitary cans for the poor to use. Mayor Strack informed the individual that he should come into City Hall and speak with City Staff about the permit requirements.

- H. **CONSENT AGENDA:** It is recommended that items listed on the Consent Agenda be acted on simultaneously unless a Councilmember or members of the audience requests separate discussion and/or action.
1. **Waive reading, except by title, of any Ordinance under consideration at this meeting for either introduction or passage, per Government Code Section 36934.**
  2. **Waive the Reading and Approve the Minutes of the January 26, 2010 Meeting with any necessary corrections.**
  3. **February 3, 2010 Claim Warrant - \$150,174.76.**
  4. **January 2010 Wages and Salaries - \$357,263.83.**
  5. **January 2010 – Treasurer's Report.**
  6. **January 2010 Building Permit Valuation - \$120,006.**
  7. **City of Corning Wastewater Operation Summary Report – January 2010.**
  8. **Approve Progress pay Estimate No. 4 in the amount of \$51,480 to Teichert Construction for the Airport Runway Improvement Project.**
  9. **Accept Resignation from Recreation Commissioner Shannon Boles.**
  10. **Resolution 02-09-10-01 Approving the Application for the Statewide Park Program Grant Funds.**
  11. **Ordinance No. 639, Regulating the Cultivation of Medical Marijuana: An Ordinance of the City of Corning adding a Chapter to Title 17 of the Corning Municipal Code that would regulate the cultivation of medical marijuana. (Second Reading)**
  12. **Ordinance No. 640, Adoption of Water Efficient Landscape Regulations: An Ordinance of the City of Corning providing authority for the City to adopt Water Efficient Landscape Regulations by Resolution of the City Council. (Second Reading)**

Mayor Strack stated if anyone is interested in applying for the Recreation Commission, please get an application from the City Clerk and get it to the City Clerk by the first of the week as the City has one applicant on file and plans to make an appointment at the next meeting. Councilor Turner verified that the applicant does not need to be a resident of the City because they would be filling the vacancy of a Commissioner that resides outside the City Limits.

Councilor Turner moved to approve Consent Agenda Items 1-12. Councilor Hill seconded the motion. Commissioner Leach stated that he would be voting in opposition of Item H-12 because

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he feels it should have gone back to the Planning Commission. He was informed that without pulling that item for further discussion and a separate vote he would be opposing all items listed on the Consent Agenda. He was then asked if he would like to pull Item H-12. He stated he would just vote no. Mayor Strack confirmed that Councilor Leach would be voting no on the entire Consent Agenda. The vote was then taken. **Ayes: Strack, Hill, Turner and Parkins. Opposed: Leach. Absent/Abstain: None. Motion was approved by a 4-1 vote with Leach opposing.**

I. **ITEMS REMOVED FROM THE CONSENT AGENDA:** None.

J. **PUBLIC HEARINGS AND MEETINGS:** None.

K. **REGULAR AGENDA:**

**13. Consider Senior Center Request for an Annual Increase of \$1,000 in Additional Funds.**

Senior Center Treasurer Mrs. Vandygriff addressed the Council giving a report of expenses and revenues the Senior Center receives. She outlined the duties of the Center Manager and her annual salary stating that even if the Center was rented out every weekend, it will not cover the wages of the Center Manager. They have raised the rent once. She stated that the Center had received three gifts totaling \$200,000, however they have had to utilize these funds for operational costs and the balance has been reduced to \$115,000 in certificates of deposit. The only money they receive is the \$2,700 from the City of Corning and \$800 annually from the Senior Nutrition Program. She informed the Council that the Senior Center would exhaust all of the capitol they have within the next 10 years. They asked for an additional \$1,000 funding annually from the City.

