

A regular meeting of the Astoria Common Council was held at the above place at the hour of 7:00 pm.

Councilors Present: Nemlowill, Jones, Price, Brownson, and Mayor LaMear.

Councilors Excused: None

Staff Present: City Manager Estes, Parks and Recreation Director Cosby, Finance Director Brooks, Deputy Fire Chief Paul Gascoigne, Police Chief Spalding, Public Works Director Harrington, and City Attorney Henningsgaard. The meeting is recorded and will be transcribed by ABC Transcription Services, Inc.

## PROCLAMATIONS

### **Item 3(a): Emergency Medical Services Week – May 20-26, 2018**

Mayor LaMear read the proclamation declaring the week of May 20-26, 2018 as Emergency Medical Services Week.

Unidentified Speaker presented a plaque to the City from Medics Ambulance Service.

### **Item 3(b): National Historic Preservation Month**

Mayor LaMear read the proclamation declaring the month of May as Historic Preservation Month.

## REPORTS OF COUNCILORS

**Item 4(a):** Councilor Nemlowill had no reports.

**Item 4(b):** Councilor Brownson reported that the Budget Committee met with Staff a few weeks ago. The budget was easy to understand and review because Staff did an excellent job putting it together and presenting it. Staff has kept Council well apprised of their priorities and needs throughout the year and they have made the most of the tight budget. He continues to stay involved with the Oregon League of Cities Taxation and Finance Committee and Community Development Committee. Understanding the interactions between cities and the State has been a great learning process. It is important to advocate on behalf of Astoria to the State. He attended a work session with Oregon Department of Transportation (ODOT) to review upcoming projects, which Astoria can opt out of at any time. The projects are intended to make traffic safer and easier to navigate. He represented the City on a new cruise ship, the Silver Explorer, which only carried 140 passengers, making it the smallest cruise ship to every visit Astoria. The ship spends the winter in the Antarctic doing educational explorations and will eventually go up to Alaska, across the Aleutian to Russia and Japan, down to the Philippines and Hawaii, and finally back down to South America. He and the Captain exchanged plaques. He gave the City's plaque to Frank Spence to share with the Port.

**Item 4(c):** Councilor Price reported that she recently visited North Davidson arts district in Charlotte, North Carolina and was surprised to see that the district did not have any art galleries. She also saw a story in the newspaper about major changes that would affect thousands of jobs in the city. However, the story made no mention of the people who would be impacted or what the citizens thought of the changes. When Astoria's local media does a story on even small businesses, the story always includes the people. She was proud to be in Astoria.

**Item 4(d):** Councilor Jones had no reports.

**Item 4(e):** Mayor LaMear complimented Director Brooks and City Manager Estes for the wonderful work they did on the budget. She has heard that budget hearings used to last five or six nights. Staff worked hard to prepare and get through the budget ahead of time, so they finished this year's hearings in one

night plus one hour. She attended a luncheon at Tongue Point to honor local law enforcement. The culinary department students prepared the meal. She announced the passing of Aaron Crockett, Astoria Parks and Recreation Advisory Board member and detailed his contributions the community. His celebration of life was scheduled for May 20, 2018. She called for a moment of silence in honor of Mr. Crockett.

#### **CHANGES TO AGENDA**

No changes.

#### **CONSENT CALENDAR**

The following items were presented on the Consent Calendar:

- 6(a) City Council Minutes of 4/2/18
- 6(b) Boards and Commission Minutes
  - (1) Planning Commission Meeting of 2/27/18
  - (2) Planning Commission Meeting of 3/27/18
  - (3) Historic Landmarks Commission Meeting of 2/20/18
  - (4) Historic Landmarks Commission Meeting of 3/20/18
- 6(c) Resolution Establishing Community Development Block Grant Fund #125

**City Council Action:** Motion made by Councilor Nemlowill, seconded by Councilor Jones, to approve the Consent Calendar. Motion carried unanimously. Ayes: Councilors Price, Jones, Nemlowill, Brownson, and Mayor LaMear; Nays: None.

#### **REGULAR AGENDA ITEMS**

##### **Item 7(a): Presentation by the Neighbors of Birch Field Regarding Birch Field**

Following the February 14th, Special City Council meeting and the press coverage of the possibility of sale of the Park, Lisa Morley and several Alderbrook neighbors have expressed the importance of keeping Birch Field as open green space and have expressed interest in an adoption agreement for the care and maintenance of the field. Similar agreements have been made at other City parks such as the First US Post Office site, thus reducing the load on the City Parks staff to maintain the sites. Lisa Morley and the neighbors of Birch Field wish to speak and make a presentation to City Council on their interest and commitment to Birch Field.

During the February 14th Special City Council meeting, City Council directed staff to continue investigating and provide additional information regarding the sale of the park. This information was completed prior to the scheduling of this presentation and is included with the memo.

It is recommended that City Council determine whether to proceed with selling the property or to proceed with negotiating maintenance agreements with the neighbors of Birch Field.

