

**CITY OF SWARTZ CREEK
SWARTZ CREEK, MICHIGAN
MINUTES OF THE COUNCIL MEETING
DATE 2/25/2013**

The meeting was called to order at 7:00 p.m. by Mayor Krueger in the Swartz Creek City Council Chambers, 8083 Civic Drive.

Invocation and Pledge of Allegiance to the Flag.

Councilmembers Present: Abrams, Gilbert, Hurt, Krueger, Porath, Shumaker.

Councilmembers Absent: Hicks.

Staff Present: City Manager Paul Bueche, City Clerk Juanita Aguilar, DPS Director Tom Svrcek.

Others Present: Sharon Shumaker, Bob Plumb, Bud Grimes, Boots Abrams, Ron Schultz, Jim Florence, Steven Shumaker, Tommy Butler.

Resolution No. 120225-01

(Carried)

Motion by Mayor Pro-Tem Abrams
Second by Councilmember Hurt

I Move the Swartz Creek City Council excuse the absence of Councilmember Hicks due to her being out of town.

YES: Gilbert, Hurt, Krueger, Porath, Shumaker, Abrams.
NO: None. Motion Declared Carried.

APPROVAL OF MINUTES

Resolution No. 130225-02

(Carried)

Motion by Councilmember Porath
Second by Councilmember Hurt

I Move the Swartz Creek City Council hereby approve the Minutes of the Regular Council Meeting, held Monday, February 11, 2013, to be circulated and placed on file.

YES: Hurt, Krueger, Porath, Shumaker, Abrams, Gilbert.
NO: None. Motion Declared Carried.

APPROVAL OF AGENDA

Resolution No. 130225-03

(Carried)

Motion by Mayor Pro-Tem Abrams
Second by Councilmember Shumaker

I Move the Swartz Creek City Council approve the Agenda, as presented, for the Regular Council Meeting of February 25, 2013, to be circulated and placed on file.

YES: Hurt, Krueger, Porath, Shumaker, Abrams, Gilbert.
NO: None. Motion Declared Carried.

REPORTS AND COMMUNICATIONS:

City Manager's Report

Resolution No. 130225-04

(Carried)

Motion by Councilmember Shumaker
Second by Councilmember Hurt

I Move the Swartz Creek City Council approve the City Manager's Report of February 25, 2013, to be circulated and placed on file.

Discussion Took Place.

YES: Krueger, Porath, Shumaker, Abrams, Gilbert, Hurt.
NO: None. Motion Declared Carried.

All other reports and communications were accepted and placed on file.

MEETING OPENED TO THE PUBLIC:

None.

COUNCIL BUSINESS:

Appointment & Appropriation, Construction Testing—Engineering, Morrish Road Bridge Project

Resolution No. 130225-05

(Carried)

Motion by Councilmember Gilbert
Second by Councilmember Hurt

I Move the City of Swartz Creek appoint Rowe Professional Services Inc. to perform construction engineering and testing services in conjunction with the Morrish Road Bridge Project, in accordance with Rowe's proposal, and further, appropriate an

amount not to exceed \$70,931 payment for services, funds to be allocated from 202 Major Streets, Morrish Road Bridge Project, and further authorize the City Staff to make necessary ledger entries and adjustments.

Discussion Took Place.

YES: Porath, Shumaker, Abrams, Gilbert, Hurt, Krueger.

NO: None. Motion Declared Carried.

Meijer Traffic Signal, Appropriate Additional PE—CE Engineering Fees

Resolution No. 130225-06

(Carried)

Motion by Councilmember Hurt
Second by Mayor Pro-Tem Abrams

WHEREAS, the City retained the services of Progressive AE of Grand Rapids to design, bid and oversee construction of a traffic signal at Westbound I-69 Ramps and Morrish Road entrance to a Meijer retail center currently under construction, resolution as follows:

Appropriation, Progressive AE: Morrish Road Meijer Traffic Signals, Data Collection, Warrants

Resolution No. 120312-06

(Carried)

Motion by Councilmember Hurt
Second by Councilmember Binder

I Move the City of Swartz Creek appropriate an amount not to exceed \$29,582 plus 10% contingency, to the City's Traffic Engineering Firm Progressive AE of Grand Rapids Michigan, for traffic safety and engineering services on Morrish Road from I-69 to Bristol Road, consummate to the development of a Meijer Retail Outlet at 4141 Morrish (Main Store) and 4155 Morrish (Convenience Store), in accordance with the specifications in the proposal dated March 9, 2012, and further, direct the City Staff to make necessary adjustments to the City's accounting system reflect revenues and expenses related to the project.

Discussion Took Place.

YES: Shumaker, Abrams, Binder, Hicks, Hurt, Krueger, Porath.

NO: None. Motion Declared Carried.

