

Minutes of the Meeting of the Utah Privatization Policy Board
Thursday, September 17, 2009 10:00 a.m.
Room 3150, State Office Building
Salt Lake City, Utah

Attendees

Senator Brent Goodfellow, Jim Kesler, Gary Nielsen, Steve Densley, Tanya Henrie, Kerry Casaday, Curtis McCarthy, Ted Boyer, Kimberly Jones, Randy Simmons, Robin Riggs, Kent Beers, Nancy Orton

Excused

Steve White, Gregory Stauffer, Steven Dickson, Representative Fred Hunsaker

Visitors

Jeb Huston, Joan Penrod & Lynette Penrod – Counterpoint, Douglas Taggart & Randy Moulding – Moulding & Sons Landfill, Kent Stabeli – Hansen, Allen & Lore, Gary Laird & Dave Wilson – Weber County, Todd Losser – UPEA, Candace Daly – NFIB, Royce Van Tassell & Jackie Evans – Utah Tax Payers Association

Welcome and Introductions

Senator Brent Goodfellow, Chair, conducted the meeting.

Approval of Minutes:

Jim Kesler made a motion that we approve the August 13, 2009 minutes. Tanya Henrie seconded his motion and the minutes were unanimously approved.

Weber County Waste Disposal Site

Mr. Penrod gave the board a handout and a presentation on why he feels that Weber County entering into an agreement with Moulding & Son's Landfill is illegal, has created an unfair monetary advantage and has created a monopoly and effectively prohibited competition in the private sector.

Dave Wilson with Weber County said that with due respect he doesn't feel this is a matter to be taken before this board. He knows the Penrod's and Counterpoint Construction are unhappy with the Counties actions here but as always there are two sides to the story. If the Penrod's and Counterpoint have filed suit we have not received notice a summons or complaint as of yet. We are happy to respond to their allegations in court.

This all came about because Randy Moulding ran a private landfill in West Haven City and closed it last year. Weber County has been searching for some time for an alternative. Weber County makes more money by bringing that to their transfer station. The transfer station is not really designed for construction and demolition waste. If Mr. Laird were to get up here he would tell you over the last six to eight months in taking that his profits have only increased \$600,000 over a previous amount of time. We can take that waste; we didn't have to facilitate this business but decided to do it to alleviate the pressure on our transfer station. Mr. Moulding had ground. Mr. Moulding and Mr. Laird have known each other for some time. There is no problem with that relationship as far as the Penrod's have accused Mr. Laird; at least one Penrod has accused Mr. Laird of taking money under the table. I have known Mr. Laird for 30 plus years and

he has integrity and would not do that. He has been searching for an alternative for C & D Waste to go to.

Mr. Moulding owned ground that would facilitate C & D Landfill. Weber County is not bound by the Purchasing Ordinances when it purchases real estate to do an RFP or an RFQ. If we would have owned the ground and were just searching for a managing agent to manage that C & D Operation we would have done an RFP for that. Mr. Moulding served Weber County well, he has kept his prices competitive. I don't know how much money he has made running his private landfill. He could have made more because he could have raised those prices to approach what our tipping fees are. He has not. The county commission was first approached with this when Gary brought it to the county commission. They are all in favor of this committee's work in privatizing things that private people can do. They said let Mr. Moulding go and do that. After some further discussions and the delay in that the county knew it could assist in that process and maybe manage most importantly the tipping fee that is associated with that. The contracts provide that the county set the tipping fee. So Mr. Moulding if he were to pass this on to someone else could not gouge the county businesses or residences that need that. There is no monopoly. If you can find the ground to locate it in Weber County or a close county round about you can do a private C & D Landfill as long as you jump through those hoops and complete the process.

There are two agreements. We believe these agreements are made in accordance with applicable law if the Penrod's want to challenge that in court they can. The real estate contract is not void. There are provisions in there that relate to doing certain things by a certain amount of time. I remind this committee and Counterpoint Construction contracts are mutual agreements between people that are beneficial to both. Conditions can be waived and right now we have suspended one condition having to do with due diligence pending the completion of getting the state permit. Weber County has a real estate interest through a contract to purchase that property at fair market value and that is a restraint on governmental entities. If you can't pay fair market value then you should not sell less than fair market value. Weber County would make more money if all the waste went through our transfer station. The other thing that comes about with that is people start dumping waste in ditches and other places because they don't want to pay the high price. As far as the liability issues there are some incorrect statements there. The contract is for 20 years. The contract pays Weber County a certain amount per ton for every ton taken in there. That is one of the advantages to the county. The other advantage to the county is they do have the authority to examine the books at any time and change the rate as necessary. They don't want private companies to do it for nothing and they don't want the citizens gouged. That is the driving force behind this whole process.

Liability issues are Mr. Moulding as the operator just as we have a conference center operator in Weber County must provide liability insurance to govern his operation. The county stands second to any claim. If there was an accident at the transfer station it would come under Mr. Moulding's insurance and then it comes to us. The county intends to operate the landfill in accordance with state law as declared in the permit that is issued.

