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City of San José Rules and Open Government Committee meeting.

>> Mayor Reed: This is Rules and Open Government Committee meeting for March 10th, 2010. First question is, are there any changes to our agenda? Deanna?

>> Deanna Santana:

>> Yes, item H-1, we'd like to, defer that for one week and I'll confirm that.

>> Mayor Reed: That's the donation of two surplus fire vehicles.

>> Uh-huh, that's true.

>> Mayor Reed: For one week. March 17th would be a week. Anything else on the agenda on modifications? All right, then we'll start with the March 16th council agenda. Anything on page 1? Starting time, 9:30 still okay? We started early this last week for a reason. I don't think there's a reason to start early the next week. All right. Anything on page 2 or 3?

>> Councilmember Constant: Mr. Mayor, I'd spoke to the City Manager about potentially deferring 4.1, one week.

>> Mayor Reed: The sign code ordinance update?

>> Councilmember Constant: Yes, because I won't be in town, and it was an interest of mine. Didn't seem to be a problem with staff.

>> That's fine.

>> Mayor Reed: What does the 23rd meeting agenda look like? I know the 16th was lighter than the 9th, which is why we went to the 16th instead of the 9th. Okay, we'll look at it shortly but if I recall, it's okay, we could probably get this done. Okay, so let's -- that would be the one week, I'm sorry, the 23rd, 23rd from the 16th.

>> Councilmember Constant: Thank you.

>> Mayor Reed: Anything else on page 2 or 3?

>> 3.2, I had a notice that the administration was going to be deferring --

>> To the 23rd.

>> Mayor Reed: That would be item 3.2, citywide capital improvement program status.

>> Yes.

>> Mayor Reed: Anything else on page 2 or 3? Page 4 or 5? We do have the budget message to be heard in the evening. Is that the only thing on the evening agenda? We have these other items, 11 items. Anything else on 4 or 5? I would anticipate taking the budget hearing first and then the land use items. Which means we certainly will not get to the land use items before 8:00. We could tell them that.

>> Lee Price: We can make a note on the amended agenda that the mayor's budget message will be heard first in the evening.

>> Mayor Reed: I think we can tell the people not before 8:00, for the land use, that way they don't have to show up at 7:00.

>> Councilmember Chirco: If there's no controversy it could be done quickly and get on with the budget. I don't know how long either one would take. I see one of them is the --

>> Mayor Reed: There were a couple of -- yeah, one of them is the soccer property, potentially, we're anticipating spending some time on the land use items.

>> Councilmember Chirco: I didn't see the 18,000.

>> Mayor Reed: Anything else on 4 or 5 or 6? I have some request for an addition, Google fiber for communities request for information, authorizing the manager to submit a response on Google fiber for an addition. Any other additions or changes?

>> We will need a sunshine waiver on this. We're adding this outside of the process so it will be out by Friday or as soon as possible.

>> Mayor Reed: Okay, well that's just a request to respond to them. It's no commitment of anything in the way of spending on our part. So we'll need to include a sunshine waiver in the motion, if --

>> Councilmember Constant: Motion to approve as amended with a sunshine waiver for that particular item.

>> Second.

>> Mayor Reed: Motion to approve as amended with a sunshine waiver on Google fiber response. All in favor? Opposed, none opposed, that's approved, taking us to the March 23rd agenda. Anything on page 1? Page 2 or 3? Page 4 or 5? I see item 3.2 is the citywide capital improvement program so it's already on here.

>> Yes.

>> Mayor Reed: The annual progress report on the general plan housing element, 4.1. There's no action to be taken on that. That's just --

>> Accept the annual report.

>> Mayor Reed: Need to accept the report and we're required to do that under the HUD or federal guidelines.

>> Right.

>> Mayor Reed: Anything else on 4 or 5? 6 or 7? Or 8 or 9?

>> Excuse me, mayor, on page 8, 9.3, the housing set aside tax allocation bonds item, that will be out by Friday. It did not make the early distribution packets so we need to request a sunshine waiver. Staff was still working on the details of the memo.

>> Mayor Reed: And these are bonds relating to how we're going to pay the state of California? Ultimately?

>> Uh-huh.