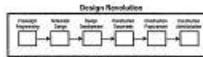
WHEREAS, Progressive AE is among a limited number of engineering firms pre-qualified and authorized to perform design and engineering services with MDOT – FDOT interstate right of Ways; and

WHEREAS, regulations, requirements and demands for additional data by the Michigan Department of Transportation caused the scope of services set forth by Progressive AE to change significantly thereby affecting the cost of the proposal submitted and approved by the City Council on March 12, 2012; and

WHEREAS, a revised proposal with detailed cost and scope changes has been submitted by Progressive AE, in the amount of \$39,812, a cost differential of an additional \$10,230, as follows:

Change in Service Request

progressive|ae



Project Name: Swartz Creek - Morrish/I-69 WB Ramps Signal Warrant Analysis, Design, and Construction Engineering
Project Number: 54576002

TO:
Name: Paul Bueche, City Manager
Address: 8083 Civic Drive
 Swartz Creek, MI 48473-1498
FAX/Email: 810-635-2887 / pbueche@cityofswartzcreek.org

PROPOSED CHANGE IN SCOPE PREVIOUSLY DESCRIBED IN [LETTER] [CONTRACT] DATED March 9, 2012 :

Additional services required to date during either Task 1 or Task 2 stages of the overall project as noted below.
Task 1 - Signal Warrant Analyses

- A. In addition to the expected standard signal warrant analysis (at Morrish/I-69 westbound ramps), MDOT also insisted on full existing and future Synchro capacity analyses and model simulations, not only for the westbound ramps intersection but also for the currently "signalized" Morrish/I-69 eastbound ramps. Required extending traffic projections work to south side of interchange and with/without signal operation scenarios on that south side, and related additional coordination with MDOT.

Task 2 - Design Documentation

- A. Signing and revised pavement marking plans and specs required by MDOT
- B. Additional coordination with Rowe on an applicable base plan and related efforts to combining Rowe data with PAE/Meijer data and additional on-site survey to eventually develop an accurate signal drawing base (more detail in 2/07/13 email to you).
- C. Shop drawing submittal and approval required additional efforts to research and recreate an MDOT powder coating specification (for poles/arms black paint).
- D. Additional coordination resolving MDOT job number issue with MDOT inspector at the pole/arm manufacture's site.

Task 3 - Construction Engineering

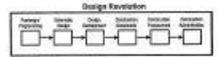
- A. Projected reduced efforts required due to up-front coordination with MDOT.

IMPACT TO SCHEDULE:

The contract time will be [increased] [decreased] by na calendar days.
 The date for completion of all work will be: May 31, 2013, (date).
 Other: some delays due to MDOT warrant study and design reviews and issues related to mast arm equipment paint specifications - goal is still full installation prior to anticipated Meijer Store opening in May.

Change in Service Request

progressive|ae



Project Name: Swartz Creek - Morrish/I-69 WB Ramps Signal Warrant Analysis, Design, and Construction Engineering
Project Number: 54576002

FEE INCREASE:

Proposed Fee Increase.....	\$	10,230.00
Current Approved Contract Amount.....	\$	29,582.00
Proposed Revised Contract Amount.....	\$	39,812.00

If you agree to the above proposed scope change, please sign below and return this form via FAX to:

Progressive Project Manager: Peter LaMourie
FAX No/email: 616-361-1493/lamourie@progressiveae.com

Thank you.

AGREED TO BY:

CLIENT

(Signature)
 (Printed Name and Title)
 (Date)

PROGRESSIVE AE

Pete Cole
 (Signature)
Pete LaMourie LCAD President
 (Printed Name and Title)
 2/19/13
 (Date)

NOW, THEREFORE, I Move the City of Swartz Creek authorize the change order as submitted and appropriate an additional amount not to exceed \$10,230 for a revised total of \$39,812 to Progressive AE of Grand Rapids Michigan, for design and construction engineering for the Morrish Road I-69 Meijer entrance traffic signal, funds to be appropriated from 202 Major Streets, and further, authorize the City Staff to make necessary ledger entries and adjustments.

Discussion Ensued.

YES: Abrams, Hurt, Krueger, Porath.

NO: Shumaker, Gilbert. Motion declared carried.

Water Tower Lease Agreement, Tri County Wireless, Inc

Resolution No. 130225-07a

(Amended)

Motion by Councilmember Porath
 Second by Councilmember Hurt

I Move the City of Swartz Creek enter into a lease agreement with Tri County Wireless of Fenton Michigan, lease as follows:

CITY OF SWARTZ CREEK
WATER TOWER SITE LEASE AGREEMENT
 Between

The City of Swartz Creek
And
Tri-County Wireless Inc

THIS WATER TOWER SITE LEASE AGREEMENT ("Lease"), is made this 25th day of **February, 2013**, between the City of Swartz Creek, a Michigan Municipal Corporation with principal offices at 8083 Civic Drive, Swartz Creek, Michigan 48473 ("City"), and Tri-County Wireless Inc, a Michigan Corporation with principal offices at 240 N. Fenway, Fenton, Michigan 48430 ("Tenant").

WHEREAS, the City is the owner of a water tower located south of Miller Road and west of Winston Drive, Tax Parcel I.D. No. 58-02-100-005, in the City ("Water Tower"); and

WHEREAS, the Tenant is in the business of providing wireless internet access and services to internet users; and

WHEREAS, the Tenant currently operates a wireless receiver on the Water Tower in order to provide wireless internet access and services to the area in and around the City; and

WHEREAS, the City previously subscribed to the Tenant for wireless services as an even exchange of value for the Tenant's occupancy of the water tower; and

WHEREAS, the City no longer utilizes wireless services and is desirous of renegotiating a market rent for occupancy of the water tower; and

WHEREAS, the City is desirous of leasing space on the Water Tower to permit the Tenant to continue to operate a wireless receiver thereon under the terms and conditions set forth in this lease.

