



**PUBLIC SAFETY RETIREMENT SYSTEM
CITY OF SURPRISE LOCAL BOARD – POLICE**
Minutes, Wednesday, February 6, 2019
16000 North Civic Center Plaza, Surprise, Arizona 85374

The following are the minutes from the PSPRS City of Surprise Local Board – Police Meeting held at 9:00 a.m. Wednesday, February 6, 2019. The meeting was held in City Hall, Council Overflow Conference Room.

Call To Order:

Chairperson Scott Gwaltney called the meeting to order at 9:07 a.m.

A. Roll Call: Scott Gwaltney, Chairperson & Citizen Board Member - Present
Don Jeffrey, Citizen Board Member – Present
Jim Conner, Citizen Board Member – Present
Ian Murton, Employee Board Member – Police Dept. – Present as of 9:30am
Courtney Hicks, Employee Board Member- Police Dept. – Present

In attendance: Chanda Washington, Board Administrator
Lindsey Steinhoff, Human Resources
Donna Meuse, Human Resources
Cynthia Kelley, Board Attorney
David Niederdeppe, Board Attorney
Brandon Johnson, Applicant
Catherine Bailey, Applicant Attorney
Robert Wingo, City Attorney- Mr. Wingo advised all present he was not attending in a representative attorney-client capacity for the Board

B. Pledge of Allegiance: None

C. Current Events Reports: None

D. Staff Reports: Ms. Washington introduced the new board member Mr. Jim Conner appointed at last night’s council meeting, 2/5/19 by Mayor Hall. Mr. Conner will not vote at today’s board meeting as he is not up to date on current board matters.

Call to the Public: None

Consent Agenda:

#1. Discussion and action pertaining to approval of PSPRS Local Board - Police December 12, 2018 Meeting Minutes. **-Approved**

Motion: Hicks
Second: Jeffrey
Opposed: None

Scott Gwaltney- voted yes
Don Jeffrey- voted yes
Jim Conner- abstain
Ian Murton- absent



Courtney Hicks- voted yes

Regular Agenda:

#2. Consideration and action pertaining to the Accidental Disability Retirement application and IME summary for Brandon Johnson. - **Approved**

Mr. Johnson has not waived confidentiality for his medical information, therefore; a motion was made at 9:10am to move to a modified executive session to discuss Mr. Johnson's applications with him and his Attorney, Catherine Bailey present.

Motion: Gwaltney
Second: Hicks
Opposed: None

Scott Gwaltney- voted yes
Don Jeffrey- voted yes
Jim Conner- abstain
Ian Murton- absent
Courtney Hicks- voted yes

Motion made to end executive session at 9:22 am

Motion: Gwaltney
Second: Hicks
Opposed: None

Scott Gwaltney- voted yes
Don Jeffrey- voted yes
Jim Conner- abstain
Ian Murton- absent
Courtney Hicks- voted yes

Motion to move to approve the Accidental Disability Retirement application and IME summary for Brandon Johnson.

Motion: Hicks
Second: Jeffrey
Opposed: None

Scott Gwaltney- voted yes
Don Jeffrey- voted yes
Jim Conner- abstain
Ian Murton- absent
Courtney Hicks- voted yes



Ms. Washington read the accidental questionnaire to the board to answer. They responded to the following questions.

1. Did the employee file the application after the disabling incident, or within one year of ceasing to be an employee? **yes**
2. Did (or will) the employee terminate by a reason of disability? **yes**
3. Did employment terminate based on a disciplinary issue? **no**
4. If the member's period of DROP has ended, if applicable, did (or will) the employee terminate by a reason of disability? **not applicable**
5. Is the employee still working a position within their job classification that the Local Board considers a reasonable range of duties position? **no**
6. Has the employee refused a position within their job classification that the Local Board considered a reasonable range of duties? **no**
7. Did the injury or condition occur prior to the current PSPRS membership date? **no**
8. Was the injury or condition the results of an event incurred during the performance of the employee's duty? **yes**

#3. Discussion and action pertaining to the revised local board procedures drafted for and presented to the City of Surprise Police PSPRS Local Board. - **Approved with conditions as noted on page 11**

Ms. Hicks asked for this item to be tabled as Mr. Murton was unable to make the meeting and he had concerns he would like to address. A motion was made to table the item.

