

August 13, 2019, Council Consent Calendar Comments

The following comments on items on the Newport Beach City Council [agenda](#) are submitted by:

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Item 1. Minutes for the July 23, 2019 City Council Meeting

The passages shown in *italics* below are from the draft minutes with suggested corrections indicated in **strikeout underline** format. The page numbers refer to Volume 64.

Page 153, first paragraph: “*Mayor Dixon indicated **penalties for** recycling violations in New York are very strict.*”

Page 154, end of first bullet under “Mayor Dixon”: “*..., and the Corona del Mar Branch Library and Fire Station **grand opening***”

Page 154, last lines: “*City Attorney Harp and Community Development Director Jurjis ... confirmed the ordinance does not prohibit Saturday construction, but imposes noise limits.*”

As this statement indicates, there seems to have been some confusion at the July 23 meeting as to whether the noise part of the new ordinance¹ applicable to “high density areas” should be called a “*ban*” on Saturday construction, or merely new Saturday “*noise restrictions*”? Although the relevant part of Ordinance No. 2019-9 (including as amended) is technically a *noise* ordinance, in updating the Planning Commission about it on July 18 (see [draft minutes](#) for PC Item No. 5), Community Development Director Jurjis himself had referred to it as “*the ordinance prohibiting construction on Saturday*” and the noise restrictions it imposes are identical to the longstanding citywide noise restrictions on Sundays which are widely perceived as a Sunday construction ban. It is probably accurate to describe both of these as “**noise restrictions that effectively ban most construction activity.**” Both are as applicable to do-it-yourselfers as to commercial operators.

Page 157, paragraph 4: “***Laurie-Petrie Lorian Petry** discussed the Aviation Committee meeting she attended on July 22, 2019, and voiced her concerns regarding the contract with Mr. Edwards.*”

Page 159, paragraph 2: “*Discussion ensued between Council and Mr. Sherwin relative to how TOT is calculated, the difference between Newport Beach & Co. (NB&Co) and Visit Newport Beach (**NBV VNB**), receiving financial reports from both companies, ... and if NB&Co and **NBV VNB** services are still needed, ...*” [without this correction, the “NBV” abbreviation is both odd and inconsistent with the one used in the motion that follows, as well as throughout the staff report for this item]

¹ The new law is [Ordinance No. 2019-9](#), scheduled to become effective August 12, but still awaiting online codification in NBMC [Sec. 10.28.040](#), and now amended with opt-out provisions by Ordinance No. 2019-11, adopted as [Item 3](#) on July 23, but not effective until August 22.

Item 3. Resolution No. 2019-72: Approval and Award of Professional Services Agreement with Avenu Insights and Analytics, LLC (“Avenu/MuniServices”) for Sales and Use Tax Auditing and Analysis

I had the impression the City had relied, for a number of years, on HdL for sales tax information and forecasts ([C-5274](#) - PSA for Sales and Use Tax Analysis and Appeals). That contract, originally awarded in 2012 appears to have been extended to September, then on June 28 rolled back to end on June 30. Is there anything the Council or public should know about this recent change of plans, which isn't explained in the staff report? Was staff anticipating the Council would rubberstamp the present item and HdL's further services would not be needed?

That said, I am pleased to see the statement in the staff report (page 3-3) that *“In accordance with procedures for the procurement of professional services, staff unsealed the fee proposals from **both** proposers.”* The City's [General Plan Update Steering Committee](#) (what ever happened to that?) was told in some detail that once they had rated the qualifications of the respondents to an RFP (why would RFQ's be different?), it was the City's practice to open the price envelope for only the highest rank respondent, and only if a “reasonable” fee couldn't be negotiated would they unseal the price for the next highest ranked firm. That seemed like an extremely strange and illogical system, for it would seem that once the technical rankings have been decided, the price proposals of all the firms become an important decision factor: especially given that rankings are not infallible, the Council (rather than the staff), just like a private consumer, may wish to go with a less-highly-ranked firm if they offer substantial cost savings. In the present case, the staff report claims the highest ranked firm also offered the lost cost, avoiding the need for such judgments.

But see [Item 7](#) on the current agenda, where the relative costs of using various similarly-ranked vendors for a roadwork design project are not revealed to the Council (or public).