NOW, THEREFORE, IT IS AGREED AS FOLLOWS:

1. **Leased Premises.** The City hereby leases to the Tenant, for the term of this lease, and upon the terms and conditions set forth herein, the non-exclusive use of the top of the Water Tower upon which Tenant may place two (2) small wireless receivers, together with adequate space on the ground below the Water Tower in order to install and place a control box (approximately 3' x 3') thereon and also grants to Tenant reasonable access thereto for adequate utility services (the "Leased Premises").
2. **Term.** The initial term of this Lease Agreement shall commence on the date first written (the "Commencement Date") above and shall be for **two (2) years**, **with an additional renewal term of two (2) years**. Said renewal term shall commence automatically without further action on the part of the City or the Tenant, unless either party provides the other party with written notice that it does not intend to renew this Lease Agreement at least **three (3) months** before the expiration of the term.
3. **Rent.**

Tenant shall pay rent annually to the City at the rate of One Thousand Eight Hundred Dollars (\$1,800.00) per year during the term of this Lease Agreement, or an amount equal to twenty percent (20%) of annual service fees collected from said tower, whichever is higher. Such rent shall be paid in advance on or before the Commencement Date and in equal installments monthly thereafter on or before the Commencement Date. Rent based upon service fees will be determined by the preceding year's receipts which Tenant shall provide the City upon written request at reasonable times, but no less than twice each year.

The rent to be paid by the Tenant for any renewal term of this Lease Agreement shall be that agreed to by the City and the Tenant at least six (6) months prior to the commencement of such renewal term.

Upon early termination of this agreement, the City agrees to refund a prorated share of the prepaid

rent.

4. **Governmental Approval Contingency.**

a. The Tenant's right to use the Leased Premises is conditioned upon its obtaining all the certificates, permits, zoning and other approvals that may be required by any federal, state, or local authority. The City shall cooperate with Tenant in its efforts to obtain and retain such approvals and shall take no action which would adversely affect the status of the Leased Premises with respect to the Tenant's proposed use thereof.

b. If any application necessary under Subparagraph 4(a) above is finally rejected or any certificate, permit, license, or approval issued to the Tenant is cancelled, expires, lapses, or is otherwise withdrawn or terminated by any governmental authority so that the Tenant will be unable to use the Leased Premises for its intended purposes, the City or the Tenant shall have the right to terminate this Lease upon thirty (30) days written notice to the City. Notice of the Tenant's exercise of its right to terminate shall be given to the City in writing by certified mail, return receipt requested, and shall be effective upon receipt of such notice by the City as evidenced by the return receipt. Upon termination, pre-paid rent shall be pro rated with any and all remaining rent dollars returned to the Tenant. Except as required under Subparagraph 10(c) below, upon such termination, this Lease shall become null and void and the parties shall have no further obligations to each other.

5. **Tenant's Use.**

a. User Priority. Tenant agrees that the following priorities of use, in descending order, shall apply in the event of communication interference or other conflict while this Lease is in effect, and Tenant's use shall be subordinate accordingly:

1. The City;
2. Public safety agencies, including law enforcement, fire, and ambulance services, that are not part of the City;
3. Other governmental agencies where use is not related to public safety; and
4. Government-regulated entities whose antenna offer a service to the general public for a fee, in a manner similar to a public utility, such as long distance and cellular telephone, not including radio or a service similar to that which the Tenant is legally authorized to provide. This use shall be non-exclusive, and the City specifically reserves the right to allow the Leased Premises to be used by other parties and to make additions, deletions, or modifications to its own facilities on the Leased Premises.

(b) Purposes. Tenant shall use the Leased Premises only for the purpose of installing, maintaining, and operating a wireless internet service receiver facility, and related equipment, including a control cabinet, and uses incidental thereto for providing wireless internet access and services which the Tenant is legally authorized to provide. This use shall be non-exclusive, and the City specifically reserves the right to allow the Leased Premises to be used by other parties and to make additions, deletions, or modifications to the Water Tower and its own facilities on the Leased Premises or on the property on which the Leased Premises is located.

(c) Operation. The Tenant shall have the right, at its sole cost and expense, to operate and maintain the wireless internet receiver and related equipment on the Leased Premises in accordance with good engineering practices and with all applicable FCC rules and regulations. The Tenant's installation of a wireless receiver and related equipment on the water Tower shall be done according to plans approved by the City, which approval shall not be unreasonably withheld. Any damage done to the Leased Premises or other City property during installation or during operations, shall be repaired at the Tenant's expense within 30 days after notification of said damage. The wireless internet receiver and related equipment installed by the Tenant shall remain the exclusive property of

the Tenant.

(d) Maintenance Improvement Expense. All modifications to the Leased Premises and all improvements made for the Tenant's benefit shall be at the Tenant's expense and such improvements, including antenna, facilities and equipment, shall be maintained in a good state of repair, at least equal to the standard of maintenance of the City's facilities on or adjacent to the Leased Premises. If Tenant's Antenna Facilities are mounted on the Water Tower they shall, at all times, be painted, at Tenant's expense, the same color as the Water Tower.

(e) Drawings. Tenant shall provide the City with as-built drawings of the equipment and improvements installed on the Leased Premises, which show the actual location of all the Tenant's wireless receivers and related equipment. Said drawings shall be accompanied by a complete and detailed inventory of all equipment and personal property placed on the Leased Premises.

(f) No Interference. The Tenant shall, at its own expense, maintain any equipment on or attached to the Leased Premises in a safe condition, in good repair and in a manner suitable to the City so as not to conflict with the use of the surrounding premises by the City. The Tenant shall not unreasonably interfere with the operations of any prior tenant using the Water Tower and shall not interfere with the working use of the water storage facilities thereon or to be placed thereon by the City.

