



**CITY COUNCIL WORK SESSION  
CITY COUNCIL CHAMBER CONFERENCE ROOM  
MONDAY, AUGUST 5, 2013, 5:00 to 7:00 PM**

1. Call to Order
2. 5:00 – 5:30 p.m. - Review and discuss aspects of a new franchise agreement with Northwestern Energy
3. 5:30 – 6:50 p.m. – Review areas outside city limits that have utility connections or are wholly surrounded for consideration of annexation
4. Public Comment
5. Adjournment

NorthWestern Energy Feb 2013 Comments to the City of Whitefish markups.

ORDINANCE NO. \_\_\_\_\_

AN ORDINANCE GRANTING TO NORTHWESTERN CORPORATION d/b/a/ NORTHWESTERN ENERGY A NON-EXCLUSIVE FRANCHISE AND FIXING THE TERMS THEREOF UNDER WHICH SAID COMPANY MAY CONSTRUCT, EQUIP, LAY, MAINTAIN AND OPERATE NATURAL GAS DELIVERY FACILITIES IN, UNDER, UPON, OVER AND ACROSS STREETS, AVENUES, ALLEYS, HIGHWAYS, BRIDGES, EASEMENTS AND OTHER PUBLIC PLACES IN THE CITY OF WHITEFISH, MONTANA, AND MAY DELIVER AND SELL NATURAL GAS.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF WHITEFISH, MONTANA:

Section 1. There is hereby granted to NorthWestern Corporation d/b/a NorthWestern Energy, its successors, and assigns ( "Franchisee"), the right, privilege, and franchise (collectively the "Franchise") under the terms contained herein to construct, equip, lay, maintain and operate in, under, upon, over and across the streets, avenues, alleys, highways, bridges, easements and other public places in the City of Whitefish, Montana, ( "City"), as now or hereafter constituted, natural gas delivery facilities for the purposes of transporting, conveying, distributing, supplying and selling natural gas services for heat, power and other purposes. Such natural gas services shall be provided at rates fixed and allowed by the Montana Public Service Commission, and Franchisee agrees to make publicly available the schedules of rates thus fixed or allowed as required by the laws of Montana.

Section 2. Franchisee agrees to construct and maintain all natural gas delivery facilities according to current industry standards and in compliance with all applicable codes, rules, regulations, statutes, and orders of local, state, and federal agencies having jurisdiction in such matters.

Section 3. Franchisee shall extend its natural gas delivery facilities to such parts of the City as the provision of Franchisee's natural gas services ~~and Public Service Commission tariff's~~ shall justify. **This and any and all other requirements are already covered in Section 1 and 2, no need to single this one out.**

Section 4. Franchisee, at all times during the existence of this Franchise, shall use its best efforts to obtain, deliver and supply a continuous, sufficient and adequate quantity of natural gas for use by said City, its inhabitants, and Franchisee's customers, provided, however, that Franchisee shall not be liable to said City or to Franchisee's customers because of the interruption or discontinuance of the supply of natural gas by causes beyond the reasonable control of Franchisee.

Section 5. Franchisee shall not discontinue the delivery of natural gas through its natural gas delivery facilities, or any portion thereof, for an unreasonable length of time for the purpose of making repairs and extensions, but Franchisee shall not be liable to the City or any of Franchisee's customers for damages caused by such temporary discontinuance or

interruption of the delivery of natural gas, provided that such repairs and extensions are made with reasonable efforts.

Section 6. All work done in, under, upon, over, and across the present and future streets, avenues, alleys, highways, bridges, easements, and other public places in the City by Franchisee for the purposes of carrying out the provisions of this Franchise shall be done and performed in a professional manner. When any street, alley, or other public place in said City is excavated or damaged by Franchisee by reason of such work, Franchisee shall restore such street, alley, or public place to its former condition as early as practicable. **Franchisee shall restore such street, alley, or public place to its former condition as early as practicable. <---- this sentence covers this** ~~Franchisee agrees that it and/or its contractors shall not deposit mud and dirt on City streets and if deposited during construction, Franchisee and/or its contractors shall clean and sweep the street of such debris.~~

If at any time a change in the grade or plan of any street, alley, or public place shall be made by order of the proper City officials, Franchisee shall, without expense to the City, make such changes in the location of its natural gas delivery facilities as the change of the grade or plan of the street, alley, or public place makes necessary, which said changes shall be made as soon as possible after said Franchisee shall have received notice from the proper City official having the charge of the same.

~~Franchisee agrees to comply with the terms of any lawfully adopted generally applicable local ordinance, to the extent that the provisions of the ordinance do not have the effect of limiting the benefits or expanding the obligations of the Franchisee that are granted by this Franchise. Neither party may unilaterally alter the material rights and obligations set forth in this Franchise. In the event of a conflict between any ordinance and this Franchise, the Franchise shall control, provided however that the Franchisee agrees that it is subject to the lawful exercise of the police power of the City. As discussed above in the Section 3 note, this edit is also covered in Section 2~~

~~Specifically, Franchisee agrees to submit applications for Excavation Permits to the City's Public Works Department and be billed for and pay the applicable Excavation Permit Fees and any street or sidewalk cutting fees. We are glad to work directly with the city to keep them up to speed on our evacuation needs in a timely fashion working directly with the City, but submitting applications is not very efficient. We will also have emergency situations where we may not be able wait to resolve the situation~~

Section 7. Franchisee shall hold the City harmless from all costs and damages which shall or may accrue to said City by reason of the neglect, default, or misconduct of the Franchisee in connection with the exercise of its rights hereunder.

Section 8 - Franchisee shall maintain throughout the term of this Franchise general liability insurance in the minimum amount required by Franchisee's Risk Management Department to adequately insure and/or protect the legal liability of Franchisee with respect to the installation, operation and maintenance of the natural gas delivery facilities together with all the necessary and desirable appurtenances authorized herein to occupy the public rights-of-way or public utility easements. Such insurance will provide protection for bodily injury and property damage including, without limitation, contractual liability and legal liability for damages arising from collapse and underground incidents.

Franchisee shall file with the City, within thirty (30) days following the effective date of this Franchise, a Certificate of Insurance evidencing proof of said insurance required pursuant to this Section and thereafter upon request of the City.

The following edits are extremely broad and burdensome, therefore we prefer the original language and a new section for insurance that we are comfortable with as shown above To the fullest extent permitted by law, Franchisee shall fully indemnify, defend, and save City, its agents, representatives, employees, and officers harmless from and against any and all claims, actions, costs, fees, losses, liabilities or damages of whatever kind or nature arising from or related to Franchisee's delivery of service or performance of work under this franchise agreement. As an example -- This section is extreme (see yellow highlight above this insert). NorthWestern is should not be expected to indemnify the City for things that may be beyond NorthWestern's control.

Franchisee shall purchase and maintain insurance coverage on a primary noncontributory basis, as set forth below. Bresnan shall provide the City a Certificate of Insurance and a copy of the additional insured policy endorsement listing City as an additional insured showing coverage for commercial General Liability Policy on a per occurrence claims form.

Franchisee shall maintain in full force and effect, at its own cost and expense, during the term of the Franchise, Commercial General Liability Insurance in the amount of \$1,000,000 combined single limit for bodily injury and property damage. Such insurance shall be noncancellable except upon thirty (30) days prior written notice to the Grantor. See NorthWestern Insurance Language inserted above

### Franchise Fees

NorthWestern does not support or endorse the concept of Franchise Fees. Further, Montana Law and/or case law provide that there may only be limited circumstances where theysuch fees may apply. NorthWestern does not believe Whitefish has met the burden necessary to establish a legal franchise fee. The following comments are offered assuming that the City believes it has the legal ability to impose such a fee on NorthWestern.

If the City were to impose such a fee on NorthWestern, NorthWestern's tariffs allow it to would turn around and recover these costs in the bills of its Whitefish customers only. These costs would only be unique to the Whitefish area and processed under an existing MPSC Rate Schedule to handle such costs to the extent they exist. These fees are another example of implementing a hidden tax in our customers' bills, where NorthWestern assumes the role of the tax collector for the City. If the City wishes to collect additional taxes for its citizens it

should do it directly, in an open and transparent process, and not bury it in this type of agreement or as a hidden tax on their utility bills.

At a recent MPSC Hearing on NorthWestern's Annual State Property Tax Rate True-up, the Commission expressed various levels of concern regarding NorthWestern's role as a hidden tax collector, including notifying our customers on a regular basis that their bills include a very high level of State Property tax recovery. NorthWestern is the largest tax-payer in Montana, with the highest tax rate in the State as well.

So if the City were to go down this path, we would continue to oppose such a fee and would also contact our Whitefish Natural Gas customers to inform them of the City's intent to impose such a fee, that we are opposed to its use assessment, and that we are simply passing it on on behalf of the City.

Section 8. Franchisee shall pay to the City an annual franchise fee equaling \$0.10 per lineal foot for each lineal foot of plastic gas main and steel gas main in the City's right-of-way plus \$10.00 for each above ground facility contained in the City's right-of-way. For calendar year, 2013, Franchisee and City agree that this amount equals \$ .00. One-fourth of the franchise fee payment shall be due quarterly and payable within ninety (90) days after the close of the preceding calendar quarter. Each payment shall be accompanied by a brief report prepared by a representative of the Franchisee showing the basis for the computation.

Franchisee and the City agree that such a franchise fee is appropriate as a regulatory fee for the following reasons:

- Franchisee currently uses the City's right-of-way at no cost. The property taxes which the Franchisee pays are for provision of the general services of the City which the Franchisee receives as does every other business, not for the specific benefits and services which the Franchisee receives from its use of the right-of-way.
- Natural gas mains and service lines present specific and special challenges for the City's Public Works Department such as:
  - The useable space for various public and private utilities in the public right-of-way is limited and natural gas lines present the highest risk of all these utilities when in conflict with City facilities;
  - Any excavation near a natural gas line progresses much more slowly and is more expensive due to the risk involved;
  - When a natural gas main or service line crosses another underground utility, the construction crew and excavator's work becomes extremely delicate and at times must even come to a halt while the gas line is relocated;
  - Our extensive work in the right-of-way and experience with "U-Dig" locate services is such that it is not uncommon for City crews or private contractors to hit and damage natural gas lines which have not been

located accurately. This problem not only places workers, as well as citizens and property in the immediate vicinity, at great risk, but typically ties up emergency responders and their equipment to secure the area until the danger has passed;

The Public Works Department is constantly rebuilding roads and aging infrastructure throughout the community. Conflicts with natural gas mains often occur when road grades are lowered or when space is required for new water, sanitary sewer and storm sewer mains. These conflicts complicate the design process, delay the pace of construction and ultimately add time and expense to the project.

As a self-government power municipality with a charter form of government, the City has authority beyond a statutory municipality in being able to request and/or require payment of a franchise fee.

The City currently receives a franchise fee from other utilities using the public right-of-way including cable television services, the water utility, and the wastewater utility.

Section ~~89~~. Franchisee is hereby given the right and authority to make assignments of this Franchise, and its rights hereunder, provided all assignees agree to be bound to the same extent as the original Franchisee.

Section ~~910~~. Except as provided in this paragraph, failure on the part of Franchisee to comply in any substantial respect with any provision of this Franchise shall be grounds for forfeiture thereof. No forfeiture shall take effect unless either (1) Franchisee agrees to the forfeiture, or (2) a court of competent jurisdiction (with a right of appeal in either party) has ruled that Franchisee failed to comply in a substantial respect with any provision of this Franchise and Franchisee has not cured the failure found by the court within six (6) months after the court's final order. The City Council, in its discretion, may grant additional time to Franchisee to cure the failure as it deems reasonable.

Section ~~4011~~. This ordinance shall take effect and be in force from and after thirty (30) days after the final passage and approval hereof, provided Franchisee shall file with the City Clerk a written acceptance of this ordinance within said thirty (30) day period, but if such acceptance is not so filed, this ordinance shall be void.

Section ~~412~~. This Franchise shall be hereby granted for an initial term of ten (10) years from and after the date of the final acceptance of this Ordinance by the Franchisee. Thereafter, this Franchise will automatically renew every ten (10) years for an additional term of ten (10) years, unless cancelled by either party by written notice to the other party, no less than five (5) years prior to the end of the then current term.

Finally passed by the City Council of the City of Whitefish, Montana, and approved this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
John Muhlfeld, MAYOR

ATTEST:

\_\_\_\_\_  
Necile Lorang, CITY CLERK

I hereby certify that the within and foregoing is a full, true, correct and complete copy of Ordinance No. \_\_\_\_\_, passed at the regular meeting of the City Council of the City of Whitefish, Montana, on the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
CITY CLERK

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Notary Public for the State of \_\_\_\_\_  
Residing at \_\_\_\_\_  
My Commission expires \_\_\_\_\_

# Legal Memorandum

July 9, 2013

To: Mayor Muhlfeld and City Councilors

From: Mary VanBuskirk, City Attorney

Re: Public Utility Franchise Agreements



During the April 15, 2013 City Council Work Session on the NorthWestern Energy's (NWE) proposed franchise ordinance and the City's response to NWE's proposed terms, the City Council requested a summary of Montana law as it pertains to public utility franchise agreements. This memorandum summarizes Montana law at this time as it pertains to governmental franchises.

## Nature of a Governmental Franchise.

Under the 1889 Constitution and case law, a franchise was classed as property and subject to taxation as such. Since the 1880's the Montana Supreme Court has acknowledged the right of the State and local governments in Montana to grant franchises to private or public companies for the construction and maintenance of infrastructure within the public right-of-way to provide essential services to the public. Through case law, governmental franchises were approved to provide essential services that affected the welfare of the people for water, telephone, electricity and a street railroad.

The present 1972 Constitution has no comparable provision found under the 1889 Constitution in Article XII, Sections 16 and 17. Without further clarification, franchises are prohibited as a special grant by law (along with "any irrevocable grant of special privileges, franchises, or immunities") in the 1972 Constitution in Article II, Section 31.

By statute, Montana defines a franchise as a "special privilege in the streets, highways, and public places of the city, whether granted by the state or the city, which does not belong to citizens generally by common right." MCA § 7-3-4201(3).

A franchise or right to use the streets, highways, bridges or public places in a city may only be granted by ordinance. MCA § 7-3-4223. As defined in the State tax code, the term "property" includes franchises. MCA § 15-1-101(1)(p). However, the State tax code further provides that in the Department of Revenue's "property" assessment, a public utility franchise may not be assessed. MCA § 15-23-303.

Court cases interpreting the meaning of franchises as it pertains to local governments have not helped much to clarify the law. In 1948 the Supreme Court characterized a franchise as a property that is incorporeal and intangible in its nature. *Glodt v. City of Missoula* (1948) 190 P.2d 545. In *Fair Play Missoula, Inc. v. City of*

*Missoula*, 52 P.3d 926 (2002) ("*Missoula*"), the Supreme Court gave some examples of public privileges granted as franchises to individuals and not enjoyed by the citizens generally based on 1917 and 1918 Court decisions: street railways laying tracks and operating cars on public roads; telegraph and telephone companies erecting poles and wires across public and private lands; and water companies tearing up streets and impeding travel to install and repair mains. Considering these early cases and undeveloped case law, the Court made the following observation in *Missoula*:

Unfortunately, Montana has failed to develop a comprehensive statutory scheme in this complex area, with the result that the law of governmental franchises will likely develop on a case by case basis in a manner that is reactive, not proactive, and is of marginal guidance to governmental officials struggling with these issues. Accordingly, this area of the law is one which the legislature may wish to examine in a future session.

Even though the 2002 Supreme Court encouraged legislative action to resolve these uncertainties, the Montana legislature has chosen not to clarify governmental franchises through legislation to date.

One year later in *Montana-Dakota Utilities Co. v. The City of Billings*, (2003) 80 P.3d 1247 (*Billings*), the Montana Supreme Court addressed whether franchise fees may be charged by a local government for a utility's use of public rights-of-way.

The underlying facts in *Billings* are confusing and complicate what could have been a straight forward decision about the ability of local governments to assess utility franchise fees. The Billings city council passed Ordinance No. 00-5133. The ordinance was entitled the "City of Billings Right-of-Way Management Ordinance"<sup>1</sup> (the ordinance). The ordinance was enacted with the purpose of protecting and regulating the city's right of way:

... [T]o protect the public rights-of-way within the City against damage and unauthorized encroachment; minimize public inconvenience during utility emplacement or maintenance; recover the costs of regulation and oversight; recover fair compensation for the occupation of the rights-of-way; and prevent premature exhaustion of the right-of-way capacity to accommodate telecommunications, utilities and other public services.

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<sup>1</sup> The terms of the 2003 ordinance were similar to an earlier passed ordinance in 1992 that incorporated franchise fee provisions similar to those proposed in the 2003 ordinance, which were withdrawn by the city after a referendum drive placed the 1992 ordinance before the voters. As early as 1918 Billings' efforts to charge a fee to its gas supplier has been unsuccessful. *State ex rel. Billings v. Billings Gas Co.* (1918), 173 P. 799.

In order to accomplish its stated purpose, the ordinance provided a "comprehensive regulatory scheme" for the leasing of city-owned property, licensing of nongovernmental entities whose facilities pass through the right-of-way and executing franchise agreements with businesses that occupy the right-of-way to service customers within the city. Towards this end, the ordinance established utility franchise fees each utility would pay in accordance with (1) a lease of city right-of-way based on fair market rent, (2) a pass-through license based on a per-foot annual assessment; or (3) a franchise fee based on 4% of gross annual revenues received from the provision of telecommunications or utility services within the city. Whether the utility was a lessee, licensee, or franchisee, the ordinance regulated the utilities' use of the right-of-way to service customers and required the utilities to obtain a work permit, post a performance bond, secure insurance, and provide notice prior to work in a right-of-way.

Following its enactment, the Montana-Dakota Utility, the Montana Power Co., Yellowstone Valley Electric Coop, Inc., and Intervenor Touch America, Inc. challenged the franchise fee provisions as an illegal tax. Other public utilities and telecommunication companies filed for *amici* status for the plaintiffs. The Montana League of Cities and Towns appeared as an *amicus* for the city of Billings. The city and the plaintiffs filed cross motions for summary judgment.

The District Court ruled on the pending summary judgment motions and agreed with the plaintiffs (public utilities and telecommunication companies) that the ordinance's franchise fee (probably limited to the fee based on an assessment of 4% of a utility's gross annual revenues) was an unlawful tax and severed the franchise fees from the ordinance. The city appealed the District Court's decision to the Montana Supreme Court. The sole issue framed by the parties in the appeal was limited to the franchise fee based on 4% of the utility's annual gross revenue:

The issue on appeal is whether a franchise fee based on 4 percent of gross annual revenue generated by each utility that occupies the public rights-of-way within the city constitutes a tax on the sale of utility services?

Also complicating the issue on appeal, a successful initiative drive placed the ordinance on the November 2001 ballot and Billings voters rejected the ordinance by a margin of 58 to 42 percent.

Unfortunately, the *Billings* Court did not limit its decision to the sole issue and determined instead that the ordinance which imposed a franchise fee on public utilities for use of the right of way was an impermissible tax on goods or services.

Although the Montana Supreme Court claimed it normally does not address moot questions, the Supreme Court agreed to hear the case even though the Billings voters defeated the ordinance through the initiative process. The Supreme Court looked at the city's ordinance and reviewed whether the ordinance established franchise fees were an

illegal tax under MCA § 7-1-112(1), which prohibits cities<sup>2</sup> to authorize a tax on the sale of goods or services.

The Court began its analysis by looking at the State's franchise law, which the Court acknowledged was "relatively underdeveloped" in Montana. The Supreme Court analyzed the franchise fee charged to the utility under the city's ordinance to determine whether the city's franchise fee was in fact a prohibited tax or a permissible regulatory fee by applying its three-part rule: "if charges are primarily to raise money, they are taxes. If the charges are primarily tools of regulation, they are not taxes".

The Supreme Court reviewed other fees charged by cities found to be permissible and distinguished the fees charged to the utilities under the ordinance. The Court explained that permissible regulatory fees directly benefit those charged the fee. For example, impact fees are permissible fees because the fees are charged and collected into a special account, earmarked for sewer and water system improvements and thereby directly benefit those who generated the need for additional water and sewer capacity.

Although the city argued that its franchise fee was neither a tax nor a fee but a rent for a public utility's occupation of the right-of-way, the Court disagreed. Unlike a city's valid legal exercise of a regulatory fee, the fees paid by the utilities under the ordinance were not earmarked for right-of-way maintenance or regulation but would be used to reduce general property taxes and to fund other projects in the city. Since there was no direct benefit to the utilities, the Supreme Court found the fee charged to the utilities to be a tax.

Furthermore, the Supreme Court disagreed with the city's argument that the utility fee was in the nature of a "rent" for the public utilities' occupation of the right-of-way for a specific benefit and therefore not a tax, by reviewing the city's relationship with public streets and alleys:

We note first of all, that the City's relationship with the public streets and alleys is not that of a traditional proprietor. Under Montana law, the state, not the City, "has ownership and control of all city streets," with local governments as the trustees. (citations omitted). Although the City has regulatory authority over its streets (citations omitted), it does not have the power to exclude public utilities. (citations omitted). Pursuant to this statutory authority, the Utilities herein have occupied the streets and alleys of the City for many years. As they point out, the fact that they

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<sup>2</sup> The Supreme Court recognized that the city of Billings as a local government under a self-government charter may exercise any power not prohibited by the Montana Constitution or State law. Under the facts in *Billings*, the Supreme Court found such an express statutory prohibition of the franchise fee in MCA § 7-1-112(1), which prohibits utilities from enacting a tax on the sale of goods or services which prevented Billings from enacting its franchise fee.

remain subject to the City's policy and regulatory powers does not make them "tenants" in the same sense as a private business that, for example, rents space in the City's airport. Furthermore, given that the Utilities occupied the rights-of-way for years prior to enactment of the ordinance, it cannot be said, even under the City's so-called "*Malott* test," that the ordinance conferred any benefit on them that they did not already enjoy.

The court dismissed the city's rental argument because the State not the city has ownership and control of all city streets, with local governments as the trustees only. Therefore, the city lacked the proprietary interest to claim the right to charge rent for the use of the right-of-way located within the city.

In addition, the 4% gross revenue fee was found inconsistent with the city's rental argument:

The City's "rental" theory is also inconsistent with the fact that the gross revenue fee is not tied to a utility's use or occupancy of the public right-of-way. (citations omitted). (gross revenues-based charge is not a legitimate fee because not based on regulatory costs or extent of right-of-way use). The fee is imposed on all revenues derived from business conducted within the city limits, regardless of the fact that some utility facilities are located on public right-of-way and some on private easements.

Even though the city argued its ordinance called for the negotiation of the franchise agreement with the utility, and therefore not a tax, the Court disagreed:

We conclude that a unilaterally imposed, revenue-generating gross-revenue fee, unrelated to use or occupancy of the right-of-way, is a tax on goods or services in violation of § 7-1-112(1), MCA.

The Supreme Court upheld the District Court and determined that the franchise fee constituted an unlawful tax on goods or services in violation of MCA § 7-1-112(1), reasoning that because the ordinance imposed a fee on public utilities for the use of the public right-of-way, the franchise fee was therefore an "impermissible tax on goods or services". Although the city urged the Court to sever the invalid fee provision from the ordinance in order to leave its other two utility franchise fees and regulatory provisions in place, as the District Court had done, the Supreme Court refused, finding instead that the remaining issues were moot.

At the time of this writing, no other State court case has addressed the broader question whether local governments may impose other types of utility franchise fees for the use of the public right-of-way which meets the Court's concerns found in *Billings*.

If you have any questions, please contact me.

MVB/klh

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## **CITY COUNCIL REGULAR MEETING AGENDA**

The following is a summary of the items to come before the City Council at its regular session to be held on Monday, August 5, 2013, at **7:10 p.m.** at City Hall, 402 East Second Street.

Ordinance numbers start with 13-06. Resolution numbers start with 13-13.

- 1) CALL TO ORDER
- 2) PLEDGE OF ALLEGIANCE
- 3) COMMUNICATIONS FROM THE PUBLIC – (This time is set aside for the public to comment on items that are either on the agenda, but not a public hearing or on items not on the agenda. City officials do not respond during these comments, but may respond or follow-up later on the agenda or at another time. The Mayor has the option of limiting such communications to three minutes depending on the number of citizens who want to comment and the length of the meeting agenda)
- 4) COMMUNICATIONS FROM VOLUNTEER BOARDS
- 5) CONSENT AGENDA (The consent agenda is a means of expediting routine matters that require the Council's action. Debate does not typically occur on consent agenda items. Any member of the Council may remove any item for debate. Such items will typically be debated and acted upon prior to proceeding to the rest of the agenda. Ordinances require 4 votes for passage – Section 1-6-2 (E)(3) WCC)
  - a) Minutes from the July 15, 2013 Council regular session (p. 25)
  - b) Resolution No. 13-\_\_\_; A Resolution amending Resolution No. 12-15 to extend the duration of the Whitefish Community Wastewater Ad Hoc Committee through December 31, 2014 (p. 33)
- 6) PUBLIC HEARINGS (Items will be considered for action after public hearings) (Resolution No. 07-33 establishes a 30 minute time limit for applicant's land use presentations. Ordinances require 4 votes for passage – Section 1-6-2 (E)(3) WCC)
  - a) None
- 7) COMMUNICATIONS FROM PUBLIC WORKS DIRECTOR
  - a) Consideration of approving a design engineering contract for stormwater projects with Robert Peccia and Associates (p. 35)
  - b) Consideration of approving a design engineering contract for stormwater projects with WGM Group (p. 35)
- 8) COMMUNICATIONS FROM CITY MANAGER
  - a) Written report enclosed with the packet. Questions from Mayor or Council? (p. 38)
  - b) Other items arising between July 31<sup>st</sup> and August 5<sup>th</sup>
  - c) Consideration of request from WAVE Board of Directors for reimbursement of building permit fees and impact fees for WAVE expansion (p. 43)
  - d) FY13 year-end financial report (p. 96)

9) COMMUNICATIONS FROM MAYOR AND CITY COUNCILORS

- a) Standing budget item
- b) Discuss upcoming implementation of no parking in bicycle lanes on Baker Avenue (p. 105)
- c) Consideration of a no parking zone on Idaho Avenue near the intersection with Edgewood Place (p. 109)
- d) Letter from Flathead Basin Aquatic Invasive Species Workgroup regarding Aquatic Invasive Species efforts (p. 115)

10) ADJOURNMENT (Resolution 08-10 establishes 11:00 p.m. as end of meeting unless extended to 11:30 by majority)

11) EXECUTIVE SESSION – CONTRACT AND PAY FOR CITY ATTORNEY - Pursuant to §2-3-203(3) MCA, the presiding officer may close the meeting during the time the discussion relates to a matter of individual privacy and then if and only if the presiding officer determines that the demands of individual privacy clearly exceeds the merits of public disclosure. The right of individual privacy may be waived by the individual about whom the discussion pertains and, in that event, the meeting must be open.



The following Principles for Civil Dialogue are adopted on 2/20/2007 for use by the City Council and by all boards, committees and personnel of the City of Whitefish:

- We provide a safe environment where individual perspectives are respected, heard, and acknowledged.
- We are responsible for respectful and courteous dialogue and participation.
- We respect diverse opinions as a means to find solutions based on common ground.
- We encourage and value broad community participation.
- We encourage creative approaches to engage public participation.
- We value informed decision-making and take personal responsibility to educate and be educated.
- We believe that respectful public dialogue fosters healthy community relationships, understanding, and problem-solving.
- We acknowledge, consider and respect the natural tensions created by collaboration, change and transition.
- We follow the rules and guidelines established for each meeting.