Councilor Leach asked the weekend rental fee; he was informed it was \$175. She stated that the Board would be considering raising the rent again. Mayor Strack asked if the Center was requesting the \$1,000 increase during this fiscal year or in our next fiscal year. She responded anytime the City could. Councilor Hill asked how long it has been since the \$2,700 was raised; the City Manager stated it has been about 15 years. Mayor Strack stated that this would definitely be discussed during the City's mid-year budget. He stated that the City's budget is very tight and he would like to consider this for the next year's budget. It was announced that this would be discussed during budget discussions.

**14. Corning Skate and Bike Park Association's Report and Request for Funding.**

John Richards addressed the Council asking for an update on land purchases, etc. that could affect the Skate and Bike Park Association. Mayor Strack stated that the City just approved under the Consent Agenda an application for a Statewide Park Programs Grant. Mayor Strack stated that he believes Planning Director John Stoufer does have a possible fall back plan if the Prop 84 Grant Funds do not come through. He also stated that there are additional funds outside the funds allocated to the Theater restoration that can be used for Parks. Mr. Stoufer stated that the City is currently negotiating with a property owner who has shown an interest in selling a piece of property that could be used for parkland. Mayor Strack stated that the Association has done a great job.

Mr. Richards outlined the various fundraisers and programs that the Association is currently working on, however they are currently on hold until the Federal Exemption Status is confirmed. He informed the Council of the stumbling blocks the Association is facing on another grant application that requires ownership of the land.

Darlene Dickison, Secretary of the Community Foundation reported on the Federal Exemption Status stating that they are now working on the month of July, our application was received in September. She also stated that she would need information prior to having a raffle, as she is required to report and send it in to the Attorney Generals Office.

**15. Accept Offer of Dedication of Excess Property, Assessor's Parcel No. 71-250-36 from Self Help Home Improvement Project.**

Mayor Strack introduced this item by title and Public Works Director John Brewer stated that this is property adjacent to Jewett Creek and that this dedication will provide access to the area upstream of the bridge on the northwest side. Councilor Leach moved to accept an offer of dedication of Assessor's Parcel No. 71-250-36 from Self Help Home Improvement Project. Councilor Hill seconded the motion. **Ayes: Strack, Hill, Turner, Parkins and Leach. Opposed: None. Absent/Abstain: None. Approved by a 5-0 vote.**

**16. Approve Payment of City Attorney Retirement Funds Held by the City.**

Mayor Strack introduced this item by title and stated that the City had received a ruling from the outside Attorney from Liebert Cassidy Whitmore today and relayed the attorney finding. Mayor Strack asked the City Manager to read the questions asked of the Attorney and the Attorney's answers which he did. These questions were:

1. "Does illegality of the CalPERS retirement benefit provision in the June 2005 contract between the City of Corning and the City Attorney render the entire June 2005 contract illegal?"  
**"No. For purposes of this letter, we have been told to assume that the provision in the 2005 contract that provides the City Attorney CalPERS retirement contributions for his City of Corning service is contrary to CalPERS law and regulations, and therefore is illegal. Because the unlawful CalPERS retirement contribution provision in the 2005 contract can be severed from the lawful compensation provisions however, the non-CalPERS provisions stand as a lawful and binding agreement."**
2. "Is the January 2010 contract between the City of Corning and the City Attorney illegal and unenforceable because it provides the City Attorney an amount of pay in lieu of the CalPERS retirement benefit?"  
**"No. A city council of a general law city like Corning has the authority to provide its City Attorney compensation in any amount it deems appropriate. (Government Code § 37206.) Nothing in the law prevents the City Council from prospectively providing the City Attorney an additional amount of compensation to in lieu of retirement or any other benefit."**
3. "Would it be an unconstitutional gift of public funds for the City Council to now contract with the City Attorney to provide him a lump sum that represents the value of the CalPERS retirement contribution that he did not receive through the 2005 contract?"  
**"No. The City Council can lawfully contract to provide the City Attorney a lump sum in the amount of the value of the retirement contributions that the CalPERS law prevented him from receiving under the terms of the 2005 contract. Such a contract would not constitute an illegal gift of public funds as prohibited by the California Constitution (Art. XI, § 10(a) and Art. XVI, § 6), if the contract provided the City Attorney the value of the CalPERS contributions he was promised in 2005 and did not receive. This would not be unlawful additional compensation, but instead would make good on the value of the total compensation that the City Attorney was previously promised, but did not receive. Any such contract should also require the City Attorney to waive all claims as to the 2005 contract."**