(g) Access. The Tenant, at all times during the term of this Lease Agreement, shall have access to the Leased Premises in order to install, operate, and maintain its wireless internet receiver and related equipment. The Tenant shall request access to the Water Tower twenty-four (24) hours in advance, and the City's approval thereof shall not be unreasonably withheld or delayed. In the event it is necessary for the Tenant to have access to the Water Tower at some time other than the normal working hours of the City, the City may charge the Tenant for whatever expense, including employees' wages, that the City may incur in providing such access to the Tenant.

6. Additional Maintenance Expenses. Upon notice from the City, the Tenant shall promptly pay to the City any additional City expenses incurred in maintaining the Leased Premises, including painting or other maintenance of the Water Tower, which is made necessary by the Tenant's occupancy of the Leased Premises.

7. Advances in Technology. As technology advances and improved receivers are developed which are routinely used in the Tenant's business, the City may require, in its sole discretion, the replacement of existing receivers with the improved receivers if the new receivers are more aesthetically pleasing or otherwise foster a public purpose, as long as the installation and use of the improved receivers are practical and technically feasible at this location.

8. Insurance and Indemnification.

(a) The Tenant shall, during the term of this Lease Agreement, maintain property damage insurance coverage on all personal property and fixtures owned by the Tenant. The Tenant acknowledges that the City is not responsible for insuring against the loss of the Tenant's equipment improvements. The Tenant shall also maintain single limit or combined limit general liability insurance policy of an amount not less than one-million dollars (\$1,000,000) individual and two-million (\$2,000,000) aggregate for property damage arising from one occurrence or for bodily or personal injuries or death or damages arising from one occurrence.

(b) The Tenant shall hold the City and its agents, officers, employees, elected officials, contractors, heirs, and assignees harmless from and indemnify the City against any and all liability, damage, loss and expense (including attorneys fees) for damages to persons or property arising or resulting from the acts or omissions or caused by the Tenant or the Tenant's employees, servants, agents, guests, assigns, subtenants, visitors or licensees, in, upon or about the Leased Premises, the Water Tower or the adjacent areas, including all common areas.

9. Damage or Destruction. If the Leased Premises are damaged or destroyed by fire, winds, flood or

other natural or manmade causes, the City shall have the option to repair or replace the Leased Premises at its sole expense, or to terminate this Lease effective on the date of such damage or destruction. In the event the City terminates this Lease, neither the Tenant nor the City shall have any further obligations hereunder. If the City elects to repair or replace the Leased Premises, until such repair or replacement is completed so that the Tenant can resume full operations, the Tenant's rental hereunder shall abate until the Leased Premises are restored to a condition that the Tenant can resume full operations.

10. **Lease Termination.**

(a) **Events of Termination.** Except as otherwise provided herein, this Lease may be terminated upon sixty (60) days written notice to the other party as follows:

(i) by either party upon a default of any covenant or term hereof by the other party, which default is not cured within sixty (60) days of receipt of written notice of default to the other party (without, however, limiting any other rights of the parties pursuant to any other provisions hereof);

(ii) by the City or Tenant for cause if it is unable to obtain or maintain any license, permit or other governmental approval necessary for the construction and/or operation of the wireless internet services.

(iii) by the City, upon 120 day's prior written notice to the Tenant if the City decides, for any reason, to redevelop the Leased Premises in a manner inconsistent with continued use of the Leased Premises by Tenant and/or removal and/or discontinued use of the Water Tower for all purposes;

(v) by the City if it determines that the Water Tower is structurally unsound, including, but not limited to, consideration of age of the Water Tower, damage or destruction of all or part of the Water Tower on the Leased Premises from any source, or factors relating to condition of the Leased Premises;

(vi) by the City if it determines that a potential user with a higher priority under Subparagraph 5(a) above cannot find another adequate location, or the Tenant's wireless receiver(s) or related equipment unreasonably interferes with another user with a higher priority; or

(vii) by the City if it determines that the Tenant has failed to comply with applicable ordinances, or state or federal law, or any conditions attached to government approvals granted thereunder, after a public hearing before the City Council

(b) **Notice of Termination.** The parties shall give Notice of Termination in writing by certified mail, return receipt requested. Such Notice shall be effective upon receipt as evidenced by the return receipt, or such later date as stated in the Notice. All rentals paid for the Lease Agreement prior to said termination date shall be retained by The City.

(c) **Site Restoration.** If this Lease is terminated or not renewed, the Tenant shall have 60 days from the termination or expiration date to remove its wireless receivers and related equipment from the Leased Premises, repair the site and restore the surface of the Water Tower. If the Tenant's wireless receivers and related equipment are not removed to the reasonable satisfaction of the City, they shall be deemed abandoned and become the property of the City and the Tenant shall have no further rights thereto.

11. **Tenant Interference.**

(a) **With Water Tower.** The Tenant shall not interfere with the City's use of the Water Tower and agrees to cease all such actions which unreasonably and materially interfere with the City's use thereof no later than three business days after receipt of written notice of the interference from the City. If the Tenant's cessation of action is material to Tenant's use of the Leased Premises and such

cessation frustrates Tenant's use of the Leased Premises, within Tenant's sole discretion, Tenant shall have the immediate right to terminate this Lease.

(b) With Higher Priority Users. If the Tenant's wireless receivers or related equipment cause impermissible interference with higher priority users as set forth in Subparagraph 5(a) above or with pre-existing tenants, the Tenant shall take any action necessary to correct and eliminate the interference. If the interference cannot be eliminated within 48 hours after receiving the City's written notice of same, the Tenant shall immediately cease operating its wireless receivers or related equipment and shall not reactivate operation, except intermittent operation for the purpose of testing, until the interference has been eliminated. If the interference cannot be eliminated within 30 days after the Tenant received the City's written notice, the City may at its option terminate this Lease immediately.