>> Mayor Reed: Anything else on 8 or 9? Again, the March budget message will be heard in the evening. Anything else in the evening on that agenda? No.

>> Not at this point.

>> Mayor Reed: We have some requests for additions, a couple of excused absence, my trip to Washington of last week, Councilmember Pyle from today due to illness.

>> Councilmember Constant: Just a quick typo on that March, 310, okay. I really can't handle months that long.

>> Mayor Reed: And then a travel request also related to my trip to Washington. Any other changes or requests for additions? We need a motion with the sunshine waiver.

>> Councilmember Constant: Is there sunshine on this one too? Oh yes.

>> Mayor Reed: On the tax allocation bonds. It will be out in ten days but it doesn't meet the --

>> Councilmember Constant: Motion to approve with the sunshine waiver.

>> Second.

>> Mayor Reed: Motion to approve with the sunshine waiver. All in favor, opposed none opposed, that's approved. Next item is the redevelopment agency agenda for March 23rd. Anything on page 1? Page 2 or 3? Or 4?

>> Mr. Mayor, if I may, item 8.2, the purchase and sale agreement at 445 West Julian street that is an early distribution item due to the public funds involved. We did not make distribution yesterday but it did go out this morning to everyone in electronic form and hard copy. So we would ask for a sunshine waiver.

>> Mayor Reed: That does make our early early.

>> Yes.

>> Mayor Reed: No other changes?

>> No other changes or adds.

>> Councilmember Constant: Motion to approve as amended with the sunshine waiver.

>> Councilmember Chirco: Second.

>> Mayor Reed: Motion is to approve as amended with the sunshine waiver. All in favor, opposed none opposed, that's approved. Anybody watching at home the March 16th meeting we had nothing to discuss because the meeting was cancelled. Any other time-certain issues we should discuss on any of these agendas? Okay, let's move on then to -- no study sessions coming up that we need to talk about. We have nothing to update on legislative update other than the trip to Washington last week which I reported on yesterday at the council meeting. Meeting schedules, request to cancel evening meeting of April 20th and set an evening meeting of April 27th to conduct general plan hearings. Just moving it one week basically.

>> Lee Price: That's correct. Not a memo, just a straightforward request to council and reschedule.

>> Councilmember Chirco: Move approval.

>> Councilmember Constant: Second.

>> Mayor Reed: Motion is to cancel one and set another one a week later for general plan hearings, April 27th, all in favor, opposed none opposed, that's approved.

>> Lee Price: Mr. Mayor as long as we're in this category of meeting schedules, I'd just like to give the Rules Committee a heads-up that on March 31st is a Wednesday, it's the last Wednesday of the month, and it's also a holiday, Cesar Chavez birthday that the city recognizes. So next week I will be bringing

forward a memo requesting that meeting and scheduling a rules in lieu for March 30th. Just wanted to give you a heads-up. .

>> Councilmember Constant: I had a question on the -- we were going to talk about this a couple of weeks ago and then I forgot, the last meeting in June which ends up on the 30th. In previous years those last ones were cancelled. I don't know if we had discussed that or what the plans were.

>> Mayor Reed: I don't think we have discussed it.

>> Lee Price: We have not discussed the schedule for the July break.

>> Mayor Reed: We should have the manager bring that forward and --

>> Councilmember Constant: My vote is yes just for the record.

>> Lee Price: June 30th?

>> Mayor Reed: Cancelling that is usually pretty popular among the councilmembers and the staff. Back to the other one. So you're thinking we won't have a rules committee meeting on the 31st because of the holiday.

>> Lee Price: That's correct. So I was going to propose that we cancel the regular Rules Committee meeting and schedule a rules in lieu for Tuesday, the 30th. But if the Rules Committee wants to have me bring back some options for moving your regular Rules Committee meeting to another day, we can -- we can work on some options for that.

>> Mayor Reed: Why don't we consider just having a Rules Committee meeting on Tuesday, the 30th at 1:00 before the council meeting.

>> Lee Price: Before the council meetings? These rooms are already booked for overflow for council meeting. So that would work.

>> Mayor Reed: Well if it was overflow for council meetings we'd be okay.

>> Lee Price: So come back with that request for next week to move it to 1:00?