Mr. Taggart who represents Moulding & Son's Landfill just wanted to make three brief points. One is to support Mr. Wilson's statements that this matter is not properly before this board from a legislative authorization standpoint. Secondly if it was properly brought before the board there would really be nothing necessary for the board to do. There is really no need to investigate and make any recommendations for example to the legislature as they order the agencies of the state to follow their own mandates. Thirdly if it was investigated I think what you would find is a very appropriate and useful privatization where the county has outsourced it's need for a landfill to an experienced landfill operator in a way that meets all the desirable factors that this board has established in its workbook to encourage privatization including reducing costs, freeing up

capital, sharing risks, using updated systems and current technology, reducing the counties administrative costs, and improving services. Bottom line we feel like the contractor properly entered into this contract in accordance with proper procedures. There is not question things happened faster by not going to the legislature.

Senator Goodfellow wanted to explain why he has this item on the agenda. He thinks any time we have a state agency such as DEQ that permits then we are concerned as a state about what is going on and therefore the reason he allowed it to be put on the agenda is because there are allegations that DEQ is involved and therefore he thought it would be appropriate.

Ralph Bon the solid waste section manager for Division of Solid and Hazardous Waste from DEQ now took his turn. He wanted to note that Raymond Wixom is here also. He is Attorney General Council for the Executive Secretary of the Solid and Hazardous Waste Control Board. DEQ's involvement in this is they are the permitting agency for solid waste disposal facilities in the State of Utah. We received a permit from Weber County on January 22nd of this year, processed that permit and it went out to public comment on that permit for 45 days. This ended on August 25, 2009. We are currently reviewing comments and preparing a response. Our responsibility by statute is to look at the environmental requirements and in cases of facilities to look at the status as a commercial facility. The permit is for the landfill but by statute we have to permit the owner and the operator.

The question was asked. When you look at the permit for the landfill do you take into consideration the local county or city ordinance where that landfill might be located whether that is acceptable under their conditions?

The answer is statute doesn't give them that authority. If they come in and ask for a permit, as an example, Mr. Warren has a permit for a facility for which he has not received local zoning approval for. You could potentially approve a site for zoning but they could never build it because the city ordinances would not allow it.

Senator Goodfellow stated that it seems that legislature set up a dual process and the process is that if you're a commercial landfill you go through that process. If you are a county then you go through another process. If this is the case with the county and the landfill operator, would there ever be a case where a private landfill would be permitted if this process is easier than going to the legislature or Governor? Do you ever see a case where a permit would be issued going the other direction?

Mr. Bon said they have five to seven commercial C & D landfills in the state. Some of them existed before the statute was put in place. Some of them have gone through the process since the statute was put in place. At least three have gone through the process since the statute was put into place to be a commercial facility.

Senator Goodfellow asked if it was Mr. Bon's opinion that the county looked at the process and thought that permitting the landfill was too difficult the other way and therefore easier to do this and therefore applied for the permit rather than the owner applying for the permit.

Mr. Bon said that he has no idea why they entered into that agreement and why they went through the processes they did. We just have the application. We are reviewing the application and part of our review is this commercial facility by the definitions of commercial in the statute. That is part of the process we are looking at.

Senator Goodfellow asked if it was a commercial facility if it's owned by the county.

Mr. Bon said it could be. We have a commercial facility owned by the city within a state. Payson City owns the landfill that is a commercial facility. It is run by Payson City. The statute has a statement in it that a commercial facility has to make some extra demonstrations for viability. If you are a commercial facility, after you get the permits you do have another step as the senator referred to as this dual process. Our process is pretty much the same for a commercial non-commercial up until we have to ask those economics questions by the statute then once the permit is issued the commercial facility has another step. They have to go to the legislature and the governor to receive approval.

Senator Goodfellow thinks this is an issue that the board needs to take a look at. If there is a law suit he is not sure that we should not be investigating this in addition to going to the courts therefore he would caution us about trying to intervene if this situation is going to go through the courts.

Robin Riggs feels that we are here to talk about privatization and on it's face this is an operation that has been privatized from that standpoint or narrow jurisdictional aspect he would vote to approve turning over operational landfill to privatizing so that's the privatization issue. If we investigate this whole thing we are getting into all kinds of stuff like the appropriateness of sole source contracting, interfering with existing contracts per say, the role of county in landfills and he honestly believes if a law suit is pending that we can investigate the privatization part of this and make some recommendations that way but in terms of the rest of this thing he thinks its best for us to be hands off. He honestly believes this board is not equipped to investigate this properly and we can go back and recommend privatization policies on landfills generally but on this one he thinks it is just too much for us to give it the justice that both parties seem to want to have.

Ted Boyer said he doesn't have a current copy of the law because our act was amended last year but he knows the original act did require a county request for any jurisdiction in privatization in involving a municipality or local government.

Senator Goodfellow said the new law is drilling down into the county and cities and the first part of that is the survey. First it is going to the state and then the county and then the city and then when we get that information in his opinion the next step is the very issue that is before the board today but not to the point where we are intervening before the courts. He feels eventually these are the kinds of issues that will come before this board because he thinks in some cases local government there has been some allegations (not in this case) that local governments have a lot of sweetheart deals. We are going to eventually look at some of these kinds of things.