Motion: Jeffrey
Second: Hicks

Ms. Washington expressed we were prepared to speak on this item today and prior to tabling the discussion she would like to discuss the revised local board procedures.

Mr. Niederdeppe started the discussion regarding the local board secretary questions that were brought up in a previous meeting. Mr. Niederdeppe indicated when the statute says a local board can elect their board secretary; he has interpreted it and it has been viewed in the past as the local board can elect in the sense of "select" their secretary. The duties a board secretary is charged with by the board require the individual to keep meeting minutes and transmission of information to the system (PSPRS). Mr. Niederdeppe expressed the natural place for this position would typically land with someone in HR or sometimes the City Clerk.

Mr. Murton joined the meeting at 9:30am. This item will no longer be tabled and he has joined the discussion. The above explanation was repeated to Mr. Murton.

Mr. Niederdeppe stated the Phoenix board is unique in their selection because they have a separate retirement administrator who runs the city's retirement system and is



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also the local board secretary. There are reasons to have the local board secretary be someone who understands the local board process and the confidential nature of what the local board sees. Another factor involved is the employer's obligation to pay for expenses for the operation of the local board.

Mr. Murton stated the wording of the A.R.S. statute actually says "elect" and we cannot interpret law the way we want to read it because it's written in law. His impression of the way the law was written is the HR Director would nominate someone and the board would use a vetting process to make a final selection. If Ms. Washington were to leave he is not sure if the board would be happy with her replacement. He wants someone the board has vetted to represent the board and employees. Additionally, if the secretary starts to not do their job, Mr. Murton feels the board should be able to replace that member at the end of a 4-year term.

Mr. Niederdeppe said there is nothing in statute that specifies about the term. He expressed all the board members make a collective decision to say they want this individual as secretary. If you look at elect in the dictionary one of the synonyms is selection and that is how we have always interpreted it.

Mr. Murton said that is an attorney interpretation and how one applies law in the courtroom is different than how one applies it as an officer on the road. Ms. Kelley reminded Mr. Murton that the board does still vote on the secretary. Mr. Murton expressed that having one person to choose from does not give them a vote in who will be secretary. Mr. Niederdeppe mentioned if the board is dissatisfied with the secretary, the board has the ability to select someone else.

Mr. Murton asked why go through the process of re-selecting if we can vet them up front. He would be fine if the board wants to write up the procedures for the HR Director to nominate someone; however, he would also like to include for the board to nominate their own candidate and have a selection process. The way we are selecting a secretary now is taking power away from the board and the board is already limited in their power.

Ms. Washington discussed city code for boards & commissions states staff liaison is responsible for taking the minutes and that is one of the duties of the local board secretary and that should be a consideration when selecting a secretary. She stated if the board wasn't pleased with the secretary, they could go to the HR Director and request someone else be selected. She stated there is a confidentiality aspect for the board to consider and if another person in the city was nominated because they are not trained to handle sensitive information and they do not have systems to access or store the sensitive medical information for records retention purposes. Mr. Murton stated that person could turn over the confidential information to the right jurisdiction since they are not taking the information home.

City Attorney Robert Wingo stated logistically that would not work because there are federal obligations under HIPAA that require certain securities in our system. Medical documents that are received are located in a separate system and if we house them



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anywhere else or allow access of those systems to someone else we would likely be in violation of federal laws and that's why traditionally HR has come to perform the duties of the local board secretary. Per our HIPAA policy, HR is allowed access to medical information and has had training on how to handle the documents. He stated it would be a violation of City of Surprise policy and federal law to give a non-HR employee access to the full medical documentation.

Mr. Murton stated the law is written the way it is and expressed that as a board member he does not want to see the city to try to minimize what powers he has on the board to ensure their employees are getting the best representation they can on this board and the board should have the ability to be involved in the selection process or the vetting process of those going to represent them or serve on the board in conjunction with them.

Mr. Gwaltney asked if Mr. Murton wanted the process for the secretary to be changed going forward since Ms. Washington is doing a fantastic job. Mr. Murton said he is happy with Ms. Washington and that she has helped him out personally. He wants to know what happens with the secretary after Ms. Washington leaves. He stated the board should also have people on the board that represent the police employees which includes the board attorney and board secretary. It is no different from what the employee board members had to do in their election process. They were nominated, they accepted the nomination and the employees voted for them to serve on the board.

