

RESOLUTION NO. 2472

A RESOLUTION TO TAKE NECESSARY STEPS TO RESTORE 8TH STREET
STRUCTURE,

DECLARING AN EMERGENCY,

AND DIRECTIVE TO STAFF AND LEGAL COUNSEL

The Warrenton City Commission being fully informed and having reviewed public records brought to the attention of the City Commission hereby declares its findings, resolves and directs City staff and legal counsel as follows, and requests the assistance of the United States Army Corps of Engineers as and for the reasons hereinafter described.

WHEREAS, The City of Warrenton has powers and responsibilities related to dikes and flood control including the obligation to operate and maintain the entire dike system that is the flood risk mitigation and flood control system operated by the City of Warrenton and Diking Districts 1, 2 and 3;

WHEREAS, The actions of the Skipanon Water Control District ("District") including removal of the tide gates arguably violated 33 USC 408 (impermissible alteration of a Federal flood risk reduction project) and were conducted without the District's first having obtained a valid Clean Water Act (CWA) permit, it is appropriate that the City lawyers and representatives consult with USACE in an effort to fully resolve all local, State, and Federal issues arising from the District's actions which at least appear to have been done without the requisite Federal, State, and City authorizations, were inconsistent with the sole purpose for which the 8th Street Structure was constructed (flood control), and which arguably were done *ultra vires* to a water control district's statutory mission and purposes under enabling legislation which grants and limits the proper activities and authority of the District; or, alternatively, if any of the foregoing was permitted under the CREST project which was initially permitted and subsequently abandoned, the USACE must identify questions raised by the CREST application in light of the totality of facts and law.

WHEREAS, The City's activities and responsibilities for flood risk mitigation and flood control system are exclusive and governed by its responsibilities to the United States Government and the United States Army Corps of Engineers (USACE);

WHEREAS, The City and USACE are partners *in perpetuity* in a civil works project concerning the dikes and flood risk mitigation system wherein the City and the Corps

each retain respective legal independence which the USACE describes in its partnership agreements and relationships with non-federal partners, including the City of Warrenton, in terms such as: "In the exercise of their respective rights and obligations under this Agreement the Government and the Non-Federal Sponsor each act in an independent capacity, and neither is to be considered the officer, agent, or employee of the other.";

WHEREAS, The City recognizes the advantages to the City of consulting with the USACE regarding the City's 1936 Flood Control Act-related Operation & Maintenance obligations as these are affected by the unauthorized removal of the tide gates at the 8th Street Structure, in order that the City may remain in full compliance with these obligations;

WHEREAS, The City's obligations related to the dikes extend to the appurtenant 8th Street Structure which was constructed for flood risk and reduction flood control purposes and designed to become an integral part of the dikes into which the 8th Street Structure is physically tied and engineered;

WHEREAS, The City was not before advised fully and appropriately but is now on notice of the following:

- That the 8th Street Structure easement that was granted from the City to the Skipanon Water Control District should be interpreted as having reverted back to the City when the District ceased to use the 8th Street Structure for the purposes granted by the easement, thereby making the City ultimately responsible for the proper maintenance and operation of the 8th Street Structure;
- That the 8th Street Structure has been deemed an integral component of the entire flood control system for which the City is ultimately responsible to the USCAE and the citizens of Warrenton and the constituents of Dike Districts 1, 2 and 3;
- That USACE can compel proper maintenance and operation of the 8th Street Structure and require that the facility be restored to its original condition including reinstalling the tidegates and other component parts which were removed, destroyed and/or disposed of by the Skipanon Water Control District;
- That in 2002 the United States Department of Agriculture Natural Resources Conservation Service studied and reported its findings to the Skipanon Water Control District which validated the flood control value of the 8th Street Structure in areas of the Warrenton Diking Districts, and thereby documented the value of

the 8th Street Structure for flood risk reduction or flood control purposes. In particular, the NRCS study and report demonstrates:

- When the tide reaches a specific elevation the tide gates should be closed;
- The 8th Street tide gate structure was designed to limit upstream flooding to an elevation of approximately 8.6 feet during a 10 percent flood event;
- That out of bank flooding begins upstream of the 8th Street tide gate at elevations between 10 and 11 feet. On Sandy Riala's property a drainage ditch connected to the Skipanon River allows water to back into her pond at an elevation of approximately 9.5 feet. The Riala driveway and access road (Dolphin Road) begin flooding at approximately an elevation of 10 feet;
- Some property damage at the Riala property could begin at a flood elevation of 10.5 feet (water in the crawl space) and significantly increasing as floods overtops the first floor at 11.4 feet. Crawl spaces to apartments northwest of the Old Highway 101 Bridge begin flooding at 11.6 feet. The apartment complex's first floor would be safe up to 13.6 feet;
- Ingress and egress to property along Dolphin Road would be compromised as flood elevations exceeded 10 feet. ... These roads would be flooded during a 10-year runoff event under normal high tide cycles;
- At approximately a 10-foot high tide, it becomes more important to make sure the gates operate as designed to reduce the potential for upstream flooding;
- When tide cycles are predicted to exceed 10 feet between May 1 and October 1, the gates should be lowered; and
- For the 8th Street Tide gate predicted flood elevations and out of bank damage elevations are too close to safely recommend significant changes to either the O&M or design of the existing structures; and based on the results of NRCS analyses, NRCS would not agree to changes that reduce the existing level of flood protection;

WHEREAS, more than a few residents upriver from the 8th Street Structure have complained to the City since the District declared that it was permanently raising the tide gates with the intention that the tide gates would not thereafter be operated as designed, and after the tide gates were removed altogether for disposal by the District, that their lands, access and/or roadway ingress and egress has been adversely affected and/or damaged, and that some have suffered actual property damage by water inundation at various times;

WHEREAS, the USACE has noted informally probable deficiencies regarding the maintenance of the 8th Street Structure and potential consequences to the City of Warrenton and the more particularly consequences to the District;

WHEREAS, in view of the potential adverse consequences and in order to avoid foreseeable harm of flooding which the 8th Street Structure was designed to prevent, and which property owners have reported to have occurred, an emergency exists which must be abated, which emergency includes the risks of harms to property and risks to public safety which are reasonably foreseeable from inundations that result in effective closure of public roads making them impassable to property owners and police, fire and emergency medical service vehicles; AND FOR THESE REASONS AND BASED ON THE FINDINGS STATED IN THE 2002 NRCS ANALYSIS AND REPORT, THE COMMISSION FINDS THAT A PUBLIC SAFETY EMERGENCY EXISTS THAT ALSO POSES RISKS OF DAMAGE TO PROPERTY and which is beyond the power and authority of the City of Warrenton to abate independent of the exercise of jurisdiction and authority of and by the USACE;

WHEREAS, in order to do avert reasonably foreseeable, potential harms responsible entities must act in a manner which is timely and effective, and must install tide gates which are the same as those removed or replicas thereof in order to comply with federal rules and federal law;

WHEREAS, it is prudent and appropriate to confer, coordinate and to the greatest extent appropriate rely on the jurisdiction and authority of the USACE, and request that the USACE assist and take action such as the USACE deems appropriate. In this regard, the Commission is advised that USACE investigates cases such as the District's probable violation of 33 USC Sec. 408 by its impermissible altering the Federal flood control structure (the 8th Street Structure constructed as a integral part of the Skipanon River dikes) by its removing the tide gates without its first having obtained a valid Sec. 408 "permission". The Commission is further advised that the USACE Regulatory Branch investigates instances such as the District's tide gate removal process and may find it constituted an "unpermitted" Clean Water Act violation because the actions of the District were in-water and other work done without the District first having obtained a valid Sec. 404 or other relevant permit; further, in such cases, the USACE may in its discretion process an application for an "after-the-fact permit" and/or elect to bring enforcement action against the violator (in this case the District), and insist upon restoration of the site to the *status quo ante* as, in this case, the District's responsibility; and further, that if USACE investigations conclude there probably were violations of Federal law, in that event there would be adequate grounds for USACE to refer the matter to the United States Attorney for the District of Oregon for civil action and/or criminal prosecution; furthermore, the Commission is advised that it is at least possible that once the District's attention has been drawn to the seriousness of the current situation, USACE, the City and the District may be able to negotiate in the context of a Section 408/Clean Water Act enforcement such that the District will effect restoration/reinstallation of the tide gates rather than remaining at risk for more severe consequences of Federal law enforcement actions; and in this regard, the USACE may