The question was asked if there was any downside for Weber County going out for competitive bid.

Dave Wilson's answer was yes, the deal was it was a combination. That is why it was not bid out. Moulding owned the land and he was going to develop that. This was a two part deal where he would own, we would hire an operator but we would just not let him operate it and charge whatever he wanted. The county was to own, to determine the cost and the tipping fee. The county doesn't care if other commercial C & D landfills come into play. Mr. Wilson has three county commissioners, two of them come from private industry, one of them has been in law enforcement all of his life and they all support privatization. That is why it was said in the outset if Mr. Moulding could have done this on maybe a timelier basis and there were not benefits to the county protecting its citizens on the tipping fee the county probably would not been involved.

It was mentioned that legal issues are not something we can or should deal with but the question of what does the state law say that creates one system for a private company and

another system for a county is. That is something that needs to be looked at considering why is that the case and is that an unfair advantage for one side or the other.

Mr. Penrod stated that on three different occasions private enterprise attempted to enter into this market and they were denied by the county. In one case this exact land was offered by Mr. Adams to the county in 2007 for a municipal dump and they turned him down. As I mentioned there was another site this Mr. Warren has already permitted that he is willing to operate at \$120.00 fee which is less than the county's assigning and the county turned him down. In another instance Mr. Burt Smith asked that the county in advance approve a C & D landfill at this same site they turned him down as well. So given that it seems to us that they are not really looking at a private entity entering this market which we feel is inappropriate. Mr. Penrod also said he owns 160 acres out there and he can guarantee every prior attempt to designate a site out there for a landfill has been denied. This is pertinent because as he understood it purchasing regulations are within the rules of this organization. This particular arrangement will be double the cost to the users of this facility from what was there previously and the private industry is ready to step in at a lower fee than what they are anticipating and it is closer to the center of the county. The transportation costs seem to mitigate the situation.

Update on Pilot Survey with Department of Administrative Services

Tracey Stevens handed out a copy of the pilot survey sent to Administrative Services. This survey was sent out about a week after the last board meeting. It was good a pilot was done because we learned a few things from it. First of all when Tracey sent it out as part of the program you can indicate whether the questions are required that they respond. This was a problem because if they didn't respond it didn't allow them to submit and apparently it was not as clear to some as it was to others that they were not following the process correctly so this was modified. This was sent out a second time. On question 14 we specifically asked them to identify their division as recommended by DAS.

Tracey then handed out the responses to the survey and explained the answers to the board.

Senator Goodfellow suggested that maybe more of what we need is a decision tree so that as they answer no to the question that's it. If they answer yes then they have to answer other questions.

The problems that occurred were through survey monkey and we are going to get those worked out.

Kent Beers stated that after a meeting with the department director and assistant director that what we have here is not much use at this moment. For example he used to be the assistant director of DFCM and after viewing DFCM's responses, we went through them in detail and we didn't understand what they were talking about. For us to use this instrument right now and try in detail to analyze a department that I am not familiar with would be extremely difficult.

Mr. Beers gave us an example with Administrative Rules. They have a category entitled Legal Document Filing. When they respond with "Is this available in the private sector" they answered no. Mr. Beers used to work in the mortgage and title industry and they had full time people who went to the county recorders office every day and file legal documents. The Director of Rules describes legal document filing as when one of the agencies files a petition for a rule with his office. So what is missing here as Senator Goodfellow said earlier, is if we start out with a decision tree and ask questions two, three and four and then for those that respond yes we need a detailed explanation about each one of the services, how that service is implemented and what they do so that when we are looking at legal document filing we understand what they are talking about rather than try to guess. Then we can ask more detailed questions that make up the balance of the survey because the other thing that we ran into was as they try to respond

and add comments some of them responded for the division as a whole and others identified specific tasks within the division. It was a mish mash and didn't make sense. One other recommendation I have is that we add one other question. That would be that we ask for the percentage of their current business or services that they provide that they have already privatized.

Gregory Stauffer thought it would be good to narrow things down for the first few questions but the one thing he is concerned about is some of these questions initially can come off to be somewhat subjective. If you ask someone, can this be made available in the private sector? Someone might be inclined to say no it can't be done. So we may lose our ability to analyze some activities by virtue of someone saying this can't be privatized. The question about yellow pages and Google search maybe came across as a little confusing as we have legal document filing is not provided by the private sector but yes it is in the yellow pages. Maybe that question should be changed to: "Do you find this service provided by the private sector in the yellow pages or a Google search?"

Royce Van Tassell suggested that a committee be formed to work with Kent and Tracey so that you have direct input between now and the next meeting in putting this together.

Senator Goodfellow
Mayor Simmons
Robin Riggs
Kerry Casaday

Ted Boyer made a motion that we create a sub-committee consisting of Mayor Simmons, Mr. Riggs, Mr. Casaday, and Senator Goodfellow to view and fine tune the questioning. Jim Kesler seconded his motion and it was unanimously approved.

Next Meetings

The next two meetings will be held on October 27, 2009 and November 24, 2009 at 10:00 in the Purchasing & General Services Conference Room