

**THE WORKSESSION
OF THE MAYOR AND CITY COUNCIL OF BENSON, ARIZONA
HELD MARCH 24, 2014, AT 6:00 P.M.
AT CITY HALL, 120 W. 6TH STREET, BENSON, ARIZONA**

CALL TO ORDER:

Mayor King called the meeting to order at 6:00 p.m. Mayor King then led the public in the Pledge of Allegiance.

ROLL CALL:

Present were: Mayor Toney D. King, Sr., Vice Mayor Al Sacco (arriving at 6:06 p.m.), Councilmembers Pat Boyle, Ron Brooks, Jeff Cook and Peter Wangsness. Absent was: Councilmember Moncada

NEW BUSINESS:

1. Discussion and possible direction to Staff about material terms to be included in draft ordinances(s) for a Benson Economic Development Committee that will, perhaps, be subsequently considered for adoption

Councilmember Brooks stated he had given the Council a rough draft of what the Economic Development Committee should look like. Councilmember Brooks then stated he had talked to a number of people about how they would like the committee to look, adding he would rather have put the committee together and gotten the input that way, but a lot of people seemed to have an idea of what it should look like up front. Councilmember Brooks then stated with Mr. Insalaco's help, he put together a rough draft of how the committee should run, adding he did have one thing he didn't put in the draft which was that he would like the committee to get input from anyone who wants to be part of it or who would come to the committee meetings. Councilmember Brooks then stated a Call to the Public isn't always the best way to do that, because of the restricted dialogue, adding he would like to have the committee membership formed with some voting members and some non-voting members. Councilmember Brooks then stated voting members would have to attend all the committee meetings while the non-voting members wouldn't have to, but would still be able to give input and suggestions. Councilmember Brooks then stated he would like to see the Chamber and the Southeastern Arizona Economic Development Group on the committee and he would also like to see the youth involved. Councilmember Brooks then stated he hadn't had time to get out and promote the committee like he wanted to, adding the advertisement for members only resulted in 4 applications, but he knows he can get a lot more if he gets out there, which is what he would like to do. Councilmember Brooks then stated he would like an extension on the deadline for applications, adding he would like to do that, as well as going to the high school to see if there might be an outstanding youth who would like to be on the committee and possibly someone from the senior community, as well as a few residents. Councilmember Brooks then stated he mostly had business people interested, adding some of them said they would put in applications, but he thinks they missed the deadline, so he would like to ask for an extension of the deadline.

Councilmember Boyle agreed with Councilmember Brooks, stating he didn't want to short-change the committee and would like to allow as much time as Council could, while still being prudent about getting it done as quickly as possible. Mayor King agreed. Councilmember Cook stated he disagreed, but was not going to expand on why. Councilmember Brooks then asked the Council if the draft looked good to them and again asked for an extension on the deadline for the membership applications to be submitted. Mayor King stated he would need to look over the draft with Councilmember Brooks asking if another worksession would be warranted. Council agreed to another worksession on the Economic Development Committee.

Councilmember Brooks then stated he didn't know if another advertisement was needed, adding he thought he could get membership applications just by getting out. Councilmember Boyle stated he could help Councilmember Brooks.

Councilmember Brooks then moved to extend the deadline for membership applications until April 11 with a worksession on the Economic Development Committee; the terms of its membership and the way the committee will function to be scheduled on April 14 before the regular Council meeting. Seconded by Councilmember Boyle. Motion passed 5-1 with Councilmember Cook voting nay.

2. **Discussion and possible direction to Staff regarding City Council Policies and Procedures, and/or City Code as related to City Council conduct or procedures**

City Clerk Vicki Vivian addressed Council, stating the Council Policies and Procedures has been brought to Council in worksessions to address basic Council proceedings, actions and expectations. Ms. Vivian then stated at a worksession held on August 12, 2013, Council decided to hold as many worksessions as needed to get through the document, adding there were some sections Council wanted to revisit with new legal counsel in place and City Attorney Gary Cohen was since hired. Ms. Vivian then stated the sections Council wanted to revisit were Section VIII – D, Section VIII – G and Section IX, adding if Council would like to revisit those issues with Mr. Cohen present, they can do so and once they are finished, Staff will incorporate all comments and revisions into the document, have legal review and then present it to Council for possible action.

