

Ruth Stellmacher

From: E Easterly <emeasterly@comcast.net>
Sent: Wednesday, June 17, 2020 4:28 PM
To: CityRecorder
Cc: Peter Fernandez
Subject: Document #4 Testimony for June 22nd Stormwater SDC Expenditure Appeal
Attachments: Stormwater Fernandez analysis response.pdf

Attached is my fourth appeal document.

Please include this document with my May 20th letter of appeal in the packet being distributed to Council members for the June 22nd Council meeting.

Sincerely,

E.M. Easterly
503-363-6221

To: Salem City Council

From: E.M. Easterly *EME*

Re West Bank Basin Stormwater SDC small conveyance funds land purchase appeal
Document #4

Date June 17, 2020

On June 5th I received an initial copy of a staff report dated June 2nd titled; *City of Salem Appeal of use of Stormwater System Development Charge Funds For the purchase of real property at 298 Taybin Road NW.* See Appendix A.

I found the background summary and legal references accurate. I agree the Stormwater Master Plan & the Stormwater SDC methodology "also envisioned and addressed the need for capacity enhancing improvements to miscellaneous small pipes and ditches." See: Appendix A page 6 paragraph 1

Missing from the June 2nd analysis is a detailed explanation as to how a \$400,000 plus land purchase qualifies as a "small pipes and ditches" project (See: Appendix B; only \$200,554.87 is available in the "Small conveyance improvements allowance.) or exactly what stormwater enhancement capacity/improvement was achieved by the purchase.

I must also challenge Director Fernandez's conclusion:

"... the acquisition is consistent¹ with the allowance for small projects identified in Table 3 of the methodology." See: Appendix A page 6 paragraph 3

Table 3 – Growth-Related Costs for SDC Improvements Fee

Basin Name	Number of Projects	Number of Detention Projects	Costs	Growth-Related Costs	Comments
Battle Creek Basin	22	2	\$15,798,000.00	\$2,588,239.00	Growth related costs are determined project by project. Costs include an additional 5% allowance for small system conveyance projects within each basin.
Croisan Creek Basin	15	1	\$8,764,000.00	\$1,614,126.00	
East Bank Basin	17	-	\$7,794,000.00	\$1,502,711.00	
Glenn Gibson Basin	23	6	\$13,945,000.00	\$2,079,848.00	
Little Pudding Basin	44	-	\$30,604,000.00	\$1,723,602.00	
Mill Creek Basin	39	-	\$20,987,000.00	\$1,213,877.00	
Pringle Creek Basin	58	3	\$61,413,000.00	\$14,278,013.00	
Upper Claggett Creek Basin	60	1	\$40,045,000.00	\$1,709,129.00	
West Bank Basin	11	1	\$4,212,000.00	\$717,828.00	
Subtotal	289	14	\$203,562,000.00	\$27,427,373.00	
% of Costs Allocated to Growth				13.5%	
Small System Conveyance	-	-	Included in subtotal cost		Growth allocated 13.5%
Monitoring/Modeling/Inventory			\$3,000,000.00	\$404,212.00	
Water Quality Facilities (Allowance is 2% of subtotal)			\$4,071,000.00	\$548,547.00	
Stream/ Habitat Improvements (Allowance is 3% of subtotal)			\$6,107,000.00	\$822,821.00	
Total			\$216,740,000.00	\$29,202,953.00	

Adopted 2002 Stormwater System Development Charge Study
Page 15

¹Compatible or in agreement with something.

First, a \$400,000 plus purchase within the West Bank basin with a \$717,828 growth-related costs expenditure budget is not a small project. See Table 3 above. The document I submitted on May 20th in support of my appeal letter outlines the stated purpose and function of the Small System Conveyance allocation. That allocation is based upon and distributed on a basin by basin allocation rather than the city-wide allocation Mr. Fernandez assumes. See: Appendix B

Second, Mr. Fernandez's June 2nd narrative describes the November staff property acquisition recommendation as being for the purpose of "stormwater detention and streambank conservation". These words flesh out the phrase used in the November staff report which declared the purchase purpose to be, in part, "for stormwater detention". What is the improved stormwater **detention**² capacity that was achieved by this City of Salem land acquisition? What is the new Stormwater infrastructure capacity that was accomplished by the Taybin land purchase? The Willamette Slough drainageway on the east side of the Taybin parcel currently operates as an integral part of the Willamette River floodplain. How will this existing stormwater detention function be improved by the City of Salem taking ownership?