Mr. Gwaltney asked Board Attorney David Niederdeppe if he has seen any board in his experiences that have actually selected a local board secretary. Mr. Niederdeppe stated it has been a proform thing.

Mr. Murton stated Phoenix PD has elected their attorney and goes through a selection process and he imagines they do the same thing with their secretary. Mr. Murton asked the Board Attorneys if they were selected when they served Phoenix PD on the PSPRS Board. Mr. Wingo stated he would speak to the selection of an attorney. Mr. Murton stated he was making a correlation and if a board can do it for their attorney why can't a board do it for the secretary.

Mr. Niederdeppe stated that he is not disagreeing with Mr. Murton, but that there are practical ramifications to the choices the collective board makes and the practical ramifications are the things Ms. Washington talked about such as the ability to access records, ability to interact with PSPRS. He said the board could authorize the selection of another secretary at this meeting, but the practical ramifications of that would have to be dealt with because the new person would have to take these minutes from this meeting, get it to PSPRS within 20 days based upon the statute requirement and would have to deal agendas and deal with all those kinds of things. He stated that he is not disagreeing with Mr. Murton but he wants the board to consider the practicality when selecting a secretary because that person has to be able to fulfill statutorily the obligations of the secretary under the system statute.



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Mr. Murton stated it is a convenience thing for the city as to whether that person is able to access or not access information. The reality is the city can give access to that person depending on if they have been vetted properly. Mr. Wingo said it was not a mere convenience, it's efficiency, logistics, administrative, and compliance with federal law.

Mr. Murton stated the board members take an oath when they sign up to be on this board. He asked how the other board members felt. He does not like it when cities or governments get involved in boards and try to minimize what the board can and cannot do.

Mr. Wingo stated this would be a good time for him to speak on the board attorney selection process since Sgt. Murton explained he wanted to review the letter of the law. Mr. Wingo provided a disclaimer that he was not at the meeting to give legal advice to the board and that he does not represent the board that is the job of the two competent attorneys that are in the room. Mr. Wingo stated the current black letter of the law and thinks that it is prudent that he speaks to that because there was concern about the independence of counsel that is selected. Mr. Wingo referenced the Surprise Municipal Code chapter 2-142 which is an ordinance that was adopted lawfully by City Council and he stated it is not inferior to any other law including state law or federal law. It is a law of the City and states "All legal counsel will be engaged exclusively by the city attorney and no expenditure may be made or indebtedness incurred for the legal services except with the written consent and approval of the city attorney".

Mr. Wingo stated in Sec. 2-295, it says "The city attorney will act as legal counsel to every public body and will attend meetings as necessary." That is the current state of the law and the only way the law will be invalidated and give this board an alternative would be if it was pre-empted by state law. Arizona state law that deals with local boards in Title 38-847 the courts have weighed in on numerous occasions on what preempts a local law and for preemption to occur you must first have a conflict in the law. When he looked at 38-847 for conflict regarding city attorney who engages counsel for the city and the local board law and he does not find any conflict. When he reviews the local board law it states that counsel will be independent, paid by the city and he finds no conflict between the statute and the city attorney selecting the local board counsel. The courts have to said in regards to conflict it has to be diametrically opposed and there cannot be any cohabitation or harmony between the two provisions. If the statutes had said the local board can select, vet or employ an attorney then he would say it would be diametrically opposed. He reiterated the statutes do not state the local board has that authority so he does not find any conflict. In addition, if there was a conflict in order for preemption to still occur there must be an expressed or implied intent by the legislature made clear in the legislation that they intended for preempt that. He does not see anything in Title 38 that the legislature expressly says they remove all power from cities or counties and we are preempting this entire field of law so that there can be no local laws. Preemption is not an issue and therefore the current city ordinance applies.



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Mr. Wingo said that even if the statute did not expressly say they needed an independent attorney for the board, he would still conflict himself out and he does that whenever his interests or city interests conflict with the potential representation. When he retains outside counsel he has no control over them. He mentioned as the two attorneys in the room would attest that he has never spoken with them outside of the initial engagement and retention for representation. They do not report to his office, he doesn't contact them to find out how things are going and they have no obligation to him whatsoever. That is supported by the ethical obligations that all attorneys in Arizona undertake by rules of ethics that are adopted by the Arizona Supreme Court. The attorney that is retained has total loyalty to the party they are representing and not the person that pays them or retains them. By law there is no obligation the board attorneys have to the city or the city attorney's office. The city merely pays for services. The board attorneys' loyalty under the ethical obligation and the rules of professional conduct they have to abide by are the board is their client regardless of whose paying or whose retaining them. There is not conflict between the state law and the city's law for the city to hire the board attorney.