Adopted by Resolution 07-09  
February 20, 2007

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July 31, 2013

The Honorable Mayor Muhlfeld and City Councilors  
City of Whitefish  
Whitefish, Montana

Mayor Muhlfeld and City Councilors:

**Monday, August 5, 2013 City Council Agenda Report**

There will be a work session at 5:00 p.m. to discuss aspects of a franchise agreement with NorthWestern Energy and to review areas outside the City limits that have utility connections or are wholly surrounded for consideration of annexation. We will provide food for the work session.

We will also have an executive session after the meeting to discuss the City Attorney contract and pay level for FY14.

The regular Council meeting will begin at 7:10 p.m.

**CONSENT AGENDA** (The consent agenda is a means of expediting routine matters that require the Council's action. Debate does not typically occur on consent agenda items. Any member of the Council may remove any item for debate. Such items will typically be debated and acted upon prior to proceeding to the rest of the agenda. Ordinances require 4 votes for passage – Section 1-6-2 (E)(3) WCC)

- a) Minutes from the July 15, 2013 Council regular session (p. 25)
- b) Resolution No. 13-\_\_\_; A Resolution amending Resolution No. 12-15 to extend the duration of the Whitefish Community Wastewater Ad Hoc Committee through December 31, 2014 (p. 33)

**RECOMMENDATION:** Staff respectfully recommends the City Council approve the Consent Agenda.

**Item a is an administrative matter and item b is a legislative matter.**

**PUBLIC HEARINGS** (Items will be considered for action after public hearings) (Resolution No. 07-33 establishes a 30 minute time limit for applicant's land use presentations. Ordinances require 4 votes for passage – Section 1-6-2 (E)(3) WCC)

- a) None

## COMMUNICATIONS FROM PUBLIC WORKS DIRECTOR

- a) Consideration of approving a design engineering contract for stormwater projects with Robert Peccia and Associates (p. 35)

From Public Works Director John Wilson's staff report:

The Public Works Department issued a public advertisement for Statements of Qualifications from engineering firms interested in our 2013 Storm Drainage Improvements Projects. We received responses from six firms. The Selection Committee interviewed four finalists, including 48 North Engineering, TD&H, Robert Peccia and Associates (RPA), and WGM Group. The Public Works Department commenced contract negotiation with the two highest ranked firms, RPA and WGM Group, immediately following interviews.

The scope of work for RPA includes the following for a fee not to exceed \$49,200:

- Evaluation of drainage needs in the Crestwood area and recommendations for future improvements. Any construction schedule will depend on the scope and cost of recommended improvements.
- Evaluation of storm drainage flows and impacts on Birch Hill Drive and Parkway Drive, with recommendations for future improvements. Outfalls onto private property north of Parkway Drive are known to impact private property. Any construction schedule will depend on the scope and cost of recommended improvements.
- Evaluation of issues at City Beach related to boat bilge discharge and petroleum contaminants. Tasks will include coordination with regulatory agencies and review of Best Management Practices, leading to recommendations for future improvements. Our goal is to install these improvements no later than the spring of 2014.
- Evaluation of drainage needs for Armory Road in the vicinity of Armory Park, with attention to the condition and maintainability of the downstream storm main crossing Armory Park from south to north. Our goal is to implement recommended improvements in the fall of 2013.

This staff recommendation involves two engineering contracts; one with RPA in an amount not to exceed \$49,200 and another with WGM Group in an amount not to exceed \$25,460. The total amount of \$74,660 was anticipated in the proposed FY14 Stormwater budget and has been included under the Improvements line item.

**RECOMMENDATION:** Staff respectfully recommends the City Council approve a design engineering contract for Phase I evaluations of storm drainage improvements with Robert Peccia and Associates, in an amount not to exceed \$49,200, for preliminary engineering in the Crestwood, Parkway Drive, City Beach and Armory Park areas.

**This item is a legislative matter.**

- b) Consideration of approving a design engineering contract for stormwater projects with WGM Group (p. 35)

See above for additional description.

The scope of work for WGM Group involves the evaluation of drainage needs along Monegan Road north of JP Road, with tasks including preliminary needs assessment, hydrologic analysis, and evaluation of alternative solutions, public involvement and recommendations for improvements. We foresee a contract amendment to enable engineering design in the fall of 2013 and a schedule for construction in 2014, based on the availability of funds. We have negotiated a fee not to exceed \$25,460.

**RECOMMENDATION:** Staff respectfully recommends the City Council approve a design engineering contract for Phase I evaluations of storm drainage improvements with WGM Group, in an amount not to exceed \$25,460, for preliminary engineering in the Monegan Road area, north of JP Road.

**This item is a legislative matter.**

#### COMMUNICATIONS FROM CITY MANAGER

- a) Written report enclosed with the packet. Questions from Mayor or Council? (p. 38)
- b) Other items arising between July 31<sup>st</sup> and August 5<sup>th</sup>
- c) Consideration of request from WAVE Board of Directors for reimbursement of building permit fees and impact fees for WAVE expansion (p. 43)

The WAVE has planned for its second major expansion for the past year. After getting architectural review approval, the building permit and impact fees for this expansion was calculated to be \$25,622.06. The start of construction was delayed because of concern over the amount of these permit and impact fees and then whether the agreement between the WAVE and the City provided that the City should be responsible for the fees.

Dan Weinberg, one of the founders of the WAVE and Treasurer of the WAVE Board came to see me on July 15<sup>th</sup> after concern arose about the \$25,622.06 cost for the building permit and impact fees. He brought in a page out of the 2004 Agreement between the Whitefish Community and Aquatic Health Center (now the WAVE) and the City. As explained in Dan's letter of July 26<sup>th</sup> requesting the reimbursement, Dan and other members of the WAVE Board feel that the January 15, 2004 Agreement meant that all building permit and impact fees would be waived, not just for the initial construction of the original WAVE facility. I told Dan that I would do further research on the matter and I called John Phelps as I thought that he would have written the original 2004 Agreement.

When John Phelps called back, he said that the section regarding building permit fees in the January 15, 2004 Agreement was really meant only for the original building

permit. As author, he didn't intend it to extend beyond the first permit, but he acknowledged that no one at that time was even thinking of an expansion. They were only focused and concerned with getting the original building built and then making sure the facility could succeed and pay off its debts. He said he would have thought that it was entirely possible that the WAVE could come back to the City Council in the future for waiver or reimbursement of any fees.

I then researched the 2006-2007 expansion of the WAVE regarding who paid for the building permit fees for that expansion. The building permit of November 2, 2006 revealed that Swank Construction paid the building permit fee as part of the project cost (there were no impact fees attributable to that expansion) and there was no reimbursement from the City.

Because the agreement says "a building permit, and the agreement author's (John Phelps) intent, and the precedent of the WAVE having paid the 2006-2007 expansion permit as part of the project cost, I told Dan and the WAVE Board that I didn't think I could just pay for the \$25,622.06 cost of the building permit and impact fees for the current expansion. They could, however, request reimbursement from the City Council.

Dan feels strongly that the intent of the 2004 Agreement he signed with the City was one of an ongoing relationship which included the City continuing to pay for future building permit and impact fees, especially for a building it owns and leases out. Dan has a letter with the reasons he believes the City should pay for all of the building permit and impact fees and that letter is in the packet.

In the past, the City has reimbursed or paid for building permit fees and/or impact fees in the following circumstances.

1. Many years ago, the City Council would sometimes waive the building permit fees for good causes and community projects such as the Memorial Park grandstands etc. For legal precedence reasons, we now prefer the City Council agree to pay or reimburse any fees. Sometimes the request was denied as well.
2. The City has used Tax Increment Funds (TIF) to pay for the impact fees of various private business developments on the theory that TIF can be used for infrastructure improvements and the property taxes from such new developments is a good return on investment many times over. Situations such as this would be the once proposed boutique hotel or the upcoming Hurraw! Balm building near the WAVE.
3. The City Council approved reimbursing the Food Bank for the impact fees only, not for the building permit for their new building near the WAVE. This reimbursement was from the Tax Increment Fund. Again, the City can use TIF for infrastructure related improvements which is what impact fees represent. The City Council in 2009 denied reimbursing Soroptimists for their renovation building permit.
4. The City Council contributed \$2,500,000 to the high school project from TIF which was well beyond the building permit and impact fee levels.

5. On the golf course new maintenance building, the Whitefish Lake Golf Club paid the building permit fees and the City reimbursed them for the impact fees.

The building permit fees for this expansion permit equal \$14,011.00 and the impact fees equal \$11,611.06 for a total of \$25,622.06. If the City Council approves any reimbursement, as long as they are comfortable, we could pay for any reimbursement from the Tax Increment Fund, both as a city facility and because of the economic development aspects that an amenity such as the WAVE brings to Whitefish.

**RECOMMENDATION:** I am in a difficult position here because I am also a member of the WAVE Board of Directors because the agreements in the past call for the City Manager to be a WAVE Board member. I am sorry this issue was not discussed and resolved earlier. However, my primary obligation is to the City of Whitefish. Therefore, because of the language in the agreement for “a building permit”, the drafter’s intent of the agreement, the precedent that the WAVE paid the building permit fee for the 2006-2007 expansion, and because the situation is analogous to the golf course maintenance building construction, I have the following recommendation.

Staff respectfully recommends the City Council agree to reimburse the WAVE Board for the impact fees of \$11,611.06 from the Tax Increment Fund for the expansion of the City owned and leased facility, but not reimburse the \$14,011.00 cost of the building permit.

**This item is a legislative matter.**

- d) FY13 year-end financial report (p. 96)

Assistant City Manager/Finance Director Rich Knapp has the FY13 year-end financial report in the packet.

#### COMMUNICATIONS FROM MAYOR AND CITY COUNCILORS

- a) Standing budget item
- b) Discuss upcoming implementation of no parking in bicycle lanes on Baker Avenue (p. 105)
- c) Consideration of a no parking zone on Idaho Avenue near the intersection with Edgewood Place (p. 109)
- d) Letter from Flathead Basin Aquatic Invasive Species Workgroup regarding Aquatic Invasive Species efforts (p. 115)

Sincerely,



Chuck Stearns  
City Manager

## "Cheat Sheet" for Robert's Rules

<b>Motion</b>	In Order When Another has the Floor?	Second Required?	Debatable?	Amendable?	Vote Required for Adoption	Can be reconsidered?
<b>Main Motion</b>	N	Y	Y	Y	Majority unless other spec'd by Bylaws	Y
<b>Adjournment</b>	N	Y	N	Y	Majority	N
<b>Recess</b> (no question before the body)	N	Y	N	Y	Majority	N
<b>Recess</b> (question before the body)	N	Y	Y	Y	Majority	N
<b>Accept Report</b>	N	Y	Y	Y	Majority	Y
<b>Amend Pending Motion</b>	N	Y	If motion to be amended is debatable	Y	Majority	Y
<b>Amend an Amendment of Pending Motion</b>	N	Y	See above	N	Majority	Y
<b>Change from Agenda</b> to Take a Matter out of Order	N	Y	N	N	Two-thirds	N
<b>Limit Debate Previous Question / Question</b>	N	Y	N	Y	Two-thirds	Yes, but not if vote taken on pending motion.
<b>Limit Debate</b> or extend limits for duration of meeting	N	Y	Y	Y	Two-thirds	Y
<b>Division of Assembly (Roll Call)</b>	Y	N	N	N	Demand by a single member compels division	N
<b>Division of Ques/ Motion</b>	N	Y	N	Y	Majority	N
<b>Point of Information</b>	Y	N	N	N	Vote is not taken	N
<b>Point of Order / Procedure</b>	Y	N	N	N	Vote is not taken	N
<b>Lay on Table</b>	N	Y	N	N	Majority	N
<b>Take from Table</b>	N	Y	N	N	Majority	N
<b>Suspend the Rules</b> as applied to rules of order or, take motion out of order	N	Y	N	N	Two-thirds	N
<b>Refer (Commit)</b>	N	Y	Y	N	Majority	Neg. vote only

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**WHITEFISH CITY COUNCIL EXECUTIVE SESSION**

**July 15, 2013**  
**5:30 pm to 7:00 pm**

A Closed Executive Session for litigation update with the City Attorney. Present were Mayor Muhlfeld, Councilors Mitchell, Sweeney, Anderson, Hildner, Hyatt and Kahle. City Staff present were City Manager Stearns, City Attorney VanBuskirk and Senior Planner Compton Ring.

**WHITEFISH CITY COUNCIL MINUTES**

**July 15, 2013**  
**7:10 P.M.**

**1. CALL TO ORDER**

Mayor Muhlfeld called the meeting to order. Councilors present were Mitchell, Sweeney, Anderson, Hildner, Kahle and Hyatt. City Staff present were City Manager Stearns, City Clerk Lorang, City Attorney VanBuskirk, Assistant City Manager/Finance Director Knapp, Senior Planner Compton-Ring, Public Works Director Wilson, Police Chief Dial, and Fire Chief Kennelly. Approximately 12 people were in attendance.

Councilor Hildner welcomed his daughter, Erika to the meeting.

**2. PLEDGE OF ALLEGIANCE**

Mayor Muhlfeld asked Jen Frandsen to lead the audience in the Pledge of Allegiance.

**3. PRESENTATIONS – Update on high school construction project and budget – Dow Powell**

Dow Powell said they heard they've been lax at giving the Council an update, so he was here tonight to update them and show a power point presentation. He said one of the school employees brought an idea to their attention and it involves the existing foyer. The initial plan had a 13.5 foot hallway connecting the new portion of the school to the old portion of the school and they realized it wouldn't be wide enough for half-time crowds at games or large events. They determined that if they kept the existing foyer and bathrooms the school would gain the existing 4,000 square feet and save on the expenses in the budget. Even with the foyer renovation the savings is about \$244,000. He said the gym is now complete. The locker room and weight rooms are in progress. The Iron Horse Foundation gave a \$1 million commitment for this project, (\$900,000 for construction and \$100,000 to purchase equipment). He said bid package 2 is the structural part of the project. In the next 30 days they will have steel going up and framing will start about the 23<sup>rd</sup> and will include all of the walls and the roof. The sewer tie-in is just about complete. He said they are trying to get the mechanical room changed over before school starts. They hope to have the locker rooms up and running for football season.

He said that bid package #1 was \$892,515 and with change orders and credits they got \$25,084. Bid package #2 was \$2,620,000 and included underground plumbing. To date, with change orders,

deductions and reductions it is \$2,677,855 which is about \$10,000 over. Bid package #3 was approved at \$10,442,987 and the low bid came in at \$11,570,066 and they are researching ways to save money. When value engineering is included in the calculation it brings it down to \$10,514,629. The School Board approved bid package #3 last week and the bidders are working on other areas for savings. Proposed solutions include using school TIF money, if possible, or using a portion of the furniture budget (FF&E) which is at \$900,000. He said they don't really have a contingency budget at this time and they'd like to have one.

Councilor Hyatt said in the beginning they talked about technology advancements in the building and Dow said they have not addressed the technology aspect of this project; they have been concentrating on constructability. Councilor Mitchell asked if the money from Iron Horse freed up some of the other budget money and Dow said the media arts room and locker rooms were put on an alternate list in Bid package #3, so they went out to find fundraising for it. Dow said Iron Horse approached them and wanted to get a better cardio area attached to the weight room and to help with the locker rooms. Councilor Mitchell asked and Dow said they are not shorting technology, just not currently addressing it. Councilor Mitchell said they are off budget by about \$260,000 and Dow said the School Board is working on it and realtors are working on selling the alternative high school. Councilor Mitchell said they were initially told that the part that is now being saved wasn't worth saving. Dow said it is worth saving and when they go to ARC they will break up the look of the building, too, and he thinks that has value. Councilor Mitchell said it has been a frustrating process, and he appreciates Dow coming tonight. Councilor Kahle thanked Dow for the update. He said there was a \$25,000 credit in phase 1; they are \$57,000 over on the second phase. Manager Stearns said they put the underground package (\$68,497) into bid #2, so, except for that they would have been off \$10,000. Councilor Mitchell said they are \$267,000 over budget and that is the bottom line. Mayor Muhlfield said the project leaders were given large marching orders and they've done a good job of cobbling together the project and the budget. He thanked the Iron Horse Foundation for their help and the building and design team for all of their work.

**4. COMMUNICATIONS FROM THE PUBLIC**—(This time is set aside for the public to comment on items that are either on the agenda, but not a public hearing or on items not on the agenda. City officials do not respond during these comments, but may respond or follow-up later on the agenda or at another time. The Mayor has the option of limiting such communications to three minutes depending on the number of citizens who want to comment and the length of the meeting agenda)

Mayre Flowers, Citizens for a Better Flathead at 36 4<sup>th</sup> Street West, said the pharmaceutical collection program included a drop box in the police stations in Whitefish and Columbia Falls and at the sheriff's department in Kalispell. She said 400 pounds of pharmaceuticals were collected and 349.8 pounds were from the county, 25.6 pounds were from Columbia Falls, and 14.4 pounds from Whitefish. She said collection of old pharmaceuticals is a real service to the public and protects water supplies. She said she looked forward to more participation from Whitefish.

Matt Baldwin, Woodside Lane, encouraged them to have a public discussion about the City's impending maneuvers with the donut planning negotiations. He said this is an important discussion. He isn't an expert on the open meeting law, but he feels that the residents and press deserve to hear the City's stance and how each Councilor votes on this matter. He said as the *Whitefish Pilot* he represents the public and lets them know what is happening. He has asked about closed meetings before, but he thinks the residents of Whitefish deserve to hear an open discussion tonight.

Mayor Muhlfeld said they discussed this briefly in their closed session and he thinks the public can anticipate comments from the Councilors at the end of the meeting.

## **5. COMMUNICATIONS FROM VOLUNTEER BOARDS**

Councilor Hildner said he attended the budget oversight meeting and he thinks Dow did a good job of bringing everyone up to speed. Councilor Hyatt said the Parks and Recreation Department will be putting their Master Plan in front of the Planning Board. Councilor Mitchell said the Park Board met and they are looking at how to modify the proposed landscaping along Highway 93 West to be more suitable and more easily maintained which should result in a better final product. He is proud of what that group has done so far. Mayor Muhlfeld said on July 13th he attended the opening ceremony for the Living Wetlands Trail and over 150 children and adults made their way through the trail. It came along as a PUD years ago and this is a definite public benefit. He liked watching people with disabilities and children learn how the wetlands play a critical role in water quality. He congratulated and thanked the Whitefish Lake Institute, the Averill's and the Friends of Wisconsin Avenue Wetland group. He invited the Councilors and the public to the fundraiser for the Institute on July 25<sup>th</sup> and 26<sup>th</sup>.

**6. CONSENT AGENDA**-(The consent agenda is a means of expediting routine matters that require the Council's action. Debate does not typically occur on consent agenda items. Any member of the Council may remove any item for debate. Such items will typically be debated and acted upon prior to proceeding to the rest of the agenda. Ordinances require 4 votes for passage – Section 1-6-2 (E)(3) WCC)

**6a. Minutes from the July 1, 2013 Council special session (p. 25)**

**6b. Minutes from the July 1, 2013 Council regular session (p. 26)**

**Councilor Kahle offered a motion, seconded by Councilor Anderson, to approve the consent agenda. The motion passed unanimously.**

**7. PUBLIC HEARINGS** (Items will be considered for action after public hearings) (Resolution No. 07-33 establishes a 30 minute time limit for applicant's land use presentations. Ordinances require 4 votes for passage – Section 1-6-2 (E)(3) WCC)

None.

## **8. COMMUNICATIONS FROM PARKS AND RECREATION DIRECTOR**

**8a. Consideration of Park Board recommendation to purchase Soroptimist Park playground capital equipment from Resort Tax fund prior to FY14 Budget adoption (p. 36)**

Ron Brunk, with the Park Board, reported that Soroptimist Park is a 1 acre park located in the north central part of Whitefish. The playground equipment is over 30 years old and doesn't meet current standards. He said they've had new playground equipment in the budget for two years. The bid is \$57,600 for the equipment delivered and installed. The Park Board thinks it is overdue and they ask the Council to support this request.

Councilor Mitchell asked if there was money and Manager Stearns said there is money in the Resort Tax for this project. Councilor Kahle asked about the money for bleachers at Memorial Park and Manager Stearns said that is separate request and that money is currently being set aside and paid out as pledged. They wanted to change the playground equipment on Pine Avenue, but there wasn't enough

money to do both so this year they are focusing on the Soroptimist Park. Ron Brunk said Kiwanis is looking at working with the City, perhaps to help with playground equipment at the other park. Mayor Muhlfeld said he asked if Resort Tax dollars could be used for park capital improvements and City Attorney VanBuskirk said it could.

**Councilor Hyatt offered a motion, seconded by Councilor Kahle, to approve the FY14 budget expenditure of \$57,600 for the purchase and installation of new play equipment and fall material for Soroptimist Park.**

Mayor Muhlfeld said he thinks many families in that neighborhood will be happy.

**The motion passed unanimously.**

## **9. COMMUNICATIONS FROM PLANNING AND BUILDING DIRECTOR**

### **9a. Consideration of application from Bevill Limited Partnership for a minor, two lot subdivision preliminary plat for Orchard Lane 2 consisting of two lots at 463 and 465 Colorado Avenue (p. 39)**

Planner Compton-Ring reported on a request by Bevill Limited Partnership for preliminary plat approval of a two-lot subdivision with an existing townhouse building. The updated regulations allow small projects to come directly to the Council. The subject property is approximately 0.354-acres. The townhouse received Architectural Review approval in 2012 and the construction of the townhouse was completed on January 22, 2013. The owner has the units for sale and the prospective purchasers are interested in owning the units along with the land.

The property is located on the east side of Colorado Avenue between Aspen Grove Street and Cedar Street. The property is addressed as 463 & 465 Colorado Avenue; the lots are 7,914 and 7,491 square feet. It is zoned WR-2, Two-Family Residential District, intended for residential purposes to provide for one and two-family homes in an urban setting connected to all municipal facilities and services. This application is reviewed as a minor subdivision in accordance with the Whitefish Subdivision Regulations. Each lot will have access via a new internal private street ending in a suitable emergency turn around. This driveway and private street are currently not paved due to the utility installation, but it needs to be paved and meet emergency access prior to final plat per the zoning regulations.

An engineered storm drainage plan is required, as the resulting impervious surface will result in more than 5,000 square feet. The plan should include a long-term maintenance plan for Homeowners' Association implementation. City water and sewer have been extended to serve the lots within the development. The existing service line to Lot 2 will need to be abandoned and connected to the sewer main prior to final plat. Subdivisions creating one additional lot are exempt from parkland dedication requirements and no parkland is being proposed. Impacts to the parks in the area as a result of this subdivision will not be significant. The Whitefish City Growth Policy designates this area as Urban. The density and zoning of the subject property falls within the guidelines for the Urban designation according to the Whitefish Growth Policy.

It is recommended that the Whitefish City Council adopt the findings of fact within staff report #WPP 13-03 and approve the preliminary plat for Orchard Lane 2, as submitted by the applicant, subject to the following conditions:

1. The development of the subdivision shall be in substantial conformance with the approved preliminary plat.
2. The existing service line to Lot 2 will need to be abandoned and connected to the sewer main prior to final plat. (Engineering Standards, Chapter 4; Staff Report, Finding 4)
3. The private road and driveway shall be paved prior to final plat. (Whitefish Zoning Regulations, §11-6-3-1D; Staff Report, Findings 1 and 4)
4. The applicant shall submit a site specific drainage plan that shows how runoff water from the impervious surfaces will be retained on site. (Engineering Standards, Chapter 5; Staff Report, Finding 3)
5. All areas disturbed because of road and utility construction shall be re-seeded as soon as practical to inhibit erosion and spread of noxious weeds. (Whitefish Subdivision Regulations, §12-4-30)
6. That a common off-street mail facility shall be provided by the developer and approved by the local post office. (Whitefish Subdivision Regulations, §12-4-24)
7. The following notes shall be placed on the final plat:
  - a. *The internal road shown on the final plat are intended to be privately owned and maintained and open to the public. It is understood and agreed that these internal roadways do not conform to City requirements for public roadways. Because of the road configuration, they are not suitable for all-season maintenance by the public authority. The owners (and successors in interest) of the lots described in this plat will provide for all-season maintenance of the private roadways by creation of a corporation or association to administer and fund the maintenance. This dedication is made with the express understanding that the private roadways will never be maintained by any government agency or public authority. It is understood and agreed that the value of each described lot in this plat is enhanced by the private nature of said roadways. Thus, the area encompassed by said private roadways will not be separately taxed or assessed by any government agency or public authority.*
  - b. That house numbers shall be posted on the house in a clearly visible location.
  - c. Garbage shall be stored in a secure location until the day of pick up or in a bear proof container pursuant to §4-5-4A.
  - d. All noxious weeds, as described by the Whitefish City Code, shall be removed throughout the life of the development by the recorded property owner. (Subdivision Regulations, Appendix D)
8. A Homeowners' Association shall be responsible for snow plowing the private road and maintaining the stormwater facility. The CC&Rs shall contain a maintenance plan for the facilities they are responsible. (Staff Report, Findings 1 and 3)
9. The preliminary plat is valid for a period of three years from the date of approval. (Whitefish Subdivision Regulations, §12-3-8)

Councilor Hildner asked about bear resistant containers and Planner Compton-Ring said it is standard language. Councilor Sweeney said nothing is changing, except the ownership of the property and Planner Compton-Ring agreed. Councilor Hildner asked about the homeowner's agreement and the

applicant said the homeowner's standards on animals can be changed to match the City's standards (re: chickens).

**Councilor Anderson offered a motion, seconded by Councilor Sweeney, to approve the Preliminary Plat of Orchard Lane 2, a minor 2-lot subdivision at 463 and 464 Colorado Avenue, adopt the findings of fact and subject to the nine conditions within staff report #WPP 13-03.**

**The motion passed unanimously.**

## **10. COMMUNICATIONS FROM CITY MANAGER**

### **9a. Written report enclosed with the packet. Questions from Mayor or Council? (p. 78)**

Councilor Kahle asked about downtown parking. Manager Stearns said he and Councilor Anderson met with the Heart of Whitefish last week and they are trying to finalize a date to meet with the working group. Mayor Muhlfeld asked about the application and bids for the grant for tree-thinning and Manager Stearns said he didn't know what the bids were. Public Works Director Wilson said he would check into it and send out an email to the Council. Councilor Hildner said the \$18,000 on the Fire Safe Grants would represent about 25%. Manager Stearns said Director Wilson could update that in the email to the Councilors.

### **9b. Other items arising between July 10<sup>th</sup> and July 15<sup>th</sup>**

Manager Stearns said they put up the gateway way finding sign and Welcome to Whitefish sign near Walgreens. He commended the Public Works crew that helped complete the project.