Ms. Vivian began with Section VIII – D, "Motion of Direction" stating at the worksession held on November 25, Council had discussed giving Staff direction that wasn't as clear as it could have been and that there was discussion on whether direction would require a motion and a vote with Councilmember Brooks stating the issue could be revisited after the Council had new legal counsel with the Council agreeing. Mr. Cohen stated he didn't feel a motion and vote was required, but he thought it was a good idea. Councilmember Brooks stated he felt a vote only took a second and by doing so, the public wouldn't think one Councilmember did something on his own. Council agreed. Mr. Cohen stated for the record to be clear, the consensus of the Mayor and Council was to leave Section VIII – D as it was in the draft with the Council agreeing.

Councilmember Brooks then asked about tabling issues, stating he didn't know if it was in the State law, but on a number of Councils, when a Councilmember tables something, he has to be the person who "un-tables" the issue before it can be placed on another agenda for the Council to address it, and asked if that was correct. Mr. Cohen stated if Councilmember Brooks was referring to a vote to have an item removed from the agenda, he didn't think there had to be another vote to put it back on the agenda and that the issue could go back on the agenda in the same manner any other issue was placed on the agenda, adding this was based on the interworking of the Mayor and Council and the City's ordinances, but he would be happy to examine the question further, if needed. Councilmember Brooks then stated what he meant was that if a Councilmember moved to table an issue, that the same Councilmember would have to "un-table" the issue for the Council to address it with Mr. Cohen stating if the issue was successfully voted on to table it, then for the Council to address it at the same meeting would require a successful motion to "un-table" it or to address it, but for the issue to be placed on a future Council agenda would not require such action. Councilmember Brooks again explained that he was asking about a Councilmember tabling an issue and that for the Council to address it, the Councilmember who originally tabled it, must "un-table" it with Mr. Cohen stating there are various circumstances, adding if a Councilmember moved to table an issue until a certain date, the issue would be placed on an agenda at that date; if the motion was to table the issue until the Council had more information, then the issue would be placed on an agenda after the information was obtained and it would be appropriate to do so, but that for the issue to be placed back on any agenda would not require a Councilmember to "un-table" it as Councilmember Brooks is referring to, noting it could be placed on any agenda the same way other issues are placed on an agenda. Councilmember Brooks then stated he believed the Councilmember who tabled an item would have to "un-table" it before the Council

could address it and he would get the information he had to Mr. Cohen to review with Mr. Cohen stating he would be happy to look at it.

Ms. Vivian then moved to Section VIII – G, “Abstention” stating the Council had briefly discussed a Councilmember abstaining and whether or not they should be allowed to address the Council as a member of the public, adding some Councilmembers felt they were still be a member of the public and should not give up the right to do so, while others felt the conflicted Councilmember should not be allowed to address the Council. Ms. Vivian stated this discussion went back and forth before the Council agreed that this would be a good subject for discussion with the new City Attorney.