Lisa Morley, 4908 Cedar St, Astoria, gave a PowerPoint presentation detailing the proposal to establish the Friends of Alderbrook Parks and to adopt Birch Field through a maintenance agreement with the City. The presentation included brief history of the park, efforts to collect data from park users on how to improve the park, and procedures used to develop the proposal. She presented Council with copies of their petition.

Councilor Brownson said when Council began considering properties to sell, Staff was not able to keep up with the maintenance of Birch Field. The City has asked hotels for more tax money to help support parks. Therefore, the City needs to do all it can to make parks manageable. He believed this proposal was a great outcome. Immediately after the February 14<sup>th</sup> meeting, Post Office Park and Tidal Rock Park were adopted. He believed the enthusiastic response from Alderbrook was great.

Ms. Morely said the neighborhood was excited to pursue the opportunity to develop a Friends group.

Councilor Jones stated it was terrific to see so many groups of neighbors in the community come together. He was glad that the possibility of selling Birch Field has inspired the enthusiasm of so many neighbors to maintain and improve the park. Simple things like park benches make the park more enjoyable to more people.

Councilor Price asked if Staff supported the proposal. She was concerned that such an extensive proposal might create a burden on Staff. Director Cosby said she spoke with Ms. Morley about the proposal a few weeks ago and had provided Ms. Morley with details about what would be required as part of a model park adoption. City Manager Estes asked if Council wanted Staff to meet with Alderbrook residents to develop an agreement for Council to consider.

Ms. Morley confirmed that only maintenance was being proposed at this time. Any park improvements would be formally proposed for approval.

Councilor Price stated she was in favor of the basic Friends agreement the City has for other parks.

Councilor Jones said he was in favor of Staff working the neighborhood to develop a Friends agreement for Council to consider. If a Friends agreement is formed, he would withdraw his previous support to remove the park's designation.

Councilor Nemlowill explained that Council discussed selling Birch Field because the Parks Department has more to take care of than resources. The condition of this park reflected that lack of resources. She was concerned about the follow through of the proposal and questioned how sustainable it would be. But she believed it was worth a try. She supported the neighborhood working with Staff to form a mutually beneficial agreement. Regular maintenance and new amenities could increase usage of the park.

Mayor LaMear called for public comments.

Mike Abrams, 4880 Ash St, Astoria, asked how the 2 percent increase in transient room taxes collected in 2016 had been allocated in the budget. Birch Field was made of sawdust infill so it is not buildable land. The tree study done last summer was a waste of money because it was done by someone from Orange County, California who did not know what firs, spruce, or hemlocks were. The baseball field is being used as an ATM. If the park is filled with water, residents' basements will flood. The backstop was sinking into the sawdust, so the park needs water drainage anyway. The residents should not have to take care of the park because they pay taxes. The City should mow it twice a year and the residents will take care of it as they have for 40 years.

Larry Bondurant, [53:42] 5141 Birch St, Astoria, said he purchased his house in 1980. At that time, the ballfield was maintained by the City. Only about four or five years ago the City stopped maintaining the park. He believed it was a drastic solution to remove the park designation of a public open space because the City could not solve the problems. He recommended the City allow the neighborhood to take care of the park while the City resolves its issues. The City should not deprive future Councils and Parks Directors from coming up with a solution.

Cheryl Waite, 486 47<sup>th</sup> St, Astoria, said she has lived in Alderbrook since 1974. She has emailed the Mayor and Councilors with her views. She did not believe the residents should have to beg the City to let the neighborhood keep the property. It is public property and she did not believe the City should discuss selling it. The City is well aware of how strong the Alderbrook community is and if they say they will maintain the park, they will.

Kathryn Olson, 5059 Birch St, Astoria, said it was her personal opinion that the City was contradicting itself. The City imposes fees and penalties on homeowners who allow their properties to become derelict. It is possible that some of these homeowners do not have the resources to maintain their homes according to the City's standards. Yet, the City has not maintained their parks due to lack of resources, causing the parks to become derelict. This is a contradiction. The community had been told that because the ball field on Birch Field is the least utilized, the City chose to consider selling it. The ball field is not utilized to its full potential because the City no longer maintains the field. She asked the City to keep and maintain the parks for the children of Astoria.

Jim Rafferty, 4825 Birch St, Astoria, said he lives in one of the mill houses below street level about half a block from Birch Field. If multi-unit housing were built on Birch Field, the runoff could travel into basements like his. He had photographs showing massive amounts of water from Birch Field almost up to what would be 50<sup>th</sup> Street and near Alderbrook Station. He wanted to know where the water would go if the property were developed. The biggest French drains would not be sufficient during a high winter tide.

**City Council Action:** Motion made by Councilor Jones, seconded by Councilor Price, to direct Staff to negotiate a maintenance agreement that includes future improvements at Birch Field with the Friends of Alderbrook Parks. Motion carried unanimously. Ayes: Councilors Price, Jones, Nemlowill, Brownson, and Mayor LaMear; Nays: None.

Mayor LaMear asked the community to let the City know if they become aware of places to build affordable housing. The City wants to keep the parks, but also wants to refrain from increasing homelessness.

