

MINUTES
Troutdale City Council – Work Session
Troutdale City Hall – Council Chambers
104 SE Kibling Avenue
Troutdale, OR 97060-2099

Tuesday, May 24, 2005

1. ROLL CALL

Mayor Thalhoffer called the meeting to order at 8:50pm.

PRESENT: Mayor Thalhoffer, Councilor Gorsek, Councilor Ripma, Councilor Thomas; Councilor Canfield, Councilor Kyle, and Councilor Daoust (by phone).

ABSENT: None.

STAFF: John Anderson, City Administrator; Jim Galloway, Public Works Director, Rich Faith, Community Development Director, Marnie Allen, City Attorney, Debbie Stickney, City Recorder and Travis Hultin, Chief Engineer.

GUESTS: See Attached.

2. DISCUSSION: A discussion of City policies regarding storm water management.

Jim Galloway, Public Works Director introduced Dunny Sorensen a risk management representative from our insurance carrier CCIS. Because some of the issues that we are going to be discussing this evening have to do with management of risk, we felt it would be appropriate to have Dunny here tonight. The reason for this work session actually started with some questions that Councilor Thomas raised. I think his questions focused on action Council took regarding the Sandy Dell Acres subdivision and the potential liability risk that the city might be assuming when it adopted an easement accepting the storm water facility associated with that development in an effort to try and minimize any possible problems coming from storm water runoff from that particular property. That led to the discussion of what should the city policy be in the way of accepting or not accepting as city infrastructure facilities such as that and catch basis. Mr. Anderson also commented that another issue that appears to be somewhat controversial is to what extent will the city require easements for storm water to go off of development property, this primarily as a result of the decision that came in the Dorrough lawsuit with the City. The City Attorney put together Exhibit A that addresses drainage law. There isn't too much that is spelled out hard and fast in the Statutes regarding drainage and how you manage storm water, it is mostly common law, it's the result of some cases over a number of years. I think it is safe to sum those up by saying they are not necessarily clear and consistent. We have also included, as Exhibit B, the Judge's Finding and Conclusions in the Dorrough lawsuit. Prior to the Dorrough lawsuit the city did what we thought was keeping with our understanding of the drainage law at the time. Our understanding was as long as you weren't increasing the rate of discharge and as long as you weren't changing the basic location of where that water went you were okay. Some of the impreciseness in the Judge's mind in the Dorrough lawsuit caused us to

wonder if in fact that was good enough. There were some comments made by the Judge not only addressing rate and location, but also talking about the volume of water that left the site. The Judge also made comments that he made us wonder how precisely we should talk about a change in location. It's virtually impossible, I think, to build anything these days without at least having some slight change in where the water goes from the predevelopment to the post development. Based on your concerns and our desire not to get involved in a second lawsuit, our initial response to what the Judge said was to take a fairly conservative approach to the storm water issue. Basically taking the posture that if there is going to be any change in rate, any change in volume, or any change in location of the storm water leaving the development site the developer would be required to obtain perfected rights, which primarily means an easement, from any of those downstream property owners who would then be receiving that water. That had resulted in some backlash from a couple of developers who have been made aware of the interpretation we are making. Also, Marnie has been working with us to try and sift through the results of that trial to make sure that we are coming up with the best analysis. We think there are probably three ways we could go, which I've outlined in my staff report. Option A would be the most conservative approach which would be to require developers to obtain easements from all downstream property owners anytime there will be an increase in the rate, volume, or a change in the location of where the water is going to be leaving the property. One of the biggest cons is that it puts a significant burden on the developer. Once that downstream property owner realizes that the developer needs something from them in order to make the development a success, that could cause a financial burden on the developer or it could put a downstream property owner in a position to in affect veto a development that they don't like. This option is a severe response to what the Judge said. Option B requires the developer to obtain easements, only if they are going to increase the rate or significantly change the location of the water that is going to be leaving the site. That is probably the option that is consistent with our understanding of current drainage law. It does not place nearly as great a burden on the developer. The potential downside is that it may be taking a narrow view of the Judge's decision. It is almost impossible to build something without at least slightly changing the location of where the water is going to leave the site. How much is too much? Certainly there was nothing in the Judge's opinion and apparently nothing significant in the case laws that really identify or qualify that, so there is a bit of a risk involved there.