(c) Interference Study - New Occupants. Upon written notice by the City that it has a bona fide request from any other party to lease an area including or in close proximity to the Leased Premises ("Leased Premises Area"), Tenant agrees to provide the City, within sixty (60) days, the radio frequencies currently in operation or to be operated in the future of each transmitter and receiver installed and operational by Tenant on the Leased Premises at the time of such request. The City may then have an independent, registered professional engineer of the City's choosing perform the necessary interference studies to determine if the new applicant's frequencies will cause harmful radio interference to the Tenant. The City shall require the new applicant to pay for such interference studies, unless the City or other higher priority user requests the use. In that event, the Tenant and all other tenants occupying the Leased Premises Area shall pay for the necessary interference studies, pro rata.

(d) Interference - New Occupants. The City agrees that it will not grant a future lease in the Leased Premises Area to any party who is of equal or lower priority to the Tenant, if such party's use is reasonably anticipated to interfere with the Tenant's operation of its Antenna Facilities. The City agrees further that any future lease of the Leased Premises Area will prohibit a user of equal or lower priority from interfering with the Tenant's Antenna Facilities. The City agrees that it will require any subsequent occupants of the Leased Premises Area of equal or lower priority to the Tenant to provide the Tenant these same assurances against interference.

12. **Assignment.** This Lease may not be sold, assigned, or transferred by Tenant without the written consent of the City, such consent not to be unreasonably withheld.

13. **Miscellaneous Provisions.**

(a) The City warrants that it has full right, power, and authority to execute this agreement. The City covenants that the Tenant, in return for paying rent and complying with the terms of this Lease Agreement, shall and may peacefully and quietly have, hold, and enjoy the leased property.

(b) The provisions of this Lease shall bind and inure to the benefit of the parties hereto and their heirs, legal representatives, successors and assigns.

(c) This Lease contains the entire agreement of the parties with respect to any matter mentioned herein and supersedes any prior oral or written agreements ~~including, but not limited to the Tri-County Lease agreement dated May 31, 2005 and the Tri-County service Agreement dated~~.

(d) This Lease may be amended in writing only, signed by the parties in interest at the time of such amendment.

(e) No waiver by either party of any provision hereof shall be deemed a waiver of any other provision or of any prior or subsequent breach or any provision hereof.

(f) If any term or provision of this Lease Agreement is held to be invalid or unenforceable, such invalidity or unenforceability shall not be construed to affect any other provision of this Lease Agreement, and the remaining provision shall be enforceable in accordance with their terms.

(i) This Lease Agreement shall be governed by and construed in accordance with the laws of the State of Michigan.

(j) If the Tenant does not promptly vacate the premises at the end of the Lease term, such holding over shall be treated as creating a month to month tenancy.

IN WITNESS WHEREOF, the parties have executed this Lease agreement as of the day and year first written above.

CITY OF SWARTZ CREEK

TRI-COUNTY WIRELESS INC.

By: _____
David Krueger, Mayor

By: _____
Its:

By: _____
Juanita Aguilar, City Clerk

By: _____
Its:

Approved as to Form:
Richard J. Figura, City Attorney

Resolution No. 130225-07b

(Carried)

Motion by Councilmember Shumaker
Second by Councilmember Hurt

I Move the Swartz Creek City Council amend the Tri County Water Tower Lease Agreement to include language that states that Tri-County Wireless, Inc. will be responsible for any repairs or maintenance and/or installation of conduit in the event that damage occurs while painting or maintaining the water tower.

YES: Abrams, Gilbert, Hurt, Krueger, Porath, Shumaker.
NO: None. Motion Declared Carried.

Resolution No. 130225-07c

(Carried)

Motion by Councilmember Porath
Second by Councilmember Hurt

I Move the City of Swartz Creek enter into a lease agreement with Tri County Wireless of Fenton Michigan, lease as follows:

**CITY OF SWARTZ CREEK
WATER TOWER SITE LEASE AGREEMENT**
Between
The City of Swartz Creek
And
Tri-County Wireless Inc

THIS WATER TOWER SITE LEASE AGREEMENT ("Lease"), is made this 25th day of February, 2013, between the City of Swartz Creek, a Michigan Municipal Corporation with principal offices at 8083 Civic Drive, Swartz Creek, Michigan 48473 ("City"), and Tri-County Wireless Inc, a Michigan Corporation with principal offices at 240 N. Fenway, Fenton, Michigan 48430 ("Tenant").

WHEREAS, the City is the owner of a water tower located south of Miller Road and west of Winston

Drive, Tax Parcel I.D. No. 58-02-100-005, in the City ("Water Tower"); and

WHEREAS, the Tenant is in the business of providing wireless internet access and services to internet users; and

WHEREAS, the Tenant currently operates a wireless receiver on the Water Tower in order to provide wireless internet access and services to the area in and around the City; and

WHEREAS, the City previously subscribed to the Tenant for wireless services as an even exchange of value for the Tenant's occupancy of the water tower; and

WHEREAS, the City no longer utilizes wireless services and is desirous of renegotiating a market rent for occupancy of the water tower; and

WHEREAS, the City is desirous of leasing space on the Water Tower to permit the Tenant to continue to operate a wireless receiver thereon under the terms and conditions set forth in this lease.

NOW, THEREFORE, IT IS AGREED AS FOLLOWS:

1. **Leased Premises.** The City hereby leases to the Tenant, for the term of this lease, and upon the terms and conditions set forth herein, the non-exclusive use of the top of the Water Tower upon which Tenant may place two (2) small wireless receivers, together with adequate space on the ground below the Water Tower in order to install and place a control box (approximately 3' x 3') thereon and also grants to Tenant reasonable access thereto for adequate utility services (the "Leased Premises").