Mr. Murton asked if the board found themselves in a legal situation wouldn't they want to entrust the person representing them and have vetted them so they know what their background is before they are selected for them.

Mr. Wingo stated that under the law that Mr. Murton referenced earlier it states the city attorney's office represents all boards. If the board were to amend the bylaws to say that the board will hire the attorney that is what attorneys would call ultra vires, which is an act beyond your authority and it would have no legal consequence. The ordinance says the city attorney selects the attorneys or represents the boards himself.

Mr. Murton stated a board for the city or the state and said this board was separate from the city. Mr. Wingo stated that this board is a local board and not a state board and falls under the purview of Chapter 2 of the city ordinances that states the city attorney has authority to hire all attorneys and the city attorney represents all boards. Mr. Murton said that when he looks at it and compares it to 38-847, it seems like it is in direct conflict. Mr. Wingo stated it was not in direct conflict. Mr. Murton said it is how one can perceive it.

Mr. Wingo asked Mr. Murton where in statutes does it say the board hires the attorney. Mr. Murton stated it does not state that. Mr. Wingo asked how is it in conflict of statute. Mr. Murton stated because the attorney is supposed to be independent and if the city attorney is the sole person that makes the selection for the attorney and the board does not have any involvement in the selection process and the person who is representing them may not necessarily be the person they want representing them.

Mr. Wingo stated he already explained the board attorney is independent and if Mr. Murton feels the board attorney is not being independent then he can file a bar complaint. There is nothing to suggest the board attorneys are not independent and anyone that is conflicted out will be independent. Under the ethical rules they are



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allowed to hire conflict attorneys in numerous situations. He stated the board will have to consult with the board attorney if they want advice on whether or not they can select a board attorney, but that he is stating the law and what the city's position is and there is an ordinance that says the city attorney hires, the city attorney represents boards and that is valid law. There is nothing he can find that preempts that in state law.

Mr. Niederdeppe added by stating that if a critical mass of a client does not want him in the room, he can understand that and can easily walk away from the representation. He takes the obligation to serve a local board independently of the city seriously that says a local board attorney is independent of the employer and any employer organizational member and owes its duty of loyalty only to the local board and they take that seriously. If the board is not satisfied with the attorney selection then they do not have to say anymore and they can leave.

Mr. Murton understood, but didn't feel that the board should have to get to that point. He has been down that road before where he served on a board that was sued and the attorney that was provided to their association was not anyone that he wanted representing him and he had to go out and get his own counsel. He stated that they have changed things with that organization after the fact and that board he is on is now able to select their attorney and they vet them and know what their background is. He just wants to be able to know the background of the people that are going to be representing him. Mr. Niederdeppe stated that Mr. Murton is entitled to know that.

Mr. Murton read the statutes the way they are written in 38-847 (N) and (M) and said he needed to review the chapters of the city ordinances that Mr. Wingo referred to for the city attorney to select the local board attorney. He knew of other local boards that selected their local board attorney and local board secretary, such as the City of Phoenix. Mr. Wingo stated under City of Surprise law you can't select your own attorney and City Council would have to amend the city code to allow the PSPRS board to do so.

Mr. Jeffrey ask if the board can select the local board secretary. Mr. Wingo said he will not provide advice on that since the board counsel already gave advice.

Ms. Hicks said the most important thing to her is the secretary is approved into the minutes and the board can remove them if need be.

Mr. Jeffrey asked if the local board secretary statute indicates we must elect the local board secretary. Mr. Murton said yes. Mr. Jeffrey felt to follow the law that the board would then need to have an election for the local board secretary.

Mr. Conner asked if this board has had an issue with the local board secretary. No issues were identified. He said for the HR Director to elect or designate a local board secretary it is more than convenience. The logistics of trying to merge with local ordinances, HIPAA, federal law, etc. is overwhelming and it sounds almost like you could be running a dual path and could almost have two secretaries, one the board likes and one the city requires you to have. He does not understand how the representation



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issue that Mr. Murton is trying to protect for employees is compromised at all because the board has total control over what the secretary does.