Councilor Brownson appreciated what the Alderbrook neighborhood was doing and believed it would be a great help. He noted that Councilors were happy to speak with residents about their concerns. He clarified that the Council did not make a decision to sell Birch Field; they were just exploring options. The City has a great Staff who provided a lot of information about the viability of parks. The Council had a long way to go before there would be a process for selling Birch Field. He appreciated the response from the community. The Council must consider all possibilities when deciding how to manage the City. The difference between owners of derelict properties and the City is that the City is trying to find ways to take care of their properties.

**Item 7(b): Presentation by Lower Columbia Preservation Society Regarding the Customs House**

Following the February 14th, Special City Council meeting and the press coverage of the possibility of sale of the Customs House and surrounding park land, the Lower Columbia Preservation Society (LCPS) has expressed interest in the preservation of Customs House at its present location and is willing to commit to an adoption agreement for the care and maintenance of the Customs House and the Park land surrounding Customs House. Similar agreements have been made at other City parks such as the First US Post Office site, thus reducing the load on the City Parks staff to maintain the sites. Representatives from the Lower Columbia Preservation Society wish to speak and make a presentation to City Council on their interest and commitment to the preservation of the Customs House.

During the February 14th Special City Council meeting, City Council directed staff to continue investigating and provide additional information regarding the possible relocation of Customs House and the sale of the surrounding park land. This information was completed prior to the scheduling of this presentation and is included with the memo.

It is recommended that City Council determine whether to proceed with selling the property or to proceed with negotiating maintenance agreements with the Lower Columbia Preservation Society.

Rachel Jensen, Executive Director, LCPS, said that LCPS wanted to negotiate a maintenance agreement with the City for the Customs House.

John Goodenberger, 856 Harrison, Num. 2, Astoria, gave a detailed history of the Customs House and showed historic photographs and drawings.

Ms. Jensen said the LCPS Board had spoken with Director Cosby, but had not negotiated an agreement. She briefly described their plans to maintain and improve the park.

Councilor Nemlowill supported the request and appreciated hearing the history. She asked for details about the interior of the building.

Mr. Goodenberger explained the building was intended to have furniture so that people could go in and see an interpretation of the original. However, it does not meet building codes because it built in the way of 1852. In order to get the building permit, he had to add two hidden improvements to protect the building against wind damage.

Councilor Nemlowill said considering the history of all of the park sites, it did not always make sense for the City's Parks Department to take care of everything. The LCPS could probably do a better job telling the site's story.

Councilor Jones said he was glad to hear that more interpretation would be added to the site. There is a huge potential to get more value out of the site, so he wanted an agreement to include interpretive signage.

Councilor Price said she believed this conversation and the discussion about Birch Field have been educational for her. Astoria does not have banking or a giant Port and it is not a tourist destination like Los Angeles, which has Disney and Hollywood. Now that the City is facing housing and homeless problems, Astoria has to keep in mind how the challenges arose. The City has to work even harder to protect and preserve the places that make Astoria a unique place. She believed it would take the entire community because the City needs everyone's help in these leaner times.

Mayor LaMear asked if landscaping would be part of the agreement.

Ms. Jensen said she and Mr. Goodenberger have discussed planting native grasses or a pollination garden.

**City Council Action:** Motion made by Councilor Nemlowill, seconded by Councilor Brownson, to cease proceedings to sell the Customs House and direct Staff to negotiate a maintenance agreement with the Lower Columbia Preservation Society. Motion carried unanimously. Ayes: Councilors Price, Jones, Nemlowill, Brownson, and Mayor LaMear; Nays: None.

#### **Item 7(c): Public Hearing and First Reading of Telecommunications Service Tax Ordinance**

Cities are authorized by ORS Ch 221 to enter into franchise agreements and impose fees upon telecommunication, gas, and electric companies that use City rights-of-way to provide their service. The definition of telecommunications includes the transmission of information but excludes one-way transmission of television signals (i.e. cable TV). In addition to a franchise agreement, cities may impose a 5 percent tax on telecommunications carriers, ORS 221.515.

A Federal Law, The Cable Communication Policy Act of 1984, allows a city to enter into franchise agreements with cable TV providers and impose a fee of 5 percent on the gross revenues derived from the provision of cable TV services. This federal law allows cable TV providers to also provide telecommunications services (such as telephone and internet) but prohibits a city from requiring the cable TV provider from including income generated from telecommunications services in the 5 percent franchise fee. Cities are also prohibited from requiring that cable TV providers enter into separate franchise agreements concerning the provisions of telecommunication services. A city may, however, adopt a telecommunications tax.

As a result of the Federal Cable Act, cable providers enjoy a competitive advantage over other telecommunications carriers in cities that do not impose a telecommunications tax.

It is recommended that the City Council conduct a first reading of the proposed telecommunications tax ordinance.

Mayor LaMear confirmed that a 7 percent tax would be imposed only on companies that provide telecommunications services without a franchise agreement.

Councilor Brownson asked why Astoria does not tax cell phone usage. City Attorney Henningsgaard explained that cell phones do not use the City's rights-of-way to transmit signals, so the City does not have any legal basis to charge a tax. Additionally, federal law prohibits the City from taxing cell phone usage.