Mr. Cohen then addressed the Council stating there are two separate issues he would like to address, stating the first is whether a Councilmember who is abstaining is required to explain the reason for the abstention, which is what the draft language proposes, adding he does not think it is required and he would not recommend requiring it. Mr. Cohen then stated he thinks a member of the Council has the right to abstain for a vote for whatever reason they want and they don’t have to explain that on the record. Mr. Cohen then stated the second issue on a Councilmember addressing the Council as a member of the public has come up a few times and he has looked into it, adding it is a very dicey issue for the City Attorney. Mr. Cohen then stated he is referring to a situation where a Councilmember doesn’t have a conflict necessarily comes off the dias and goes to the podium and speaks to the Mayor and Council, supposedly taking off their Mayor or Council hat and talking about issues, adding he has actually made inquiries to a number of City Attorneys and have gotten various answers, but he will say from his perspective, it is very uncomfortable for him when that happens. Mr. Cohen then stated he thinks the best practice is to allow the Mayor or Councilmember who has a conflict of interest and can’t vote on a particular issue, such as a zoning issue on their own property, to address the Mayor and Council to give their input or request on how the vote should be, adding he sees no problems with that, but stated other than that situation, the Mayor or a member of the Council coming off the dias and speaking to the Council as a member of the public when they are not conflicted on any particular issues really puts a lawyer and the law in question, adding there is no clear answer on this. Mr. Cohen then stated he had looked into it and it was his recommendation to adopt a policy reflecting the practice that when a legal conflict of interest occurs, the conflicted member of the Council may address the Mayor and Council on the issue, but when no such legal conflict of interest occurs, they not be allowed to do so, adding again, there is no clear law on the subject.

Councilmember Wangsness stated he believed the current draft of the policies and procedures required a Councilmember who had a conflict of interest, to leave the dias with Mr. Cohen stating he was referring to a situation pursuant to State law where the Mayor or Councilmember has a conflict that would preclude them from voting on a particular issue, which happens from time to time, and State law requires them to leave the dias and to not vote. Councilmember Boyle stated he didn’t think the Councilmember had to leave the room, but could just sit down with the public. Mr. Cohen then stated in a situation where the Mayor or Councilmember had a personal interest in an issue and could not vote on it legally, he could understand if they wanted to address the Mayor and Council during the Call to the Public, adding it was acceptable and should be allowed, but other than a legal conflict of interest, the issue becomes very gray. Mr. Cohen then stated he couldn’t tell the Council it was legal or illegal, but he would say it was uncomfortable for a City Attorney, adding if it wasn’t done or wasn’t allowed as a matter of policy, it would be easier for the attorney and it would be his recommendation to adopt such a policy. Discussion on this issue continued with Councilmember Boyle speaking about how a Councilmember who was not legally conflicted about an issue would be able to discuss the issue, asking if the Councilmember should place the item on a Council agenda and participate in the discussion when the issue was addressed by the Council with Mr. Cohen stating that would then allow the Councilmember to be part of a discussion on an issue that he was not legally conflicted on, adding if the Councilmember were legally conflicted, he would be allowed to address the Council at the Call to the Public.

Councilmember Wangsness then stated his question was whether or not the Councilmember with a legal conflict of interest was required to leave the dias, adding the Council had an Open Meeting Law training session with Mr. Sims and he recalled being told that the conflicted Councilmember did not have to leave

the dias. Mr. Cohen stated he could check on it, but whether the Councilmember left the dias or not, he felt the issue with Section VIII – G was paragraph 2 regarding the Councilmember addressing the Council and asked if the Council wanted to adopt a policy that would allow the Mayor or a member of the Council to take off their hat and speak to the remaining Council as a member of the public during the open Call to the Public or not, adding he knew the Council had worksessions where it and the first amendment were discussed, and that there are differing opinions because the law is not clear.