That said,

1. **The agreement (page 3-5) does not conform with the statement in the staff report Abstract (and Recommendation part b) that it is “a one-year agreement ... with the option to extend for an additional four years, in one year increments.”**
2. Provision 1 (“Term”) says *“The term of this Agreement shall commence on the Effective Date, and shall terminate on June 30, 2024.”* That is clearly the statement of a five-year term. One would not guess from that it is actually 1 year with options to renew. Nor is the Adobe Reader search function able to find anything to that effect.
3. Aside from the \$6,000 yearly fee for accessing their Clearview software platform, the compensation due to Avenu Insights also seems more something that is “understood” between the parties than spelled out in the agreement. For example, at the start of the Schedule of Billing Rates (Exhibit B, page 3-22), “Sales Tax ... Forecasting services” is indicated as something that will be billed on a contingency basis (based on recoveries achieved using leads developed by the vendor). It is very hard to see how a sales tax forecast can be billed on a contingency basis. That would seem to fall under “Additional

Consulting Services” (although I notice it is also listed as something to be provided by the Clearview software).

Finally, I am pleased to see the vendor is willing to accept a *lower* contingency percentage as the size of the recoveries increases. That is commendably different from the Tom Edwards [airport consulting agreement](#) debated at the July 23 Council meeting, in which the vendor is paid a *higher* rate for extra hours than for standard ones.

Item 5. Bayview Heights Drainage Project – Notice of Completion for Contract No. 7109-1 (15X11)

I don’t recall if the Council (and public) have seen renderings of what the finished project was intended to look like.

Is the floor of the “vegetated detention basin” indeed supposed to be vegetated? If so, with what?

During this past spring it appears to have functioned mostly as a concrete-walled pond and mudflat.

Item 9. Amendment No. One to Agreement with Rainbow Disposal Co., Inc. dba Rainbow Environmental Services (Rainbow) for Beach Container Refuse Collection Service

The statement at the end of the staff report (bottom of page 9-2) that “*It should be noted that no changes are being made to the contracted billing rates*” is mystifying.

This is “Amendment One” and the billing rates shown in Exhibit B (page 9-9) are quite different from those in the existing contract [C-4709](#). Not only are there (as explained in the staff reports) different numbers of bins in different areas at different times, but even where the number of bins is constant, there appear to be very slightly different summer and non-summer rates, all of which are higher than they originally were. Presumably much of this is due to CPI increases, and the staff report is trying to say the cost per bin emptying has increased only by that amount.

Item 11. Wastewater Flow Agreement with Costa Mesa Sanitary District

The Council should be aware the CMSD Board of Directors heard a presentation about these properties as [Item C.8](#) at their February 12, 2019, study session (“see” [audio](#) starting at 12:10 and [minutes](#)).

The item was presented by former CNB² Municipal Operations Co-Director [George Murdoch](#).³

² CNB = City of Newport Beach

The CMSD Board was led to believe CMSD and CNB staff had been discussing annexation of these properties (for CMSD sewer service purposes, only) for more than a year (previously, annexation of the entire CNB sewer operation by CMSD had been considered, briefly, as an alternative to a rate increase).

According to the [CMSD staff report](#), after public outreach in March, the Council and Board were expected to endorse the annexation in April with the item going to LAFCO as early as May and being completed by September.

Such an annexation would avoid the need for the Flow Agreement and continued exchange of funds between the agencies.

Since none of this is discussed in the current CNB staff report, there has apparently been a change of plan.

Regarding the “Funding Requirements” it would have seemed helpful to indicate how much sewer revenue was actually collected from these properties in FY19 so the Council (and public) could see how that compares to the roughly \$20,000 paid to CMSD.

In that connection, Mr. Murdoch said that of the properties shaded blue on Mesa Drive (in Exhibit A of the draft agreement, [CNB staff report](#) attachment, page 11-10), the City receives revenue from, and pays CMSD, **only** for 2148 Mesa (the rightmost one of the set on the left). The other six properties, through some anomaly of history, have been allowed to connect to the CMSD system without reimbursement from the City and CMSD has been unable to assess the owners because their properties (like all those being discussed here) are outside the CMSD service district. In other words, **six of the Mesa Drive properties** (apparently originally on septic tanks) **have been enjoying free sewer service for many decades** (see the caption explaining this in Mr. Murdoch’s [Exhibit G](#) from his February presentation to the CMSD Board).

Is something going to be done to correct this situation?