The Attorney from Liebert Cassidy Whitmore, Cynthia O' Neill, a partner in the firm concluded that:

"The provisions in the 2005 contract for CalPERS retirement were illegal as applied to the City Attorney because of his service as a City Attorney in another jurisdiction. The fact that the retirement provision in the 2005 contract is distinct, and is therefore severable

from the remaining parts of that contract, however, renders the balance of that contract valid and enforceable.

The 2010 contract is valid and enforceable because it does not contain any CalPERS retirement provisions. Under a "total compensation" concept, the City Council has authority to increase the amount of salary to make up for the value of the CalPERS retirement contributions.

The City Council can contract to provide the City Attorney the value of the retirement contributions, without violating the California Constitution's prohibition against gifts of public funds. This is because the 2005 contract identified CalPERS retirement benefits as part of the City Attorney's total compensation, yet the City Attorney did not receive any value from the CalPERS retirement provision. If the City Attorney also waives all rights to sue for the value of the missing component of total compensation, the public will receive the benefit of avoiding a lawsuit."

Councilor Turner then read the following prepared statement:

"Citizens of Corning, this statement is in regards to Item No. K-16 of the Corning City Council meeting for February 9, 2010 regarding Mike Fitzpatrick's accrued retirement contribution totaling \$46,970.18.

I have had nothing but a good relationship with Mike both as City Attorney and personal friend but this is economics!

During the City Council meeting, June 2005, it approved an employee service contract with Mr. Fitzpatrick. The starting salary was on 7/1/05 \$4,000 a month, 7/1/06 \$4,250 a month, 7/1/07 \$4,500 a month with retirement PERS 2% at 55. This action took place when I was on the County Board of Supervisors and was not able to ask the City to pursue a retainer of say \$2,000 plus on call as needed. The Corning City Council at its 1/26/10 meeting voted 3-2 to extend this contract with a raise to \$5,000 and adjustment for the year. It was requested that we hold this over until after the budget and look into the possibility of the City Attorney with a retainer but this was not done. I acknowledge that Mike has provided service on 2 major cases but how long do we continue to reward him for that with this salary.

Based on the above comments I will not support the City payment of \$46,970.18, as this is City money, nothing was contributed by Mr. Fitzpatrick."

Councilor Hill stated that these funds were part of his contract and contractually committed to him, the City has held them over as part of his compensation package.

Mayor Strack stated for the record that there has been no interest paid on this, however the City has collected interest on this amount while holding the funds. Councilor Leach confirmed that the City has continued to set aside, up until December 31, 2009 the retirement funds as promised in the 2005 contract. Mayor Strack stated that Mr. Fitzpatrick has provided the Council a letter which is in the packet stating that he is willing to meet with two Council members to review whether it would be more cost effective to go back to the old hourly charges rather than maintain the part time status. Mayor Strack suggested that this might be a good idea to meet with Mike and explore the possibility that this might save the City money.

Councilor Leach stated he would like to meet with Mr. Fitzpatrick to discuss this issue before voting on this issue. Mayor Strack stated that the problem with that is that we made a commitment with Mr. Fitzpatrick and we need to act on this.