>> Mayor Reed: Move everybody's schedule probably could do that and we would avoid taking up anything major but we would have that there if we needed to adjust something, probably a short meeting. Anything from the public record the committee wishes to pull for discussion?

>> Lee Price: I have item A. I know there was a response from Katy Allen.

>> Mayor Reed: Item A is the response on liquidated damages on Santa Teresa library project.

>> Councilmember Chirco: My question had to do with the change in the wages in the middle of the work and the letter of explanation. I wanted to know when the work started or how long the work was. Because I can see an oversight, when you're in the middle of the contract, I can also see them having to pay the correction amount. But to have it you know, three times ...

>> Let me explain. The wage index --

>> Mayor Reed: Just a little closer to the microphone. Just pull it closer.

>> The wage index is issued based on the advertisement date for the project. And there are predetermined increases, so there's a wage index and predetermined increases that are already known. So this contractor was aware of those increases and failed to pay the increase.

>> Councilmember Chirco: Aware when they bid the job or aware in the midst of the job?

>> They should be aware when they bid the job.

>> Councilmember Chirco: Can you tell me when the work started?

>> Their actual work?

>> Councilmember Chirco: Yeah because they were a subcontractor as I understand it.

>> They actually started -- I'm sorry, I don't have it with me. But the job began -- we identified the wage violation in November of 2008.

>> Councilmember Chirco: Now, my question was, when did the wage violation start? Because the change in the wages was November of '08, was that it? Do I have that right?

>> Right. In November of 2008, when we received their payrolls, they were paying an incorrect wage rate. And that wage rate became effective in June of -- June 30th, 2008.

>> Councilmember Chirco: I got that out of the letter. What I didn't get, they are a subcontractor. Say they're a concrete subcontractor. Did they start a month, did they start in October and the work continued through to the end of November? I'm trying to figure out was it mid-work or prior to the work beginning?

>> And I'm not sure if I'm understanding your question.

>> Councilmember Chirco: I'm trying to figure out if the wage change became effective in the middle of the actual work, or did the wage change come before they started their work?

>> I believe -- I will have to -- I don't -- can't remember off the top -- but I believe it -- the wage increase occurred prior to their starting their work.

>> Councilmember Chirco: But it was after they had bid the contract?

>> Correct.

>> Councilmember Chirco: Were they aware there was going to be a change when the bid was made?

>> Yes. That's their -- it's when they bid the job, they know -- they should be aware what the wages -- what the wage index is, and the predetermined increases. This is not a new subcontractor. They've performed on other projects, and they have where -- they have violated on other projects, as well.

>> Councilmember Chirco: Well, to me that's more condemning than anything else but I can see somebody being a month on the job under an old wage, they have, say, another month to go and in the middle of this two-month period there's a wage increase that is set by, I'm guessing the city.

>> No, it's set by the Department of Industrial relations.

>> Councilmember Chirco: Okay.

>> And those wages are issued, they're known, they're made public.

>> Councilmember Chirco: My thinking was, if there was a legitimate reason for not catching that change of salary then they should be responsible for the unpaid wages. But to have the three-times penalty, I questioned.

>> Well, it's a liquidated damage and it is in conformance with the city's policy.

>> Councilmember Chirco: I get that. I just -- my question was whether it was appropriate if it was an honest mistake, since they were in the middle of a contract. But if it occurred -- so I will look at the attorney for clarification on that.

>> I'll try to answer that. Back in 2003 when the council adopted the policy to impose liquidated damage damages they actually imposed the policy so it would be a strict liability. Meaning it doesn't matter whether it's a mistake, it doesn't matter whether it was intentional. It applies regardless of the intent of the parties. And so in the contract, it doesn't provide for any ability for the contractor to say oh, I'm sorry, I made a mistake, or if I didn't have the personnel to do it, whatever the excuse is, when the council adopted the policy it was a strict liability. It doesn't matter it was a mistake the way the council required it to be imposed. So Nina doesn't have the authority to allow somebody to come in with a excuse because it's a strict liability issue.

>> Councilmember Chirco: I understand that, that that's not Nina's authority. But as a councilperson, I think that's something we need to look at.

>> And you can, you can look at the policy that could, if the council wanted to, provide for a cure provision so that it's not a strict liability. But again, it is on the purview of the council to consider whether or not they want to allow the 2003 policy to allow for that.