## **11. COMMUNICATIONS FROM MAYOR AND CITY COUNCILORS**

**11a. Standing budget item - None.**

**11b. Email from Kimberly Sikorsky of Jersey Boys Pizza requesting changing one 2 hour parking space on 1<sup>st</sup> Street or Spokane Avenue to a 15 minute loading/unloading zone parking space (p. 93)**

Councilor Hildner asked and Director Wilson said Public Works didn't have an opinion on this. Manager Stearns said two comments were received from City staff who felt it would set a bad precedent. However, Director Taylor said he knows of problems parents have making quick stops in and out of the Middle School so he thought that maybe a 15-minute parking spot on the east side of Spokane would be valuable. Manager Stearns said the Jersey Boys already have an existing sign for delivery parking only. Councilor Hyatt said he thinks it is more important for the school than for the pizza place. Manager Stearns said these types of spaces are difficult to enforce, so the signs aren't foolproof. Councilor Mitchell asked and City Attorney VanBuskirk said having special parking places for particular businesses is hard to provide for all those for whom it would benefit. Mayor Muhlfeld said this is coming from Jersey Boys, but if the school wants a spot it should come from them. Councilor Mitchell said there are a lot of businesses who would like a 15-minute parking spot, but he doesn't think they can start this precedent. Councilor Anderson agreed. The rest of the Councilors agreed.

**11c. Email from Fred Frost regarding fireworks (p. 96)**

Councilor Hyatt said he lives in the same neighborhood and the fireworks went off at 5 a.m. Manager Stearns said Chief Dial responded to Mr. Frost. He said they had about 50 calls per day and gave out 13 citations. The Police Department is recommending that all the citations be issued for \$500 fines, so they are taking in fairly seriously. He said 46 people may face \$500 fines. Councilor Hildner applauded that recommendation. He suggested that they have a discussion on whether they want to shorten the fireworks to only July 4<sup>th</sup> within City limits.

Mayor Muhlfeld inquired whether there is a motion following the executive session.

**Councilor Hildner offered a motion, seconded by Councilor Sweeney, to approve the filing of the stay pending appeal and to authorize the appeal of Judge Ortley's July 8, 2013 Order in the Phillips lawsuit to the Montana Supreme Court.**

Councilor Mitchell said this is the hardest thing that he has done. He has always tried to work things out without going to court. He is trying to figure out how they're affecting people who live in the donut and they still don't have answers. He said philosophically he is opposed to this, but he understands why they are doing it. He said he wanted the public to understand that he was struggling with this tonight. Councilor Kahle said he also struggles with this, but as an elected official for the City of Whitefish his responsibilities are for the City. He said they need to remember that the City was sued and they need to see it through to the end. He hopes they can continue to negotiate with the county. Councilor Hyatt said when he was elected he stood on the fact that he wanted people to have representation and the people in the donut still don't have representation. He said he didn't believe they need to take this to the Supreme Court.

**The motion passed 4-2 with Councilors Hyatt and Mitchell voting in opposition.**

Councilor Hildner thanked Attorney VanBuskirk and Manager Stearns for service above and beyond the call of duty. He saw Attorney VanBuskirk pulling weeds outside the old police station and Manager Stearns with his hands full of garbage he picked up on his walk to work. He thanked both of them for their efforts. He said if every person picked a weed or picked up litter they'd be a lot further along. He said the cable on the City parking lot is frayed and needs to be replaced. He said the weeds at Baker Commons got mowed and he thanked them for that and said it looks a lot better. He passed out gummy worms for national gummy worm day.

Councilor Hyatt said he went out to the Viking Creek restoration and preserve with his daughter and it is an incredible trail. He thanked Mike Koopal, the Whitefish Lake Institute and the Averill family.

Councilor Anderson said the 13-year old all stars won the All-Star tournament. He said the 12-year olds have a tournament in Columbia Falls this weekend. He said the local teams have really gotten to know each other and it is about families and it affirms why they live here. Councilor Kahle read an email from Doug and Nikki Reed who want more recycling in Whitefish. She said they launched a boat from Whitefish city beach and saw a lot of garbage overflowing. Mayor Muhlfeld said a Whitefish High School student called who said he was working on an Eagle project, maybe this would be a good fit.

Manager Stearns said glass recycling is a problem, but they can look at what they can do. Councilor Hildner said Compton-Ring completed the half marathon and he congratulated her.

Mayor Muhlfeld said the results of the septic leach investigation of Viking Creek and City Beach was completed in May and he wondered what they found. Director Wilson said there was some contamination along those areas and the sewer lines were reviewed via camera, but they weren't failing. He suggested the investigators look into septic tanks along Viking Creek. Mayor Muhlfeld said he saw the City Parks crew refurbishing the garden beds along Highway 93 south and he wanted to thank Director Cozad and the staff. Mayor Muhlfeld said the county is looking at a shortfall of \$50,000 in the county landfill recycling program. He said Mayre Flowers was quoted as saying that perhaps the next step would be to form a working group and he will pass that idea along to the county, letting them know the City would be willing to participate.

Mayor Muhlfeld said the invasive species check station team is set up in Hungry Horse. Councilor Sweeney asked if they've had to quarantine any boats and Manager Stearns said he would ask Director Cozad to let them know. At City Beach the big improvement is that the Whitefish Lake Institute has someone there from 8 a.m. to noon on Saturdays and Sundays. Councilor Hyatt asked and Mayor Muhlfeld said Flathead Basin Commission, the City of Whitefish, the Bureau of Reclamation through USFS and Trout Unlimited all contributed to the cost of the invasive species station. Mayor Muhlfeld said Happy Birthday to Betty Adams who turned 94 this summer. Councilor Mitchell said Highway 93 West is looking really good.

**11. ADJOURNMENT** (Resolution 08-10 establishes 11:00 p.m. as end of meeting unless extended to 11:30 by majority)

Mayor Muhlfeld adjourned the meeting at 8:31 p.m.

\_\_\_\_\_  
Mayor Muhlfeld

\_\_\_\_\_  
Jane Latus Emmert, Recording Secretary

Attest:

\_\_\_\_\_  
Necile Lorang, City Clerk

RESOLUTION NO. 13-\_\_\_\_

A Resolution of the City Council of the City of Whitefish, Montana, amending Resolution No. 12-15 to extend the duration of the Whitefish Community Wastewater Ad Hoc Committee through December 31, 2014.

WHEREAS, on July 16, 2012 the Whitefish City Council adopted Resolution No. 12-15, which created a Whitefish Community Wastewater Ad Hoc Committee (the "Committee"). Resolution No. 12-15 provided for the Committee to disband no later than July 31, 2013, or earlier if the City Council completes its consideration of the Committee's report prior to that date; and

WHEREAS, the Committee completed its draft Management Plan and Report at its July 17, 2013 meeting in time for the upcoming August 19, 2013 City Council work session, but due to the Committee's earlier termination date, the Committee would not be able to assist the City Council in its consideration of the draft Management Plan and Report with the public's participation, unless its duration was extended; and

WHEREAS, during the Committee's July 17, 2013 meeting, the Committee members determined the duration of the Committee should be expanded through December 31, 2013 to allow the Committee's continued participation in the development of the Management Plan and Report with the City Council and public process; and

WHEREAS, it will be in the best interests of the City of Whitefish to extend the term of the Committee to December 31, 2013, or earlier if the City Council completes its consideration of the Committee's Management Plan and Report prior to that date.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Whitefish, Montana, as follows:

Section 1: That Section 4 of Resolution No. 12-15 is hereby amended in its entirety to provide as follows:

Section 4: The Committee shall begin its deliberations as soon as practical after creation of the Committee. The Committee shall be disbanded no later than ~~July 31, 2013~~ January 31, 2014, or earlier if the City Council completes its consideration of the Committee's report prior to that date.

Section 2: This Resolution shall take effect immediately upon its adoption by the City Council, and signing by the Mayor thereof.

PASSED AND ADOPTED BY THE CITY COUNCIL OF THE CITY OF WHITEFISH, MONTANA, THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 2013.

\_\_\_\_\_  
John M. Muhlfeld, Mayor

ATTEST:

\_\_\_\_\_  
Necile Lorang, City Clerk

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July 29, 2013

Mayor Muhlfeld and City Councilors  
City of Whitefish  
Whitefish, Montana

Mayor Muhlfeld and Councilors

**Recommendation to Approve Two Engineering Consultant Agreements for  
Phase I Evaluations for Storm Drainage Improvements**

Introduction/History

The Public Works Department issued a public advertisement for Statements of Qualifications from engineering firms interested in our 2013 Storm Drainage Improvements Projects. We received responses from six firms. The Selection Committee interviewed four finalists, including 48 North Engineering, TD&H, Robert Peccia and Associates (RPA), and WGM Group. The Public Works Department commenced contract negotiation with the two highest ranked firms, RPA and WGM Group, immediately following interviews.

Current Report

This memo is to recommend the City Council approve two engineering contracts for Phase I evaluations of storm drainage improvements. Each of these scopes of work is expected to lead to Phase II engineering services for capital improvements.

The scope of work for RPA includes the following for a fee not to exceed \$49,200:

- Evaluation of drainage needs in the Crestwood area and recommendations for future improvements. Any construction schedule will depend on the scope and cost of recommended improvements.
- Evaluation of storm drainage flows and impacts on Birch Hill Drive and Parkway Drive, with recommendations for future improvements. Outfalls onto private property north of Parkway Drive are known to impact private property. Any construction schedule will depend on the scope and cost of recommended improvements.

- Evaluation of issues at City Beach related to boat bilge discharge and petroleum contaminants. Tasks will include coordination with regulatory agencies and review of Best Management Practices, leading to recommendations for future improvements. Our goal is to install these improvements no later than the spring of 2014.
- Evaluation of drainage needs for Armory Road in the vicinity of Armory Park, with attention to the condition and maintainability of the downstream storm main crossing Armory Park from south to north. Our goal is to implement recommended improvements in the fall of 2013.

The scope of work for WGM Group involves the evaluation of drainage needs along Monegan Road north of JP Road, with tasks including preliminary needs assessment, hydrologic analysis, and evaluation of alternative solutions, public involvement and recommendations for improvements. We foresee a contract amendment to enable engineering design in the fall of 2013 and a schedule for construction in 2014, based on the availability of funds. We have negotiated a fee not to exceed \$25,460.

#### Financial Requirement

This staff recommendation involves two engineering contracts; one with RPA in an amount not to exceed \$49,200 and another with WGM Group in an amount not to exceed \$25,460. The total amount of \$74,660 was anticipated in the proposed FY14 Stormwater budget and has been included under the Improvements line item.

#### Recommendation

We respectfully recommend the City Council approve two engineering contracts for Phase I evaluations of storm drainage improvements:

- one with Robert Peccia and Associates, in an amount not to exceed \$49,200, for preliminary engineering in the Crestwood, Parkway Drive, City Beach and Armory Park areas and
- one with WGM Group, in an amount not to exceed \$25,460, for preliminary engineering in the Monegan Road area, north of JP Road.

Funds for this work are included in the proposed FY14 Stormwater Fund budget.

Sincerely,



John C. Wilson  
Public Works Director

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# MANAGER REPORT

July 31, 2013



## NEW WAYFINDING ENTRY SIGN

On July 12<sup>th</sup> and 15<sup>th</sup>, city crews excavated and installed a new Whitefish entry or gateway sign at the location of the existing welcome sign by the Walgreens and Verizon stores on Hwy 93 South. A picture of the sign is below. The Public Works crews did a great job on the excavation, concrete work, and installation. Virgil Bench designed the concrete structure and rebar design. The Heart of Whitefish paid for the landscaping and rock work around the sign which was designed by Bruce Boody Landscape Architect and installed by Valley Earthscapes.

We are going to wait to install the new entry sign on the west side by Grouse Mountain Park until after MDT and their contractor finish Phase II of the Whitefish West Hwy 93 North reconstruction project next year.



## **WHITEFISH FIREFIGHTERS' ASSOCIATION DONATION OF BRUSH TRUCK**

The Whitefish Firefighters' Association found, purchased and donated a 1998 Chevrolet Type 6 wildland fire brush truck to the City of Whitefish. The vehicle cost \$11,400 plus it cost \$1,500 to transport it to Whitefish for a total cost of \$12,900. This purchase means we can delay purchasing a new brush truck which was budgeted at \$165,000. The Firefighters' Association also plans to buy a new chassis and then build a brand new brush truck as well. This vehicle is a very welcome donation and it is in a picture below. A copy of the letter from the Whitefish Firefighters Association is included in the packet.



## **ESC CONSTRUCTION FINAL ACCOUNTING**

After years of construction and purchasing using the Senator Tester grant, we have finally closed out the Emergency Services Center (ESC) construction fund. Because the City Council authorized the purchase of the replacement fire bay doors, there was no extra or unused money to return to the Tax Increment Fund (TIF). Rich Knapp prepared a sheet showing the final breakdown of all costs and revenues and it is attached in the packet. Including the grant secured by Senator Tester for ESC equipment, the total cost of construction and equipment equaled \$8,801,866.

## MEETINGS

Cemetery Committee (7/18) – I met briefly with the Cemetery Committee on July 18<sup>th</sup>. They may be interested in continuing pursuit of the south end of the land by the Wastewater Treatment Plant, even if they could only do a cemetery of 5-7 acres. They may consider doing additional groundwater testing next spring in that area to determine the area of land which is dry enough for a cemetery. They may also consider some DNRC land near the Lion Mountain Loop trailhead of the Whitefish Trail.

BID working group (7/22) – Necile, Rich, and I met with Marcus Duffey, Dale Reisch, Dave Boye, and Chris Schustrom who are representatives of the Chamber of Commerce and Heart of Whitefish who are helping us work on a concept for a Business Improvement District or some other form of assessment district for O&M costs of the parking structure. This meeting was just an inaugural meeting where we discussed the background of the parking structure and reviewed different options for an assessment district. We are going to meet again on August 2<sup>nd</sup>.

Tour of Stoltze Lands with TPL (7/30) – Mayor Muhlfeld and I toured the Stoltze lands in Haskill Basin which are in the proposed conservation easement for removing the development rights by the Trust for Public Land (TPL). There were representatives from TPL, Fish Wildlife, and Parks, DNRC and others. We toured the lands and answered their questions.

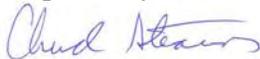
## UPCOMING SPECIAL EVENTS

August 1<sup>st</sup> at 11:00 a.m. – Ribbon cutting at BNSF land at Whitefish River cleanup  
August 8-11- Huckleberry Days in Depot Park

## REMINDERS

City Hall closed on Monday, September 2<sup>nd</sup> for Labor Day; City Council meeting will be Tuesday, September 3<sup>rd</sup>.

Respectfully submitted,



Chuck Stearns  
City Manager



## Whitefish Firefighters Association

P.O. Box 1154 • Whitefish, MT 59937 • (406) 863-2480 • Fax: (406) 863-2498

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July 19, 2013

Chuck Stearns, City Manager  
City of Whitefish  
418 E. 2<sup>nd</sup> Street  
Whitefish, Montana 59937

Dear Chuck:

On behalf of the 39 members of the Whitefish Firefighters Association, I am pleased to be able to donate to the City a 1998 Chevrolet Type 6 brush truck. This truck was recently purchased by the Association from the Fry Fire District, Sierra Vista, Arizona. We feel this unit will offer the fire department a reliable wildland firefighting vehicle for many years to come.

Sincerely,

A handwritten signature in black ink, appearing to read "Justin Woods", with a long horizontal flourish extending to the right.

Justin Woods, President

**A non-profit 501(c)3 organization**

### Emergency Services Center Cost Breakdown

Bond Issuance Costs	98,919
Architectural/Engineering Design Fees	992,883
Construction-Furniture, Fixtures, Equipment, & Technology *	635,219
Construction-Contractor	6,070,605
Building Permits & Impact Fees	92,205
Other	10,000
Total	\$ 7,899,831

Tester Grant Equipment	\$ 902,035
Total	\$ 8,801,866

*\* Direct outlays rather than paying contractor mark-up*

### Emergency Services Center Sources Breakdown

Bond	7,567,941
HB645	144,860
Interest	36,080
Impact Fees	150,957
Tester Grant	676,526
TIF Tester Match	225,502
	\$ 8,801,866

July 26, 2013

Chuck Stearns  
City Manager  
City of Whitefish  
P.O. Box 158  
418 East 2nd Street  
Whitefish, MT 59937-0158

Dear Chuck,

As the treasurer and a board member of the Wave, I hereby request that the City of Whitefish reimburse the Wave for our recently paid building permit and impact fees. The reasons are simple:

- The City owns the Wave. The Wave non-profit, having a 7-member board of directors, has a 70-year lease to manage the facility. The non-profit gave the facility to the City.
- According to a 2004 agreement between the City and the Wave, we are not required to pay these fees. That agreement states:

13. Building Permit; Fees. The Nonprofit shall apply for and obtain a building permit from the City, but the City shall waive all applicable building permit fees. The City shall also waive all water and sewer Plant Investment Fees and connection fees. The Nonprofit shall pay to the City Water and Sewer Departments all monthly utility ; fees.

- The 2004 agreement, containing the passage shown above, was not a one-time statement of responsibilities. Rather, it was a statement of the ongoing relationship between the Wave and the City.

Thank you for your consideration of this request.

Sincerely,



Dan Weinberg  
Treasurer, The Wave  
1250 Baker Ave.  
Whitefish, MT 59937

# FEE CALCULATIONS

Ordinance No. 07-25 Updated Nov 2007



Building Permit Number	<b>8440</b>	Property Address:	1250 Baker Ave Whitefish, Montana
------------------------	-------------	-------------------	--------------------------------------

## RESIDENTIAL CONSTRUCTION:

### NEW

A. How many dwelling units are included in the bulding application? \_\_\_\_\_

B. Is there now, or has there been a dwelling unit on the lot in the last 12 months? yes \_\_\_\_\_

no \_\_\_\_\_ (if not, proceed to FEE CALCULATION\*)

### C. ADDITIONS

If this is an addition to an existing house, is a new dwelling unit being created?

yes \_\_\_\_\_ How many additional dwelling units are there? \_\_\_\_\_

no \_\_\_\_\_

D.

## NON-RESIDENTIAL CONSTRUCTION

### NEW/ADDITION

E. Is there now, or has there been a (non-residential) building on this lot in the last 12 months? yes   x    
no \_\_\_\_\_ (if not, proceed to G)

F. Enter the gross (non-residential) square footage of existing building ..... \_\_\_\_\_ square feet

G. Enter the gross (non-residential) square footage for new or addition .....   9200   square feet

H.

M  
E  
M  
O

## IMPACT FEE CALCULATIONS

Net Number of New or Additional Dwelling Units.....	_____			<b>FEE'S DUE</b>
* PAVED TRAILS.....	\$421	x	0	\$0.00
* PARK MAINTENANCE BUILDING.....	\$28	x	0	\$0.00
* EMERGENCY SERVICES BUILDING.....	\$775	x	0	\$0.00
* CITY HALL FEE.....	\$734	x	0	\$0.00

## IMPACT FEE CALCULATIONS

Gross New Square Footage of Non-Residential Area.....	<u>  9200  </u>			<b>FEE'S DUE</b>
* EMERGENCY SERVICES BUILDING.	\$0.38	x	9200	\$3,496.00
* CITY HALL FEE.....	\$0.36	x	9200	\$3,312.00

## FEE CALCULATIONS FROM PUBLIC WORKS DEPARTMENT

*** WATER (Impact Fee)	<u>  \$1,693.25  </u>	Latecomers WATER	<u>  \$0.00  </u>	WATER Meter	<u>  \$0.00  </u>
** SEWER (Impact Fee)	<u>  \$1,706.90  </u>	Latecomers SEWER	<u>  \$0.00  </u>	INSPECTION	<u>  \$0.00  </u>
* STORMWATER (Impact Fee)	<u>  \$850.00  </u>	REFUSE (Container Fee)	<u>  \$0.00  </u>	OTHER	<u>  \$0.00  </u>

## FEE CALCULATIONS/ ADMINISTRATION of IMPACT FEES

*** 5% of Impact Fees for PW/water	<u>  \$84.66  </u>
** 5% of Impact Fees for PW/sewer	<u>  \$85.35  </u>
* 5% of Impact Fees (other)	<u>  \$382.90  </u>

## FEES TRANSFERRED FROM BUILDING PERMIT

1) Building Permit Fee	\$ <u>  4,732.00  </u>
2) Plan Review Fee	\$ <u>  5,126.00  </u>
3) Planning/Zoning	\$ <u>  2,366.00  </u>
4) Fire Prevention Program Fee	\$ <u>  2,287.00  </u>
Total Due (For Building Permit)	\$ <u> 14,511.00 </u>
Deposit Rec'd	\$ <u>      500.00  </u>
Balance of BUILDING PERMIT	\$ <u> 14,011.00 </u>

## FINAL TOTALS

BUILDING PERMIT Balance	\$ <u> 14,011.00 </u>
IMPACT & OTHER FEE'S	\$ <u> 11,611.06 </u>
OTHER DEPOSITS REC'd	\$ _____
Date: _____	\$ _____
<b>THE GRAND TOTAL</b>	<b>\$ <u> 25,622.06 </u></b>



# MEMORANDUM

#2013-033

To: Mayor John Muhlfeld  
City Councilors

From: Chuck Stearns, City Manager

Re: Staff Report – Consideration of request from WAVE Board of Directors for reimbursement of building permit fees and impact fees for WAVE expansion

Date: July 29, 2013

## Introduction/History

The WAVE has planned for its second major expansion for the past year. After getting architectural review approval, the building permit and impact fees for this expansion was calculated to be \$25,622.06. The start of construction was delayed because of concern over the amount of these permit and impact fees and then whether the agreement between the WAVE and the City provided that the City should be responsible for the fees.

## Current Report

Dan Weinberg, one of the founders of the WAVE and Treasurer of the WAVE Board came to see me on July 15<sup>th</sup> after concern arose about the \$25,622.06 cost for the building permit and impact fees. He brought in a page out of the 2004 Agreement between the Whitefish Community and Aquatic Health Center (now the WAVE) and the City. As explained in Dan's letter of July 26<sup>th</sup> requesting the reimbursement, Dan and other members of the WAVE Board feel that the January 15, 2004 Agreement meant that all building permit and impact fees would be waived, not just for the initial construction of the original WAVE facility. I told Dan that I would do further research on the matter and I called John Phelps as I thought that he would have written the original 2004 Agreement.

When John Phelps called back, he said that the section regarding building permit fees in the January 15, 2004 Agreement was really meant only for the original building permit. As author, he didn't intend it to extend beyond the first permit, but he acknowledged that no one at that time was even thinking of an expansion. They were only focused and concerned with getting the original building built and then making sure the facility could succeed and pay off its debts. He said he would have thought that it was entirely possible that the WAVE could come back to the City Council in the future for waiver or reimbursement of any fees.

I then researched the 2006-2007 expansion of the WAVE regarding who paid for the building permit fees for that expansion. The building permit of November 2, 2006 revealed that Swank Construction paid the building permit fee as part of the project cost (there were no impact fees attributable to that expansion) and there was no reimbursement from the City.

Because the agreement says “a building permit, and the agreement author’s (John Phelps) intent, and the precedent of the WAVE having paid the 2006-2007 expansion permit as part of the project cost, I told Dan and the WAVE Board that I didn’t think I could just pay for the \$25,622.06 cost of the building permit and impact fees for the current expansion. They could, however, request reimbursement from the City Council.

Dan feels strongly that the intent of the 2004 Agreement he signed with the City was one of an ongoing relationship which included the City continuing to pay for future building permit and impact fees, especially for a building it owns and leases out. Dan has a letter with the reasons he believes the City should pay for all of the building permit and impact fees and that letter is in the packet.

In the past, the City has reimbursed or paid for building permit fees and/or impact fees in the following circumstances.

1. Many years ago, the City Council would sometimes waive the building permit fees for good causes and community projects such as the Memorial Park grandstands etc. For legal precedence reasons, we now prefer the City Council agree to pay or reimburse any fees. Sometimes the request was denied as well.
2. The City has used Tax Increment Funds (TIF) to pay for the impact fees of various private business developments on the theory that TIF can be used for infrastructure improvements and the property taxes from such new developments is a good return on investment many times over. Situations such as this would be the once proposed boutique hotel or the upcoming Hurraw! Balm building near the WAVE.
3. The City Council approved reimbursing the Food Bank for the impact fees only, not for the building permit for their new building near the WAVE. This reimbursement was from the Tax Increment Fund. Again, the City can use TIF for infrastructure related improvements which is what impact fees represent. The City Council in 2009 denied reimbursing Soroptimists for their renovation building permit.
4. The City Council contributed \$2,500,000 to the high school project from TIF which was well beyond the building permit and impact fee levels.
5. On the golf course new maintenance building, the Whitefish Lake Golf Club paid the building permit fees and the City reimbursed them for the impact fees.

#### Financial Requirement

The building permit fees for this expansion permit equal \$14,011.00 and the impact fees equal \$11,611.06 for a total of \$25,622.06. If the City Council approves any reimbursement, as long as they are comfortable, we could pay for any reimbursement from the Tax Increment Fund, both

as a city facility and because of the economic development aspects that an amenity such as the WAVE brings to Whitefish.

### Recommendation

I am in a difficult position here because I am also a member of the WAVE Board of Directors because the agreements in the past call for the City Manager to be a WAVE Board member. I am sorry this issue was not discussed and resolved earlier. However, my primary obligation is to the City of Whitefish. Therefore, because of the language in the agreement for “a building permit”, the drafter’s intent of the agreement, the precedent that the WAVE paid the building permit fee for the 2006-2007 expansion, and because the situation is analogous to the golf course maintenance building construction, I have the following recommendation.

Staff respectfully recommends the City Council agree to reimburse the WAVE Board for the impact fees of \$11,611.06 from the Tax Increment Fund for the expansion of the City owned and leased facility, but not reimburse the \$14,011.00 cost of the building permit.

## AGREEMENT

THIS AGREEMENT is entered into as of the 15<sup>th</sup> day of January, 2004, by and between the City of Whitefish, a municipal corporation (the "City"), and the Whitefish Community Aquatic & Health Center, a Montana nonprofit § 501(c)(3) corporation (the "Nonprofit") with respect to the following facts:

The parties enter into this Agreement in order to further their cooperation in the creation of a new aquatic and health center to serve the people of the City of Whitefish and the greater Whitefish community area. The aquatic and health center to be created will hereafter be referred to as the "Wave."

### THEREFORE, THE PARTIES AGREE AS FOLLOWS:

1. Identification of Property. The City has acquired title to all land upon which the Wave is to be constructed. The land consists of those parcels legally described on Exhibit "A," attached hereto and incorporated herein by reference. The City is in the process of and will complete a boundary line adjustment that will increase the size of the land upon which the Wave will be constructed, as detailed on Exhibit "B," attached hereto and incorporated herein by reference. In addition, the City owns land located on the East side of Baker Avenue, as shown on the map on Exhibit "C," attached hereto and incorporated herein by reference. The City will, if requested by the Nonprofit, allow all or a portion of such land (Exhibit "C") to be used for parking in connection with the Wave. All of the land described or mapped on Exhibits "A" and "B," and if requested by the Nonprofit, the additional land mapped on Exhibit "C," shall comprise the property that is subject to this Agreement.

2. City's Contribution. The City originally committed to contribute toward the Wave cash in an amount of seven hundred thousand dollars (\$700,000.00); together

with any interest accruing from the date such funds were committed. The City, has, instead, contributed real estate valued by the parties at \$262,603.00, leaving the City committed to contribute additional cash of \$437,397.00, plus interest. Such funds will be contributed by the City as needed by the Nonprofit; provided, however, that none of such funds shall be used for construction of any of the Wave's buildings or attached fixtures. Such funds may be used for infrastructure improvements located outside the building footprint, for landscaping or parking lots and driveways, or for removable furniture or equipment. The parties acknowledge that the use of the City's contributed funds is restricted in order to ensure that all funds used in construction of the Wave's building and attached fixtures are private funds.