Councilor Nemlowill asked why the City chose to reject a similar proposal in 2012. City Attorney Henningsgaard said he remembered Mayor Van Dusen saying he did not want any new taxes.

Councilor Nemlowill stated the City needed more money and asked what the downside of the tax would be. City Attorney Henningsgaard said that people who use Charter for telecommunications services could recognize an increase in their rates.

Councilor Brownson stated it is legal for the City to charge the tax and the tax would create competitive fairness among telecommunications companies. If the City is going to be fair to the companies, the only other alternative would be to eliminate the tax currently being charged to Quest. City Attorney Henningsgaard confirmed that was the concept behind the tax, which is not unique. Most cities impose this tax.

Councilor Price asked how 7 percent was derived. She noted the memorandum said 5 percent. City Attorney Henningsgaard stated the legislature came up with the number and confirmed that 5 percent was in an older version of the memorandum. He believed Charter was currently the only provider that would be affected.

Mayor LaMear opened the public hearing at 8:24 pm and called for public comments.

Robin Smith, Senior Manager of Government Affairs, Charter Communications, 222 NE Park Plaza Dr. Vancouver, WA, said there is no rational basis for the fee to the extent that the City intends to impose any new taxes or fees on Charter customers regardless of the service. We believed it is unwarranted and unlawful. If the intent is to tax the internet, the City should recognize that the internet is an important service in today's economy. Adding a tax to that service is unwarranted and unlawful. Astoria residents rely on internet service for work, school, and all manner of information critical to their daily lives, getting the weather, health information, and job searches. It is unfair to burden customers with a new internet tax when the City is already fully reimbursed for the use of the right-of-way with our 5 percent franchise fee. This is a tax, not a fee. Fees are imposed to recover costs and taxes are imposed to raise revenues for the General Fund. Charter's internet service does not impose any additional regulatory costs or right-of-way burdens on the City. Therefore, there is no basis to impose an additional fee on customers. It is a tax. If the purpose of a utility license ordinance like this is to secure fair and reasonable compensation for its residents, realize that any tax imposed on customers as a result of this ordinance will be passed through to customers and line itemized on the bill indicating the origin and amount of the tax, just like the 5 percent franchise fee. If the City imposes a 7 percent tax on Charter's broadband voice video, a typical customer would pay almost \$11 every month in City imposed taxes, which would appear as a line item on all of the customers' bills in the City of Astoria. Last year, Charter's customers paid \$121,700+ in franchise fees to the City. Additional taxes will not encourage the adoption of broadband services or higher speeds of service. There is really no authority to impose additional licensing requirements. It appears the City is imposing new licensing requirements in addition to the existing franchise agreement. The new requirements would have to be renewed through a process. Charter already has a franchise authorizing and regulating its use of the rights-of-way. Any additional licensing requirements such as this are unnecessary and unlawful and appear to violate the Cable Act. When considering the negative financial impact on customers, we hope the City reconsiders its position and withdraws the proposed ordinance. We would welcome the opportunity to discuss ways to promote deployment and adoption of broadband service throughout the community. However, in the event that the City intends to move forward with this ordinance, we believe the ordinance is unlawful as applied to Charters' customers and will submit our legal position to the City for review and consideration. She is not a lawyer, but wondered if the City had considered the difference between a tax and a fee as defined by federal law, and how it is being applied in this situation.

Councilor Brownson stated a phone is not internet. When purchasing a phone from Charter, this ordinance would impose a tax just as if a customer chose to purchase the phone from Quest. He understood this would increase the monthly bill, but on a \$39.95 plan the bill would only increase by about \$2.10 a month. If a phone package came with a free phone, the customer would not be charged the tax. He did not believe Charter's argument held up.

Ms. Smith explained that the tax would not be charged on the phone itself, but on the service.

Councilor Brownson confirmed he understood and said it was difficult to tell because he was not a lawyer either.

Ms. Smith said Charter already pays a 5 percent franchise fee. They have not installed any new equipment that has interfered with the rights-of-way in any way in order to provide additional services on the exact same infrastructure.

Councilor Brownson disagreed. Quest is paying a franchise fee as well and they are also being taxed. This ordinance allows the City to treat Charter the same way it treats Quest, who is also providing internet. The City does not tax internet, just phone use.

Ms. Smith confirmed she understood that this ordinance would not tax broadband service, just telecommunications services.

Councilor Brownson further explained that in a \$100 per month service package that includes internet, phone, and cable, the tax can only be imposed on the phone service. So, if the phone service portion of that package is \$39.95, he would not pay \$11 a month.

Ms. Smith believed the City's definition of telecommunications was unclear.