2. **Term.** The initial term of this Lease Agreement shall commence on the date first written (the "Commencement Date") above and shall be for **two (2) years**, with an additional renewal term of **two (2) years**. Said renewal term shall commence automatically without further action on the part of the City or the Tenant, unless either party provides the other party with written notice that it does not intend to renew this Lease Agreement at least **three (3) months** before the expiration of the term.

3. **Rent.**

Tenant shall pay rent annually to the City at the rate of One Thousand Eight Hundred Dollars (\$1,800.00) per year during the term of this Lease Agreement, or an amount equal to twenty percent (20%) of annual service fees collected from said tower, whichever is higher. Such rent shall be paid in advance on or before the Commencement Date and in equal installments monthly thereafter on or before the Commencement Date. Rent based upon service fees will be determined by the preceding year's receipts which Tenant shall provide the City upon written request at reasonable times, but no less than twice each year.

The rent to be paid by the Tenant for any renewal term of this Lease Agreement shall be that agreed to by the City and the Tenant at least six (6) months prior to the commencement of such renewal term.

Upon early termination of this agreement, the City agrees to refund a prorated share of the prepaid rent.

4. **Governmental Approval Contingency.**

a. The Tenant's right to use the Leased Premises is conditioned upon its obtaining all the certificates, permits, zoning and other approvals that may be required by any federal, state, or local authority. The City shall cooperate with Tenant in its efforts to obtain and retain such approvals and shall take no action which would adversely affect the status of the Leased Premises with respect to the Tenant's proposed use thereof.

b. If any application necessary under Subparagraph 4(a) above is finally rejected or any

certificate, permit, license, or approval issued to the Tenant is cancelled, expires, lapses, or is otherwise withdrawn or terminated by any governmental authority so that the Tenant will be unable to use the Leased Premises for its intended purposes, the City or the Tenant shall have the right to terminate this Lease upon thirty (30) days written notice to the City. Notice of the Tenant's exercise of its right to terminate shall be given to the City in writing by certified mail, return receipt requested, and shall be effective upon receipt of such notice by the City as evidenced by the return receipt. Upon termination, pre-paid rent shall be pro rated with any and all remaining rent dollars returned to the Tenant. Except as required under Subparagraph 10(c) below, upon such termination, this Lease shall become null and void and the parties shall have no further obligations to each other.

5. **Tenant's Use.**

a. User Priority. Tenant agrees that the following priorities of use, in descending order, shall apply in the event of communication interference or other conflict while this Lease is in effect, and Tenant's use shall be subordinate accordingly:

1. The City;
2. Public safety agencies, including law enforcement, fire, and ambulance services, that are not part of the City;
3. Other governmental agencies where use is not related to public safety; and
4. Government-regulated entities whose antenna offer a service to the general public for a fee, in a manner similar to a public utility, such as long distance and cellular telephone, not including radio or a service similar to that which the Tenant is legally authorized to provide. This use shall be non-exclusive, and the City specifically reserves the right to allow the Leased Premises to be used by other parties and to make additions, deletions, or modifications to its own facilities on the Leased Premises.

(b) Purposes. Tenant shall use the Leased Premises only for the purpose of installing, maintaining, and operating a wireless internet service receiver facility, and related equipment, including a control cabinet, and uses incidental thereto for providing wireless internet access and services which the Tenant is legally authorized to provide. This use shall be non-exclusive, and the City specifically reserves the right to allow the Leased Premises to be used by other parties and to make additions, deletions, or modifications to the Water Tower and its own facilities on the Leased Premises or on the property on which the Leased Premises is located.

(c) Operation. The Tenant shall have the right, at its sole cost and expense, to operate and maintain the wireless internet receiver and related equipment on the Leased Premises in accordance with good engineering practices and with all applicable FCC rules and regulations. The Tenant's installation of a wireless receiver and related equipment on the water Tower shall be done according to plans approved by the City, which approval shall not be unreasonably withheld. Any damage done to the Leased Premises or other City property during installation or during operations, shall be repaired at the Tenant's expense within 30 days after notification of said damage. The wireless internet receiver and related equipment installed by the Tenant shall remain the exclusive property of the Tenant.

(d) Maintenance Improvement Expense. All modifications to the Leased Premises and all improvements made for the Tenant's benefit shall be at the Tenant's expense and such improvements, including antenna, facilities and equipment, shall be maintained in a good state of repair, at least equal to the standard of maintenance of the City's facilities on or adjacent to the Leased Premises. If Tenant's Antenna Facilities are mounted on the Water Tower they shall, at all times, be painted, at Tenant's expense, the same color as the Water Tower.

(e) Drawings. Tenant shall provide the City with as-built drawings of the equipment and improvements installed on the Leased Premises, which show the actual location of all the Tenant's

wireless receivers and related equipment. Said drawings shall be accompanied by a complete and detailed inventory of all equipment and personal property placed on the Leased Premises.

(f) No Interference. The Tenant shall, at its own expense, maintain any equipment on or attached to the Leased Premises in a safe condition, in good repair and in a manner suitable to the City so as not to conflict with the use of the surrounding premises by the City. The Tenant shall not unreasonably interfere with the operations of any prior tenant using the Water Tower and shall not interfere with the working use of the water storage facilities thereon or to be placed thereon by the City.