Third, a declaration of "consistent with" is a conclusion without supporting details. For example, Mr. Fernandez's analysis references small project 5 percent funds on a citywide basis. See: Appendix A page 5 paragraph 5 Yet Table 3 specifically allocates the 5 percent funds by drainage basin. Nor does Mr. Fernandez's analysis offer evidence that the Taybin land purchase actually qualified as a West Bank small system conveyance project.

Mr. Fernandez claims the Taybin land purchase is consistent with Stormwater SDC small projects allocation. What does Mr. Fernandez mean by the "small projects" allowance? Which Stormwater Master Plan policy or "infrastructure" did this land purchase accomplish? Is Mr. Fernandez including more than the 5 percent small conveyance allowance in his small projects allowance claim?

Why, for example, does Mr. Fernandez's June 2nd document not provide answers to the questions I originally asked in my May 20th submission repeated below?

1. How much of the \$200,554 small conveyance pipe and ditches moneys allocated to the West Bank Basin has been expended between 2000 and 2019?
2. What are the pipe and ditch improvements secured with the FY 2020 \$401,764.52 expenditure?
3. What are the stormwater infrastructure improvements resulting from the 2020 land purchase?
4. What other non-stormwater infrastructure benefits are secured by this stormwater SDC funded purchase?

I would remind Council that the expenditure of Stormwater SDC moneys must be specifically related to a future Salem stormwater infrastructure. The stormwater purposes and infrastructure benefits achieved by the 298 Taybin Rd NW land purchase have not been clearly articulated. Mr. Fernandez has offered no pipe and ditch improvement details to justify the expenditure of an amount greater than the 5 percent small conveyance allocation moneys allocated to the West Bank Basin.

A closer review of the Table 3 chart references three city-wide Stormwater SDC money allocations – Monitoring/Modeling/Inventory, Water Quality Facilities, and Stream/Habitat Improvements. Mr. Fernandez's analysis references both the Water Quality Facilities and Stream/Habitat improvement allocations, but provides no linkage to either of these two potential Stormwater SDC funding allocations as a funding source for the purchase of 298 Taybin Rd NW. Why?

In regards to the 2 percent city-wide Water Quality Facilities moneys allocation, the November 25th

² "Detention: A stormwater facility that delays the downstream progress of stormwater runoff in a controlled manner. This is typically accomplished using temporary storage areas and a controlling outlet device."

staff report provided no reference to a Water Quality Facility as the purpose of the land purchase accompanying the November 25, 2019 consent calendar information adopted by Council.

A city-wide 3 percent allocation for Stream/Habitat Improvements is a second funding allocation within the Stormwater SDC rubric that might be construed from the November 25, 2019 staff report accompanying the consent calendar information adopted by Council. That report did describe the objective of the proposed purchase with the following language:

“Natural Environment Stewardship; Safe, Reliable and Efficient Infrastructure.”

Tying the above words to specific habitat infrastructure improvements offered in the Salem Stormwater Master Plan may be possible, but no evidence is contained within the record which supports this reason to justify the Council authorization to purchase the Taybin property. If, indeed, it was or is Mr. Fernandez's intent to extend the language of the 5% small conveyance Stormwater SDC allocation to include the city-wide 3% stream/habitat improvement allocation, I invite him to do so with specificity. In so doing I ask that Mr. Fernandez answer the following questions:

1. How much of the city-wide Stream/Habitat Improvement Stormwater SDC allocation of \$822,821 has been expended between 2002 and 2019?
2. What will be the stormwater stream and riparian habitat infrastructure improvements resulting from the 2020 Taybin land purchase?
3. Mr. Fernandez's June 2nd document states: “... and possible future use for Marine Drive construction.” He also states: “Future use of the western portion of the parcel for transportation purposes would require reimbursement to the Stormwater SDC fund for that portion of the property.” See: Appendix A page 4 paragraph 2 What other non-stormwater infrastructure benefits are secured by this stormwater SDC funded purchase? Approval to use Stormwater SDC funds for a potential future Marine Drive is not a stormwater infrastructure application contained in the Salem Stormwater Master Plan. An acknowledgment that a future reimbursement may be required does not erase the original illegality of the using Stormwater SDC funds to secure land for a “potential” non-stormwater infrastructure use.
4. How is authorizing the use of Stormwater SDC funds to demolish a residential dwelling comply with the Salem Stormwater Master Plan?
5. How is the expenditure of stormwater SDC money for any non-stormwater infrastructure benefit legally justified?