consider whether a new Section 408/Clean Water Act permission/permit would be necessary for the restoration of the *status quo ante* in the enforcement context described. Finally, the Commission is advised that the USACE will be instrumental in the course of the foregoing described considerations in clarification by formal transfer and acknowledgment that the 8th Street Structure in fact is a part of and integral to the City's Federally-constructed dike flood risk mitigation system. This may require some further USACE and USDA NRCS Federal internal administrative action such as a more formal transfer of administrative jurisdiction over the 8th Street Structure, in contrast with the ill-considered correspondence from NRCS to the District which NRCS has more recently repudiated; and

WHEREAS, the District is without funds, paid staff or professional staff to accomplish the things that need to be done including the restorative acts which the USACE may require the District to perform, it is probable that the District will require effective assistance which the City staff may be able to provide at District expense;

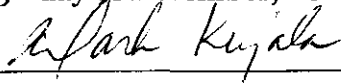
THEREFORE, BE IT RESOLVED:

1. By this RESOLUTION and in the exercise of its authority as the governing body of the City of Warrenton, this Commission hereby requests the USACE to review and appropriately invoke its regulatory and enforcement authority and jurisdiction in order to insure the lawful, compliant and effective Operation & Maintenance of the 8th Street Structure for the intended purposes (flood risk reduction and flood control purposes) of federal funding of the 8th Street Structure and dikes of which it was permitted by USACE to be constructed as an integral part.
2. The City Manager, City staff at the City Manager's direction, and the City's attorneys advising and representing the City in related matters are directed to take measures deemed by them appropriate and effective to protect the interests of the City, Dike Districts #1, #2 and #3, and those who might be adversely affected by the actions and inactions of the Skipanon Water Control District ("District") concerning and impacting the 8th Street Structure and the tide gate facilities which are designed to be a part thereof, including but not limited to litigation, if necessary, to recover costs and damages and obtain such other relief as may be deemed in the interests of the City of Warrenton.
3. Inasmuch as City staff obtained possession and control two of the three tide gates which the District removed from the 8th Street Structure (the District

having destroyed the third of them) in order to preserve this public and federal property, and will retain possession and control over them subject to the direction of the USACE, the Commission authorizes and directs City staff to continue the City's risk mitigation and risk reduction efforts for the benefit of those potentially adversely effected by the District's actions, including taking steps to fabricate a replacement for the tide gate which the District destroyed, and obtaining other component parts in order to be in readiness to cooperate and assist at District expense whenever the USACE directs restoration of the 8th Street Structure as the City anticipates. Unless the District takes steps to accept responsibility and bear the costs which the City must assume due to the District's improper acts, when the City's attorneys initiate appropriate litigation and assert such legal claims as are deemed in the public interest to quiet title, and for damages at law and equitable relief, the Commission anticipates that the District will be required to make restitution to the City for these and other expenses, and by the actions the Commission hereby takes, the Commission does not authorize City expenditures or appropriation of City funds to accomplish those things for which the District is responsible. The City's attorneys are directed to take legal actions and do so at an appropriate time as may be determined in their discretion and professional judgment.

4. The City shall continue, in the course of executing the foregoing actions and during the pendency of USACE review, to confer and consult with USACE and assist the USACE. Such assistance may extend to the District insofar as the District is required to act in accordance with USACE direction and determinations, and is unable to do so timely, efficiently or effectively, due to lack of professional staff and other necessary resources, provided that City assistance and providing tide gates and component parts shall be at the District's expense.
5. This resolution is and shall be effective from and after its adoption and passage by the Commission.

ADOPTED by the City Commission of the City of Warrenton
this 13th day of December, 2016.



Mark Kujala, Mayor

ATTEST:



Dawne Shaw, Administrative Assistant