Councilor Brownson stated other municipalities have been doing this and the City Attorney has determined that there is good legal footing for the City to move forward on this tax. Otherwise, the City would not be considering it. City Attorney Henningsgaard said in 2016, in the case of *Eugene v. Comcast*, the Oregon Supreme Court decided that this type of tax structure adopted by the legislature and imposed by the City of Eugene was legal. He believed the case was still under appeal, but that is the highest precedent available at this time. The definition of telecommunications services he used is the same definition used by the City of Eugene. He explained that Quest pays a 7 percent franchise fee. Cable providers have their own separate statutes in federal law, which allows local governments to impose a 5 percent franchise fee on cable services. It prohibits local governments from having any other charges on cable services, which are defined by federal law. Charter's current franchise agreement expired seven years ago. The agreement imposed a fee only on cable services and was consistent with federal law. Federal law does not prohibit the City from imposing taxes on telecommunications services because telecommunications services are different than cable services. The Cable Act that Ms. Smith spoke about only applies to the provision of cable services, not telecommunications services.

Councilor Price asked if the tax would apply to Verizon, AT&T, etc. She also wanted to know if any municipalities in Clatsop County imposed this tax. City Attorney Henningsgaard said the basic format for the ordinance came from Coos Bay and included some of the language used by Eugene. Hood River, Portland, Salem, and Warrenton applies this tax. Warrenton has done away with franchise agreements and only imposes taxes, which is a different model. This ordinance would apply to every telephone service provider that does not have a franchise agreement with the City for telecommunications services. He believed that all providers except Charter had franchise agreements. Because Charter is a cable provider, the City cannot require them to have a franchise agreement for telecommunications services under federal law. The only way the City can impose a tax on a cable provider is through this ordinance, which is authorized under state law. City Manager Estes added that Verizon and AT&T are cellular service providers that do not use rights-of-way for transmission.

Councilor Price said Charter has no competition for cable service, so she was hesitant to impose a 7 percent tax on the majority of Astorians. City Attorney Henningsgaard explained that the idea was to equalize the playing field between cable providers and telecommunications providers.

Councilor Nemlowill asked if Councilors who were Charter customers had a conflict of interest. City Attorney Henningsgaard explained that since the Council's action would apply equally to everyone in the city, it would not be considered a conflict of interest.

Mayor LaMear asked if all of the franchise fees were equal. City Attorney Henningsgaard stated they were equal within each industry. The statute and federal law specifies different amounts for each industry. Cable can only be 5 percent and telecommunications can be 7 percent.

Mayor LaMear asked why the ordinance would charge 7 percent instead of 2 percent. City Attorney Henningsgaard explained that Charter was currently only being charged on their cable services, but they pay nothing on their telecommunications services. The tax would only apply to the income Charter gets from telecommunications services. The definition of telecommunications is telephone services.

Councilor Nemlowill asked how this proposal came about. City Manager Estes said the City and Charter have been negotiating a franchise agreement for several years now and it is time for the agreement to be considered by City Council. During negotiations with Charter, this tax was discussed. It was presented to Council in the past and Staff believed it was appropriate for Council to discuss the tax again since a new franchise agreement would be considered. City Attorney Henningsgaard added that Director Brooks had asked him why the City did not impose this tax while all other municipalities do. He told her he presented the ordinance to Council six years ago, but it was not adopted. Director Brooks stated she brought up the tax because it would provide equity with other telephone providers in town who use the City's rights-of-way. She knew a precedent had been set by the Eugene case, so she had asked City Attorney Henningsgaard why Astoria did not charge Charter for their phone lines in the city.

Ms. Smith stated it was said that this tax would only be imposed on telecommunications, which inferred that phone service was just voice. However, the definition says, "telecommunications service means any service provided for the purpose of voice, video, or data transmission." That is the internet. The definition also says, "including but not limited to local exchange service, access service, extended area service, call origination, interconnections, switching transport, call termination, and any other telecommunication services identified and authorized by the Federal Communications Commission (FCC) or the Public Utility Commission of Oregon." The definition goes on to say it does not include cable service. She reiterated that voice, video, and data transmission were the internet.

Councilor Brownson noted that data transmission included faxes, so the reference to the internet was a bit archaic.

Mayor LaMear called for public comments.

Chris Ferrar, 3023 Harrison Ave, Astoria, said his household has split service. They have Century Link's telephone service and Charter's internet service. He did not realize his telephone was being charged a tax while people with Charter's phone service were not being charged the same tax. He believed it was fair to either tax everyone or no one.

Mayor LaMear closed the public hearing at 8:45 pm and called for Council discussion and deliberation.

**City Council Action:** Motion made by Councilor Jones, seconded by Councilor Price to conduct a first reading of the telecommunications tax ordinance. Motion carried 4 to 1. Ayes: Councilors Price, Jones, Brownson, and Mayor LaMear; Nays: Councilor Nemlowill.

Director Brooks conducted the first reading of the ordinance.

#### **Item 7(d): Public Hearing and First Reading of Charter Franchise Ordinance**

Charter Communications now operates under an extension of a charter ordinance that expired January 31, 2011. A renewed franchise would allow Cable TV operations to continue for ten years.

The City currently has six franchise ordinances allowing the use our rights of way for telephone, internet, cable TV, gas and electricity<sup>1</sup>. Prior to the 2011, these ordinances differed in their regulation of work in the right-of-way, and such things as tree trimming and revenue reporting. Between 2009 and 2012 the City reviewed its policies concerning franchises, removed provisions regulating work in the right-of-way and adopted a policy of simplicity and uniformity in its franchise ordinances.