Mr. Murton stated the duties of the local board secretary encompasses many areas and he wants to make sure that they are doing their job and have the best interest of the employees. Mr. Conner said the secretary is not a representative function they work for the board.

Ms. Steinhoff stated that even if Ms. Washington was not the secretary, she would still have to work with the employees. Mr. Conner stated that it seems to him that Mr. Murton is trying to make the board secretary position one that is responsible to the board. Ms. Kelley stated the police employee board position is completely different than the local board secretary position. Police employee board members are there to vote on matters presented to them whereas the secretary does the work for the board.

Ms. Meuse stated the board has recourse and wanted to make sure the board understood that Ms. Washington or any local board secretary is not a voting member. All of the board members stated they understood. Ms. Meuse further discussed how the board has options in the event they are not satisfied with the performance of the local board secretary and there have not been any issues to date. However, if there were issues or the local board secretary were to leave, the designee replacement would need to be reviewed by HR for appropriateness based upon job duties. Ms. Meuse asked what changes is the board trying to get to in the board procedures?

Mr. Jeffrey indicated the law says the board shall elect the local board secretary so he would like for the procedures to match the law. He did indicate the local board attorney appears to be correct based upon Mr. Wingo's explanation. Mr. Conner stated that the board has been given advice from the impartial attorney that the word elected can be used in the sense of selected. He asked Mr. Jeffrey's if they changed the procedures would it change their election process. Mr. Jeffrey's stated probably not.

Ms. Washington mentioned in the board's meeting notebooks under tab 3 on page 3 under C #3 states, "The human resources director or designee shall serve as the local board secretary. The local board shall confirm the appointment of the board secretary by vote". She explained if the board was not satisfied with the person designated as the local board secretary, they could elect not to vote for them.

Mr. Niederdeppe advised the board on page 2 of the procedures, it lists the definition of the local board secretary and states "secretary means the person so designated and elected pursuant to A.R.S. 38-847 (M) who is charged with keeping a record and preparing agendas, minutes and decisions of all hearings and rehearing of the local board". It looks like the controversy on this is how it meshes with page 3 under C#3. He thinks Mr. Murton is suggesting that how the board secretary is elected/selected be listed first and the definition listed second. Mr. Murton stated he would prefer to keep the secretary definition listed on page 2 under #25, but would rather indicate who designates the secretary.



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Mr. Wingo asked the board from a practical standpoint how would they go about selecting a qualified individual as the board secretary. Hire a 3rd party to go headhunt the individual or investigate employees in HR to determine who is the most qualified. The selection that the HR Director makes is not an arbitrary. It's a selection of someone who fills the position who is familiar with obtaining medical records, HIPAA trained and works on a daily basis with disability issues. He wants to know how the board has expertise and ability in vetting for this position.

Mr. Murton asked Ms. Washington who would fill in for her if she was sick. It was identified that two other individuals from HR could fill in. He felt that the board could have an election based upon three individuals from HR. Mr. Wingo expressed who would pay for someone other than Ms. Washington to perform the duties of a board secretary. He explained Ms. Washington's job duties include that of the board secretary whereas the other two individuals job duties do not include the board secretary.

Mr. Murton asked if the job classification includes the person who is going to represent the board. It was confirmed the job classification includes the board secretary. He did not agree with that as he feels the city has already pre-determined who is going to represent the board as the local board secretary when they hire someone into Ms. Washington's position. Mr. Gwaltney stated that Ms. Washington is not a voting member and she handles the administrative duties and does not have a say on how and what the board votes on. Mr. Murton expressed concern that the board doesn't truly get to vote on the local board secretary as the designee is determined by who fills the role in HR. Ms. Meuse pointed out to the board that the position is fully vetted by HR.

Mr. Wingo stated if there are identified deficiencies or issues with the individual not doing their job, the board has the authority to say nay and at that point the HR Director would address who fills the position, but it cannot be arbitrary and capricious or on a whim that the board says they do not like the person, there has to be an identified reason.

Mr. Gwaltney asked for a poll. Mr. Murton said he would vote no. Ms. Hicks stated she understands Mr. Murton's point of view, however she is comfortable with the way the board procedures are currently since the board can vote the local board secretary in and deselect them if need be. Mr. Jeffrey, Mr. Gwaltney and Mr. Conner all agreed with Ms. Hicks.