>> Councilmember Chirco: I was more interested when the work started, when the wage increase was instituted and did they -- how much the work continued past, it obviously had to continue past the wage change because there was a liability for the unmet wages.

>> The other difficult issue that accommodation up with these liquidated damages, the city is in contract with the general contractor. The city doesn't have a contract with the subcontractor. The liability is on the general contractor not subcontractor but the way it works is the general contractor basically defers all the liability to the sub because the sub is the one that did the violation. It's important and I'm assuming in most of these cases the general is the one who becomes aware of all the prevailing wage requirements and the question is in many of these cases did the general contractor do the appropriate thing to it with its sub, to make sure they understood what their obligations were.

>> Councilmember Chirco: And that's another question.

>> Councilmember Constant: If I could jump in for a second, seeing that the total restitution was totaling \$1300, it couldn't be more than a week that these wages weren't paid. I think Judy's questions about timing is really important for us to look at. Was it in the middle of a pay period or any of these other things. So I personally would like to have more information about the specifics of this, kind of a time line. But I think also I know I would like to perhaps see some options from the city attorney's office, come to the council, potential for us putting some sort of cure mechanism that you mentioned and perhaps we could make that partly of our motion when we're done talking.

>> So would you like it to come before Rules for you to discuss it before coming to the council or would it be in the future.

>> Councilmember Chirco: You know it might be something to go to Community and Economic Development. Because it's not to excuse people. I think there needs to be corrective action. But I also think having the strategy for like Pete said, this is so small that it looks like either it was maybe one week

pay period, there was a change in the middle of the process to allow for -- it's kind of the compassion you put into government.

>> Right, and I think it's something we can consider. The argument against putting a cure provision in there which allows somebody to go to come back and take care of a problem is that there could be the possibility there could say well, if they catch me, I have some time to fix it.

>> Councilmember Chirco: That's a legitimate concern to raise.

>> This needs to be weighed and the council can deal with the policy however it wants.

>> And I think that was the basis of how we got to liquidated damages in 2003. We were having repetitive offenders.

>> Mayor Reed: I have a question about the time issue, raised in the letter from Babel plumbing, asserting that there was a 15-month lag in the handling of this. Can you address that?

>> Yes. They -- we don't -- our office doesn't assess liquidated damages until restitution has been paid. We received the acknowledgment that restitution had been paid in March. Typically -- following that we send the general contractor a letter assessing the liquidated damage. Given that it got lost in -- it happen -- we didn't send the liquidated damage letter until -- in February.

>> Mayor Reed: Well, do we have an issue with an equitable defense to this because of the delay? It's sort of hard to sort out who's in charge of this between the contractor who we have a contract with and the subcontractor who's ultimately responsible for this I presume under their arrangement and whether or not it would have been better for them to deal with that earlier. I can't tell if any harm was suffered by the delay, with the subcontractor. But I'm worried about an equitable claim that somehow between us and the subcontractor some the subcontractor who is now apparently maybe not out of business but ill and doesn't have a job to work on now. So do we have an equitable defense issue even with liquidated damages?

>> Well, again not personally being involved in this particular matter, I'm not sure exactly whether the factual situations would create an equitable defense or an issue. But we could work with Nina to look at that issue, and then if you send to it to CED Committee we can also come back, or we can come back to Rules with information on that.

>> Mr. Mayor, I was going to suggest something along the lines of what Ed was just speaking to, is it sounds as though we need to get the chronology in order as well as when some of the triggers were put into place so that the council understands the City's actions and what options the council has going forward. If there are any, definitely I hear the opportunity for a referral to CED, but it feels to me as though there are certain key dates and alternative actions that we're not prepared for today and that bringing it back would certainly give the committee more information to make a more informed decision.

>> Councilmember Chirco: I would support that, because yesterday we dismissed a huge number of debts against other people and statute of limitations and that concerns knee.