Although each utility operation (for example electricity and cable TV) has unique operational and regulatory requirements, Charter Communications would not accept many of the City's uniform provisions.

The City does not object to Charter's language as proposed. However, the City has not accepted several of Charter's suggestions and Charter disagrees with these sections of the proposed franchise. For example, Section 13.2 describes the Council's adopted non-discrimination policy, Section 29 contains the City's standard insurance clause, and Section 9.9 requires Charter to comply with applicable law when performing construction work in a City right-of-way. In each of these sections Charter has suggested language that it prefers and has not indicated that it would accept the language in this proposal.

Charter has also suggested several provisions that do not appear in any other City franchise and which could impose additional legal and financial burdens on the City. These suggestions do not appear in this proposal.

The Pacific Power franchise (and the City's original proposal to Charter) is seven pages long, whereas the proposed Charter Communications ordinance consists of 12 pages. As presented, it contains several non-uniform provisions. Nevertheless, the proposed ordinance reflects over six years of discussions and many different draft proposals.



Included in the packet is a proposed ordinance granting Falcon Community Ventures I, known locally as Charter Communications, a renewed city franchise to locate transmission lines in City rights of way. It is recommended that City Council conduct a public hearing and hold a first reading of the ordinance as proposed.

Mayor LaMear opened the public hearing at 8:56 pm.

Alan Galloway, Legal Counsel, Davis Wright Tremaine, 1300 SW 5<sup>th</sup> Ave, Portland, said he was speaking on behalf of Charter Communications. He had been negotiating with City Attorney Henningsgaard, who always negotiated in good faith. The negotiations began a long time before he became involved. This is an unusual situation because no agreement has been made, but an agreement is on the agenda. The proposed franchise agreement includes provisions that Charter does not agree to. If the ordinance is adopted, Charter is not prepared to enter into the agreement. He had provided a letter to City Attorney Henningsgaard stating Charter's concerns and he hoped the Council had seen that letter. Charter has proposed four changes to the proposed ordinance for fairness and clarity. The proposed changes are as follows:

- An equal protection provision, which Charter believes is essential. While the City does not currently have any other franchise agreements with this provision, this is a standard provision for cable franchises. It is important for cable providers to know that when they enter into these agreements, they will have a level playing field if competitors come into the area. If the City offers other cable providers a lower franchise fee, Charter cannot compete.
- Reimbursement of costs ensures Charter will receive the same material conditions as competitors to open up the streets and do maintenance.
- Their proposed insurance provision goes above and beyond the City's insurance requirements. The City requires franchisees have coverage equal to the limits in the Oregon Tort Claims Act. That is included in Charter's proposed language, but it also spells out the dollar amount Charter will use to meet those limits. The proposed dollar amount would cover gradual year-to-year increases for the 10-year term of the agreement. Including dollar amounts makes it easier for Charter's insurance carrier to ensure the required coverage.
- A construction and restoration of rights-of-way provision would spell out some of the procedures in more detail to facilitate compliance and clarity.

He believed Charter's proposal was reasonable. Uniformity is fine as a general principle as long as it is not at the expense of fairness or clarity. Charter and the City have negotiated and agreed upon several provisions that are in the proposed ordinance, including the language on non-discrimination in Section 13.2 and the language on tree trimming. However, the four provisions proposed yield to fairness and clarity and make it easier to ensure that Charter is complying with the rules.

Mayor LaMear explained that the City's intent is to require the same of all utilities, which she believed was fair and consistent.

Mr. Galloway stated the 5 percent cable franchise fee is the most the City can charge under federal law. Charter is not trying to negotiate that down. They are only concerned with the procedural language that sets forth the obligations to maintain certain levels of insurance and working in rights-of-ways. The equal protection language is meant to ensure that Charter's competitor does not get a lower rate, which he has seen in other cities.

Councilor Brownson said he was concerned that Charter's proposed language would tie the City's hands. Data use and transmission is changing all the time and a competitor might not offer the same services at Charter. It could be to the City's benefit to offer a company an incentive or the City could decide to create its own internet service.

Mr. Galloway said he understood the City's concerns. Charter's proposed language acknowledges that the City has the right to grant franchises to other cable providers. However, it does not speak to completely new technology. If the City wanted to do its own satellite based internet data system, this language would not be implicated.

Councilor Brownson confirmed that Charter was only concerned about competitors who provide cable television, not internet or telephone services.

Mr. Galloway explained that the proposed language was for multichannel video programming distribution, which is different from Roku, YouTube, or Netflix. The Cable Act provides a very technical distinction between cable television service and other services. This is also defined in the franchise agreement.

Councilor Brownson said attaching City Code 2.70 to 2.755 on construction and restoration to the franchise agreement gives Charter access to the City's requirements without building it into the agreement.