(g) Access. The Tenant, at all times during the term of this Lease Agreement, shall have access to the Leased Premises in order to install, operate, and maintain its wireless internet receiver and related equipment. The Tenant shall request access to the Water Tower twenty-four (24) hours in advance, and the City's approval thereof shall not be unreasonably withheld or delayed. In the event it is necessary for the Tenant to have access to the Water Tower at some time other than the normal working hours of the City, the City may charge the Tenant for whatever expense, including employees' wages, that the City may incur in providing such access to the Tenant.

6. Additional Maintenance Expenses. Upon notice from the City, the Tenant shall promptly pay to the City any additional City expenses incurred in maintaining the Leased Premises, **including painting and associated removal and/or replacement and/or enclosure of wires in conduit**, or other maintenance of the Water Tower, which is made necessary by the Tenant's occupancy of the Leased Premises.

7. Advances in Technology. As technology advances and improved receivers are developed which are routinely used in the Tenant's business, the City may require, in its sole discretion, the replacement of existing receivers with the improved receivers if the new receivers are more aesthetically pleasing or otherwise foster a public purpose, as long as the installation and use of the improved receivers are practical and technically feasible at this location.

8. Insurance and Indemnification.

(a) The Tenant shall, during the term of this Lease Agreement, maintain property damage insurance coverage on all personal property and fixtures owned by the Tenant. The Tenant acknowledges that the City is not responsible for insuring against the loss of the Tenant's equipment improvements. The Tenant shall also maintain single limit or combined limit general liability insurance policy of an amount not less than one-million dollars (\$1,000,000) individual and two-million (\$2,000,000) aggregate for property damage arising from one occurrence or for bodily or personal injuries or death or damages arising from one occurrence.

(b) The Tenant shall hold the City and its agents, officers, employees, elected officials, contractors, heirs, and assignees harmless from and indemnify the City against any and all liability, damage, loss and expense (including attorneys fees) for damages to persons or property arising or resulting from the acts or omissions or caused by the Tenant or the Tenant's employees, servants, agents, guests, assigns, subtenants, visitors or licensees, in, upon or about the Leased Premises, the Water Tower or the adjacent areas, including all common areas.

9. Damage or Destruction. If the Leased Premises are damaged or destroyed by fire, winds, flood or other natural or manmade causes, the City shall have the option to repair or replace the Leased Premises at its sole expense, or to terminate this Lease effective on the date of such damage or destruction. In the event the City terminates this Lease, neither the Tenant nor the City shall have any further obligations hereunder. If the City elects to repair or replace the Leased Premises, until such repair or replacement is completed so that the Tenant can resume full operations, the Tenant's rental hereunder shall abate until the Leased Premises are restored to a condition that the Tenant can resume full operations.

10. Lease Termination.

(a) Events of Termination. Except as otherwise provided herein, this Lease may be terminated upon sixty (60) days written notice to the other party as follows:

(i) by either party upon a default of any covenant or term hereof by the other party, which default is not cured within sixty (60) days of receipt of written notice of default to the other party (without, however, limiting any other rights of the parties pursuant to any other provisions hereof);

(ii) by the City or Tenant for cause if it is unable to obtain or maintain any license, permit or other governmental approval necessary for the construction and/or operation of the wireless internet services.

(iii) by the City, upon 120 day's prior written notice to the Tenant if the City decides, for any reason, to redevelop the Leased Premises in a manner inconsistent with continued use of the Leased Premises by Tenant and/or removal and/or discontinued use of the Water Tower for all purposes;

(v) by the City if it determines that the Water Tower is structurally unsound, including, but not limited to, consideration of age of the Water Tower, damage or destruction of all or part of the Water Tower on the Leased Premises from any source, or factors relating to condition of the Leased Premises;

(vi) by the City if it determines that a potential user with a higher priority under Subparagraph 5(a) above cannot find another adequate location, or the Tenant's wireless receiver(s) or related equipment unreasonably interferes with another user with a higher priority; or

(vii) by the City if it determines that the Tenant has failed to comply with applicable ordinances, or state or federal law, or any conditions attached to government approvals granted thereunder, after a public hearing before the City Council

(b) Notice of Termination. The parties shall give Notice of Termination in writing by certified mail, return receipt requested. Such Notice shall be effective upon receipt as evidenced by the return receipt, or such later date as stated in the Notice. All rentals paid for the Lease Agreement prior to said termination date shall be retained by The City.

(c) Site Restoration. If this Lease is terminated or not renewed, the Tenant shall have 60 days from the termination or expiration date to remove its wireless receivers and related equipment from the Leased Premises, repair the site and restore the surface of the Water Tower. If the Tenant's wireless receivers and related equipment are not removed to the reasonable satisfaction of the City, they shall be deemed abandoned and become the property of the City and the Tenant shall have no further rights thereto.

11. Tenant Interference.

(a) With Water Tower. The Tenant shall not interfere with the City's use of the Water Tower and agrees to cease all such actions which unreasonably and materially interfere with the City's use thereof no later than three business days after receipt of written notice of the interference from the City. If the Tenant's cessation of action is material to Tenant's use of the Leased Premises and such cessation frustrates Tenant's use of the Leased Premises, within Tenant's sole discretion, Tenant shall have the immediate right to terminate this Lease.

(b) With Higher Priority Users. If the Tenant's wireless receivers or related equipment cause impermissible interference with higher priority users as set forth in Subparagraph 5(a) above or with pre-existing tenants, the Tenant shall take any action necessary to correct and eliminate the interference. If the interference cannot be eliminated within 48 hours after receiving the City's written notice of same, the Tenant shall immediately cease operating its wireless receivers or related equipment and shall not reactivate operation, except intermittent operation for the purpose of testing, until the interference has been eliminated. If the interference cannot be eliminated within 30 days

after the Tenant received the City's written notice, the City may at its option terminate this Lease immediately.