>> Councilmember Constant: You actually brought up what I was going to bring up. I think when we do review this, we should see if there's a specific time that we should take action in. Because you know having been a business owner before getting a bill for something that happened over a year in arrears is sometimes dull to work with, especially if you're a small business. If you could do that maybe we have a 12 month period. Because really, when people make mistakes, it's kind of hard. I tell you I retired from the police department in year 2000. I got a bill six years later for miscalculations I'd made. Six years later, you kidding me? I think sometimes we have to be responsible for our actions as well. And then just to clarify where things come back. I think the policy itself discussion should go to CED but this particular issue should come back to rules.

>> Councilmember Chirco: Would I make that motion and note and file the rest of them.

>> So we'll bring back a written report for the Rules Committee to review, we'll track the referral today, if there's any additional referrals, how about we send them all to CED at once, once the committee has had more information to either add on to today's referral?

>> Mayor Reed: Is that okay?

>> Councilmember Chirco: Yes.

>> Mayor Reed: So we have a motion to refer to staff for some additional work, bring it back to us, and note and file the rest of the public record. All in favor, opposed, none opposed, that's approved. We now go to appointments to boards, commissions and committees. I have a recommendation to swap councilmembers Chu and Nguyen, on the mobilehome advisory and the small business development commission. And in my memo I note that while there are some other committee changes that councilmembers were interested in that we ought to wait until after we've resolved the retirement board

restructuring before we start moving people around, because this was the only trade for trade in the whole list.

>> Councilmember Constant: Motion to approve.

>> Councilmember Pyle: Second.

>> Mayor Reed: Motion is to approve. All in favor, opposed, none opposed.

>> Lee Price: Can I ask for a one week turn around so that we can go ahead and put that on next week's agenda?

>> Mayor Reed: Yes. So that goes on next week's agenda. And then recommendation from the clerk to approve Nathaniel Montgomery to the project diversity committee to fill an unexpected opening.

>> Councilmember Chirco: Move approval.

>> Councilmember Constant: With one-week turn around?

>> Lee Price: Yes, please.

>> Mayor Reed: The motion is to approve with one-week turnaround. All in favor, opposed, none opposed, that's approved. The donation of two surplus fire vehicles has been deferred a week. Next we have to consider the city auditor's monthly report for activities of February. Sharon Erickson is with us.

>> Sharon Erickson: Thank you, Mr. Mayor and members of the committee. We issued two reports during the month of February, decentralized cash handling and an audit of the redevelopment agency's agreement with legacy partners for the museum park project. Also during February, I have mixed feelings about announcing that senior auditor Jorge Oseguera took the position of City Auditor in Sacramento of which we are extraordinarily proud and really sad to see him go. He was actually sworn in yesterday. Assignments in progress, we have three for sure that are scheduled for March, they'll be released tomorrow. Review of community center staffing, our semi annual recommendation follow-up report, in which we are trying this time to really try to quantify any potential budget impacts from recommendations. And then also a verification of performance cost and performance measures of sewer line cleaning program. We are also struggling to get through audit of the card room oversight. What I tried to do here is give you some notice and I regret I didn't do this in advance of yesterday's meeting that the focus of our review really is on licensing and permitting of card room owners and key employees. And other employees. So that's where we're really focusing in, so it really was a separate issue from what was decided yesterday. That draft is out for response. It went out this morning to the administration, and we'll be coming back at either at the April Public Safety meeting or potentially before. We'll have to work that out. Other upcoming audits coming up then in April, are audit of major contracts, this is the airport parking management agreement, and then we are working on our financial scan the first one of community based organizations. We're hoping that one can hit in April as well. We've started this month four new projects, somehow we got them all lined up back to back and now we're starting new ones. Those are an audit of pension sustainability of procurement card transaction, disability retirements and take-home vehicles. I'm happy to answer any questions.

>> Mayor Reed: Pete.

>> Councilmember Constant: Just a quick question on the take-home vehicles. I know we've had a few of those. What's going to be different on this particular one than the previous ones? Just bringing it up to date or is there a differently scene?

>> Sharon Erickson: Yes. This one, the previous audit was of the fleet in general as I understand it. It was while I wasn't here. I understand it was the fleet in general. There was a recommendation related to take home vehicles. We want to go in, in depth? And look at where those vehicles are, what the usage is.

>> Councilmember Constant: So this is citywide, would include police take home vehicles which was a separate audit at one point as well.