3. Treatment as Loan. At its option, the City may treat all funds contributed (\$700,000.00 plus accrued interest) as a loan to the Nonprofit, to be repaid if, and only if, the Wave is the subject of a foreclosure initiated by one of the Nonprofit's lenders. The Nonprofit agrees that such a loan shall be secured by second trust deed, thereby allowing the City to foreclose if the loan should be in default. The Nonprofit agrees to execute such documents as necessary in order to establish the loan and second trust deed described in this paragraph. The Nonprofit agrees that if a foreclosure is initiated against the Wave or any portion thereof, the Nonprofit shall, at least thirty (30) days before any scheduled foreclosure sale, allow the City to take over ownership of the Wave, and assume the Wave's existing debt, without any other consideration on the part of the City.

4. City to Build Thirteenth Street. The City agrees that it shall, at its own expense, design and construct a section of Thirteenth Street to the West of Baker Avenue, which section is shown on the map attached hereto as Exhibit "D," and

incorporated herein by reference. The City shall construct this section of Thirteenth Street in order to facilitate access to the Wave. In addition to construction of the roadway itself, the City shall construct sidewalks, boulevards, underground utilities and decorative lighting pursuant to and in compliance with the Department of Public Works' requirements. Construction of Thirteenth Street and related facilities shall be completed in time for the opening of the Wave to the public.

5. Nonprofit Board. The Nonprofit agrees that it currently has a seven-member Board of Directors, and shall not increase the number of Directors without the prior written consent of the Whitefish City Council. Nor shall the Nonprofit delegate to an Executive Committee or any other entity or individual substantial decision-making power of its Board of Directors without the prior written consent of the Whitefish City Council. Members of the Nonprofit Board of Directors shall not be compensated. Official meetings of the Board of Directors shall be open to the public except when discussing personnel, litigation, contract negotiations or fundraising issues. One of the positions on the Nonprofit's Board of Directors shall be filled by the Whitefish City Manager. In the event that the City has no City Manager due to resignation or termination, or in the event that the City Manager is unable to perform as a Director of the Nonprofit for a substantial period of time, the Acting City Manager, or the individual serving in a similar position, shall serve as a temporary Director on behalf of the City, but such temporary Director's term shall end immediately upon the Whitefish City Manager's availability for service as a Director.

6. Construction of the Wave. The Nonprofit shall be solely responsible for constructing and equipping the Wave and for constructing and installing all related improvements, including but not limited to parking lots and access driveways, curbs and

gutter, landscaping and irrigation system, lighting, sidewalks and signage. All of such improvements, together with all furniture, fixtures and equipment, shall hereafter be referred to as the "Wave and related improvements." The Nonprofit shall construct the Wave and related improvements in full compliance with all City Zoning Jurisdiction Regulations, Building and Fire Codes, Utility Regulations and similar requirements. The Nonprofit shall apply for and obtain approval of the outside appearance of the Wave and related improvements from the Whitefish Architectural Committee. All architectural aspects of the Wave and related improvements shall be designed and stamped by an architect licensed in Montana and experienced in the design and construction of similar buildings. All engineering aspects of the Wave and related improvements shall be designed and stamped by an engineer licensed in Montana and experienced in the design and construction of similar buildings. The Wave and related improvements shall be constructed in conformity with the schematic drawing attached hereto as Exhibit "E," and incorporated herein by reference, and no substantial change shall be made without the prior written approval of the Whitefish City Council.

7. Fundraising. Except as otherwise stated herein, the Nonprofit shall be solely responsible for all fundraising and/or borrowing in connection with the construction of the Wave and related improvements.

8. Transfer to City. Upon completion of construction of the Wave and related improvements, they shall be transferred by the Nonprofit to the City, without receipt of any consideration from the City, who shall thereafter own them, and the City shall then lease the land, the Wave and related improvements to the Nonprofit pursuant to a Lease containing the terms set forth in this Agreement, and such other terms agreed to by the parties.

9. Transfer by City. Prior to or after the land, the Wave and related improvements are leased to the Nonprofit by the City, the City may, but is not required to, transfer ownership of such property to a nonprofit corporation or limited liability company that is wholly controlled by the City, which entity shall then lease such property to the Nonprofit according to the terms contained herein.

10. Collateral for Loan. The City agrees that the land, the Wave and related improvements may be used by the Nonprofit as collateral for a loan that shall not exceed \$2.5 million. The Nonprofit agrees that it shall faithfully repay any such loan according to its terms, and shall indemnify, defend and hold the City harmless from any liability for repayment of such loan.

11. Construction Contract; Insurance; Indemnification. In any construction contract entered into between the Nonprofit and any contractor involved in the construction of the building and related improvements, the Nonprofit shall insert a provision requiring that such contractor provide a policy of liability insurance in an amount of not less than \$2 million, which policy shall name the City and the Nonprofit as additional insureds. Such insurance policy shall not be canceled without at least sixty (60) days prior written notice to the City and to the Nonprofit. In addition, any such construction contract shall provide that the contractor shall indemnify, defend and hold the City and the Nonprofit, their employees and agents, harmless from any and all causes of action, claims, damages and liabilities incurred as a result of the acts or omissions of the contractor, its employees, agents and subcontractors. Such obligation to defend shall include the payment by the contractor of reasonable attorneys' fees incurred in the defense of the City or the Nonprofit.

12. Construction Contract; Workers' Compensation; Warranty. In any construction contract entered into between the Nonprofit and any contractor involved in the construction of the Wave and related improvements, the Nonprofit shall insert a provision requiring that the contractor maintain workers' compensation insurance as required by law. In addition, any such construction contract shall provide that the contractor warrants that all materials and services provided shall be of a good and workmanlike quality free and clear of defects of any kind, for a period of one (1) year after the date of substantial completion.

13. Building Permit; Fees. The Nonprofit shall apply for and obtain a building permit from the City, but the City shall waive all applicable building permit fees. The City shall also waive all water and sewer Plant Investment Fees and connection fees. The Nonprofit shall pay to the City Water and Sewer Departments all monthly utility fees.

14. Sublease to Physical Therapists. The parties now agree, and the Lease between the parties shall provide: The City agrees that the Nonprofit shall be entitled to sublease approximately thirty-five hundred (3,500) square feet of the Wave building for use as offices for a physical therapist or group of physical therapists, who shall also be entitled to use portions of the Wave as determined by the Nonprofit. Such lease shall be for a term of years, at a market rental, and subject to such additional terms as determined by the Nonprofit.

15. Sublease to Other Parties. The parties now agree, and the Lease between the parties shall provide: The City agrees that the Nonprofit shall be entitled to sublease other portions of the Wave to concessionaires and other parties so long as

those portions of the Wave identified below are not reduced in size or availability to the public:

- a. Twenty-five (25) yard, six (6) lane pool;
- b. Recreation pool and related waterslide area;
- c. Warm water therapy pool;
- d. Fitness and weight room;
- e. Group fitness and aerobics room;
- f. Childcare center;
- g. Racquetball/handball/squash courts; and
- h. Multi-purpose gym.

Such subleases shall be for a term of years; at a market rental, and subject to such additional terms as determined by the Nonprofit.

16. Payment of Rent. The parties now agree, and the Lease between the parties shall provide: Once the land, the Wave and related improvements are leased to the Nonprofit by the City, or by its transferee, the Nonprofit shall pay yearly rent of ten dollars (\$10), in advance.

17. Nonprofit Responsibility. The parties now agree, and the Lease between the parties shall provide: The Nonprofit shall be solely responsible for all costs of operating, maintaining, repairing and replacing the Wave and related improvements. For purposes of this paragraph, "maintenance" shall include but not be limited to maintenance of all landscaping, irrigation, lighting, driveways and parking lots (including striping and snow removal), signage and refuse removal. Except as set forth herein with respect to insurance, the City shall have no responsibility whatsoever to contribute towards the cost of operation, maintenance, repair or replacement.

18. Standard of Maintenance, etc.; Reserves. The parties now agree, and the Lease between the parties shall provide: The Nonprofit shall at all times operate, maintain, repair and replace the Wave and related improvements in a prudent manner with the goal of preserving for use by the public an attractive, safe, comfortable and convenient facility. The Nonprofit shall identify and maintain sufficient reserve funds (as determined by its Board of Directors) to ensure that it will be able to adequately operate, maintain, repair and replace the Wave and related improvements at all times.

19. Manner of Operation. The parties now agree, and the Lease between the parties shall provide: The Nonprofit shall be solely responsible for operating the Wave as a public facility serving the residents of the greater Whitefish area and residents from other areas of Flathead County as well as visitors and tourists. The Nonprofit may employ a professional manager or management company, according to such terms as the Nonprofit determines are appropriate.

20. Goals. The parties now agree, and the Lease between the parties shall provide: In operating, maintaining, repairing and replacing the Wave, or in employing an individual or entity to do so, the parties agree that the Nonprofit shall strive to attain the following goals in descending order of importance:

a. The business of the Nonprofit and the Wave shall be conducted in a sound and prudent financial manner, in order to ensure that all of its payables and debts are current.

b. The Nonprofit shall strive to establish free use of the Wave by the City Parks and Recreation Department, in recognition of the City's fundamental role in the creation of the Wave. In recognition of the Wave as a community facility that is to be accessible to the community, the Nonprofit shall strive to

establish rates to the public that will allow as many individuals as possible to afford to use the Wave. The Nonprofit shall strive to create a scholarship program to allow the use of the Wave by individuals who could not otherwise afford to do so.

The Wave's generation of net revenues, on an annual basis, shall be evidence that it is becoming able, or is able, to provide reduced fee or free use of the Wave by the City Parks and Recreation Department. For purposes of this paragraph, "net revenues" shall be defined as gross operating revenues less operating expenses, without regard to depreciation. In order to evaluate the Wave's financial status, the Whitefish City Manager, or Acting City Manager, as the case shall be, shall always have complete access to all of the Wave's financial and accounting information.

21. Use of Wave by City. The parties now agree, and the Lease between the parties shall provide: In recognition of the City's fundamental role in the creation of the Wave, the City Parks and Recreation Department shall be entitled to use the Wave's facilities at times that are useful and meaningful to the provision of its recreational programs. The parties acknowledge that the Parks and Recreation Department's needs will change over time, depending on the popularity of its recreational programs, the availability of other facilities, and other factors. At the time of the signing of this Agreement, the Parks and Recreation Department's primary need is the use of one of the basketball courts in the multi-purpose gym on Tuesday and Thursday, from 5:30 - 7:30 P.M., during the months of January, February, and from approximately October 15 through December 15. The Nonprofit agrees that the Parks and Recreation Department shall have use of one of the basketball courts in the multi-purpose gym during those months, days, and times.

22. Coordination of Recreational Programs. The parties now agree, and the Lease between the parties shall provide: It is in the best interests of the Nonprofit and the City's Parks and Recreation Department to coordinate their provision of recreational programs so that they do not compete with or interfere with one another's programs. The parties therefore agree that they shall notify one another at least sixty (60) days prior to the initiation of any new recreational program using any of the Wave's facilities, and engage in a dialogue designed to eliminate competition or interference with one another.

23. City's Fire Insurance. The parties now agree, and the Lease between the parties shall provide: During construction of the Wave and related improvements, and continually thereafter the City shall pay for and maintain a policy of fire and extended coverage insurance on the Wave and related improvements, in an amount sufficient to assure the replacement of any such items destroyed or damaged. Such coverage need not extend to items of personal property brought into the Wave by members of the public; nor shall it extend to items of personal property owned by the physical therapists or other tenants who sublease a portion of the Wave. Such policy of insurance shall provide that it shall not be canceled without at least sixty (60) days prior written notice to the Nonprofit.

24. Nonprofit's Liability Insurance. The parties now agree, and the Lease between the parties shall provide: After construction of the Wave and related improvements, the Nonprofit, as the entity responsible for operating, maintaining, repairing and replacing the Wave and related improvements, shall pay for and maintain at all times a policy of public liability insurance in an amount not less than \$1 million (\$1,000,000.00) which policy shall name the City as an additional insured. Such

insurance coverage shall be primary, and any similar coverage maintained by the City shall be secondary. Such policy shall be written with an insurance company satisfactory to the City and shall provide that it shall not be canceled without at least sixty (60) days prior written notice to the City. The insurance policy limits contained in this paragraph shall be discussed by the parties every five (5) years during the term of the Lease, and any extension, with a view toward increasing such limits to keep pace with inflation in damage awards.

25. Management Company's Liability Insurance. The parties now agree, and the Lease between the parties shall provide: In any contract entered into between the Nonprofit and a manager or management company, the Nonprofit shall insert a provision requiring that such manager or management company pay for and at all times maintain a policy of public liability insurance in coverage amounts satisfactory to the City and the Nonprofit, which policy shall name the City and the Nonprofit as additional insureds and shall provide that its coverage shall be primary, and any similar coverage maintained by the City or the Nonprofit shall be secondary. Such policy shall be written with an insurance company satisfactory to the City and to the Nonprofit and shall provide that it shall not be canceled without at least sixty (60) days prior written notice to the City and to the Nonprofit.

26. Nonprofit to Indemnify. The parties now agree, and the Lease between the parties shall provide: The Nonprofit, as the entity responsible for operating, maintaining, repairing and replacing the Wave and related improvements, agrees to indemnify, defend, and hold the City, its employees and agents, harmless from any and all causes of action, claims, damages and liabilities incurred as a result of the operation, maintenance, repair and replacement of the Wave and related improvements. Such

obligation to defend shall include the payment by the Nonprofit of reasonable attorneys' fees incurred in the defense of the City.

27. Management Company to Indemnify. The parties now agree, and the Lease between the parties shall provide: In any contract entered into between the Nonprofit and a manager or management company, the Nonprofit shall insert a provision requiring that such manager or management company shall indemnify, defend and hold the City and the Nonprofit, their employees and agents, harmless from any and all causes of action, claims, damages and liabilities incurred as a result of acts or omissions of such manager or management company. Such obligation to defend shall include the payment of reasonable attorneys' fees incurred in the defense of the City or the Nonprofit.

28. Term of Lease. The parties now agree, and the Lease between the parties shall provide: The lease of the land, the Wave and related improvements by the City, or its transferee, to the Nonprofit shall be for an initial term of thirty (30) years, with two (2) consecutive twenty (20) year options, each of which options may be exercised by the Nonprofit by delivery to the City, not less than twelve (12) months prior to the expiration of the existing term, of a written notice of the Nonprofit's intention to exercise such option. The initial thirty (30) year term of the Lease shall begin on the first day of the month in which the Wave opens for public use. The rental terms and related lease terms applicable to the option terms shall be identical to the terms contained herein.

29. Exclusive Use. The parties now agree, and the Lease between the parties shall provide: While leasing from the City the Nonprofit shall have exclusive use of the land, the Wave and related improvements, and shall be entitled to reasonably limit, control and schedule use of the Wave in a manner that it deems appropriate, subject to

the goals and restrictions set forth herein. In limiting, controlling and scheduling the use of the Wave the Nonprofit shall not unlawfully discriminate against any individual or group. The Nonprofit shall be entitled to use the Wave for its own fundraising activities or for other community fundraising activities, so long as it does so without unlawful discrimination against any individual or group.

30. No Assignment. The parties now agree, and the Lease between the parties shall provide: The lease of the land, the Wave and related improvements by the City to the Nonprofit shall not be assigned without the prior written approval of the City Council. The Nonprofit may sublet portions of the Wave only as set forth in paragraphs 14 and 15.

31. Non-Profit Qualification. The parties now agree, and the Lease between the parties shall provide: Throughout the entire period of construction of the Wave and related improvements, and thereafter through the entire term of the lease to the Nonprofit of the land, the Wave and related improvements, the Nonprofit shall remain a non-profit corporation, qualified as such under § 501(c)(3) of the Internal Revenue Code. The failure to maintain qualification as a non-profit corporation under § 501(c)(3) of the Internal Revenue Code shall be considered a material breach of this Agreement; provided, however, that if because of changes in federal tax law it becomes impossible for the Nonprofit to maintain qualification under § 501(c)(3), then it shall not be considered a material breach.

32. Litter; Landscaping. The parties now agree, and the Lease between the parties shall provide: Throughout the term of this Agreement the Nonprofit shall maintain the land, building and related improvements free of litter, trash and other debris and shall promptly clean up any such material that accumulates. During the term

of this Agreement the Nonprofit shall maintain any and all landscaping in an attractive condition, and shall promptly treat or remove any weeds or other undesirable plants.

33. Ownership by City. The parties now agree, and the Lease between the parties shall provide: Upon termination of the Lease of the land, the Wave and related improvements, all such property (together with all furniture and equipment used in the Wave) shall automatically revert to the City.

34. Notice; Litigation Forum: The parties now agree, and the Lease between the parties shall provide: If either party believes that the other party has breached any terms of this Agreement, the party claiming that a breach has occurred shall provide a written notice to the party alleged to have breached the Agreement, which notice shall detail the circumstances of the alleged breach. The party that is alleged to have breached the Agreement shall have thirty (30) days within which to respond or, if appropriate, make adequate arrangements to remedy the breach. If adequate arrangements to remedy the alleged breach have not been made by the conclusion of the 30-day period, then the party alleging that a breach has occurred shall be entitled to proceed with litigation or arbitration regarding the alleged breach. Any litigation to enforce or interpret the provisions of this Agreement or the parties' rights and liabilities arising out of this Agreement shall be maintained only in the courts in the County of Flathead, Montana.

35. Attorneys' Fees: The parties now agree, and the Lease between the parties shall provide: In the event of any litigation or arbitration to enforce or interpret the provisions of this Agreement, or to remedy a breach thereof, the prevailing party shall be entitled to reasonable attorneys' fees as fixed by the court or arbitration.

36. Arbitration. Any party that desires to initiate arbitration may do so in accordance with the provisions of the Uniform Arbitration Act, beginning at § 27-5-111, MCA. Notice of the demand for arbitration shall be filed in writing with the other party. The parties shall jointly select an arbitrator, unless they are unable to agree, in which case they shall each appoint an arbitrator and the two arbitrators shall select a third arbitrator. The arbitrators shall be empowered, by majority decision, to decide any issue of fact or law submitted to them. This agreement to arbitrate shall be specifically enforceable under the prevailing arbitration law. The parties shall share equally the arbitrators' fees and costs.

37. Entire Agreement: The parties now agree, and the Lease between the parties shall provide: This Agreement contains the entire agreement of the parties hereto, and supersedes any prior written or oral agreements between them concerning the subject matter contained herein. There are no representations, agreements, arrangements, or understandings, oral or written, between the parties hereto relating to the subject matter contained in this Agreement which are not fully expressed herein. The provisions of this Agreement may be waived, altered, amended or repealed in whole or in part only upon the written consent of all parties to this Agreement.

38. Partial Invalidity: The parties now agree, and the Lease between the parties shall provide: Each term, covenant, condition or provision of this Agreement shall be viewed as separate and distinct, and in the event that any such term, covenant, condition or provision shall be held by a court of competent jurisdiction to be invalid, the remaining provisions shall continue in full force and effect.

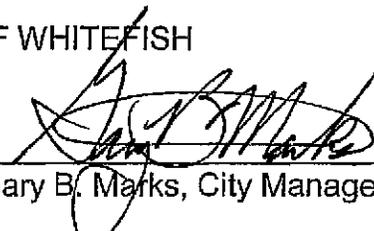
39. Governing Law: The parties now agree, and the Lease between the parties shall provide: The construction of this Agreement, and the rights and liabilities of the parties hereto, shall be governed by the laws of the State of Montana.

40. Successors in Interest: The parties now agree, and the Lease between the parties shall provide: Subject to the restrictions against assignment as herein contained, this Agreement shall inure to the benefit of, and shall be binding upon, the assigns, successors in interest, personal representatives, estate, heirs, and legatees of each of the parties hereto.

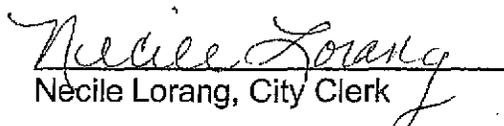
41. Necessary Acts: The parties now agree, and the Lease between the parties shall provide: Each party to this Agreement agrees to perform any further acts and execute and deliver any further documents that may be reasonably necessary to carry out the provisions of this Agreement.

CITY OF WHITEFISH

By:

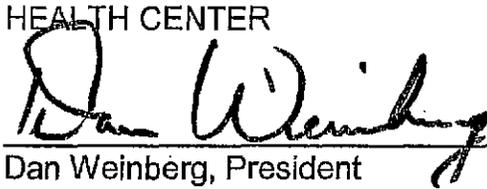
  
\_\_\_\_\_  
Gary B. Marks, City Manager

ATTEST:

  
\_\_\_\_\_  
Necile Lorang, City Clerk

WHITEFISH COMMUNITY AQUATIC &  
HEALTH CENTER

By:

  
\_\_\_\_\_  
Dan Weinberg, President



**EXHIBIT "A"**

Those portions of Lots 11 and 12, Riverside Improvement Company's Acreage described as follows:

Commencing at the Southwest corner of the Southeast  $\frac{1}{4}$ , Section 36,  
Township 31 North, Range 22 West; thence along the South line  
of the Southeast  $\frac{1}{4}$   
East 247.61 feet to the Point of Beginning; thence continuing along the South  
Line  
East 300.49 feet; thence  
North 245.10 feet; thence  
South  $89^{\circ}57'36''$  West 299.82 feet; thence  
South  $0^{\circ}09'28''$  West 244.89 feet to the Point of Beginning.

Certificate of Survey No. 11825.

**AND**

Lots 2 & 3 of the Amended Plat of a Portion of Lots 10, 11 & 12 of Riverside Improvement Company's Acreage, according to the official plat thereof, filed in Official Records of Flathead County, Montana.

**EXHIBIT "A"**

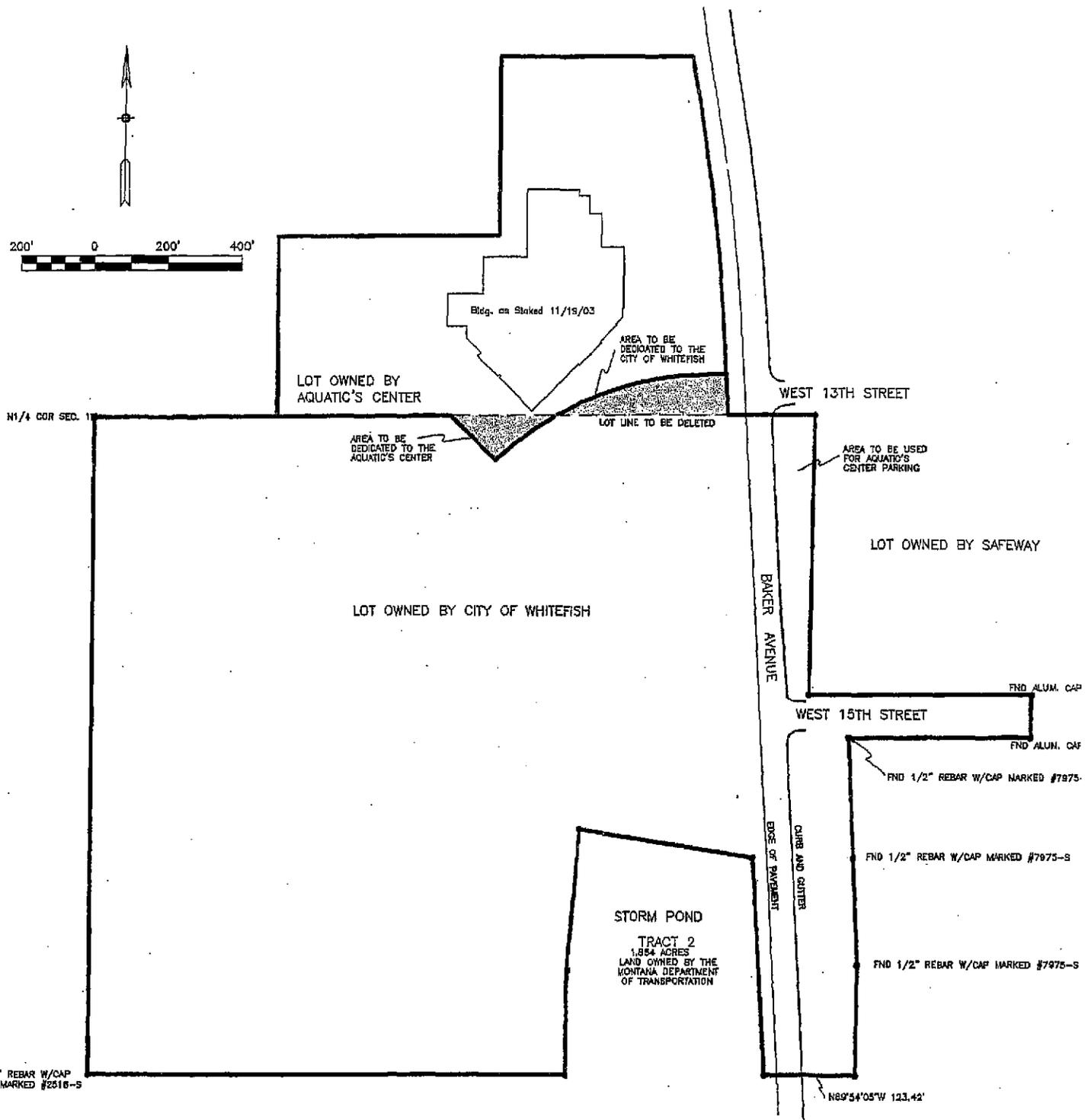
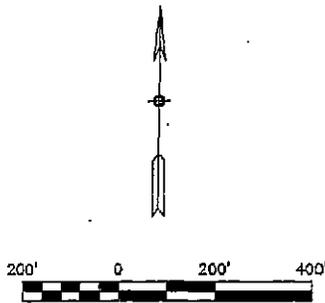
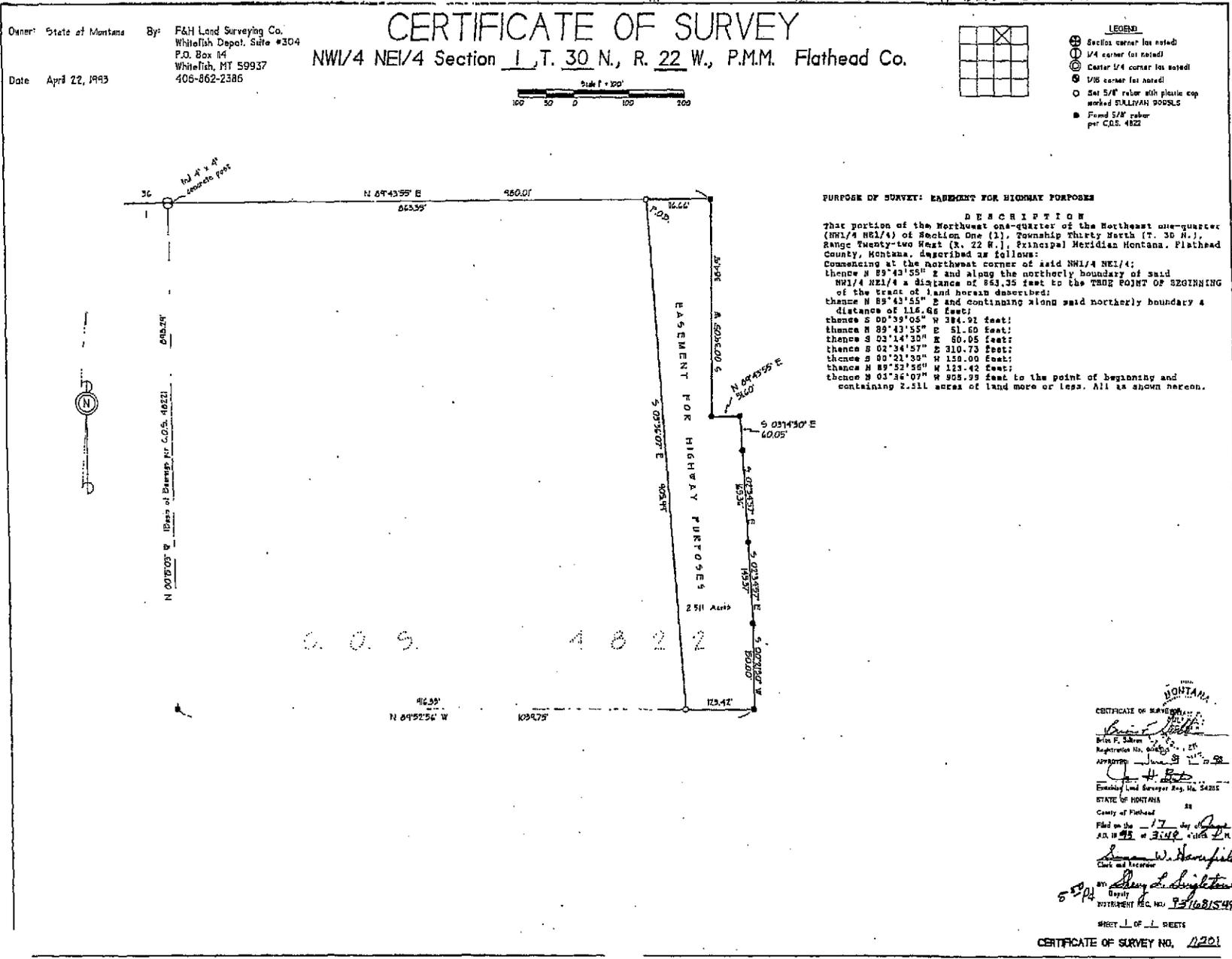


EXHIBIT **B**



STATE OF MONTANA

CERTIFICATE OF SURVEY

*Eric F. Salmon*  
Eric F. Salmon  
Registration No. 006263  
APPROVED: June 29 1993  
Erecting Land Surveyor Reg. No. 54225

STATE OF MONTANA  
County of Flathead

Filed on the 17 day of June  
A.D. 1993 at 3:49 o'clock P.M.