Mr. Galloway stated that there is nothing in their proposed language saying local laws would not be followed. One of their provisions states Charter would comply with applicable federal, state, and local laws. Charter just wants a little bit more detail spelled out on how that process would work. If Charter fails to complete a restoration, there is a period of time within which the City can notice Charter and give them the opportunity to complete the work. This is not a waiver to City Codes, just operational details Charter would like spelled out to give their employees more definition.

Councilor Brownson said he questioned how important the insurance provision and the construction and restoration provision was. If the dollar amounts in the insurance provision reflected what would happen over 10 years anyway, why bother? The insurance companies know State laws and have the necessary information.

Mr. Galloway stated Charter wants the numbers specified in the agreement. They are not trying to get out of any obligations. He understood the City has never had an equal protection provision in their agreements, partly because they are specific to cable service. But Charter has never signed a cable franchise without an equal protection provision.

Councilor Brownson asked why it had taken seven years to get to this point.

Mr. Galloway explained he had been involved in the negotiations for about 18 months. The negotiations were on again, off again. Charter wants to come to an agreement and he was present to help create a path to get a mutually acceptable agreement completed. Since he has been involved, he has seen that Charter has a desire to get this done. It takes time to go up the chain and get approvals on all the changes, but he hoped Charter and the City could come to an agreement.

Mayor LaMear said all of the other utilities agreed to these rules.

Mr. Galloway explained that some of their proposed language is specific to cable franchises, like the equal protection provision. Charter is quite worried about the insurance language, but he could not speak to what other utility companies did or did not require.

Councilor Jones understood why the proposed language was in Charter's best interest, but the City's interest is in protecting the City's position. Astoria is sympathetic to small businesses asking for protection against big box stores. This is as if a big box store was asking for protection from small businesses. He was inclined to support City Attorney Henningsgaard's position.

Mr. Galloway said Charter has made a huge investment in maintaining the cable system and customer service. The possibility of a competitor coming in is concerning. Charter is not afraid of competition, but they are worried about uneven competition. The ability to compete should be fair regardless of the size of the company.

City Attorney Henningsgaard said Charter has low limits on their liability insurance and are covering that with an umbrella policy. If the Oregon Legislature does not change the law and the franchise agreement only lasts ten years, Charter's proposal would cover the limits. The Tort Claim limits are set by the legislature at their whim with the intent of protecting local governments to a certain extent. Those limits have been challenged and defeated in court a couple of times. The legislature could increase them or do away with them. Putting dollar limits in the agreement prevents the City from changing the limits even if the legislature changes the limits. No one else has had a problem with Astoria's agreements saying the limits are what has been set by the Oregon Tort Claims Act. It is a standard provision. There is no language saying this agreement with Charter can only last 10 years; it may last 20 or 25 years. So, it is impossible to say that Charter's suggestion provides the protection that the City needs. Work done in the rights-of-way is completely under the City's control and the City states how this work needs to be done. If Astoria adopts Charter's additional provisions for work in the rights-of-way, Public Works will have to refer to the franchise agreement every time Charter wants to do work. The City's franchise

agreements require utilities to comply with ordinances. If additional provisions were added to the agreements, Public Works would have a difficult time managing work done in the rights-of-way.

Councilor Nemlowill asked how the City would benefit from a first reading of the ordinance, considering Charter was not in a position to accept the agreement. City Attorney Henningsgaard said the existing franchise agreement would remain in place until another one is negotiated. If Charter does not want a new agreement, they would have to comply with the old agreement.

Councilor Price believed the points of negotiation seemed minor. She did not see any reason to go beyond what is usual for the City and create new rules for one company.

Mr. Galloway clarified that the dollar amounts for the insurance were included for clarity, but the language also included a safety. If the legislature changed the limits, Charter would be required to abide by those limits. Therefore, there is no possibility that the City would not be covered for the amounts in the Oregon Tort Claims Act. He believed it was unlikely that the legislature would make the limits skyrocket, but if that happened those limits would be covered. The construction and restoration language references work being done in accordance with applicable federal, state, and local laws, codes, ordinances, rules, and regulations. He believed Charter's requests were modest.

Councilor Price asked if Charter would sign an agreement with all of their proposed provisions except the insurance limits.

Mr. Galloway said no, every provision is a sticking point for Charter and he did not have the authority to say they would sign the agreement without any one of the provisions. If the provisions are inadequate, they could be revised. He recommended the City propose that Charter use the City's insurance language with the dollar amounts added.

Mayor LaMear called for public comments.

Sam Rascoe, 686 Harrison Ave, Astoria, asked if it was possible for the City to sign a franchise agreement with another company.

City Attorney Henningsgaard confirmed Charter was the only company that provided cable service to Astoria. Any company could provide cable services, but Charter owns the infrastructure.

Mayor LaMear closed the public hearing at 8:32 pm.

**City Council Action:** Motion made by Councilor Price, seconded by Councilor Jones conduct a first reading of the Charter franchise ordinance as proposed by Staff, Motion carried unanimously. Ayes: Councilors Price, Jones, Nemlowill, Brownson, and Mayor LaMear; Nays: None.

Director Harrington conducted the first reading of the ordinance.