>> Sharon Erickson: We'll be doing this one citywide.

>> Councilmember Constant: Okay, thank you.

>> Mayor Reed: Couple of questions. The date for the City Auditor's -- well, the City Manager use of force advisory group which you're participating in, there's a return date on that to council?

>> We'll be providing a status report to the Public Safety committee March 18th.

>> Mayor Reed: Will there be a memo out on that soon I presume?

>> There will be a verbal report out with a PowerPoint.

>> Mayor Reed: Okay, March 18th.

>> Councilmember Chirco: Would that go to all of the council offices?

>> The PowerPoint presentation, sure, we can get it out.

>> Mayor Reed: I think you should just plan on circulating that after you've done it. There will be some interest in it I'm sure. Anything else from the committee? We need a motion to accept the report.

>> Councilmember Constant: So moved.

>> Councilmember Chirco: Second.

>> Mayor Reed: Motion is to approve the report, all in favor, opposed, none opposed, report's approved.

>>> Third item on the approval list is approval of the great American litter pickup even as a city council sponsored event.

>> Councilmember Chirco: Move approval.

>> Councilmember Constant: Second.

>> Mayor Reed: Motion is to approve that. All in favor, opposed none opposed, that's approved. Council committee agendas, there's a request to add an item to the community and economic development committee work plan for April 22nd regarding commercial signage on city-owned property.

>> Councilmember Chirco: Move approval.

>> Second.

>> Mayor Reed: Motion is to approve. All in favor, opposed, none opposed, that's approved. Taking us -- we have nothing under open government initiatives. We have open forum. David Wall.

>> David Wall: Good afternoon. First and foremost --

>> Mayor Reed: Can you get a little closer to the microphone? Just pick it up a bit, thank you.

>> David Wall: Doesn't really matter you can hear me. First and foremost I want to thank the San José police department once again for their outstanding and continuing efforts in my neighborhood. With special reference to Officer Todd McMann. 4124, official thanks will be forthcoming on the public record. Second I'd like to discuss the public record request, and I'm considering an environmental service department reorganization chart that I asked for. I think it's reasonable that I be given this because it's posted on the city's intranet so employees knew about it but I was denied. So I thought I'd bring that to your attention. Third, CPE, the cost per enplanement, the calculation needs to be looked at in closer detail. Also, for use at the airport, are you familiar with MD-80 type aircraft? Well, the modifications from stage 2 to stage 4 can be done relatively easy and could be done at nighttime, and planes could be moved around and parked at the airport and work on, for relatively (inaudible) Here's my garbage bill. I've asked the city animal control complaints on the garbage bill for overages, all we have is the healthy neighborhood venture fund. And I don't know why they have an exclusive bid on the garbage bill. People will give money for animal control if it's made available. I would. I wouldn't give a dime to HNVF because of all those redundant systems and how they carry out those nonprofit centers. But animal control I'd love to give money but there's no way to give it and I've asked this before. And lastly, I want to thank all of you. You're putting up with a lot of extra work and you're not being compensated for and getting a lot of grief from citizens, some very much deserved, but not all. Thank you.

>> Mayor Reed: I'd like to ask the administration to take a look at that Healthy Neighborhood Venture Fund check-off box, we did that a few years ago. I haven't seen a report on whether or not anybody gives or works and maybe animal control or some other items could be added on that so there's a choice that might generate some money. Yeah -- so police officers, firefighters, park maintenance, you name it, but it may be a source of funding. Council salaries, probably not.

>> David Wall: I don't often write off -- you should be paid extra in my opinion.

>> Mayor Reed: And then the public records act requests --

>> Lee Price: Mr. Mayor, I was just going to add, in case Mr. Wall didn't know this, if you do have a cat or dog that you license, and you get your renewals from PRNS for those licenses, there is an opportunity to check a box and to also add a donation to your check. So there is an opportunity to donate to animal services in that regard.

>> Mayor Reed: If you're already licensed.

>> Lee Price: If you're already licensing your pet.

>> David Wall: Garbage bills are mandatory for property owners.

>> Mayor Reed: Okay. And the public records act request that Mr. wall referred to, do we need to agendize that I think for next week. If he's been denied the records, let's take it up next week. Anything else? Meeting's adjourned.