Councilor Thomas asked the fourth bullet under the pros for Option B, wouldn't that be a con?

Jim Galloway replied no, the pro is that following Option B does reduce the risks associated with developer lawsuits. However, if there is a lawsuit by a developer the defense of that is likely not covered by our insurance.

Mayor Thalsofer stated that is a con.

Travis Hultin stated the second sentence in that bullet is really just an informational point. The point of that bullet is the first sentence which is it reduces the risk, which is a pro.

Mayor Thalsofer stated that second sentence is pretty important.

Jim Galloway stated perhaps the flip side of that is the fourth bullet under the cons, taking that course of action might increase the potential of a lawsuit from property owners, however, more than likely the property owners lawsuits would likely be defended by the City's insurance. Marnie, could you talk about what those issues would probably be and why one would be covered and one wouldn't.

Marnie Allen, City Attorney stated basically our policy covers us if we are sued for trespass, negligence, or nuisance. But if we are sued for inverse condemnation, meaning that someone claims that we have taken their property by converting it to a public storm water easement, that claim is typically not covered. It is very uncommon for a property owner to just file an inverse condemnation claim; usually they file all of the potential claims which is what happened in the Dorrough case. The City's insurance carrier has been very supportive and agreed to cover the attorney fees and defend inverse condemnation when there are other claims that are covered by the policy. If we were just faced with an inverse condemnation suit alone, that wouldn't be covered.

Jim Galloway asked the potential suit that we would likely get from a developer if we had a very strict requirement as far as getting easements that they may find difficult or impossible to obtain would likely be what?

Marnie Allen replied inverse condemnation. They would probably challenge our condition of approval through the land use process that required them to obtain an off-site easement all the way to the river and claim that it was an unconstitutional takings violation. That claim would not be covered and that wouldn't commonly come in connection with claims that are covered.

Councilor Canfield asked is the difference between Option A and Option B deleting the volume?

Jim Galloway replied that is correct. Generally speaking the way we have administered this is when the belief was that the drainage requirement was to address rate but not necessarily volume, we generally put in some type of structural capability to regulate the rate. Probably the two most common have been either a detention basin or large detention pipes buried underground and then some type of regulating device that would release the water at a rate no greater than pre-development. Obviously if you are holding the water and releasing it out at the pre-development rate you are going to be sending out a greater volume of water over time it just won't be at a greater rate. We believed that was okay. There are some things in the Judge's ruling that make us wonder a little bit on his interpretation. Our recommendation would be to go with Option B on the issue of the easements; we think that is a logical middle ground to take.

Councilor Canfield asked how realistic is it, let's say if we decided on Option A, in your mind does that put a big enough burden on the developers that we would most likely see resistance or litigation?

Marnie Allen replied yes especially if you have a development that is far removed from a public storm water system where they have to convey it to a stream because then they would have to go across several different properties.

Councilor Daoust stated I am okay with the staff recommendation of Option B.

Councilor Gorsek stated I am comfortable with Option B.

Councilor Ripma asked in the Dorrough case the City's insurance carrier or the City ended up paying for it. If Option B had been required would that have taken care of the Dorrough problem?

Marnie Allen replied it seems there were a couple of issues in the Dorrough case. One was that we didn't perfect the easement and record it, so we didn't go far enough in terms of getting an easement in that case, which made things more complicated. Had we obtained and recorded the easement, it would have been fine. Would the City have had to require an easement under Option B in the Dorrough case? I guess it depends on which expert you believe. The engineer that designed the storm drainage system in that case said that water wasn't being diverted from a discharge point in one location and conveyed and discharged in another location. An expert for the Dorroughs testified at the trial contrary to that and the Judge found in his findings that a major portion used to be discharged from the site in one location and only a small portion was discharged into the channel where all of the water now is being discharged. If the City believed that a major portion of the water was being discharged in a different location, then we would have required an easement and it would have been recorded under Option B and that would have resolved the issues in the Dorrough case.