Absent answers to the above questions and requested information, I, once again, ask the Salem City Council rescind its November 25, 2019 authorization to purchase 298 Taybin Road NW with Stormwater SDC funds and remit the full land purchase amount to the restricted Stormwater SDC account. Another funding source is needed to fund this purchase.

Mr. Fernandez's June 2nd document does not address, nor does it provide substantial evidence to justify setting aside the Salem Stormwater Master Plan policies that dictate fiduciary responsibilities for expenditures of SDC funds mandated therein. Neither are there supportive arguments provided for clearly ignoring legal requirements of ORS 223.307. A clear example of this is the expenditure of Stormwater SDC funds to demolish a dwelling on the 298 Taybin Road NW site. This, along with the purchase of 298 Taybin Road NW, is not an appropriate use of SDC funds per the requirements of ORS 223.297³.

³ “... to establish that the charges may be used only for capital improvements.”

Appendix A

City of Salem, Oregon
Appeal of use of Stormwater System Development Charge Funds
For the purchase of real property at
298 Taybin Road NW

June 2, 2020

Issue

On May 20, 2020, E.M. Easterly submitted a letter to the City Council appealing the use of Stormwater System Development Charge (SDC) funds for the purchase of real property at 298 Taybin Road NW.⁴ Mr. Easterly's appeal is pursuant to Oregon Revised Statutes 223.302(2) and Salem Revised Code 41.180(c), which allow any citizen to challenge an expenditure of system development charge revenues within two years of the subject expenditure. This report provides the background of the expenditure, a summary and analysis of the appeal, and the staff recommendation. Mr. Easterly's contention is the use of Stormwater SDC funds is inconsistent with applicable state statutes.

Background

In late 2017, staff learned that the property at 298 Taybin Road NW was proposed for development. The property is within the adopted Marine Drive NW alignment and abuts an unnamed waterway along the west edge of Wallace Marine Park. Staff worked with the property representatives and owners to come to an agreeable purchase price for the property. In October 2019, staff recommended to Council acquisition of this parcel for immediate use as stormwater detention, streambank conservation, and possible future use for Marine Drive NW construction. Given its immediate planned use, staff recommended use of Stormwater System Development Charge funds for its acquisition. Future use of the western portion of the parcel for transportation purposes would require reimbursement to the Stormwater SDC fund for that portion of the property.

On November 25, 2019, Council approved entering into a purchase and sale agreement with JDV Investments LLC for the acquisition of the property. The staff report (File #19-538) showed the total amount of the purchase, \$401,764.52 and indicated the source of funds was from Stormwater System Development Charges. The real estate purchase closed on January 30, 2020.

⁴In addition to his May 20, 2020, appeal letter, Mr. Easterly has provided the following correspondence to staff, Budget Committee and Council on this issue:

1. Memorandum to City Council (May 20, 2020)
2. Letter to Dan Atchison, City Attorney (May 12, 2020, updated May 18, 2020)
3. Letter to Salem Budget Committee (May 13, 2020)
4. Letter to Dan Atchison, City Attorney (May 8, 2020)
5. Letter to Robert Barron, Chief Financial Officer (April 27, 2020)
6. Email to Robert Barron, Chief Financial Officer (April 21, 2020)

Easterly Appeal

Mr. Easterly raises the following issue in his appeal:

Stormwater SDC funds were used to purchase land not included in the list of eligible projects identified in the current *Salem Stormwater Master Plan* in violation of the limitations described in ORS 223.307.

Pertinent Law

System development charges are governed by ORS Chapters 223.209 to 223.314. The pertinent sections related to the appeal are found in:

- ORS 223.307, which defines the authorized expenditures of system development charges and how these expenditures must be identified in adopted plans; and
- ORS 223.309, which establishes the requirements for preparing and adopting a methodology for capital improvements financed by system development charges.

ORS 223.307(2), states that SDCs may be spent only on capacity increasing capital improvements. The statute further states that increases in system capacity may be established if a capital improvement increases the level of performance or service provided by existing facilities or provides new facilities, and the portion of the improvements funded by SDCs must be related to the need for increased capacity to provide service for future users.

ORS 223.307(4), states that any capital improvement being funded wholly or in part with system development charge revenues must be included in the plan and list adopted by a local government pursuant to ORS 223.309 (Preparation of plan for capital improvements financed by system development charges).