Under the new agreement, it would appear CNB is agreeing to pay CMSD their full rate for these properties. Does CNB plan to pass this charge on to the property owners? Or will it be paid out of the general fund? One might guess these six estate owners (like the Mesa Drive estate owners already within the CMSD service boundary) could afford the \$94 dollars a year.

Also regarding the CNB staff report, it is very difficult to tell which parts of the [discussion](#) on page 11-2 refer to the expired agreement (for example, the “20-year term”) and which parts refer to the proposed new agreement (for example, the references to “Exhibits A and B”). It would have seemed helpful to highlight how the new agreement differs from the old.

³ George, who is now an East Orange County Water District Director, was apparently hired by the City under a pre-existing on-call consulting agreement with Richard Brady & Associates ([C-8169-1](#), since expired on July 30, unless it’s been extended) – thereby evading the [Policy F-14](#) requirement for Council approval of contracts with firms employing (at the time of contract?) people who have worked for the City within the last five years.

Regarding the proposed new agreement ([Attachment A](#) starting on page 11-3):

1. In the **first “WHEREAS,”** I suspect “**retailer**” may have been intended to read “**residential**” or else “residential” was inadvertently omitted from the list of uses⁴ (it might also be noted that although CMSD provides wastewater services to all the uses stated, it provides solid waste collection only to small residential units with curbside service through a contract with CR&R similar to that the City has).
2. I believe the statement in the **third “WHEREAS”** that one of the purposes of the 1991 amendment ([C-2100](#)) was to “*modify the number of properties served by CMSD*” is misleading.
 - a. Although the [1991 amendment](#) has attached to it an “[Exhibit “A”](#)” with a notation that it is “*revised 9/1991*,” it does not appear to change the properties from those [delineated in 1979](#) and I can find no reference to this graphically-revised exhibit in the amendment.
 - b. What the 1991 amendment *did* add to the agreement was an “[Exhibit “B”](#)” related to the division of fees and responsibilities in an area of West Newport Mesa which seems to involve a set of properties on the north side of West 16th Street, along the [Newport Beach – Costa Mesa border](#), which is also, apparently, in that area the boundary of the [CMSD service area](#). As in the Back Bay, some of these are (or were at the time of the 1991 amendment) CNB ratepayers whose wastewater flows into CMSD sewers, but others are of the opposite kind: properties in the CMSD service area that flow into the CNB system.
 - c. **To the extent the 1991 “Exhibit “B”” and the related paragraph of explanation remains relevant, it seems important this understanding be carried forward into the new agreement, but I can find no evidence that it is** (it is not within the boundary area to which the new agreement applies).
3. I believe the statement in the **fourth “WHEREAS”** that “*the 1991 Amendment expired in August, 2009*” is incorrect.
 - a. The 1979 agreement is [dated](#) August 9, **1979**, and clearly states it had a [term](#) of **20** years.
 - b. The [1991 amendment](#) appears to have been concerned primarily with adjusting the rate structure to match that charged by CMSD rather than being an independent amount adjusted by CPI. It expressly states that no other terms are being modified.
 - c. It therefore appears that the previous agreement expired on August 9, **1999** (not 2009), and that the City has been paying without any written agreement for the last 20 years.
 - d. An expiration in 1999 is also what George Murdoch believed. See the CMSD February 12, 2019, [minutes](#), page 2, as well as the [CMSD staff report](#): “*The*

⁴ I don’t personally understand why the uses are listed. I would omit the entire list.

agreement expired nearly twenty years ago on August 9, 1999, but CMSD and City officials have agreed to a "gentlemen" agreement where the City would continue paying the capacity fees to CMSD."

4. **Section 7.4** refers to an "**annual invoice period**" without clearly what the "period" is. It is evidently a **July 1 to June 30 fiscal year**.
5. In **Exhibit A** ("Sewer Service Boundary," on page 11-10), the two southernmost properties shaded in blue on Tradewinds Lane (near lower left corner of the exhibit) – **1815 and 1821 Tradewinds** – are *not* listed in **Exhibit B** ("Parcels Receiving Sewer Services").
 - a. Mr. Murdoch's [Exhibit B](#) from his February 12 presentation to the CMSD Board suggested field studies had shown these properties do not flow into the CMSD system. That would suggest the new agreement's Exhibit B is correct and Exhibit A is wrong.
 - b. I don't know if subsequent studies have reached a different conclusion, but **it would seem Exhibit A and Exhibit B of the agreement should be consistent.**