Travis Hultin, Chief Engineer stated essentially Option B is the policy that was in effect at the time. That option is in-line with how most engineers in Oregon understand the drainage law and how most agencies administer it.

Councilor Ripma stated except that the developer wasn't required to get the easement, the City attempted to get the easement and the City failed to perfect it. Option B would require the developer to get the easement.

Travis Hultin replied actually the developer did obtain the easement. It was hardly a well-written document and it wasn't signed by both owners of record, it was only signed by the husband and it was never recorded and the Judge felt that was inadequate. Also, based on what their engineer had told our engineering department there wouldn't have been a need for an easement.

Councilor Ripma stated just so I am clear, staff is recommending Option B?

Travis Hultin replied yes.

Councilor Ripma stated Option B sounds good to me.

Councilor Thomas stated I concur with Option B.

Mayor Thalhoffer stated I have one problem with this. The fourth bullet under the pros for Option B, the first part states it reduces risks associated with developer lawsuits, that is fine.

The second part that defense of such lawsuits is not covered by the City's insurance, that bothers me. Why wouldn't you cover a lawsuit in this case?

Dunny Sorensen, CCIS, replied there is an exclusion in the policy for inverse condemnation. If you reduce the risk of a lawsuit, the likelihood of having a claim that is not covered is reduced.

Jim Galloway stated another reason for listing that as a pro is that in comparing Option A and B it is less of a risk. Probably the only way that you virtually get away from it is to choose Option C where you don't require the developer to do anything, so he probably would not sue you because he will get his way, but I don't think we want to go there.

Mayor Thalhoffer stated but we could get sued by other people?

Jim Galloway replied right, but they will be covered by the insurance.

Jim Galloway stated I think we heard a consensus from the Council to go with Option B.

Council agreed to Option B for the off-site easements. (Option B is to require developers to obtain easements from all private property owners that will receive additional rate of storm water or receive storm water at a different location.)

Jim Galloway stated the second topic is the issue of city ownership versus private ownership of certain storm drainage facilities. This has to do with whether or not the city should take a more pro-active approach and assume ownership of storm water treatment and detention facilities serving multiple properties. We feel that if we take a pro-active approach and assume ownership the city can provide better oversight than if the facility is owned by a homeowners association or another private entity. We think there is a reduced risk of lawsuits that might be associated with a malfunction. I think it puts us in a better position if we own and operate the facility to respond to and address concerns or questions raised. After meeting with Dunny Sorensen of CCIS, I do believe that it is a pretty clear recommendation from him, on behalf of CCIS, that they feel that is probably the best position to put the city in as far as a liability risk. Obviously there is a down side; it puts the responsibility of bearing the cost of maintenance and repair on the City. There are some potential increased risks associated with personal injury lawsuits, if for example, we own an above ground detention basin that has water in it and someone falls in and is injured. It also opens up some additional legal theories if someone wants to take action against the city. Option B is to not take a pro-active approach and instead avoid ownership of such a facility whenever we can and allow the facility to be privately owned. Obviously the benefit to the city is it avoids the cost of maintenance and repair and it might have some reduced risks associated with personal injury lawsuits and it reduces some of the legal theories that might be used to bring suit against the city because we are not the owner of the facility. The cons of that are that we have minimal oversight. There is always the risk that the maintenance and repairs do not get accomplished. If the facility isn't being maintained there could be potential for lawsuits from those who suffer the affects of the facility not working properly and coming back on the city because we authorized it to be built. There may be some expectation from some of our citizens that a facility like that is owned and maintained by the city. If this is the only reason a homeowners association is going to be created that may be

a downside. There could be a compromise on other city facilities that are dependent on that private facility. An example might be if the runoff from the street is going into a detention facility that is privately owned and maintained and is not properly maintained it could cause a backup which could flood our streets. In the last year or two we have taken a swing from a previous posture of trying to avoid accepting the ownership where at all possible to one where we think it makes sense we would assume ownership and maintenance responsibility. We thought that was headed in the direction that Council wanted us to but wanted to make sure that is correct and if not ask you for some guidance in the direction that you would like us to take.