ORS 223.309(1), requires a local government to prepare an infrastructure master plan that includes a list of the capital improvements that the local government intends to fund, in whole or in part, with revenues from an SDC and the estimated cost, timing and percentage of costs eligible to be funded with revenues from the improvement fee for each improvement.

Analysis

Consistent with the requirements of ORS 223.223.309(1), the City has an adopted *Stormwater Master Plan* and a Stormwater SDC Methodology. These were adopted in 2000 and 2002, respectively. Both documents include detailed lists of capacity improvement projects totaling \$203,562,000 in (2000 dollars).

In addition to specific projects, the *Stormwater Master Plan* also envisioned and addressed the need for capacity enhancing improvements to miscellaneous small pipes and ditches. The Plan included an allowance of 5 percent to the total estimated projects for small conveyance improvements, 2 percent for implementation of water quality facilities, and 3 percent for stream restoration/habitat improvement (page 5-8).

Similar language is repeated in Section 2, page 14 of the Stormwater SDC methodology. Under Capital Requirements to Serve Growth, it states "costs include a 5 percent allowance for unspecified but anticipated small system conveyance projects within each basin as included in the Master Plan." In Table 3 of the methodology, there is a line item for "Small System Conveyance" as described in the language above, and the dollar amount says, "Included in subtotal cost" with no dollar amount. The allowance for small projects would total 5 percent of \$203,562,000, or \$10,178,100 (in 2000 dollars).

In conclusion, Mr. Easterly is correct that the Taybin property acquisition is not specifically listed in the project tables for West Bank Basin in Appendix B of the methodology. However, the acquisition is consistent with the allowance for small projects identified in Table 3 of the methodology. Therefore, the City complied with all applicable state statutes when purchasing the property with stormwater SDC funds.

Staff Recommendation

Based on the analysis of Mr. Easterly's concerns and the conclusion reached, staff recommends Council reject Mr. Easterly's appeal.

City of Salem Stormwater Master Plan

Table 6-9
West Bank Basin DSIP Project List

DSIP Proj. ID	City of Salem CIP ID	Location	Recommended Improvement	Total	Early Action Item?	Comments
WBB1		Wallace Rd between Orchard Hts and Taybin Rd	Replace undersized pipe	\$ 224,315		
WBB2		From Wallace Rd and Glen Creek Rd to Gerth Ave and 6th	Replace undersized pipe	\$ 1,181,238	Yes	Street CIP 6.O. Bond F (2000-01, 2004-05) , bad pipe, alignment, debris, proposed Walker School Park
WBB3		From Cascade Drive to 9th and Gerth	Replace undersized pipe	\$ 229,692	Yes	Adverse grade
WBB4		8th Ave between Gerth Ave and Rosemont Ave	Replace undersized pipe	\$ 351,480	Yes	High water complaints
WBB5		Senate St between 6th Ave and the Willamette River	Replace undersized pipe	\$ 725,084		Heavy roots, silt, gravel, bad joints
WBB6		Culvert across the Salem-Dallas Hwy, near Moores Wy	Replace undersized pipe	\$ 238,000		ODOT coordinations, LWI implications
WBB7		Culvert across Eola Dr near the intersection of Eola Dr and Turnage St	Replace undersized culvert	\$ 81,294		Street CIP (2004-05)
WBB8		Culvert across Jasper Wy near intersection with Eola Dr	Replace undersized culvert	\$ 8,628		
WBB9		Along Eola Dr between Gehlar Rd and Sunwood Dr	Replace undersized pipe	\$ 91,452		Street CIP (2004-05)
WBB10		Barberry St between 23rd Ct and Eola Dr	Replace undersized pipe	\$ 181,865		Street CIP (2004-05)
WBB11		Eola Dr near intersection with Sunwood Dr	Add detention capacity at Woodhaven Detention Facility	\$ 748,850	Yes	
Subtotal				\$ 4,011,097	-	
Small conveyance improvement allowance				\$ 200,554.67	-	This allowance is 5% of the subtotal.
Total (\$)				\$ 4,211,652		

1. INCLUDES ALLOWANCES FOR PERMITTING, ACQUISITION, PREDESIGN, AND FINAL DESIGN (15%), ADMINISTRATION (6%), CONSTRUCTION MANAGEMENT (8%) AND CONTINGENCY (40%).