Ms. Hicks mentioned prior to Mr. Murton arriving for the meeting there was a motion made to table the discussion of the revised local procedures. Mr. Gwaltney stated he doesn't feel that it stands as the motion was not fully approved.

A motion was made to withdraw request to table discussion of revised local board procedures drafted for and presented to the City of Surprise Police PSPRS Local Board.

Motion: Hicks
Second: Jeffrey
Opposed: None



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Scott Gwaltney- voted yes
Don Jeffrey- voted yes
Jim Conner- abstain
Ian Murton- voted yes
Courtney Hicks- voted yes

Ms. Washington wanted to discuss a concern the fire board brought up when reviewing their procedures when it came to pre-existing conditions. (A break was taken).

Mr. Murton brought to the board's attention on page 4 under subsection (d)(i), it states the local board members not present may attend by telephone or other electronic means is in violation of city code and should be amended. Ms. Washington explained the board members must be present for the meetings so this statement will need to be amended.

Ms. Washington explained the section about pre-existing condition located on page 5, under #4 of procedures mentions that employees who have been identified as having a pre-existing conditions will receive a copy of their pre-employment physical and will be given 30 days to submit additional documentation for their permanent file, but employees who do not have pre-existing conditions do not receive a copy of their pre-employment physical. She explained at the last fire board meeting, it was recommended that if an employee does not have a pre-existing condition, they would also receive a copy of their pre-employment physical and she wanted to see if this board wanted to include this same language in the local board procedures. All board members agreed to have the language included. Ms. Washington also pointed out on page 3 of the procedures, the definition of a quorum states there must be at least one employee police board member present.

A motion to approve revised local board procedures drafted for and presented to the City of Surprise Police PSPRS Local Board with (d)(i) removed and adopting the language on page 5, #4 the employee will receive a copy of their pre-employment physical if there is no pre-existing condition identified. During the motion, Mr. Murton wanted to have the local board conduct on pages 9-11 of the current procedures added to the revised local board procedures that were being voted on. Mr. Gwaltney added to his motion, to include the old pages 9-11 local board conduct to the revised local board procedures.

Motion: Gwaltney
Second: Hicks
Opposed: Murton

Scott Gwaltney- voted yes
Don Jeffrey- voted yes
Jim Conner- abstain
Ian Murton- voted no
Courtney Hicks- voted yes



#4. Review and Discussion of June 30, 2018 PSPRS Police Actuarial Report- No Action Needed

Ms. Washington gave an overview of the City of Surprise contribution rates, funding status and each section of the actuarial report for 2018. She also explained some of the changes from the 2017 actuarial report and improvements that have been made.

#5. Consideration and action pertaining to placing items on future agenda.

None of the board members wish to add anything to the next agenda at this time.

Ms. Washington informed the board she is not sure if they will need a meeting next month. If they do meet, the meeting will go back to the regular schedule and time and it would be March 13th at 10am.

#6. Executive Session: Consideration and action to enter into Executive Session pursuant to A.R.S. 38-431.03 (A) (2) and (3) for consideration or discussion of material deemed confidential by law and/or discussion or consultation for legal advice with the board attorney regarding the local board procedures.

The board went into modified executive session to discuss the Disability Retirement Application with Applicant Brandon Johnson and his attorney, Catherine Bailey at 9:10am. This executive session ended at 9:22am.

Adjournment:

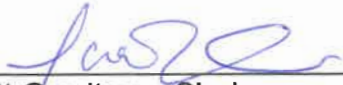
Chair Scott Gwaltney made a motion to adjourn the meeting at 10:42 a.m. – **Approved**

Motion: Gwaltney
Second: Jeffrey
Opposed: None

Scott Gwaltney- voted yes
Don Jeffrey- voted yes
Jim Conner- abstain
Ian Murton- voted yes
Courtney Hicks- voted yes



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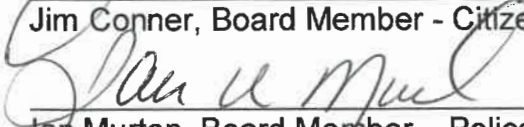
Scott Gwaltney, Chairperson




Donald Jeffrey – Board Member - Citizen



Jim Conner, Board Member - Citizen



Ian Murton, Board Member – Police Dept.



Courtney Hicks, Board Member - Police Dept.



Chanda Washington, Board Secretary