Councilor Canfield stated under Option B you have a potential cost of \$2,000 to \$5,000 annually per facility. How many facilities do we own and what would be the estimated total cost?

Jim Galloway replied Exhibit C tries to address that. Some of the facilities we have require virtually no maintenance. The detention basins require some grounds maintenance which is probably all that is required in most cases. We have some storm filter units and the manufacture recommends initially having those cleaned and replaced annually. A facility could vary from the potential of \$2,000 - \$5,000 down to some facilities costing virtually nothing.

Councilor Canfield asked based on Exhibit C there are only three non-city owned storm water facilities?

Jim Galloway replied yes.

Councilor Canfield asked under the cons for Option B, you mention that it could compromise City facilities dependent on the private facility, could you explain that?

Jim Galloway replied that is the example I gave where I said if a detention facility that is collecting water from a city street fails due to lack of maintenance or something like that and it causes a back up it could end up causing flooding on the city streets.

Councilor Canfield asked has that ever happened in Troutdale?

Jim Galloway replied I don't think we have ever had that from the private detention basin.

Councilor Canfield stated before reading this material I never thought about expectations that the city would own storm drainage facilities. So I am wondering if citizen expectations are necessarily something to consider.

Jim Galloway stated we wanted to try and get as many of the issues before you. We get calls, not necessarily regarding storm water drainage, but I think there are some services that folks generally assume that the government is providing and we are the first folks they call. For example, we get calls from residents of apartment complexes with issues regarding water, sewer or a pot hole in their driveway. I think there are a number of folks that just assume if it is water, sewer or streets that the city takes care of it. We have to inform them that portion is privately owned and the city only owns up to the property line.

That is where that thought came from. Whether or not it is really a consideration I will leave that to your judgment.

Councilor Canfield asked so we are kind of operating under Option B right now.

Jim Galloway replied no, we are doing more of Option A right now. We have been doing that over the last two or three years.

Councilor Canfield asked has there been any previous litigation regarding this issue?

Jim Galloway replied the only issue that I am aware of has been the Dorrough issue.

Councilor Gorsek stated however, we did have a long discussion about Sandy Dell Acres and the question of that facility being private or not.

Jim Galloway replied yes.

Councilor Kyle asked was Strawberry Meadows always city maintained?

Jim Galloway replied yes.

Councilor Kyle stated okay this is just another example of an assumption that the city maintained it. When we first moved into our house and Strawberry Meadows was flooding and we were getting all this good topsoil from up on the hill, we called the city and complained. We just assumed that if we were getting flooded from a new development above us that it was the City's fault.

Councilor Daoust stated the one privately owned storm water facility, Spectro Detention Basin, if the City took over ownership of that would we actually have to pay the owner for that piece of property?

Jim Galloway replied I wouldn't plan to do that. In fact I don't have the intent to go out and retroactively acquire any that currently exist now. There was discussion with the Cherry Ridge Homeowners Association a few years back where they asked us to take it over and at that time we said no because it wasn't the direction we were headed. Probably, if they came in again with that same request we might bring that request to the Council to see if we would want to do that. Generally speaking we are looking for guidance for future development as oppose to going back and doing anything retroactively.

Councilor Daoust stated I am okay with Option A.

Councilor Gorsek stated I like Option A.

Councilor Ripma stated I favor Option A.

Councilor Thomas stated I could go with Option A. I think you have addressed my concerns regarding taking over a facility prematurely before we were sure that all of the issues were taken care of in order to avoid future lawsuits like we had in the past.

Mayor Thalsofer stated I favor Option A.

Councilor Thomas asked are the maintenance costs paid for with the storm water fee?

Jim Galloway replied yes.

Council agreed to Option A for City ownership of storm drainage treatment and detention facilities. (Option A is to take a pro-active approach and assume ownership of storm water treatment and detention facilities serving multiple properties.)

3. ADJOURNMENT:

MOTION: Councilor Gorsek moved to adjourn. Seconded by Mayor Thalsofer. Motion passed unanimously.

Meeting adjourned at 9:29pm.

Paul Thalsofer, Mayor

Approved September 13, 2005

ATTEST:

Debbie Stickney, City Recorder