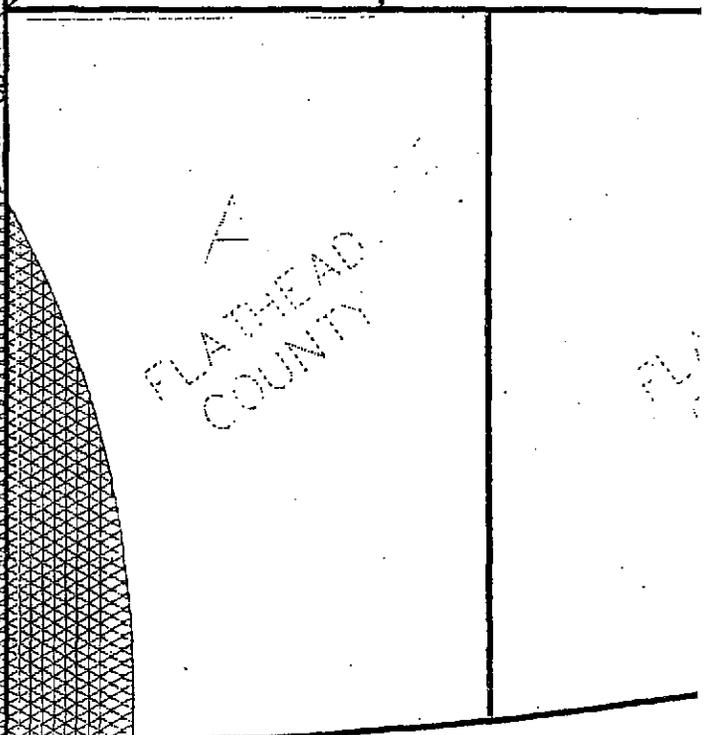
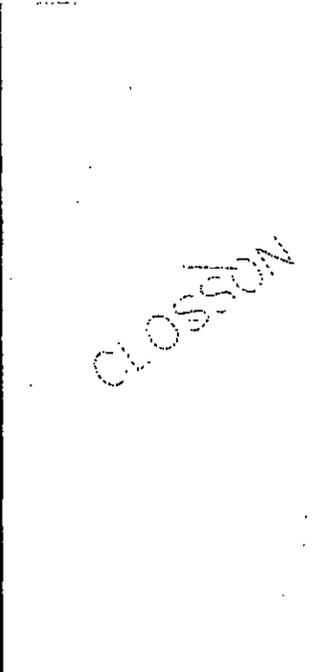
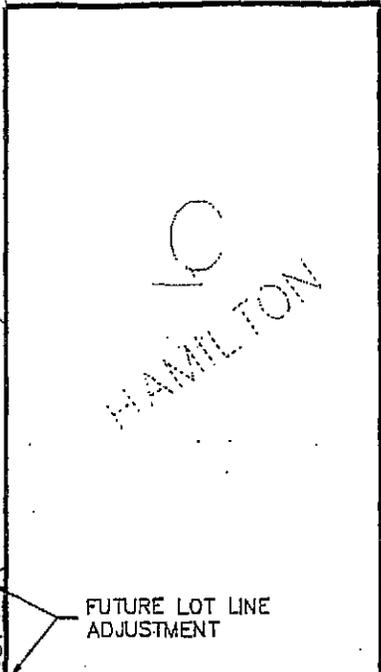
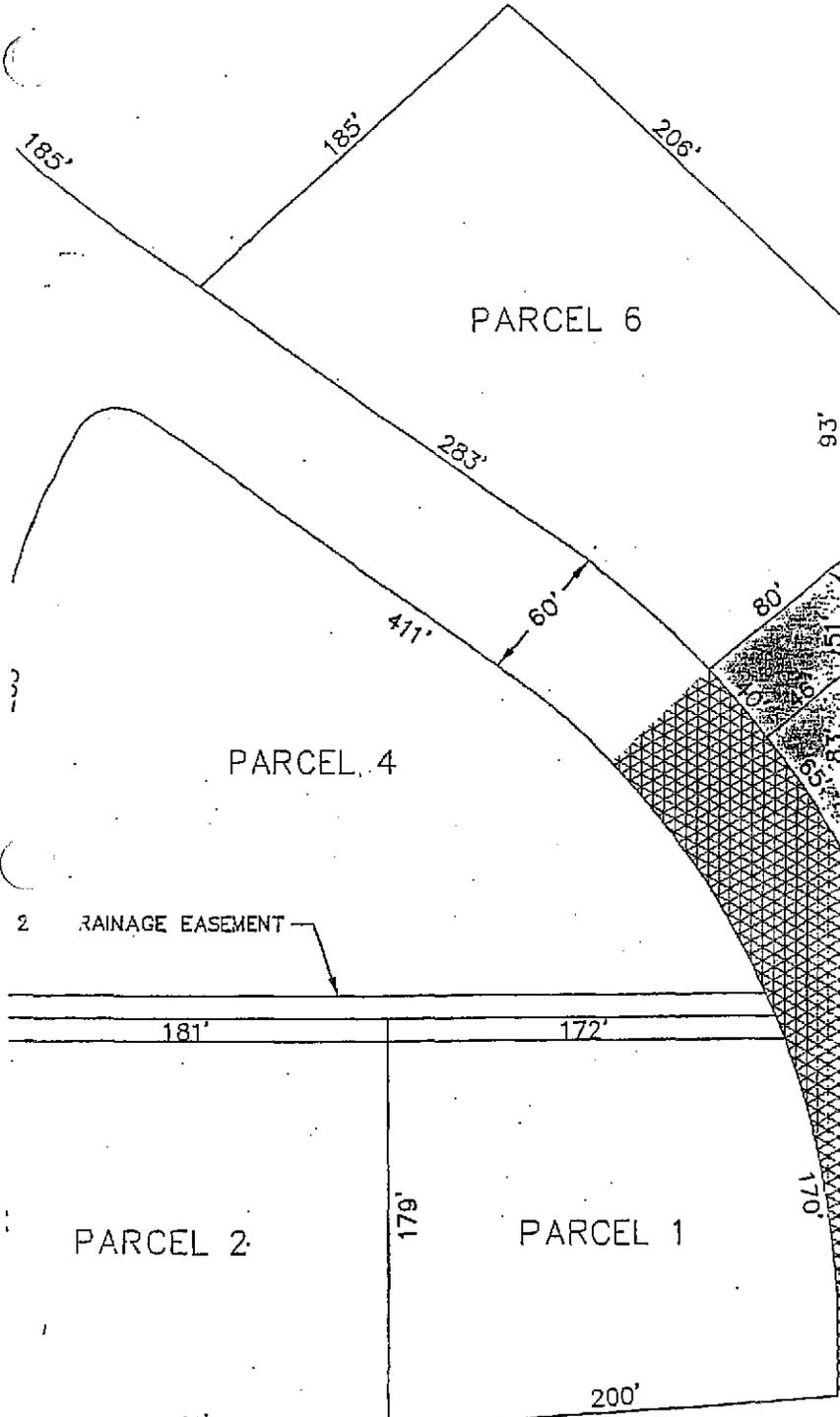
*William W. Harvfield*  
Clerk and Recorder

BY: *Sherry L. Singleton*  
Sherry L. Singleton  
Deputy  
INSTRUMENT REC. NO. 9316215490

SHEET 1 OF 1 SHEETS

CERTIFICATE OF SURVEY NO. 1201

EXHIBIT "C"



W. 13TH

EXHIBIT "D"

EXHIBIT " E "

WHITEFISH COMMUNITY AQUATIC & HEALTH CENTER

MULTI-PURPOSE GYM



25-YARD, 8-LANE POOL



WARM WATER THERAPY POOL

RACQUETBALL/HANDBALL/SQUASH COURTS



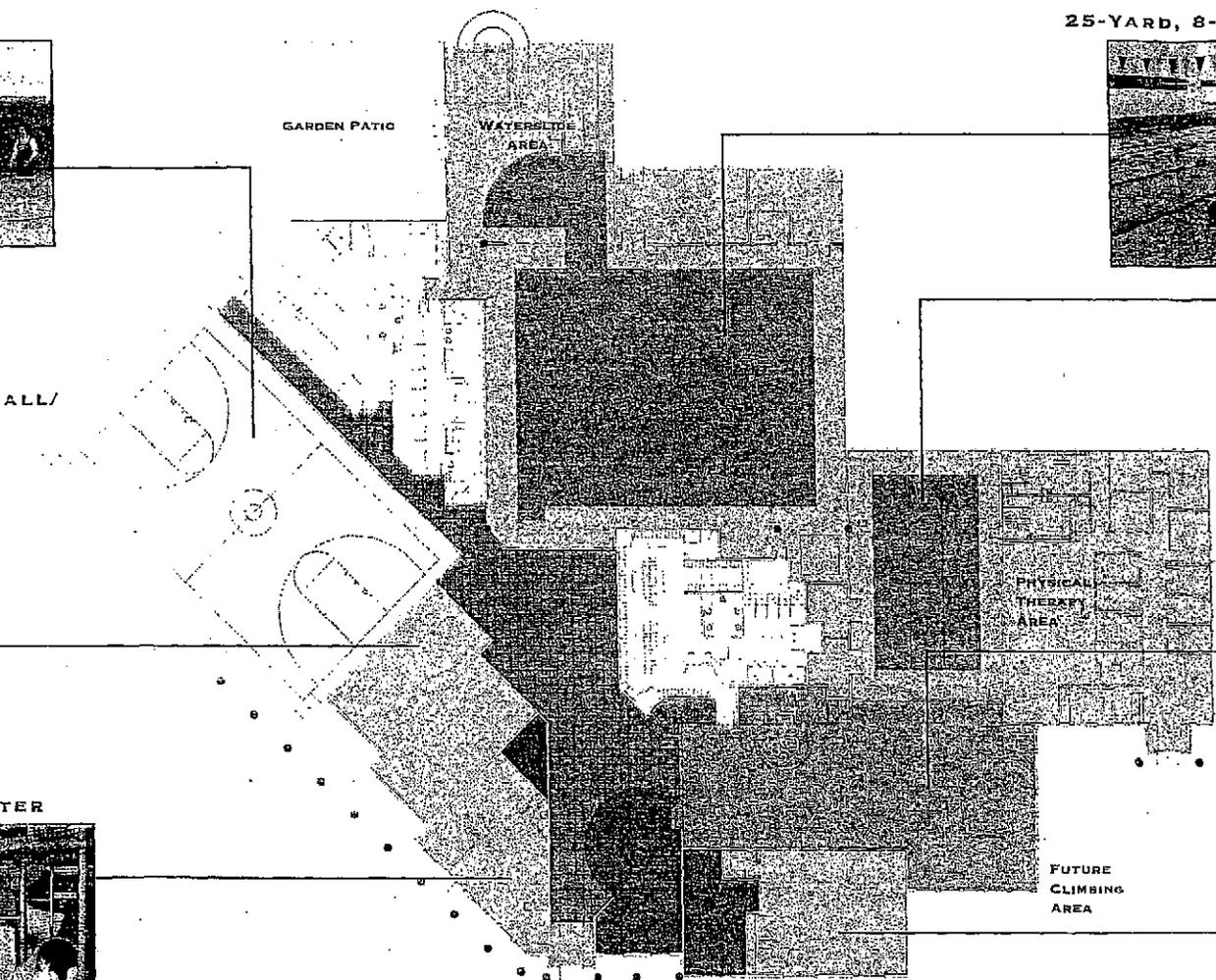
FITNESS & WEIGHT TRAINING



CHILD CARE CENTER



GROUP FITNESS & AEROBICS



CONVENIENTLY LOCATED: BAKER AVENUE & 13TH STREET (ACROSS FROM GLACIER PEAK MEDICAL CLINIC)

**AMENDMENT NO. 1 TO AGREEMENT**

THIS AGREEMENT is entered as of the 26th day of September, 2005, by and between the City of Whitefish, a municipal corporation (the "City"), and the Whitefish Community Aquatic & Health Center, a Montana nonprofit Section 501(c)(3) corporation (the "Nonprofit") with respect to the following facts:

A. The parties previously entered into an agreement dated January 15, 2004, which defined their relationship in connection with the construction and leaseback of the "Wave" (hereafter referred as the Master Agreement).

B. The parties wish to amend the Master Agreement, as set forth herein.

THEREFORE, the parties agree as follows:

1. The third and fourth sentence of Paragraph 2 of the Master Agreement, entitled "City's Contribution," are hereby amended to provide as follows:

Such funds will be contributed by the City as needed by the Nonprofit; provided, however, that none of such funds shall be used for construction of any of the Wave's buildings, attached fixtures, infrastructure improvements, landscaping, parking lots, or driveways. Such funds may be used for removable equipment, such as furniture, athletic equipment, artwork, and similar items.

2. Paragraph 14 of the Master Agreement, entitled "Sublease to Physical Therapists" shall be amended by adding the following sentences:

Any physical therapist or group of physical therapists shall pay for and maintain at all times a policy of public liability insurance in an amount of not less than \$1,000,000.00 which policy shall name the City and the Nonprofit as additional insureds. In addition, such physical therapist or group of physical therapists shall maintain a policy of professional liability (malpractice) insurance in an amount of not less than \$1,000,000.00 which policy shall name the City and the Nonprofit as additional insureds. Such policy shall be written with an insurance company satisfactory to the City and shall provide that it shall not be canceled without at least thirty (30) days prior written notice to the City.

3. Paragraph 15 of the Master Agreement, entitled "Sublease to Other Parties," shall be modified by adding the following sentences:

Any other parties subleasing a portion of the Wave shall pay for and maintain at all times a policy of public liability insurance in an amount of not less than \$1,000,000.00 which policy shall name the City and the Nonprofit as additional insureds. Such policy shall be written with an insurance company satisfactory to the City and shall

provide that it shall not be canceled without at least thirty (30) days prior written notice to the City.

4. Paragraph 17 of the Master Agreement, entitled "Nonprofit Responsibility," shall be amended by the addition of the following sentence:

To the extent that damage or destruction caused by the negligence of the Nonprofit, or of its Management Company, or their agents or employees, occurs to any portion of the Wave (including all personal property located thereon) for which the City maintains fire or property damage insurance, the Nonprofit shall be responsible for paying the deductible with respect to such insurance coverage.

5. Paragraph 21 of the Master Agreement, entitled "Use of Wave by City," shall be amended by adding the following sentences:

The City agrees to indemnify, defend and hold the Nonprofit, its Management Company, and their employees and agents, harmless from any and all causes of action, claims, damages and liabilities incurred as a result of acts or omissions on the part of the City, and its employees and agents, when the City's Parks and Recreation Department uses the Wave's facilities, or sponsors events or activities that use the Wave's facilities. Such obligation to defend shall include the payment by the City of reasonable attorney's fees incurred in the defense of the indemnified parties.

6. Paragraph 23 of the Master Agreement, entitled "City's Fire Insurance," shall be amended by adding the following sentences:

As the Nonprofit or the Nonprofit's management company acquires new or replacement furniture, equipment, or other personal property of any type, for use in connection with the Wave, such items shall automatically, upon initial acquisition by the Wave or the Wave's management company, become the property of the City, and shall thereafter be owned by the City. The Nonprofit and its management company, if any, shall notify the City Finance Director promptly, in writing, if any individual item of furniture, equipment, or personal property is acquired having a value of \$5,000.00 or greater. As the parties charged with the operation of the Wave, the Nonprofit, and its management company, if any, shall be free to sell, dispose of, or trade-in furniture, equipment, and personal property of any type as they determine necessary and appropriate, when such items are destroyed, become obsolete, or are reasonably determined to be no longer useful in connection with the operation of the Wave, provided, however, that if such property has any value, then it shall only be disposed of upon receipt of its fair market value.

The City agrees that it shall and does hereby waive the right of subrogation with respect to the Nonprofit, its officers and employees, and with respect to Planetary Fitness Consulting, LLC, its officers and employees, in connection only with damage or destruction to the Wave and related improvements, but not with respect to any other type of liability. Furthermore, if the City determines that excessive losses have occurred which make it impractical to continue to waive subrogation as set forth above, then the City shall be entitled to withdraw this waiver; provided, however, that prior to any such withdrawal of this waiver, the City shall provide at least sixty (60) days prior written notice to the Wave and to Planetary Fitness Consulting, LLC, and after having provided an opportunity for both parties to present their positions to the City.

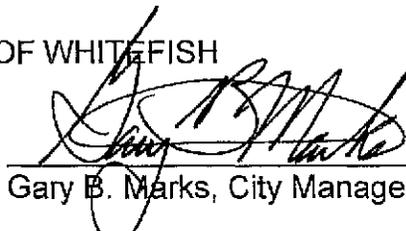
7. Paragraph 25 of the Master Agreement, entitled "Management Company's Liability Insurance," is hereby amended by revising the first sentence to provide as follows:

The parties now agree, and the Lease between the parties shall provide: In any contract entered into between Nonprofit and a manager or management company, the Nonprofit shall insert a provision requiring that such manager or management company pay for and at all times maintain a policy of public liability insurance with coverage limits of \$2,000,000.00 per occurrence and \$3,000,000.00 aggregate, which policy shall name the City and the Nonprofit as additional insureds.

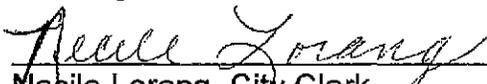
8. Except as modified herein, the other terms of the Master Agreement shall remain in full force and effect.

CITY OF WHITEFISH

By:

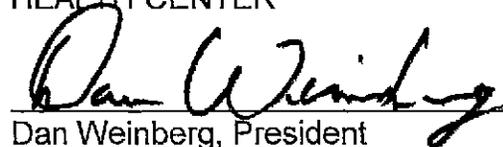
  
\_\_\_\_\_  
Gary B. Marks, City Manager

ATTEST:

  
\_\_\_\_\_  
Necile Lorang, City Clerk

WHITEFISH COMMUNITY AQUATIC &  
HEALTH CENTER

By:

  
\_\_\_\_\_  
Dan Weinberg, President

STATE OF MONTANA )  
 ) :ss  
County of Flathead )

On this 3<sup>rd</sup> day of October, 2005, before me, the undersigned, a Notary Public in and for the state aforesaid, personally appeared GARY B. MARKS, City Manager of the City of Whitefish, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Notarial Seal the day and year last above written.

Necile Loring  
Printed Name: Necile Loring  
Notary Public for the State of Montana  
Residing in Whitefish, Montana  
My Commission expires: 9-19-2007

(SEAL)

STATE OF MONTANA )  
 ) :ss  
County of Flathead )

On this 26<sup>th</sup> day of September, 2005, before me, the undersigned, a Notary Public in and for the state aforesaid, personally appeared DAN WEINBERG, Whitefish Community Aquatic & Health Center, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Notarial Seal the day and year last above written.

Keni Hopkins  
Printed Name: Keni Hopkins  
Notary Public for the State of Montana  
Residing in Columbia Falls, Montana  
My Commission expires: 11-06-2006

(SEAL)



## OFFICE OF THE CITY ATTORNEY

**John M. Phelps, City Attorney**  
jphelps@cityofwhitefish.org  
(406) 863-2444

**Keni L. Hopkins, Legal Assistant**  
khopkins@cityofwhitefish.org  
(406) 863-2445

Post Office Box 158  
Whitefish, MT 59937-0158  
Facsimile (406) 863-1249



COPY

November 15, 2006

Dan Weinberg  
575 Delrey Road  
Whitefish, MT 59937-8042

RE: Amendment No. 2

Dear Dan:

Thanks for dropping by and signing Amendment No. 2 to the Master Agreement. Gary Marks has resigned it, and I have enclosed one of the two originals for your files.

Have a great day!

Very truly yours,

John M. Phelps

JMP/klh  
Attachment

cc: Steven E. Cummings, Christensen, Moore, Cockrell, Cummings & Axelberg

## AMENDMENT NO. 2 TO AGREEMENT

THIS AGREEMENT is entered into as of the 14 day of November, 2006, by and between the City of Whitefish, a municipal corporation (the "City"), and the Whitefish Community Aquatic & Health Center, a Montana nonprofit Section 501(c)(3) corporation (the "Nonprofit") with respect to the following facts:

A. The parties previously entered into an agreement dated January 15, 2004, which defined their relationship in connection with the construction and leaseback of the "Wave" (hereafter referred to as the "Master Agreement").

B. On September 26, 2005, the parties entered into Amendment No. 1 to the Master Agreement.

C. The parties wish to further amend the Master Agreement, as described more fully in the following recitals and in the text of the amendment set forth below.

D. Paragraph 1 of the Master Agreement identifies two parcels of property, described on Exhibit "A" and Exhibit "B" to the Master Agreement, which comprise the property that is subject to the Master Agreement. Paragraph 1 of the Master Agreement also identifies a third parcel of property, located on the East side of Baker Avenue, and described on Exhibit "C" to the Master Agreement, which the City agreed to allow the Nonprofit to use for parking if requested by the Nonprofit.

E. The City has now acquired an additional parcel of property, described as Lot 3 of the Baker Commons Phase 1 Subdivision Plat, which is shown on Exhibit "A," attached hereto and incorporated herein by reference, which the parties wish to substitute, in place of the City's property located on the East side of Baker Avenue, for use by the Wave as parking.

THEREFORE, the parties agree as follows:

1. The parties agree that the Nonprofit shall not be entitled to use, and shall have no further legal interest in, the City's property located on the East side of Baker Avenue, and shown on the map attached to the Master Agreement as Exhibit "C." Instead, the City hereby leases to the Nonprofit, according to the same provisions and for the same term as the other property leased to the Nonprofit pursuant to the Master Agreement, that property identified as Lot 3 of the Baker Commons Phase 1 Subdivision Plat, as further shown on Exhibit "A," attached hereto.

2. The property identified as Lot 3 of the Baker Commons Phase 1 Subdivision Plat, may be used by the Wave for parking or for any other use directly related to the Wave.

3. To the extent that the Nonprofit installs improvements on Lot 3 of the Baker Commons Phase 1 Subdivision Plat, it shall be subject to and shall comply with



STATE OF MONTANA )  
 )  
 ) :ss  
County of Flathead )

On this 14th day of November, 2006, before me, the undersigned, a Notary Public in and for the state aforesaid, personally appeared DAN WEINBERG, President of the Whitefish Community Aquatic & Health Center, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Notarial Seal the day and year last above written.



Keni Hopkins  
Printed Name: KENI HOPKINS  
Notary Public for the State of Montana  
Residing in COLUMBIA FALLS, Montana  
My Commission expires: 11-06-2010



**COPY**

LEASE AGREEMENT

THIS AGREEMENT is entered into as of the 21 day of May, 2010, by and between the City of Whitefish, a municipal corporation (the "City"), and the Whitefish Community Aquatic & Health Center, a Montana nonprofit § 501(c)(3) corporation (the "Nonprofit") with respect to the following facts:

A. The "Wave," as used herein, refers to the community aquatic and health center located at 1250 Baker Avenue, in Whitefish, Montana. The term "Wave" includes the building and all related improvements, including but not limited to parking lots, access driveways, curbs and gutter, landscaping and irrigation system, lighting, sidewalks, and signage. All of such improvements, together with all furniture, fixtures and equipment, shall hereafter be referred to as the "Wave and related improvements."

B. The parties originally entered into an Agreement dated January 15, 2004, by which the parties cooperated in order to construct the Wave, and which provided for the lease of the Wave to the Nonprofit upon completion of construction (the "Original Agreement").

C. The parties entered into Amendment No. 1 to the Original Agreement on September 26, 2005. Amendment No. 1 dealt primarily with issues involving the sublease of space in the Wave, and with insurance issues.

D. The parties entered into Amendment No. 2 to the Original Agreement on November 14, 2006. Amendment No. 2 dealt with the lease, by the City, of Lot 3 of Baker Commons Phase 1 to the Wave, for use by the Wave in the future.

E. The parties wish to place all of the provisions relating to the lease of the Wave property in one document, and it is for that reason that the parties have prepared and executed this Lease Agreement.

THEREFORE, THE PARTIES AGREE AS FOLLOWS:

1. Identification of Leased Property. The City owns all land upon which the Wave is situated, and such land consists of those parcels legally described on Exhibit "A," attached hereto and incorporated herein by reference. All of the land described or mapped on Exhibit "A" shall comprise the property that is subject to this Lease. The parties acknowledge that Lot 3 of Baker Commons Phase 1 Subdivision, which is a part of the leased property, is currently an undeveloped lot. As provided in Amendment No. 2 to the Original Agreement, when and if the Nonprofit determines to construct improvements on Lot 3 of Baker Commons Phase 1 Subdivision, the Nonprofit shall comply with Paragraphs 6, 7, 11, 12 and 13 of the Original Agreement.