Councilmember Brooks spoke about how important both appearances are and that the public trust the Council, adding he likes the idea of a Councilmember who has a legal conflict of interest being required to leave the dias during that issue. Councilmember Brooks then stated he also had a problem with a Councilmember addressing the Council during the Call to the public, adding the Councilmember may be addressing the Council as a public person, but everyone knows they are a Councilman, and by addressing the Council, they are still weighing in on the issue, whether they are allowed to vote on it or not, but then stated if a Councilmember's property was the subject of a zoning issue, he felt the Councilmember had the right to defend themselves against the change and address the Council, so he was unsure of how to deal with these situations. Councilmember Boyle stated Mr. Cohen's suggestion of a policy was right in line with Councilmember Brooks' concerns. Mr. Cohen agreed, stating the ability of a Councilmember addressing the Council as a member of the public during the Call to the Public being allowed or limited to a legal conflict of interest issue would be acceptable, but any other situation where there was no legal conflict of interest would not be acceptable, adding that would be his recommendation for a host of reasons. Vice Mayor Sacco asked if Mr. Cohen could come up with guidelines of his recommendation with Mr. Cohen stating if the policy he was recommending was agreed to by Council, he would draft the necessary language for Council consideration, adding the Council could direct him through a motion, second and a vote to draft such language.

Councilmember Wangsness stated his question was whether the Councilmember with a legal conflict of interest was required to leave the dias or not with Mr. Cohen stating he would check on that issue, but what concerned him was whether or not the Mayor or a Councilmember choosing to abstain on any issue, is legally required to disclose why, adding he did not believe it was required. Mr. Cohen then stated he would come back with draft language that was consistent with the law, adding for clarity that he would be addressing 3 issues after receiving the direction from Council to do so; 1) being required to state why a Councilmember is abstaining, 2) whether or not a Councilmember with a legal conflict of interest is required to leave the dias or not, and 3) having a Councilmember addressing the Council as a member of the public on issues where both a legal conflict of interest exists and where a legal conflict does not exist. Councilmember Brooks stated Mr. Sims (who presented the Open Meeting Law Training to Council) is substantially educated in Open Meeting Laws, and told the Council they were not required to leave the dias when a conflict of interest existed, however, Councilmember Brooks stated his contention was that a member remaining on the dias could give the impression that they were still a part of the discussion and he would prefer the conflicted Councilmember leave the dias to assure the public that they were not part of the discussion and make the public more confident in the Council. Councilmember Wangsness stated his recollection was that Mr. Sims recommended the conflicted Councilmember remain on the dias so they couldn't be accused of participating from the audience with head-nodding and other gestures, adding Mr. Sims' perception was that the conflicted Councilmember was better off remaining on the dias, doing nothing. Councilmember Cook stated that is also what he remembered. Mr. Cohen stated when it comes time to adopt language on the issue of being required to leave the dias, the Council could be more restrictive in their policies, noting that even if State law does not require the conflicted Councilmember to leave the dias, the Council could still implement such a policy, if they chose.

Mr. Cohen then stated he was looking for direction from Council regarding the 3 issues he spoke about earlier; 1) being required to state why a Councilmember is abstaining, 2) whether or not a Councilmember with a legal conflict of interest is required to leave the dias or not, and 3) having a Councilmember addressing the Council as a member of the public on issues where both a legal conflict of interest exists and where a legal conflict does not exist. Councilmember Brooks then moved to have the Council revisit

Section VIII – G at the next worksession for the draft Council Policies and Procedures. Seconded by Councilmember Wangness.

Councilmember Cook then stated he didn't want Mr. Cohen to be surprised at Councilmember Cook's position when the Council revisits the language with what the majority of the Council wants drafted, adding he feels that there is a majority on this Council that wants the City Attorney and the Mayor to enforce their selective suppression of free speech and there is a majority on Council who wants the Mayor to be the primary instrument in that. Councilmember Cook then stated there is no procedure or enabling statute that allows enforcement of selective free speech suppression against another Councilmember.

After no other discussion, Mayor King called for a vote. The motion passed 5-0 with Councilmember Cook not participating. During the course of the vote, Councilmember Brooks stated Councilmember Cook needed to say why he was abstaining, with Councilmember Cook disagreeing. Councilmember Brooks then stated he would like an answer from Mr. Cohen on the issue with Mr. Cohen stating if there is a majority of the Council participating, Councilmember Cook was not required to vote. Councilmember Brooks asked if a Councilmember would have to state, in the future, why he was not participating with Councilmember Cook stating he did not have to state why. Councilmember Brooks then stated he would like an opinion from Mr. Cohen on that issue in the future.