**Item 7(e): Liquor License Application by Cheryl Cameron, dba Foglifter Café, 382 12<sup>th</sup> Street for a New Outlet Full On-Premises Commercial License**

A liquor license application has been filed by Cheryl Cameron for Street14 LLC doing business as Foglifter Cafe. This application is a New Outlet for a Full On- Premises Commercial License. The appropriate Departments have reviewed the application and it is recommended that the City Council consider approval of the application.

Councilor Nemlowill declared a potential conflict of interest as her husband owns Fort George Brewery. The Applicant is not a client, so she planned to vote.

**City Council Action:** Motion made by Councilor Brownson, seconded by Councilor Price, to approve the liquor license application by Cheryl Cameron. Motion carried unanimously. Ayes: Councilors Price, Jones, Nemlowill, Brownson, and Mayor LaMear; Nays: None.

**Item 7(f): Liquor License Application by Wifrano Melo, dba Tora Sushi Lounge Astoria, 1197 Commercial Street, for an Additional Privilege for an Off-Premises Sales License.**

A liquor license application has been filed by Wifrano Melo for Tora Sushi Lounge Astoria, Inc. doing business as Tora Sushi Lounge Astoria. This application is an Additional Privilege for an Off-Premises Sales License. The appropriate Departments have reviewed the application and it is recommended that the City Council consider approval of the application.

Councilor Nemlowill declared a direct conflict of interest as her husband owns Fort George Brewery and the Applicant is a client. She recused herself from voting.

**City Council Action:** Motion made by Councilor Price, seconded by Councilor Jones, to approve the liquor license application by Wifrano Melo. Motion carried unanimously. Ayes: Councilors Price, Jones, Brownson, and Mayor LaMear; Nays: None.

**NEW BUSINESS & MISCELLANEOUS, PUBLIC COMMENTS (NON-AGENDA)**

Councilor Price asked for an update on the Friends of the Column's efforts to develop rules for lighting the Column.

Director Cosby said the Friends had canceled their meeting, which was scheduled for earlier that day. The proposal by the Friends would need to be approved by City Council. Therefore, she recommended Council give Staff direction on whether they would like to allow the Column to be lit in June.

Mayor LaMear asked how much is cost to change the lights. Director Cosby said the City does not currently charge a fee. City Manager Estes added that Staff had recommended charging a fee if the current regulations were changed in the future. Council's policy has been to allow a certain number of light changes per fiscal year. That limit has been reached for this year. Council voted to allow the Friends to develop their own policies.

Councilor Brownson asked if there was a way to address the request to exceed the City's limit before the Friends have had a chance to develop a policy. Director Cosby stated she would contact the Friends to see if they were okay with that and present a proposal to Council at the next meeting.

Councilor Jones asked if the City already owned the lights in the color being requested. Director Cosby explained that colored frames are placed over the lights and the City asks that the organization requesting the color change provide the frames.

Councilor Price said she would appreciate the opportunity for Council to make a decision at the next meeting on the request to light Column for Pride Week, June 3-10, 2018.

Councilor Nemlowill said the Column would be condemned if it were not for the Friends. They maintain the Column, they restored it in the past and are saving up for the next restoration. She did not believe the Column should be lit any unique colors. The Column lighting policy was put in place before she was on City Council. She did not have anything against the organizations requesting the colored lighting.

Councilor Price agreed. The Column is a work of art and Astoria's best monument. She believed it should only be lit with white lights. Instead of trying to decide what the Column should be lit for, the City should light it up for everything. She agreed that the Friends have saved the Column, but it is still a City park. She did not want the Friends to do all of the decision-making, but wanted to honor what they do by hearing their opinion. City Manager Estes confirmed that Director Cosby would ask the Friends of the Column if they had any objections to the request for Pride Week because she did not expect them to have a policy to propose to Council by the next meeting. The limit on the number of times the Column is illuminated is City Council policy, so Council could make changes to the policy. The proposal by the Friends would be for illumination requests in future years.

Councilor Price did not believe the Friends knew that some members of Council were opposed to lighting the Column.

Councilor Nemlowill said once the City allows something to happen, it is difficult to change.

Councilor Jones wanted to find out how members of the community felt about lighting the Column.

Unidentified Speaker said when minority groups were being represented, the tyranny of the majority should not matter.

Councilor Price said there are many ways of recognizing all sorts of people and groups.

Mayor LaMear has been asked why the Column is lit teal or pink. This is an opportunity to talk to people about the cause being recognized.

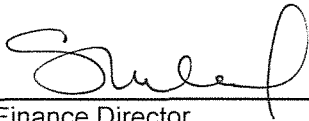
City Manager Estes confirmed that Council wanted to add a discussion about illuminating the Column for Pride Week to the next meeting's agenda.

**ADJOURNMENT**

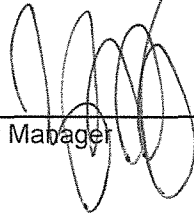
There being no further business, the meeting was adjourned at 9:46 pm.

**ATTEST:**

**APPROVED:**



\_\_\_\_\_  
Finance Director



\_\_\_\_\_  
City Manager