2. Nonprofit Board. The Nonprofit agrees that it currently has a seven-member Board of Directors, and shall not increase the number of Directors without the prior written consent of the Whitefish City Council. Nor shall the Nonprofit delegate to an Executive Committee or any other entity or individual substantial decision-making power of its Board of Directors without the prior written consent of the Whitefish City Council. Members of the Nonprofit Board of Directors shall not be compensated. Official meetings of the Board of Directors shall be open to the public except when discussing personnel, litigation, contract negotiations or fundraising issues. One of the positions on the Nonprofit's Board of Directors shall be filled by the Whitefish City Manager. In the event that the City has no City Manager due to resignation or

termination, or in the event that the City Manager is unable to perform as a Director of the Nonprofit for a substantial period of time, the Acting City Manager, or the individual serving in a similar position, shall serve as a temporary Director on behalf of the City, but such temporary Director's term shall end immediately upon the Whitefish City Manager's availability for service as a Director.

3. Sublease to Physical Therapists. The City agrees that the Nonprofit shall be entitled to sublease approximately thirty-five hundred (3,500) square feet of the Wave building for use as offices for a physical therapist or group of physical therapists, who shall also be entitled to use portions of the Wave as determined by the Nonprofit. Such lease shall be for a term of years, at a market rental, and subject to such additional terms as determined by the Nonprofit. Any physical therapist or group of physical therapists shall pay for and maintain at all times a policy of public liability insurance in an amount of not less than \$1,000,000.00 which policy shall name the City and the Nonprofit as additional insureds. In addition, such physical therapist or group of physical therapists shall maintain a policy of professional liability (malpractice) insurance in an amount of not less than \$1,000,000.00 which policy shall name the City and the Nonprofit as additional insureds. Such policy shall be written with an insurance company satisfactory to the City and shall provide that it shall not be canceled without at least thirty (30) days prior written notice to the City.

4. Sublease to Other Parties. The City agrees that the Nonprofit shall be entitled to sublease other portions of the Wave to concessionaires and other parties so

long as those portions of the Wave identified below are not reduced in size or availability to the public:

- a. Twenty-five (25) yard, six (6) lane pool;
- b. Recreation pool and related waterslide area;
- c. Warm water therapy pool;
- d. Fitness and weight room;
- e. Group fitness and aerobics room;
- f. Childcare center;
- g. Racquetball/handball/squash courts; and
- h. Multi-purpose gym.

Such subleases shall be for a term of years, at a market rental, and subject to such additional terms as determined by the Nonprofit. Any other parties subleasing a portion of the Wave shall pay for and maintain at all times a policy of public liability insurance in an amount of not less than \$1,000,000.00 which policy shall name the City and the Nonprofit as additional insureds. Such policy shall be written with an insurance company satisfactory to the City and shall provide that it shall not be canceled without at least thirty (30) days prior written notice to the City.

5. Payment of Rent. The Nonprofit shall pay yearly rent of ten dollars (\$10), in advance.

6. Nonprofit Responsibility. The Nonprofit shall be solely responsible for all costs of operating, maintaining, repairing and replacing the Wave and related improvements. For purposes of this paragraph, "maintenance" shall include but not be limited to maintenance of all landscaping, irrigation, lighting, driveways and parking lots

(including striping and snow removal), signage and refuse removal. Except as set forth herein with respect to insurance, the City shall have no responsibility whatsoever to contribute towards the cost of operation, maintenance, repair or replacement. To the extent that damage or destruction caused by the negligence of the Nonprofit, or of its Management Company, or their agents or employees, occurs to any portion of the Wave (including all personal property located thereon) for which the City maintains fire or property damage insurance, the Nonprofit shall be responsible for paying the deductible with respect to such insurance coverage.

7. Standard of Maintenance, etc.; Reserves. The Nonprofit shall at all times operate, maintain, repair and replace the Wave and related improvements in a prudent manner with the goal of preserving for use by the public an attractive, safe, comfortable and convenient facility. The Nonprofit shall identify and maintain sufficient reserve funds (as determined by its Board of Directors) to ensure that it will be able to adequately operate, maintain, repair and replace the Wave and related improvements at all times.

8. Manner of Operation. The Nonprofit shall be solely responsible for operating the Wave as a public facility serving the residents of the greater Whitefish area and residents from other areas of Flathead County as well as visitors and tourists. The Nonprofit may employ a professional manager or management company, according to such terms as the Nonprofit determines are appropriate.

9. Goals. In operating, maintaining, repairing and replacing the Wave, or in employing an individual or entity to do so, the parties agree that the Nonprofit shall

strive to attain the following goals in descending order of importance:

a. The business of the Nonprofit and the Wave shall be conducted in a sound and prudent financial manner, in order to ensure that all of its payables and debts are current.

b. The Nonprofit shall strive to establish free use of the Wave by the City Parks and Recreation Department, in recognition of the City's fundamental role in the creation of the Wave. In recognition of the Wave as a community facility that is to be accessible to the community, the Nonprofit shall strive to establish rates to the public that will allow as many individuals as possible to afford to use the Wave. The Nonprofit shall strive to create a scholarship program to allow the use of the Wave by individuals who could not otherwise afford to do so.

The Wave's generation of net revenues, on an annual basis, shall be evidence that it is becoming able, or is able, to provide reduced fee or free use of the Wave by the City Parks and Recreation Department. For purposes of this paragraph, "net revenues" shall be defined as gross operating revenues less operating expenses and debt service, without regard to depreciation. In order to evaluate the Wave's financial status, the Whitefish City Manager, or Acting City Manager, as the case shall be, shall always have complete access to all of the Wave's financial and accounting information.

10. Use of Wave by City. In recognition of the City's fundamental role in the creation of the Wave, the City Parks and Recreation Department shall be entitled to use the Wave's facilities at times that are useful and meaningful to the provision of its recreational programs. The parties acknowledge that the Parks and Recreation

Department's needs will change over time, depending on the popularity of its recreational programs, the availability of other facilities, and other factors. The City agrees to indemnify, defend and hold the Nonprofit, its Management Company, and their employees and agents, harmless from any and all causes of action, claims, damages and liabilities incurred as a result of acts or omissions on the part of the City, and its employees and agents, when the City's Parks and Recreation Department uses the Wave's facilities, or sponsors events or activities that use the Wave's facilities. Such obligation to defend shall include the payment by the City of reasonable attorney's fees incurred in the defense of the indemnified parties.

11. Coordination of Recreational Programs. It is in the best interests of the Nonprofit and the City's Parks and Recreation Department to coordinate their provision of recreational programs so that they do not compete with or interfere with one another's programs. The parties therefore agree that they shall notify one another at least sixty (60) days prior to the initiation of any new recreational program using any of the Wave's facilities, and engage in a dialogue designed to eliminate competition or interference with one another.

12. City's Fire Insurance. The City shall pay for and maintain a policy of fire and extended coverage insurance on the Wave and related improvements, in an amount sufficient to assure the replacement of any such items destroyed or damaged. Such coverage need not extend to items of personal property brought into the Wave by members of the public; nor shall it extend to items of personal property owned by the physical therapists or other tenants who sublease a portion of the Wave. Such policy of insurance shall provide that it shall not be canceled without at least sixty (60) days prior

written notice to the Nonprofit. As the Nonprofit or the Nonprofit's management company acquires new or replacement furniture, equipment, or other personal property of any type, for use in connection with the Wave, such items shall automatically, upon initial acquisition by the Wave or the Wave's management company, become the property of the City, and shall thereafter be owned by the City. The Nonprofit and its management company, if any, shall notify the City Finance Director promptly, in writing, if any individual item of furniture, equipment, or personal property is acquired having a value of \$5,000.00 or greater. As the parties charged with the operation of the Wave, the Nonprofit, and its management company, if any, shall be free to sell, dispose of, or trade-in furniture, equipment, and personal property of any type as they determine necessary and appropriate, when such items are destroyed, become obsolete, or are reasonably determined to be no longer useful in connection with the operation of the Wave, provided, however, that if such property has any value, then it shall only be disposed of upon receipt of its fair market value. The City agrees that it shall and does hereby waive the right of subrogation with respect to the Nonprofit, its officers and employees, and with respect to the Nonprofit's management company, its officers and employees, in connection only with damage or destruction to the Wave and related improvements, but not with respect to any other type of liability. Furthermore, if the City determines that excessive losses have occurred which make it impractical to continue to waive subrogation as set forth above, then the City shall be entitled to withdraw this waiver; provided, however, that prior to any such withdrawal of this waiver, the City shall provide at least sixty (60) days prior written notice to the Nonprofit and to the Nonprofit's

management company, and after having provided an opportunity for both parties to present their positions to the City.

13. Nonprofit's Liability Insurance. The Nonprofit, as the entity responsible for operating, maintaining, repairing and replacing the Wave and related improvements, shall pay for and maintain at all times a policy of public liability insurance in an amount not less than \$1 million (\$1,000,000.00) which policy shall name the City as an additional insured. Such insurance coverage shall be primary, and any similar coverage maintained by the City shall be secondary. Such policy shall be written with an insurance company satisfactory to the City and shall provide that it shall not be canceled without at least sixty (60) days prior written notice to the City. The insurance policy limits contained in this paragraph shall be discussed by the parties every five (5) years during the term of the Lease, and any extension, with a view toward increasing such limits to keep pace with inflation in damage awards.

14. Management Company's Liability Insurance. In any contract entered into between Nonprofit and a manager or management company, the Nonprofit shall insert a provision requiring that such manager or management company pay for and at all times maintain a policy of public liability insurance with coverage limits of \$2,000,000.00 per occurrence and \$3,000,000.00 aggregate, which policy shall name the City and the Nonprofit as additional insureds. Such policy shall be written with an insurance company satisfactory to the City and to the Nonprofit and shall provide that it shall not be canceled without at least sixty (60) days prior written notice to the City and to the Nonprofit.

15. Nonprofit to Indemnify. The Nonprofit, as the entity responsible for operating, maintaining, repairing and replacing the Wave and related improvements, agrees to indemnify, defend, and hold the City, its employees and agents, harmless from any and all causes of action, claims, damages and liabilities incurred as a result of the operation, maintenance, repair and replacement of the Wave and related improvements. Such obligation to defend shall include the payment by the Nonprofit of reasonable attorneys' fees incurred in the defense of the City.

16. Management Company to Indemnify. In any contract entered into between the Nonprofit and a manager or management company, the Nonprofit shall insert a provision requiring that such manager or management company shall indemnify, defend and hold the City and the Nonprofit, their employees and agents, harmless from any and all causes of action, claims, damages and liabilities incurred as a result of acts or omissions of such manager or management company. Such obligation to defend shall include the payment of reasonable attorneys' fees incurred in the defense of the City or the Nonprofit.

17. Term of Lease. The lease of the land, the Wave and related improvements by the City, to the Nonprofit shall be for an initial term of thirty (30) years, with two (2) consecutive twenty (20) year options, each of which options may be exercised by the Nonprofit by delivery to the City, not less than twelve (12) months prior to the expiration of the existing term, of a written notice of the Nonprofit's intention to exercise such option. The initial thirty (30) year term of the Lease shall begin on the first day of the month in which the Wave opens for public use. The parties agree that

the initial lease term began on February 1, 2005. The rental terms and related lease terms applicable to the option terms shall be identical to the terms contained herein.

18. Exclusive Use. While leasing from the City the Nonprofit shall have exclusive use of the land, the Wave and related improvements, and shall be entitled to reasonably limit, control and schedule use of the Wave in a manner that it deems appropriate, subject to the goals and restrictions set forth herein. In limiting, controlling and scheduling the use of the Wave the Nonprofit shall not unlawfully discriminate against any individual or group. The Nonprofit shall be entitled to use the Wave for its own fundraising activities or for other community fundraising activities, so long as it does so without unlawful discrimination against any individual or group.

19. No Assignment. The lease of the land, the Wave and related improvements by the City to the Nonprofit shall not be assigned without the prior written approval of the City Council. The Nonprofit may sublet portions of the Wave only as set forth in paragraphs 3 and 4.

20. Non-Profit Qualification. Through the entire term of the lease to the Nonprofit of the land, the Wave and related improvements, the Nonprofit shall remain a non-profit corporation, qualified as such under § 501(c)(3) of the Internal Revenue Code. The failure to maintain qualification as a non-profit corporation under § 501(c)(3) of the Internal Revenue Code shall be considered a material breach of this Agreement; provided, however, that if because of changes in federal tax law it becomes impossible for the Nonprofit to maintain qualification under § 501(c)(3), then it shall not be considered a material breach.

21. Litter; Landscaping. Throughout the term of this Lease the Nonprofit shall maintain the land, building and related improvements free of litter, trash and other debris and shall promptly clean up any such material that accumulates. During the term of this Lease the Nonprofit shall maintain any and all landscaping in an attractive condition, and shall promptly treat or remove any weeds or other undesirable plants.

22. Ownership by City. Upon termination of the Lease of the land, the Wave and related improvements, all such property (together with all furniture and equipment used in the Wave) shall automatically revert to the City.

23. Notice; Litigation Forum: If either party believes that the other party has breached any terms of this Lease, the party claiming that a breach has occurred shall provide a written notice to the party alleged to have breached the Lease, which notice shall detail the circumstances of the alleged breach. The party that is alleged to have breached the Lease shall have thirty (30) days within which to respond or, if appropriate, make adequate arrangements to remedy the breach. If adequate arrangements to remedy the alleged breach have not been made by the conclusion of the 30-day period, then the party alleging that a breach has occurred shall be entitled to proceed with litigation or arbitration regarding the alleged breach. Any litigation to enforce or interpret the provisions of this Lease or the parties' rights and liabilities arising out of this Lease shall be maintained only in the courts in the County of Flathead, Montana.

24. Attorneys' Fees: In the event of any litigation or arbitration to enforce or interpret the provisions of this Lease, or to remedy a breach thereof, the prevailing party shall be entitled to reasonable attorneys' fees as fixed by the court or arbitration.

25. Arbitration. Any party that desires to initiate arbitration may do so in accordance with the provisions of the Uniform Arbitration Act, beginning at § 27-5-111, MCA. Notice of the demand for arbitration shall be filed in writing with the other party. The parties shall jointly select an arbitrator, unless they are unable to agree, in which case they shall each appoint an arbitrator and the two arbitrators shall select a third arbitrator. The arbitrators shall be empowered, by majority decision, to decide any issue of fact or law submitted to them. This agreement to arbitrate shall be specifically enforceable under the prevailing arbitration law. The parties shall share equally the arbitrators' fees and costs.

26. Entire Agreement: This Lease contains the entire agreement of the parties hereto, with respect to the lease of the land, the Wave and related improvements, and supersedes any prior written or oral agreements between them concerning the lease terms contained herein. There are no representations, agreements, arrangements, or understandings, oral or written, between the parties hereto relating to the lease of the land, the Wave, and related improvements which are not fully expressed herein. The parties acknowledge that their prior Original Agreement, dated January 15, 2004, and Amendment No. 1, dated September 26, 2005, and Amendment No. 2, dated November 14, 2006, contain provisions in addition to lease terms, and the parties agree that only the lease terms in those three agreements are superseded by this new Lease. The provisions of this Lease may be waived, altered, amended or repealed in whole or in part only upon the written consent of all parties to this Lease.

27. Partial Invalidity: Each term, covenant, condition or provision of this Lease shall be viewed as separate and distinct, and in the event that any such term, covenant, condition or provision shall be held by a court of competent jurisdiction to be invalid, the remaining provisions shall continue in full force and effect.

28. Governing Law: The construction of this Lease, and the rights and liabilities of the parties hereto, shall be governed by the laws of the State of Montana.

29. Successors in Interest: Subject to the restrictions against assignment as herein contained, this Lease shall inure to the benefit of, and shall be binding upon, the assigns, successors in interest, personal representatives, estate, heirs, and legatees of each of the parties hereto.

30. Necessary Acts: Each party to this Lease agrees to perform any further acts and execute and deliver any further documents that may be reasonably necessary to carry out the provisions of this Lease.

CITY OF WHITEFISH

By: Charles C. Stearns  
Charles C. Stearns, City Manager

ATTEST:

Necile Lorang  
Necile Lorang, City Clerk

WHITEFISH COMMUNITY AQUATIC &  
HEALTH CENTER

By: Leif B. Erickson  
Leif B. Erickson, President

STATE OF MONTANA )  
 ) :SS  
County of Flathead )

On this 18th day of May, 2010, before me, the undersigned, a Notary Public in and for the state aforesaid, personally appeared CHARLES C. STEARNS, City Manager of the City of Whitefish, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Notarial Seal the day and year last above written.



Keri Hopkins  
Notary Public for the State of Montana  
Keri Hopkins  
[print or type name of Notary]  
Residing at Columbia Falls  
My Commission expires: 11.06.2010

STATE OF MONTANA )  
 ) :SS  
County of Flathead )

On this 21st day of May, 2010, before me, the undersigned, a Notary Public in and for the state aforesaid, personally appeared LEIF B. ERICKSON, Whitefish Community Aquatic & Health Center, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same.

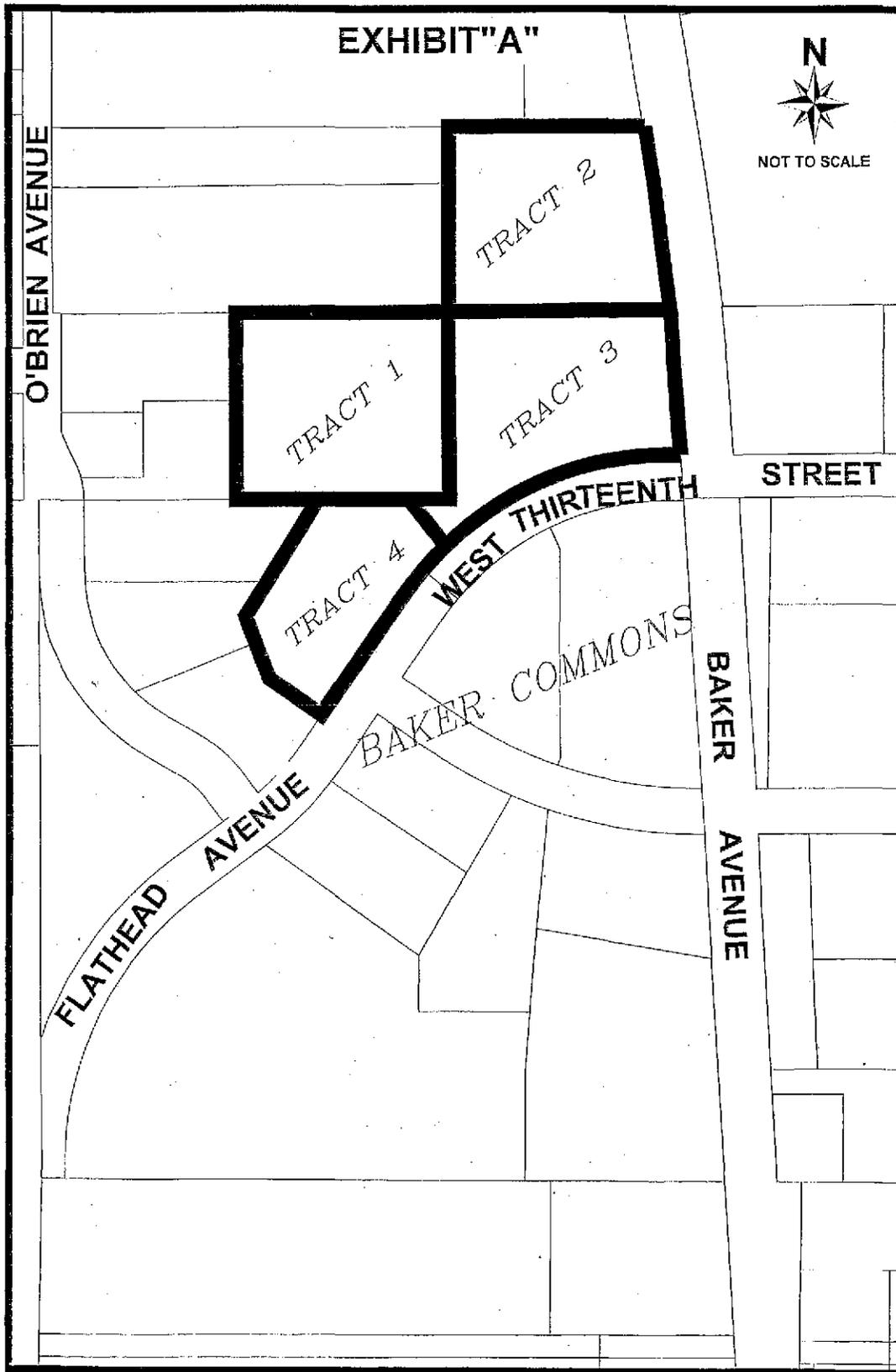
IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Notarial Seal the day and year last above written.

(SEAL)



DENYNE ADAMS  
NOTARY PUBLIC-MONTANA  
Residing at Kallispell, Montana  
My Comm. Expires January 15, 2012

Denyne Adams  
Notary Public for the State of Montana  
Denyne Adams  
[print or type name of Notary]  
Residing at Kallispell  
My Commission expires: 1-15-2012



**TRACT 1:**

Those portions of Lots 11 and 12, Riverside Improvement Company's Acreage described as follows:

Commencing at the Southwest corner of the Southeast 1/4, Section 36,  
Township 31 North, Range 22 West; thence along the South line  
of the Southeast 1/4  
East 247.61 feet to the Point of Beginning; thence continuing along the South  
Line  
East 300.49 feet; thence  
North 245.10 feet; thence  
South 89°57'36" West 299.82 feet; thence  
South 0°09'28" West 244.89 feet to the Point of Beginning.

Certificate of Survey No. 11825.

**TRACT 2:**

Lot 2 of the Amended Plat of a Portion of Lots 10, 11 & 12 of Riverside Improvement Company's Acreage, according to the official plat thereof, filed in Official Records of Flathead County, Montana.

**TRACT 3:**

Lot 1 of THE WAVE, an Amended Plat of Lot 3 of an Amended Plat of a Portion of Lots 10, 11 & 12 of Riverside Improvement Company's Acreage, according to the official plat thereof, filed in Official Records of Flathead County, Montana.

**TRACT 4:**

Lot 3 of Baker Commons Phase 1 Subdivision, according to the official plat thereof, filed in Official Records of Flathead County, Montana.

# Staff Report



To: Mayor John Muhlfeld and City Councilors  
 From: Rich Knapp, Assistant City Manager/Finance Director  
 Date: August 5, 2013  
 Re: Fiscal Year 2013 Year End Financial Report

*Rich Knapp*

This first page is a summary the City’s financial status, the rest of the report is for more detail.

An analysis of available cash in property tax supported funds provides a quick and simple review of the city’s financial health. The following table lists FY13’s budgeted year-end cash in column (a), FY13’s year-end actual cash column (b) and FY12’s year-end actual cash column (c).

### Property Tax Supported Funds

	Budget June 30 2013 Cash	Actual Jun 30 2013 Cash	Actual Jun 30 2012 Cash	One Year Change
	a	b	c	(b-c)
General	\$566,605	\$737,438	\$510,602	\$226,836
Parks/Rec	\$2,863	(\$90,162)	\$728	(\$90,890)
Police	\$12,776	\$71,628	\$49,825	\$21,803
Library	\$18,095	\$23,758	\$8,370	\$15,388
Fire & Amb	\$283,943	\$524,672	\$471,926	\$52,746
Building	\$14,607	\$7,826	\$941	\$6,885
	\$898,889	\$1,275,160	\$1,042,393	\$232,767
		% increase in cash		22%

The total property tax supported funds’ cash increase from last June was \$232k or 22%. The city GF cash now exceeds June 2009. In addition, GF cash remained positive in May for the first time since May 2009. Parks’ required an additional \$63k transfer from the general fund. Building was able to pay back \$59k to the General Fund. Also, two of the three building permits for the high school project have been deposited—the third was deposited in July.

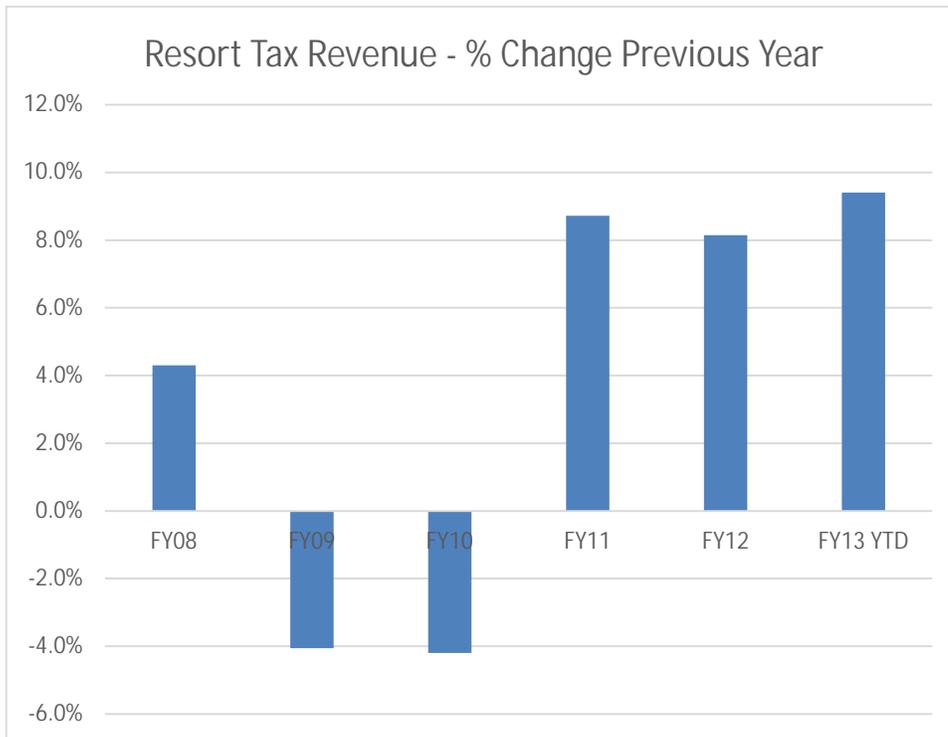
Fire union pay increases are not reflected in any of the numbers in this report. When the fire union settles, the city will pay retroactively to July 1, 2012.