Councilmember Cook then stated the Council had an extensive discussion about how many members of the Council would be required to pass a motion or take action should several Councilmembers abstain, adding if 4 Councilmembers were to abstain, he didn't feel language should be left in the Policies and Procedures that may allow 2 of 3 remaining Councilmembers to approve any action. Ms. Vivian stated she had noted that she would need to discuss this issue with the City Attorney since the Council just discussed being able to abstain for any reason at all and not having to state why, adding under a different section in the Policies and Procedures, the Council consensus was that unless there was a legal conflict of interest, Councilmembers could not abstain and would be required to vote on the issue. Ms. Vivian then stated she wanted to address this with the City Attorney since the Council now had conflicting sections in the Policies and Procedures. Councilmember Cook then stated if the issue would be revisited in both sections, the Council could continue onto the next issue with Ms. Vivian stating as it is right now, the sections contradict each other, adding she would discuss the sections with the City Attorney and they would be brought back to Council for their consideration.

Ms. Vivian then moved to Section IX – Open Meeting Law Violations, stating the Council went over this subject in depth at the October 10 meeting held with Attorney Bill Sims and Councilmember Brooks had said that he would like to get the new City Attorney's opinion on this issue when the Council hired a new City Attorney. Ms. Vivian then stated the Council had focused on emails. Councilmember Brooks stated emails are a big problem, adding if he sends an email to a Councilmember and they forward it on to another Councilmember who then forwards it to another Councilmember, it could create a violation since it could ultimately be forwarded to a quorum of the Council. Councilmember Brooks then stated the Council may want to consider adding a statement to their emails requesting it not to be sent to other Councilmembers to keep that from happening, but again, he would like to get the new Attorney's opinion on how to handle this. Councilmember Wangness stated it also probably wouldn't hurt to not permit blind copies on emails, adding otherwise, a Councilmember could send the email and blind copy 3 more and mistakenly violate the Open Meeting Law and no one would know but the Councilmember who sent the email. Councilmember Brooks asked if Councilmember Wangness meant that a statement should be added to the email with Councilmember Wangness stating he was saying the Council shouldn't use blind copies to each other to avoid the Open Meeting Law, adding a Councilmember may respond to another Councilmember not knowing the first person blind copied others and could violate the Open Meeting Law without even knowing it. Ms. Vivian then addressed Council stating she felt the Council shouldn't blind copy anyone, adding when a Councilmember acts as a Councilmember through their email, it is a public document and it would be her recommendation that the Council not blind copy anyone ever on Council communications. Ms. Vivian then stated she also recommended that the Councilmembers never hit "reply all" when replying to an email, adding some Councilmembers are in the habit of doing so, but if they ever added their opinion

to a reply and sent it to all the other Councilmembers, it would be a violation of the Open Meeting Law and encouraged Councilmembers to eliminate that habit altogether.

There was further discussion on emails with Council discussing emails being forwarded and noting that the practice was ok as long as the message was not forwarded to a quorum of the Council, but that the Councilmember forwarding the message may need to understand that the email may have already been sent to some Councilmembers. Mr. Cohen then stated he was hearing the Council wanting some language drafted in this section that precludes the Mayor and Council from blind copying anyone when they send an email and adding language as part of a “stamp” that would go on all of the Mayor and Council’s emails, adding the language would basically advise the Mayor and Council and everyone who receives the email about the need to comply with the Open Meeting Law and to not forward it such that 4 or more members of the Mayor and Council receive it.

ADJOURNMENT:

Councilmember Brooks moved to adjourn at 6:46 p.m. Seconded by Councilman Wangsness. Motion passed 6-0.

Toney D. King, Sr., Mayor

ATTEST:

Vicki L. Vivian, CMC, City Clerk