Mr. Bowen addressed the Council stating his opinions opposing payment of these funds because he still believes it to be illegal. Mr. Cofer also stated his opposition to paying Mr. Fitzpatrick the funds returned by CalPERS and why he remains opposed to this. He referred to the fact that the

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County of Trinity and the City of Anderson also contributed to Mr. Fitzpatrick's retirement. The County of Trinity did not give these funds to Mr. Fitzpatrick. He also stated that based on comments made last week to the Maywood Women's Club and a published news article in the Corning Observer, Councilor Becky Hill will be leaving the Council some time this month. He respectfully suggested that the honorable thing for her to do would be to refrain from voting on this controversial issue and let a newly constituted City Council make the decision on how to handle this matter, after all, they will still be around to take the bows or the heat that this decision brings to light.

Councilor Hill responded to Mr. Cofer's comments stating that a decision had not yet been made, and that had a decision been made, she would not refrain from voting on any issue that comes before this Council until such time as she does resign, citing that she would not be a "Lame Duck" Council member. If she were not reelected she would be voting on issues before the Council after the elections until such time as the new Council takes seat in December. She will continue to vote on issue before the Council for as long as she remains a Council member and take the good, the bad, and the ugly that goes with it.

Benny Brown stated that he is not a resident of the City however his business has provided a large sum of money via taxes to this Community. He stated that he might not be very popular after tonight when he states his opinion, however it makes no sense to give this money returned by CalPERs to Mr. Fitzpatrick. As Mr. Cofer stated the County of Trinity had a similar agreement with Mr. Fitzpatrick and they didn't do the "Good Ole Boy" thing and return the funds.

Mr. Fitzpatrick responded stating that he contributes to the Corning tax base; he has purchased vehicles here also, one or two from Mr. Brown and he takes exception to an inference that somehow he is trying to do something dishonest or taking advantage of the City. He then outlined the background leading up to tonight's discussion stating that prior to five years ago he billed the City on an hourly basis. With the 2005 contract he stopped charging the City for litigation time (hourly charges spent on litigation issues) in return for retirement benefits. Basically, five years ago the City stated Mike, we will let you have some money in retirement if you won't charge us for litigation, it is not a bonus.

Councilor Hill confirmed that the City Attorney would be taxed on these funds the same as income; the taxes could not be deferred.

Councilor Hill moved that Mayor and Council find:

- That the 2005 Employment Contract with the City Attorney Michael Fitzpatrick is a legal contract binding the City, and
- That the City Councils review of the circumstances and communications surrounding this citizens complaint shows no wrongdoing on the part of the City Attorney, and
- That the payment of accrued retirement funds totaling \$46,790.18 is not a "gift of public funds" and
- Move that Mayor and Council approve the Release of Liability Agreement prepared by Outside Counsel, authorize the Mayor and Council to sign the Agreement and approve the payment of \$46,790.18 to Michael Fitzpatrick, Corning City Attorney.

Councilor Parkins seconded the motion. **Ayes: Strack, Hill, and Parkins. Opposed: Turner and Leach. Absent/Abstain: None. Approved by a 3-2 vote with Turner and Leach opposing.**

L. **ITEMS PLACED ON THE AGENDA FROM THE FLOOR: None**

M. **COMMUNICATIONS, CORRESPONDENCE AND INFORMATION: None**

**N. REPORTS FROM MAYOR AND COUNCIL MEMBERS:**

17. **Hill:** Reported on a conference call with the League of California Cities regarding an initiative measure to prohibit that State from taking funds used for Transportation or Local Government Projects and Services. She would like all Council members to take a petition and collect at least 10 signatures and return to Steve by the first part of next week (Tuesday).
18. **Turner:** Reported on an interview he did with Channel 7 relating to flooding at the animal shelter and suggests that the City look into another spot for the animal shelter.
19. **Parkins:** Asked the Staff and Council to start a dialog about our animal shelter and discuss the state of the shelter and never become a kill shelter again.
20. **Leach:** February 18<sup>th</sup> Community Action Agency is a planning session.
21. **Strack:** Nothing.

**O. ADJOURNMENT!: 9:00 p.m.**

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Lisa M. Linnet, City Clerk