### Financial Highlights

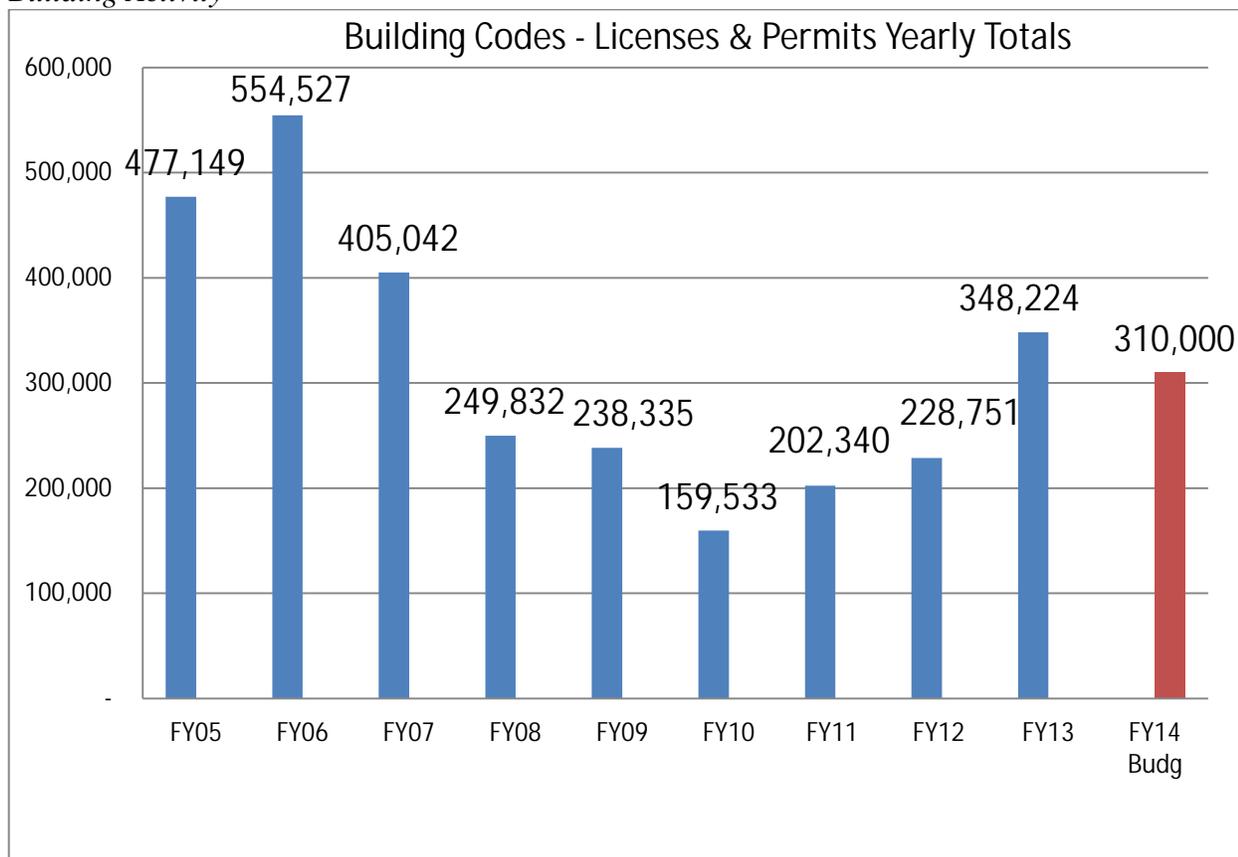
Building License and Permits revenue was the highest since FY2007 (see graph later). Ambulance Fees net write downs were about 12% lower than the previous two years—Medicare write downs were higher than expected. Water and Sewer Charges are 7% and 6% higher respectively, while water & sewer rates were increased by a smaller 2.5% in Oct ‘12. Solid Waste remains healthy despite no rate increase. Planning related fees are collectively about 174% of budget. The city’s interest earnings are about 1/5 lower than even two years ago. Impact fees are more than double two years ago and will exceed budget projections. Several parks programs required more assistance than anticipated. Library cash balances never went negative. The city reduced debt by 11%.

**Economic Trends**

*Resort Tax-* The graph below illustrates the trend in commerce within the city over the last five plus years.



*Building Activity-*



The following discussion highlights the attached three spreadsheets.

### **General Fund Revenue (line 9 to 17)**

Charges for Services (mostly planning & zoning fees) were 88% or \$101k higher than last year and were \$92k higher than budget. Zone Plan Review and Conditional Use fees were almost double last year. Planning fees were \$42k versus \$14k last year.

The \$23k golf lease came in a month late so it is not reflected in the year end numbers.

Interest earnings were only \$14k vs \$47k last year because the remainder of longer term CDs expired last year. The city will again look at the market and available options to increase interest earnings.

### **General Fund Expenditures, Net Revenue, & Cash (line 21 to 45)**

Total GF Expenditures were 99% of budget. The only major unanticipated expense was the increase in transfer to the parks fund to make up for the \$63,730 shortfall.

GF cash balance was \$737,438 compared to \$170,826 on Jun 30, 2011 (see I45). The graph located on the GF numbers page shows GF cash history for the last five years. The city GF cash now exceeds June 2009. In addition, cash remained positive in May for the first time since May 2009.

### **Property Tax Supported Funds (line 47 to 51 for summary, p. 2 for detail)**

Aggregate numbers for all property tax supported funds are found on line 47 through 51. The property tax supported funds' numbers are a sum of all the funds on the second sheet under "Property Tax Supported Funds." Line 50 and 51, summarized the total net gain/loss, and cash balance for the GF and all other property tax supported funds.

A key analysis is done by comparing net year end budgeted use of reserves (M47) to the net loss/gain actual (I47). The current budget anticipated decreasing cash reserves in Prop. Tax funds by \$195k at year end. At year-end the net was a \$38k use of reserves—a difference of \$157k.

The main reasons for the difference between budgeted and actual include:

- \$150k of expenditures net of debt funding for the purchase of Fire & Ambulance apparatus that was budgeted but will not occur this fiscal year
- \$35k of salary increase back pay to fire union members
- \$90k in receivables in Parks-\$70k Ice Den draw, \$20k late ice den payment
- Several other one time projects and capital that have not started yet

### **Page 2 of the numbers**

Park and Rec had a \$63k net loss that was absolved by a general fund transfer. The remaining \$90k came in July. The main shortfalls between budget and actual include Ice Rink \$30k, Adult Programs \$10k, Youth Programs \$20k, and Summer Camp \$20k. Parks had several unexpected expenditures, including a Grouse Mnt tennis court repair, an insurance claim, and a roof repair at the saddle club.

Library did not have a negative cash balance in April and May and ended the year better than expected (I91).

Building Codes net gain was \$44k higher than budget (L113). Furthermore, Building was able to pay back \$59k of the loan from the general fund and retain a higher cash balance.

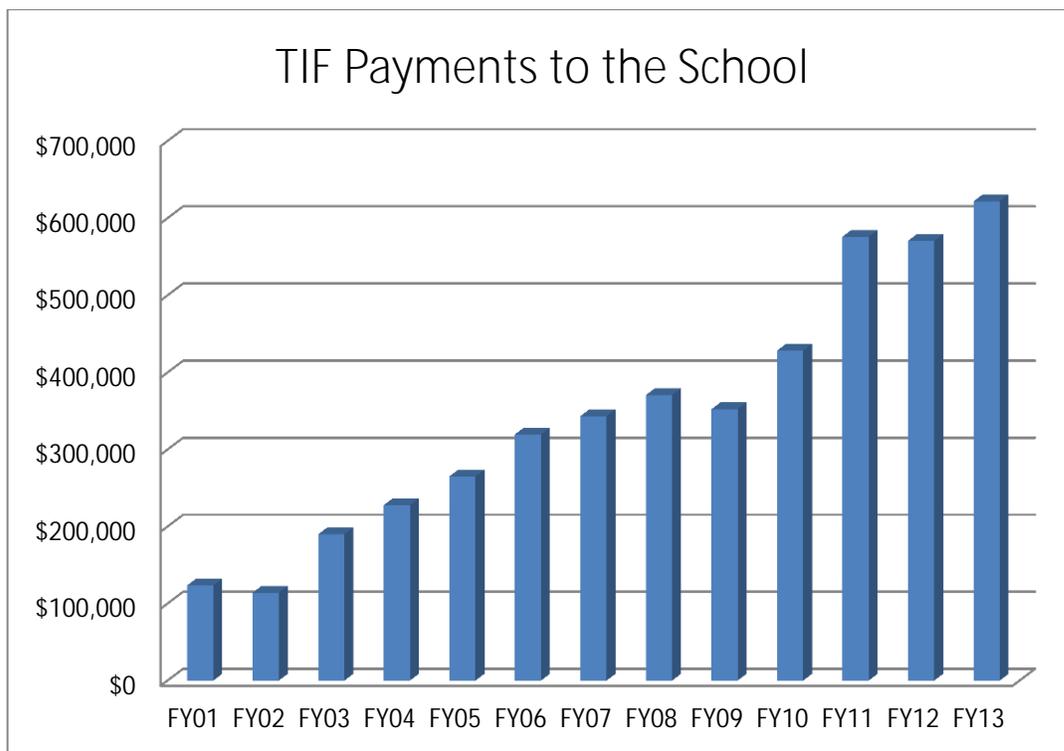
Ambulance fee revenues net of medicare, rescue care, city discount, and bad debt were 12% or \$60k lower than last year (L99). Ambulance Accounts Receivable balance was unusually high due to a reevaluation with Medicare, but that has been resolved and has now returned to normal levels. The A/R balance shows revenue recognized but cash has not been received. Fire & Ambulance still didn't reflect a 3.7% pay increase, which is now budgeted for FY14.

**Other Tax, Fee, & Assessment Supported Funds (p.2, line 121 to 148)**

These funds found on the second half of the second spreadsheet, receive no general property tax support.

Resort tax revenue was higher than 2012 by 8% (I123). As planned, expenditures are higher than the last couple of years and the cash balance continues to decrease.

The payment to the school of \$1 million from the TIF occurred in April. In addition, the residential rebate continues to increase.



**Enterprise Funds (p.3)**

Water charges were 7% higher than last year (line 160) while sewer charges were 6% higher (line 174). The increase in rates in October 2012 was 2.5% for water and sewer. The additional increase in revenue is probably mostly due from water use. In garbage, the City's choice not to pass on the increase from North Valley to the customer has not negatively affected the fund's solvency and it is possible to pass on the rate increase again this fall.

Water bill delinquency trends remained constant in FY13. The following information is based on averages. Of the 3,700 utility accounts, 14% are late, of that 14%, 28% receive a second late notice or door tag, of that 28%, 4% or 18 accounts are shut-off.

The water capital expenditures (I166) of \$1,729,176 are from the hydro project, Suncrest booster, US93 W, and some new vehicles.

## Capital Assets

Major capital asset events during FY 2013 include the following:

- Completed 6<sup>th</sup>/Geddes Reconstruction Project
- Continued design of E. 2<sup>nd</sup> Street Reconstruction and Trail
- Donation of \$25k for new baseball stadium
- Completed phase 2 of city-wide wireless communications network
- Completed design and started construction on Dodger Lane
- Completed Ice Den roof repair, and concrete at entrance
- Began Ice Den locker room upgrade
- Purchased 3 new compressors, sound system, light fixtures for the Ice Den
- Many upgrades to Emergency Services via the Homeland Security Grant
- Completed the hydroelectric plant
- Completed Wayfinding Signs project
- Began design on Skye Park Bridge
- Purchased US Hwy 93 West bridge improvements and decorative street lights
- Paid for US Hwy 93 Whitefish West Reconstruction Project Phase I
- Began Baker Ave outfall reconstruction project
- Upgraded HVAC at the water treatment plant, and sewer plant clarifier energy improvement for improved efficiency
- Purchased eDraulic cutter for rescue
- Purchased new loader & dump truck

## Long-term Debt

The City's total debt decreased by 10.9% or \$2,316,000 in FY 2013. Additional debt proposed in the FY14 budget includes \$875k Fire & EMS vehicles and \$1.6M in water & sewer mostly for Whitefish West. The City has no general obligation debt.

Outstanding Debt					
	Rate/TIC	June 30 2013	June 30 2012	June 30 2011	June 30 2010
<b>Revenue Bonds</b>					
TIF ESC	4.23%	\$12,020,000	\$13,285,000	\$14,510,000	\$15,695,000
SID166	4.18%	\$865,000	\$935,000	\$1,005,000	\$1,080,000
<b>Loans</b>					
Water	~2.1%	\$3,740,000	\$4,261,000	\$4,676,000	\$5,076,000
Sewer	~2.3%	\$2,328,000	\$2,788,000	\$2,171,000	\$2,217,911
Intercap-Ice Rink		\$140,000			
Total		\$19,093,000	\$21,269,000	\$22,362,000	\$24,068,911

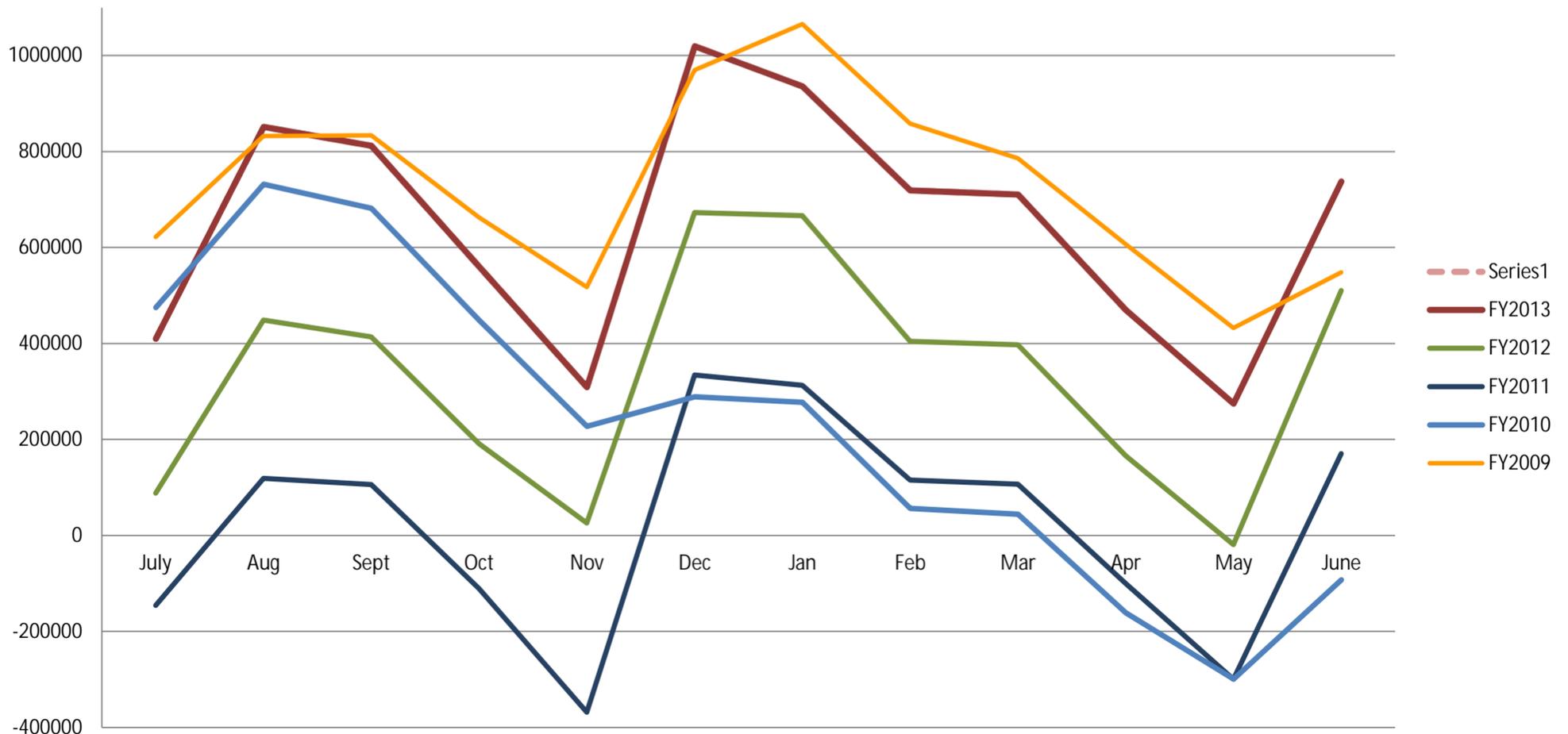
**Quarterly Financial Analysis  
City of Whitefish**

Month End: 6/30/2013 100% of fiscal year complete

YTD YTD YTD  
Jun 30, 2011 Jun 30, 2012 Jun 30, 2013

General Fund Revenues	YTD Jun 30, 2011		YTD Jun 30, 2012		YTD Jun 30, 2013		Chng Prev YR	% Chng Prev Yr
	Dollars	% of Budget	Dollars	% of Budget	Dollars	% of Budget		
Property Taxes	\$1,875,397	95%	\$1,925,200	103%	\$1,885,753	99%	(\$39,447)	-2%
Total Licenses and Permits	\$62,475	110%	\$59,611	105%	\$63,053	106%	\$3,443	6%
Intergovernmental Revenue	\$729,477	100%	\$727,093	99%	\$757,000	100%	\$29,906	4%
Charges for Services	\$151,627	107%	\$116,164	80%	\$218,123	174%	\$101,959	88%
Fines and Forfeitures	\$207,497	79%	\$254,596	118%	\$251,958	106%	(\$2,638)	-1%
Miscellaneous	\$37,876	160%	\$59,509	188%	\$27,919	77%	(\$31,590)	-53%
Investment Earnings	\$60,785	152%	\$47,145	135%	\$14,944	60%	(\$32,201)	-68%
Resort Tax & SID Revolving Transfer In	\$540,574	100%	\$553,708	100%	\$598,007	100%	\$44,299	8%
<b>Total General Fund Revenues</b>	<b>\$3,665,709</b>	<b>97%</b>	<b>\$3,743,026</b>	<b>103%</b>	<b>\$3,816,757</b>	<b>102%</b>	<b>\$73,731</b>	<b>2%</b>
<b>General Fund Expenditures</b>								
City Court	\$241,289	94%	\$251,045	67%	\$259,160	88%	\$8,115	3%
Prosecution Services	\$133,494	121%	\$99,303	75%	\$101,742	104%	\$2,439	2%
Administrative Services	\$66,326	97%	\$66,305	74%	\$70,723	98%	\$4,418	7%
Legal Services	\$16,990	95%	\$30,556	68%	\$34,382	95%	\$3,826	13%
Community Planning	\$224,032	91%	\$237,083	71%	\$270,980	90%	\$33,897	14%
Budgeted Interfund Loan (Building & Drug F)	\$102,490	100%	\$0	75%	\$0	0%	\$0	#DIV/0!
Transfer to Park Fund	\$413,384	101%	\$474,370	75%	\$535,730	114%	\$61,360	13%
Transfer to Law Enforcement Fund	\$1,730,227	100%	\$1,710,000	75%	\$1,795,000	100%	\$85,000	5%
Transfer to Fire & Amb Fund	\$343,502	100%	\$343,502	75%	\$494,594	100%	\$151,092	44%
Transfer to Library Fund	\$0	0%	\$33,370	100%	\$34,371	100%	\$1,001	3%
<b>Total General Fund Expenditures</b>	<b>\$3,250,988</b>	<b>96%</b>	<b>\$3,387,416</b>	<b>97%</b>	<b>\$3,657,604</b>	<b>99%</b>	<b>\$270,188</b>	<b>8%</b>
<b>General Fund Revenues Less Expenditures</b>	<b>\$414,721</b>		<b>\$355,610</b>		<b>\$159,153</b>		<b>(\$196,457)</b>	<b>-55%</b>
<b>General Fund Operating Cash Balance</b>	<b>\$170,826</b>		<b>\$510,602</b>		<b>\$737,438</b>		<b>\$226,836</b>	<b>44%</b>
<b>Prop Tax Supported Funds (no General) Net</b>	<b>\$223,822</b>		<b>\$111,960</b>		<b>(\$38,618)</b>		<b>(\$150,578)</b>	<b>-134%</b>
<b>Prop Tax Supported Funds (no General) Cash</b>	<b>\$584,958</b>		<b>\$531,791</b>		<b>\$537,721</b>		<b>\$5,931</b>	<b>1%</b>
<b>Total Gen &amp; Prop Tax Supported Funds Net</b>	<b>\$638,543</b>		<b>\$467,570</b>		<b>\$120,536</b>		<b>(\$347,034)</b>	<b>-74%</b>
<b>Total Gen &amp; Prop Tax Supported Funds Cash</b>	<b>\$755,784</b>		<b>\$1,042,393</b>		<b>\$1,275,160</b>		<b>\$232,767</b>	<b>22%</b>

GF Operating Cash Balance



	A	B	C	D	E	F	G	H	I	J	K	L	M
78			Jun 30, 2011		Jun 30, 2012		Jun 30, 2013						
79	<b>Property Tax Supported Funds</b>		Dollars	% of Budget	Dollars	% of Budget	Dollars	% of Budget	Chng Prev YR	% Chng Prev Yr			
80													
81	Parks and Rec Operating Cash Balance		\$370		\$728		(\$90,162)		(\$90,890)		-12478%		
82	Parks, Rec & Community Services Revenues		\$1,134,173	95%	\$1,181,718	90%	\$1,350,337	91%	\$168,619		14%	yr end budgeted	
83	Parks, Rec & Community Services Exp.		\$1,132,968	95%	\$1,150,925	78%	\$1,446,383	97%	\$295,458		26%	gain	
84	Revenues less Expenditures		\$1,206		\$30,793		(\$96,046)		(\$126,839)		-412%	\$2,223	
85													
86	Law Enforcement Operating Cash Balance		\$54,252		\$49,825		\$71,628		\$21,803		44%		
87	Law Enforcement Revenues		\$2,202,280	103%	\$2,082,802	110%	\$2,203,308	99%	\$120,506		6%	yr end budgeted	
88	Law Enforcement Expenditures		\$2,107,632	100%	\$2,056,618	109%	\$2,233,883	99%	\$177,266		9%	use of reserves	
89	Revenues less Expenditures		\$94,649		\$26,184		(\$30,576)		(\$56,760)		-217%	(\$33,942)	
90													
91	Library Operating Cash Balance		\$15,183		\$8,370		\$23,758		\$15,388		184%		
92	Library Revenues				\$203,966	108%	\$201,745	96%	(\$2,221)			yr end budgeted	
93	Library Expenditures				\$206,591	119%	\$186,268	93%	(\$20,322)		-10%	gain	
94	Revenues less Expenditures				(\$2,625)		\$15,476		\$18,101		-690%	\$10,066	
95													
96	Fire & Ambulance Cash Balance		\$515,004		\$471,926		\$524,672		\$52,746		11%		
97	Fire & Ambulance Taxes, p&i		\$376,463	94%	\$492,615	97%	\$515,049	99%	\$22,434		5%		
98	Ambulance Services Revenue		\$846,087	107%	\$856,552	108%	\$891,494	103%	\$34,942		4%		
99	Ambulance Services Rev Net Write Downs		\$503,243		\$499,927		\$439,278		(\$60,649)		-12%		
100	Fire & Ambulance Revenue		\$2,914,137	115%	\$2,641,053	115%	\$2,757,757	76%	\$116,704		4%	yr end budgeted	
101	Fire & Ambulance Expenditures		\$2,771,200	106%	\$2,654,504	113%	\$2,743,640	71%	\$89,136		3%	use of reserves	
102	Revenues less Expenditures		\$142,937		(\$13,451)		\$14,117		\$27,568		-205%	(\$187,195)	
103													
104	Building Codes Operating Cash Balance		\$150		\$941		\$7,826		\$6,885		732%		
105	Payable to the General Fund		(\$460,977)		(\$460,977)		(\$401,848)				-13%		
106	Budgeted Loan from General Fund		\$12,013	100%	\$63,026	No Loan	\$0	No Loan Needed					
109	License and Permits Revenues		\$202,342	101%	\$228,753	130%	\$381,358	113%	\$152,606		67%		
110	Building Codes Expenditures without C. Falls		\$216,247	97%	\$218,550	92%	\$317,614	98%	\$99,064		45%		
111	Columbia Falls Contract Revenues		\$20,241	42%	\$36,835	105%	\$32,175	124%	(\$4,661)		-13%	yr end budgeted	
112	Columbia Falls Contract Expenditures		\$47,263	101%	\$39,026	108%	\$37,770	99%	(\$1,256)		-3%	gain	
113	Revenues less Expenditures		\$2,423		\$71,059		\$58,411		(\$12,648)		-18%	\$13,646	
114													
115	<b>Total Property Tax Supported Funds (not including General Fund)</b>												
116	Total Property Tax Supported Cash		\$584,958		\$531,791		\$537,721		\$5,931		1%		
117	Total Property Tax Supported Revenue		\$6,499,132		\$6,438,173		\$6,926,941		\$488,768		8%	yr end budgeted	
118	Total Property Tax Supported Expenditures		\$6,275,309		\$6,326,213		\$6,965,559		\$639,345		10%	use of reserves	
119	Revenues less Expenditures		\$223,822		\$111,960		(\$38,618)		(\$150,578)		-134%	(\$195,202)	
120													
121	<b>Other Tax, Fee &amp; Assessment Supported Funds</b>												
122	Resort Tax Operating Cash Balance		\$2,415,908		\$2,425,036		\$2,142,223		(\$282,813)		-12%		
123	Resort Tax Collections		\$1,680,394	112%	\$1,819,283	108%	\$1,966,426	114%	\$147,143		8%		
124	Resort Tax Investment Earnings		\$37,616	125%	\$21,542	127%	\$5,528	37%	(\$16,014)		-74%	yr end budgeted	
125	Resort Tax Expenditures and Transfers		\$1,859,097	71%	\$1,907,503	67%	\$2,252,711	77%	\$345,209		18%	use of reserves	
126	Revenues less Expenditures		(\$141,087)		(\$66,678)		(\$280,758)		(\$214,079)		321%	(\$1,187,807)	
127													
128	Street and Alley Operating Cash Balance		\$801,162		\$1,080,164		\$1,044,448		(\$35,716)		-3%		
129	Street and Alley Revenues		\$1,364,483	124%	\$1,287,573	98%	\$1,363,646	103%	\$76,073		6%	yr end budgeted	
130	Street and Alley Expenditures		\$1,158,435	81%	\$1,016,869	60%	\$1,215,583	73%	\$198,713		20%	use of reserves	
131	Revenues less Expenditures		\$206,048		\$270,704		\$148,064		(\$122,640)		-45%	(\$346,776)	
132													
133	Tax Increment Operating Cash Balance		\$1,986,742		\$2,361,982		\$2,058,921		(\$303,061)		-13%		
134	Tax Increment Property Taxes, p&i		\$4,027,535	110%	\$3,820,628	99%	\$4,211,911	100%	\$391,283		10%		
135	Tax Increment Revenues		\$4,353,691	114%	\$4,149,803	99%	\$4,326,931	98%	\$177,129		4%	yr end budgeted	
136	Tax Increment Expenditures & Transfers		\$2,686,081	84%	\$3,966,044	82%	\$4,627,455	73%	\$661,411		17%	use of reserves	
137	Revenues less Expenditures		\$1,667,609		\$183,759		(\$300,523)		(\$484,282)		-264%	(\$1,938,459)	
138													
139	Impact Fee Collections - Revenues		\$85,904	176%	\$114,132	234%	\$178,170	143%	\$64,038		56%		
140													
141	Street Lighting #1 Operating Cash Balance		\$47,283		\$43,255		\$63,951		\$20,696		48%		
142	Street Lighting District #1 (Rsdntl) Revenues		\$73,486	111%	\$69,871	105%	\$71,419	108%	\$1,548		2%	yr end budgeted	
143	Street Lighting District #1 (Rsdntl) Exp.		\$72,265	85%	\$73,198	85%	\$50,656	48%	(\$22,542)		-31%	use of reserves	
144	Revenues less Expenditures		\$1,221		(\$3,328)		\$20,763		\$24,090		-724%	(\$40,033)	
145													
146	Street Lighting #2 Operating Cash Balance		\$61,361		\$71,063		\$66,370		(\$4,693)		-7%		
147	Street Lighting District #4 (Cmmrcial) Revenues		\$63,281	111%	\$59,112	103%	\$56,745	99%	(\$2,367)		-4%	yr end budgeted	
148	Street Lighting District #4 (Cmmrcial) Exp.		\$47,042	69%	\$48,710	71%	\$61,372	69%	\$12,662		26%	use of reserves	
149	Revenues less Expenditures		\$16,238		\$10,402		(\$4,626)		(\$15,028)		-144%	(\$31,553)	
150													
155													