(c) Interference Study - New Occupants. Upon written notice by the City that it has a bona fide request from any other party to lease an area including or in close proximity to the Leased Premises ("Leased Premises Area"), Tenant agrees to provide the City, within sixty (60) days, the radio frequencies currently in operation or to be operated in the future of each transmitter and receiver installed and operational by Tenant on the Leased Premises at the time of such request. The City may then have an independent, registered professional engineer of the City's choosing perform the necessary interference studies to determine if the new applicant's frequencies will cause harmful radio interference to the Tenant. The City shall require the new applicant to pay for such interference studies, unless the City or other higher priority user requests the use. In that event, the Tenant and all other tenants occupying the Leased Premises Area shall pay for the necessary interference studies, pro rata.

(d) Interference - New Occupants. The City agrees that it will not grant a future lease in the Leased Premises Area to any party who is of equal or lower priority to the Tenant, if such party's use is reasonably anticipated to interfere with the Tenant's operation of its Antenna Facilities. The City agrees further that any future lease of the Leased Premises Area will prohibit a user of equal or lower priority from interfering with the Tenant's Antenna Facilities. The City agrees that it will require any subsequent occupants of the Leased Premises Area of equal or lower priority to the Tenant to provide the Tenant these same assurances against interference.

12. Assignment. This Lease may not be sold, assigned, or transferred by Tenant without the written consent of the City, such consent not to be unreasonably withheld.

13. Miscellaneous Provisions.

(a) The City warrants that it has full right, power, and authority to execute this agreement. The City covenants that the Tenant, in return for paying rent and complying with the terms of this Lease Agreement, shall and may peacefully and quietly have, hold, and enjoy the leased property.

(b) The provisions of this Lease shall bind and inure to the benefit of the parties hereto and their heirs, legal representatives, successors and assigns.

(c) This Lease contains the entire agreement of the parties with respect to any matter mentioned herein and supersedes any prior oral or written agreements ~~including, but not limited to the Tri-County Lease agreement dated May 31, 2005 and the Tri-County service Agreement dated~~.

(d) This Lease may be amended in writing only, signed by the parties in interest at the time of such amendment.

(e) No waiver by either party of any provision hereof shall be deemed a waiver of any other provision or of any prior or subsequent breach or any provision hereof.

(f) If any term or provision of this Lease Agreement is held to be invalid or unenforceable, such invalidity or unenforceability shall not be construed to affect any other provision of this Lease Agreement, and the remaining provision shall be enforceable in accordance with their terms.

(i) This Lease Agreement shall be governed by and construed in accordance with the laws of the State of Michigan.

(j) If the Tenant does not promptly vacate the premises at the end of the Lease term, such holding over shall be treated as creating a month to month tenancy.

IN WITNESS WHEREOF, the parties have executed this Lease agreement as of the day and year first written above.

CITY OF SWARTZ CREEK

TRI-COUNTY WIRELESS INC.

By: _____
David Krueger, Mayor

By: _____
Its:

By: _____
Juanita Aguilar, City Clerk

By: _____
Its:

Approved as to Form:
Richard J. Figura, City Attorney

YES: Gilbert, Hurt, Krueger, Porath, Shumaker, Abrams.
NO: None. Motion Declared Carried.

Fire Contract, Progress Update

(Discussion)

City Manager Bueche updated the City Council on the progress of the Fire Contract.

MEETING OPENED TO THE PUBLIC:

Tommy Butler, 40 Somerset, spoke about the status of the police department and the fact that he feels that the City does not need to lose the police department. Mr. Butler stated that he was impressed that when he called the police department, the Chief answered the phone.

REMARKS BY COUNCILMEMBERS:

Councilmember Gilbert stated that the dog statue for the Veteran’s Memorial has been ordered.

Councilmember Shumaker spoke about an article in the View about the Veteran’s Memorial. Mr. Shumaker stated that the Committee passed a resolution not to add anything new to the Veteran’s Memorial. Mr. Shumaker spoke about Memorials in other communities and stated that Swartz Creek should be very proud of the memorial. Mr. Shumaker talked about turning all of the responsibilities of the maintenance of the memorial to the City.

Councilmember Porath asked if there would be a sidewalk on both sides of the bridge on Morrish Road. Mr. Porath asked about the time frame for the Fire Department getting their new piece of equipment.

Mayor Pro-Tem Abrams agreed with Mr. Butler about the police, citing how well they patrol when residents are out of town. Mr. Abrams stated that if anyone wants to commemorate a war, they can buy a brick for the Veteran’s Memorial.

Mayor Krueger also agreed with Mr. Butler about the police department. Mr. Krueger questioned why the flag was gone off of the pole at the entrance to the City Hall. He was advised that the new ones are ready to be picked up and the DPS was waiting for the wind speeds to let up so there would be less damage to the flags. Mr. Krueger spoke about the opening dates for the new Meijer store.

Adjournment

Resolution No. 130225-08

(Carried)

Motion by Councilmember Hurt
Second by Councilmember Shumaker

I Move the City of Swartz Creek adjourn the Regular Session of the City Council meeting at 8:22 p.m.

YES: Unanimous Voice Vote.
NO: None. Motion Declared Carried.

David A. Krueger, Mayor

Juanita Aguilar, City Clerk