	A	B	C	D	E	F	G	H	I	J	K	L	M
156			Jun 30, 2011			Jun 30, 2012			Jun 30, 2013				
157	<b>Enterprise Funds</b>		Dollars	% of Budget		Dollars	% of Budget		Dollars	% of Budget	Chng Prev YR	% Chng Prev Yr	
158													
159	Water Operating Cash Balance		\$790,992			\$1,510,967			\$764,310		(\$746,658)	-49%	
160	Water - Metered Water Sales		\$2,151,878	100%		\$2,331,447	108%		\$2,486,936	106%	\$155,489	7%	
161	Water - Operating Revenues		\$2,361,064	102%		\$2,600,946	114%		\$2,842,311	112%	\$241,365	9%	year end budget
162	Water - Operating Expenditures		\$1,371,776	87%		\$1,350,590	92%		\$1,388,169	87%	\$37,579	3%	Net Opr. Rev
163	Operating Revenues less Expenditures		\$989,288			\$1,250,356			\$1,454,142		\$203,786	16%	\$946,156
164	Net Opr. Rev Required by Year End		\$740,841			\$740,841			\$684,000				
165													
166	Non Operating Revenue		\$4,962	248%		\$400,000	0%		\$205,522	20%	(\$194,478)	-49%	
167	Water Capital Expenditures		\$145,792	14%		\$273,360	22%		\$1,729,176	65%	\$1,455,816	533%	
168	Water Debt Service		\$591,550	105%		\$590,784	100%		\$575,080	77%	(\$15,703)	-3%	
169													
170	Rate Increase History		No Increase			Oct '11 - 2%			Oct '12 - 2.5%				
171													
172													
173	Wastewater Operating Cash Balance		\$53,260			\$506,304			\$438,965		(\$67,340)	-13%	
174	Wastewater - Sewer Service Charges		\$1,820,209	110%		\$1,937,067	109%		\$2,051,208	108%	\$114,141	6%	
175	Wastewater - Operating Revenues		\$1,937,638	108%		\$2,075,082	111%		\$2,276,967	114%	\$201,885	10%	year end budget
176	Wastewater - Operating Expenditures		\$1,476,423	98%		\$1,444,586	96%		\$1,345,700	83%	(\$98,886)	-7%	Net Opr. Rev
177	Operating Revenues less Expenditures		\$461,215			\$630,497			\$931,267		\$300,771	48%	\$391,648
178	Net Opr. Rev Required by Year End		\$279,000			\$279,914			\$304,000				
179													
180	Non Operating Revenue		\$272,478	21%		\$1,436,240	80%		\$65,192	11%	(\$1,371,048)	-95%	
181	Wastewater Capital Expenditures		\$172,563	10%		\$1,266,937	71%		\$496,967	40%	(\$769,970)	-61%	
182	Wastewater Debt Service		\$85,924	62%		\$102,323	53%		\$207,952	93%	\$105,629	103%	
183													
184	Rate Increase History		May '10 - 11.7%			Oct '11 - 5%			Oct '12 - 2.5%				
185													
186													
187	Solid Waste Operating Cash Balance		(\$353)			\$41,392			\$75,324		\$33,933	82%	
188	Solid Waste Revenues		\$710,718	102%		\$728,116	102%		\$744,850	100%	\$16,734	2%	
189	Solid Waste Expenditures		\$681,545	99%		\$690,562	99%		\$710,256	96%	\$19,694	3%	
190	Revenues less Expenditures		\$29,173			\$37,553			\$34,593		(\$2,960)	-8%	
191													
192	Rate Increase History		Apr '10 \$1.00			No Increase			No Increase				
193													
194													

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RESOLUTION NO. 03-20

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF WHITEFISH, MONTANA, ESTABLISHING "NO PARKING" ZONES ON BAKER AVENUE, SECOND STREET (HIGHWAY 93) AND EDGEWOOD PLACE, AND IN DESIGNATED BICYCLE LANES.**

WHEREAS, § 10.52.060 of the Whitefish Municipal Code provides that the City Council may, on motion, create "no parking" zones within the City; and

WHEREAS, based upon a recommendation received from the Public Works Department, the City Council has determined that it is in the best interests of the City, and its inhabitants, to establish "no parking" zones on Baker Avenue, Second Street (Highway 93) and Edgewood Place, and in designated bicycle lanes,

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Whitefish, Montana, as follows:

Section 1: There is hereby established a "no parking" zone on the west side of Baker Avenue from the alley between First and Second Streets to the intersection of Second Street and Baker Avenue, a distance of approximately one hundred seventy-five feet (175').

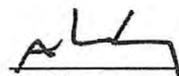
Section 2: There is hereby established a "no parking" zone on the north side of Second Street (Highway 93) from its intersection with Baker Avenue to a point one hundred twenty-five feet (125') west of Baker Avenue.

Section 3: There is hereby established a "no parking" zone on the north and south sides of Edgewood Place from Montana Avenue to Washington Avenue.

Section 4: It shall be unlawful for any vehicle to be parked in any bicycle lane on a City street if the bicycle lane is clearly marked by means of signs or other markings on the pavement.

Section 5: This Resolution shall take effect immediately upon its adoption by the City Council, and signing by the Mayor thereof.

PASSED AND ADOPTED BY THE CITY COUNCIL OF THE CITY OF WHITEFISH, MONTANA, ON THIS 16th DAY OF JUNE, 2003.

  
MAYOR

ATTEST:

  
City Clerk

ORDINANCE NO. 03-17

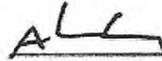
AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF WHITEFISH, MONTANA, PROHIBITING VEHICLES FROM DRIVING IN DESIGNATED BICYCLE LANES.

IT IS HEREBY ORDAINED BY THE CITY COUNCIL OF THE CITY OF WHITEFISH, MONTANA, AS FOLLOWS:

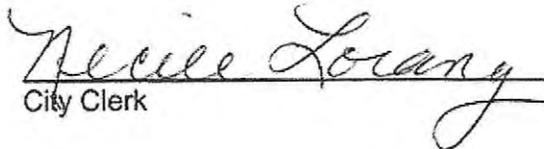
Section 1: It is unlawful for any person to drive or operate any vehicle, whether passing another vehicle or otherwise, in a designated bicycle lane, except that it shall be lawful to cross a designated bicycle lane, in a perpendicular manner, in order to turn into a driveway, another City street, a City alley, or other lawful point of entry for vehicles. A designated bicycle lane is one that has been clearly marked by means of either signs or other markings on the pavement.

Section 2: This Ordinance shall take effect thirty (30) days after its adoption by the City Council of the City of Whitefish, Montana, and signing by the Mayor thereof.

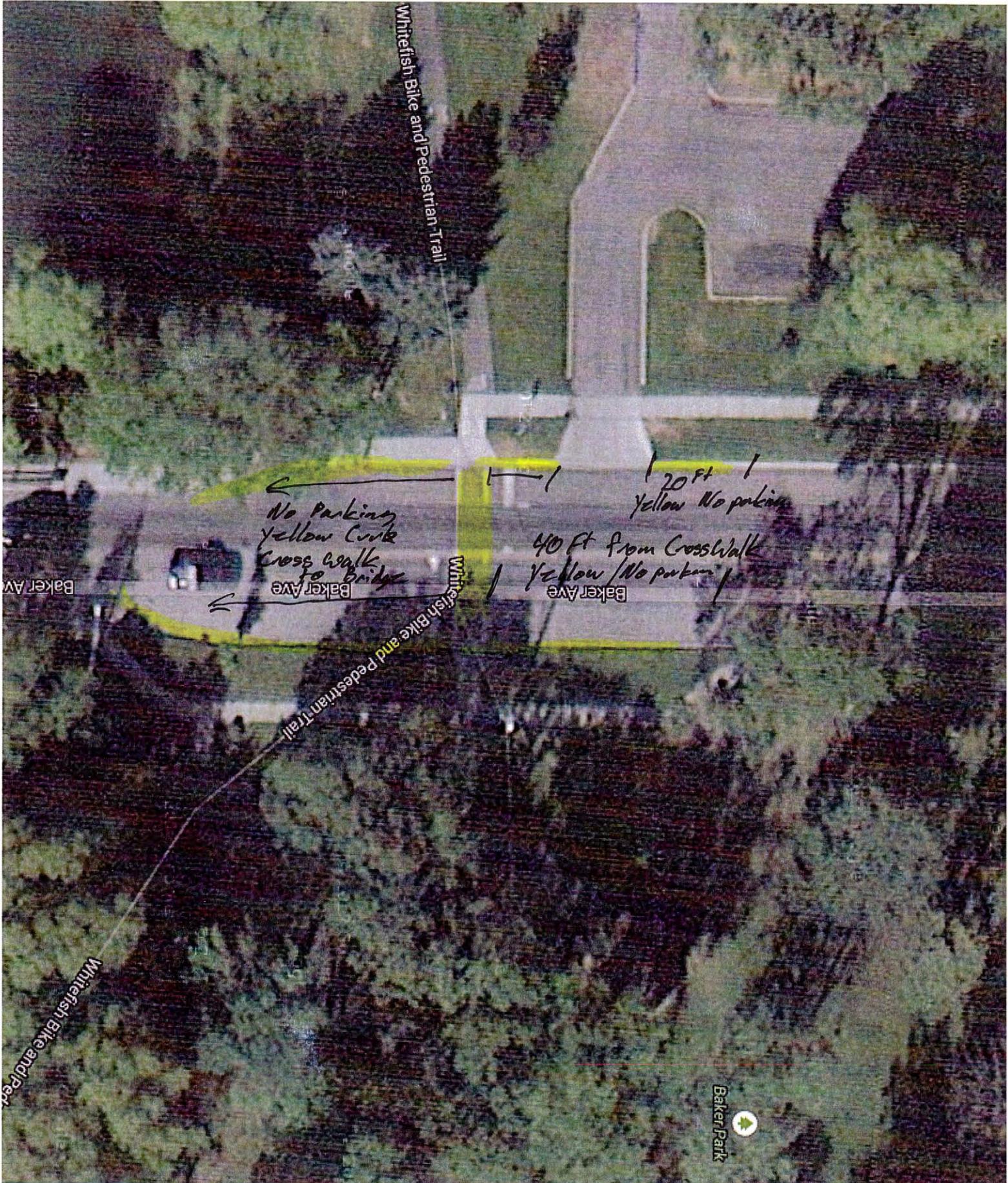
PASSED AND ADOPTED BY THE CITY COUNCIL OF THE CITY OF WHITEFISH, MONTANA, THIS 7th DAY OF JULY, 2003.

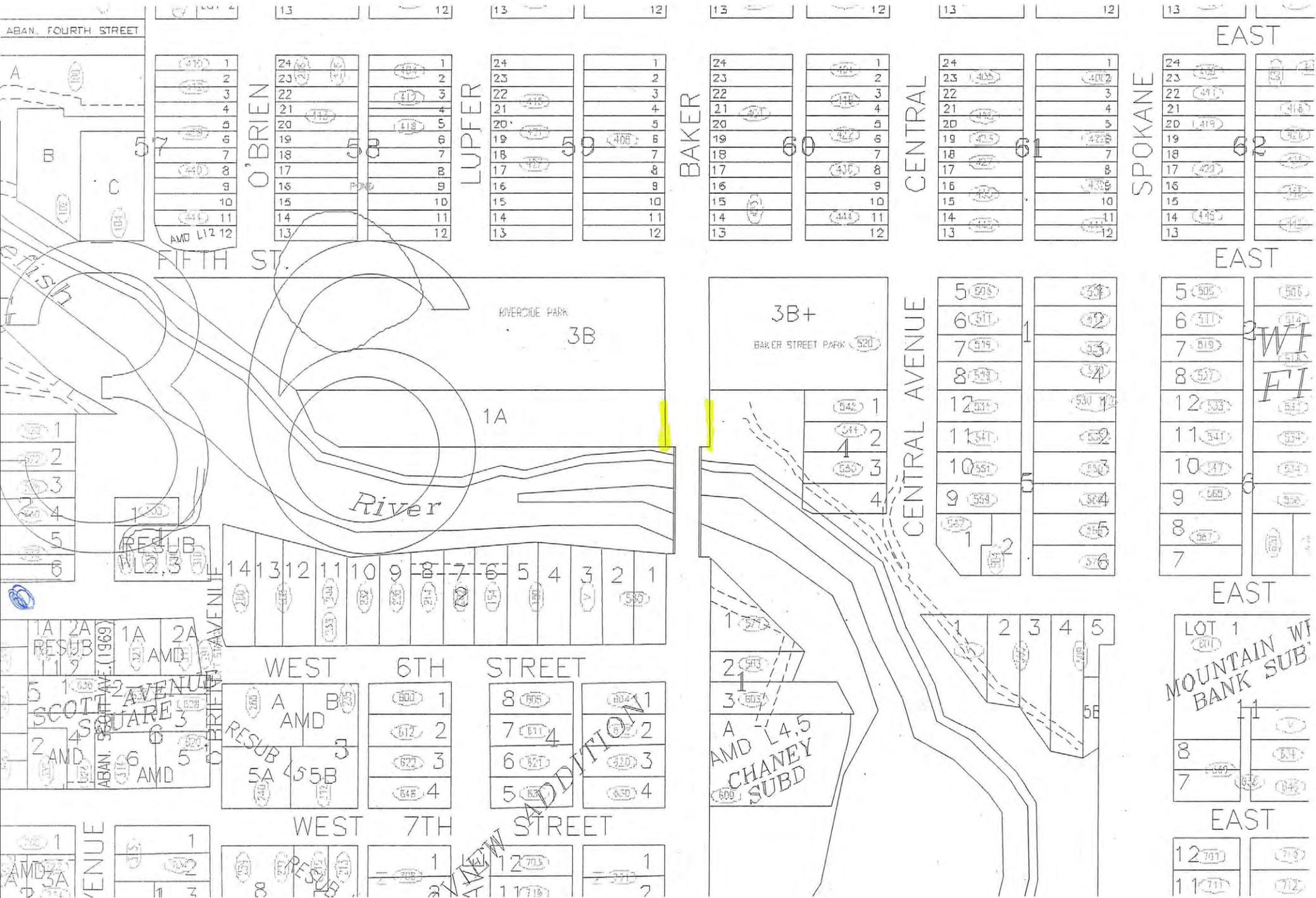
  
\_\_\_\_\_  
ANDY FEURY, MAYOR

ATTEST:

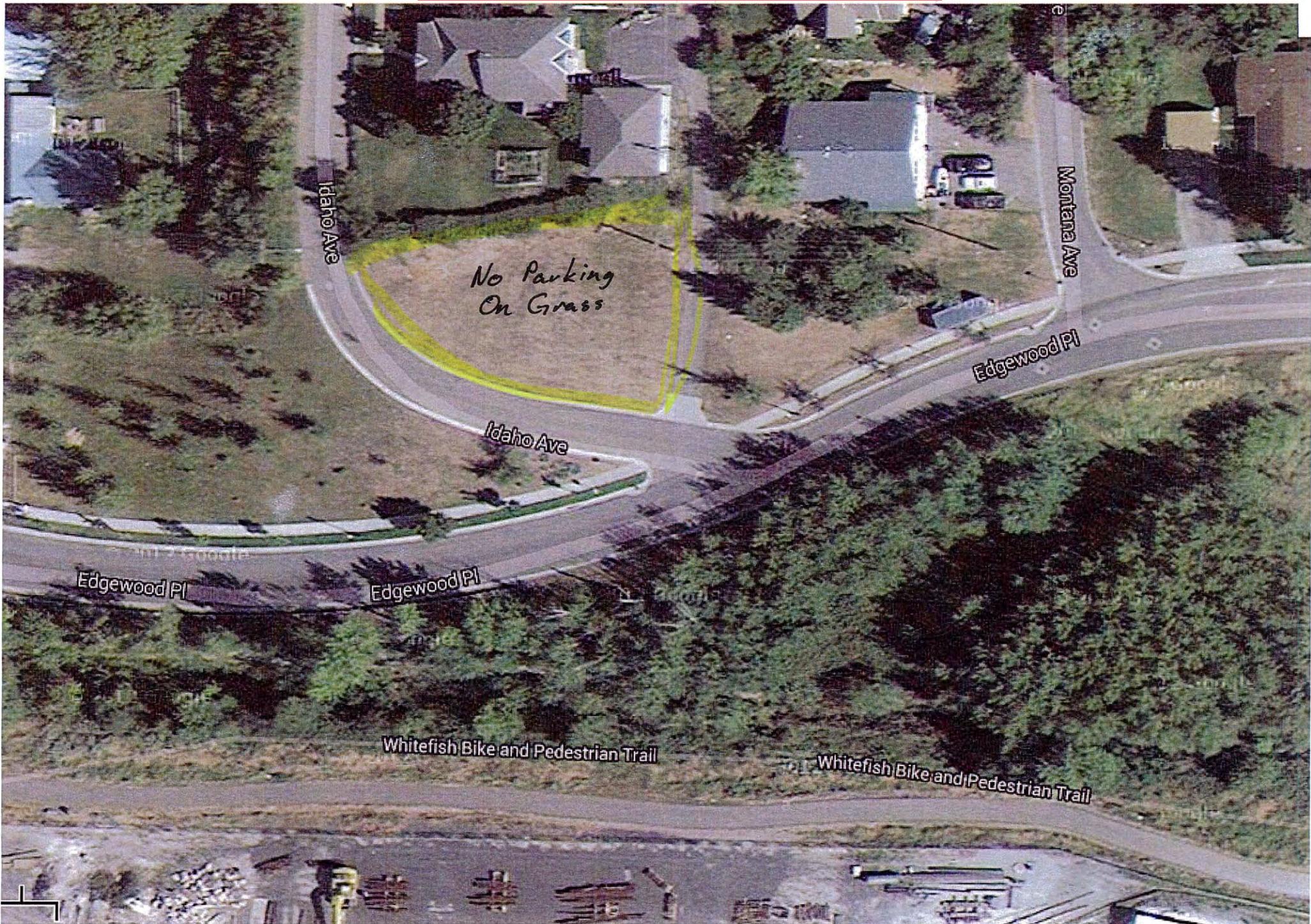
  
\_\_\_\_\_  
City Clerk

Crosswalk from Riverside Park to Kiddie's Park by Baker Avenue bridge





Parking area proposed for no parking on Idaho Avenue near Edgewood Place

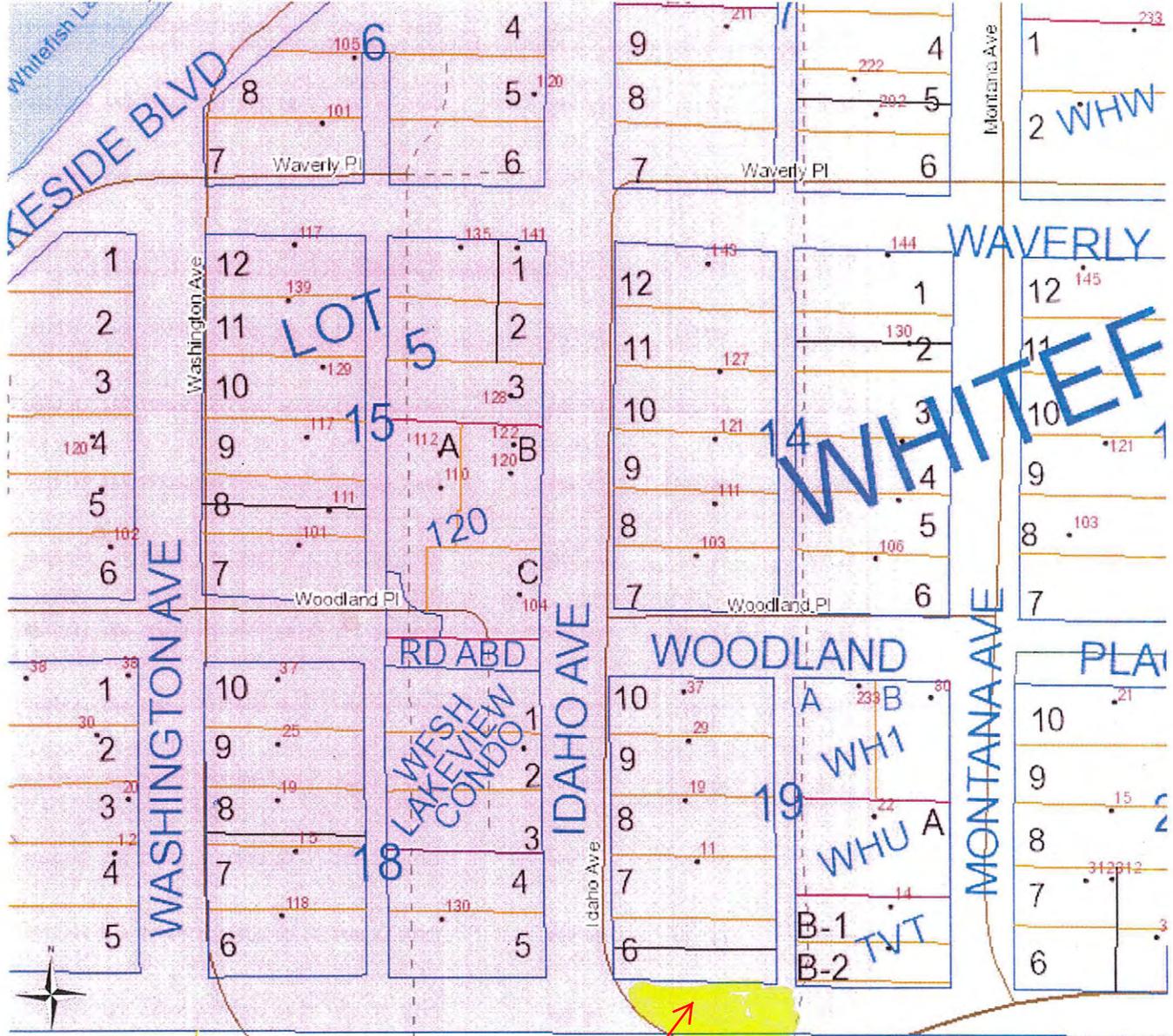




# FLATHEAD COUNTY GIS

## KALISPELL, MONTANA

MAP SCALE: 1:1,677 MAP CENTER: LATITUDE 48° 24' 57.86 LONGITUDE -114° 20' 51.17



Edgewood Pl

NOTE: No warranty is made by Flathead County for the use of GIS data for purposes not intended by Flathead County.

CONTACT: 800 South Main Kalispell MT, 59901 Phone (406) 758-5540 Fax (406) 758-5840

City right-of-way

BNSF right-of-way





## Chuck Stearns

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**From:** Chuck Stearns [cstearns@cityofwhitefish.org]  
**Sent:** Friday, July 19, 2013 3:07 PM  
**To:** 'Chuck Stearns'  
**Subject:** FW: FYI Idaho Avenue

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**From:** Tom Kennelly [<mailto:tkennelly@cityofwhitefish.org>]  
**Sent:** Wednesday, July 03, 2013 10:09 AM  
**To:** 'John Wilson'; 'Chuck Stearns'; 'Bill Dial'  
**Subject:** RE: FYI Idaho Avenue

My concern is that as the grass dries out and with the heat from the catalytic convertors of these parked vehicles , we have a large potential for a grass and multi vehicle fire that could easily spread to the neighboring residences.

## 6-2-4: PROHIBITED AND RESTRICTED PARKING:

- A. No Parking Zones: The following zones or areas are designated by the city council to be no parking zones wherein the parking of vehicles is prohibited except at the times and under the circumstances therein set forth. The city council may from time to time, on motion, create other and further no parking zones within the city. The no parking zones designated by the city council are as follows:
1. No automobile or vehicle shall be parked on the north side of Second Street, between Spokane Avenue and Kalispell Avenue; no automobile or vehicle except school buses when actually engaged in loading or unloading pupils shall be parked within a distance of one hundred feet (100') south of that part of the east side of Spokane Avenue extending from directly in front of the west entrance of the public school building, the distance of one hundred feet (100') shall be measured from the north side of the west entrance of the building and the area created shall be designated a no parking zone, and reserved exclusively for the use of school buses, loading and unloading pupils transported by such buses to and from the Whitefish public school; this no parking area shall not apply during the summer months when school is not in session.
  2. All no parking zones must be either posted with a suitable sign or marked with a yellow curb. (Ord. A-85, 12-5-1955; amd. Ord. A-237, 6-4-1973; Ord. 86-15, 7-7-1986; Ord. 09-15, 9-21-2009)
- B. Limited Parking Areas: The city council declares the following to be limited parking areas in which certain restrictions on parking are established, and it shall constitute a violation of this title for the owner or operator of any vehicle to violate the provisions hereof. The city council may, from time to time by motion, when it determines it advisable to do so, establish other and different limited parking areas within the city. The limited parking areas established which are in effect are as follows:
1. The area on the south side of Second Street extending from the northeast corner of the intersection of Second Street and Lupfer Avenue for a distance of fifty feet (50') from the fire hydrant located on the corner of the intersection is created a limited parking area and the parking of automobiles and other vehicles within said parking area hereby created for a period of more than twelve (12) minutes is forbidden and prohibited; provided, however, that parking within twelve feet (12') of said fire hydrant is expressly prohibited and forbidden.
  2. The parking of trucks and commercial vehicles in excess of twenty feet (20') overall length is prohibited anywhere on Second Street between Spokane Avenue and Lupfer Avenue and also on Central Avenue between Railway Street and Fifth Street.
- C. Two-Hour Parking: It is unlawful for any person to park any "vehicle", as defined in section [6-1-2](#) of this title, for more than or in excess of two (2) continuous or consecutive hours at any one time during the hours from eight o'clock (8:00) A.M. to six o'clock (6:00) P.M. in any one parking space on the following described streets within the city:

## Flathead Basin Aquatic Invasive Species Workgroup

A Partnership consisting of: Confederated Salish and Kootenai Tribe, Flathead Basin Commission, Flathead County, Flathead Conservation District, Flathead Lake Biological Station, Flathead Lakers, Flathead National Forest, Glacier National Park, Lake County, Missoula County, Montana Department of Agriculture, Montana Department of Fish, Wildlife and Parks, Sanders County, U.S. Geological Service and Whitefish Lake Institute.

7/18/2013

Mayor John Muhlfeld and the Whitefish City Council  
Whitefish City Hall  
418 2<sup>nd</sup> Street East  
Whitefish, MT 59937

Dear Mayor Muhlfeld and the Whitefish City Council:

The Flathead Basin AIS workgroup would like to thank you for your recent contribution to the ongoing AIS prevention effort. This past year we accomplished many of the goals set out in the Flathead Basin AIS Strategic Plan, to provide a heightened level of protection for the Basin, including but not limited to: secured funding for the Clearwater Junction Inspection Station; commenced the Curly Leaf Pondweed removal in Flathead Lake; obtained grant funding to develop a transboundary AIS protocol for the Crown of the Continent which will increase the effectiveness of AIS prevention efforts in Montana, Alberta and British Columbia; and expanded AIS survey and monitoring efforts. The contribution of the City of Whitefish provided us with the seed money needed to establish the Highway 2 watercraft inspection station in Coram for the 2013 field season and to undertake the Eurasian Water Milfoil removal in Beaver Lake. The leadership and vision provided by the City regarding AIS prevention is a testament to the community's commitment to protecting water quality, and the local economy.

The Flathead Basin AIS workgroup looks forward to another productive year as we continue to provide AIS prevention services and expertise. Once again, thank you for your contribution to the Basin AIS prevention effort. Your support is greatly appreciated!



Caryn Miske  
Executive Director  
Flathead Basin Commission  
on behalf of the Flathead AIS Workgroup

cc: Chas Cartwright, Chair, Flathead Basin Commission  
✓ Chuck Stearns, City Manager, City of Whitefish