



**Request for City Council Committee Action
from the Department of Public Works**

Date: January 16, 2007
To: Honorable Sandra Colvin Roy, Chair Transportation & Public Works Committee
Subject: **Appeal of Stormwater Utility Fee from Zimmerschied, Inc.**

Recommendation:
That the City Council uphold the denial of the appeal and adopt the attached Findings, Conclusions and Recommendations.

Prepared by: Corey M. Conover, Assistant City Attorney, 673-2182
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Approved by: _____
Steven A. Kotke, P.E., City Engineer, Director of Public Works

Presenter: Rhonda Rae, Director of Engineering Services

Permanent Review Committee (PRC)	Approval _____	Not applicable	<u> X </u>
Policy review Group (PRG)	Approval _____	Not applicable	<u> X </u>

Financial Impact (Check those that apply)

- No financial impact - or - Action is within current department budget (If checked, go directly to Background/Supporting Information)
- Action requires an appropriation increase to the Capital Budget
- Action requires an appropriation increase to the Operating Budget
- Action provides increased revenue for appropriation increase
- Action requires use of contingency or reserves
- Business Plan: Action is within the plan. Action requires a change to plan.
- Other financial impact (Explain):
- Request provided to department's Finance Dept. contact when provided to the Committee Coordinator

Community Impact

- Neighborhood Notification: Not Applicable
- City Goals: Not Applicable
- Comprehensive Plan: Not Applicable
- Zoning Code: Not Applicable

Background/Supporting Information

The appellant has submitted a letter dated November 28, 2006 to Mayor R. T. Rybak, attached as Exhibit-1 and referred to in the "Current Action" section below, regarding an appeal for the property at 4430 Lyndale Av N. The appeal that was denied on July 27, 2006 regarding the property at 4430 Lyndale Av N was also applicable to the adjoining property at 4400 Lyndale Av N, and therefore this staff report provides information about both addresses.

Please refer to CHART 1, below.

For 4400 Lyndale Av N: At the start of the Stormwater Utility Program in March 2005, the property at 4400 Lyndale Av N was billed on the basis of a 0.75 runoff coefficient. An investigation following a dispute of the account determined that the property had less impervious surface than estimated for the property's Land Use Category, and therefore the runoff coefficient was reduced to 0.52, which reduced each monthly billing for this parcel by approximately 31%.

For 4430 Lyndale Av N: At the start of the Stormwater Utility Program in March 2005, the property at 4430 Lyndale Av N was billed on the basis of a 0.90 runoff coefficient. The same investigation as described above determined that the property had less impervious surface than estimated for the property's Land Use Category, and therefore the runoff coefficient was reduced to 0.44, which reduced each monthly billing for this parcel by approximately 51%.

CHART 1 (Excerpt from Attachment 1, Appeal Determination, July 27, 2006)

After the appellant filed disputes in March 2005, adjustments were made in April 2005 to both accounts, as follows:

4400 Lyndale Av N

Gross area of property: 23,180

Customer class of record: Mixed Commercial Residential, Apartment

Baseline runoff coefficient for this customer class, to estimate amount of impervious surface: 0.75

Runoff coefficient that resulted from calculation after dispute was filed: 0.52

<u>What monthly charge would have been if original ESUs were used:</u>		<u>Actual monthly charge using re-calculated ESUs:</u>	
Number of ESUs (originally billed):	11.36	Number of ESUs (revised):	7.93
2006 rate per ESU:	<u>\$9.17</u>	2006 rate per ESU:	<u>\$9.17</u>
Monthly charge in 2006	\$104.17	Monthly charge in 2006	\$72.72

4430 Lyndale Av N

Gross area of property: 56,653

Customer class of record: Industrial Warehouse – Factory

Baseline runoff coefficient for this customer class, to estimate amount of impervious surface: 0.90

Runoff coefficient that resulted from calculation after dispute was filed: 0.44

<u>What monthly charge would have been if original ESUs were used:</u>		<u>Actual monthly charge using re-calculated ESUs:</u>	
Number of ESUs (originally billed):	33.33	Number of ESUs (revised):	16.37
2006 rate per ESU:	<u>\$9.17</u>	2006 rate per ESU:	<u>\$9.17</u>
Monthly charge in 2006	\$305.64	Monthly charge in 2006	\$150.11

This adjustment reflected a revised (reduced) estimate of impervious area on both properties.

The City establishes monthly Stormwater Utility Fees by multiplying the Equivalent Stormwater Units (ESU) for each property times \$9.17 (rate in 2006) per ESU. At inception of the Stormwater Utility Fee in March 2005, the ESUs for each property were calculated by multiplying the total property area times the property's land use category runoff factor, thus estimating an impervious area for each property. The estimated impervious area is then divided by 1,530 square feet to arrive at the number of ESUs for the property. The runoff factors that are assumed for each use category were derived from nationally recognized data.

In the Appellant's case, the ESUs originally calculated at the start of the program in March 2005 were 11.36 and 33.33 ESUs, respectively for the two properties. The 11.36 and 33.33 ESUs were the result of multiplying the gross lot areas of 23,180 and 56,653 square feet, respectively, by 0.75 and 0.90, the respective runoff coefficients assumed for the land use categories of the two properties, and dividing the products by 1,530, the square footage of one ESU.

$$(23,180 \text{ sq. ft.} \times 0.75) / 1,530 \text{ sq. ft.} = 11.36 \text{ ESUs}$$
$$(56,653 \text{ sq. ft.} \times 0.90) / 1,530 \text{ sq. ft.} = 33.33 \text{ ESUs}$$

April 2005 Dispute Resolution

When we have a question on Stormwater Utility Fees a closer review of the property's impervious area is done with the use of available information the property owner may have or other information we may have. At times we find that the estimated percent of impervious area using the assumed runoff factor according to a property's land use category is not applicable, because the combined square footage of rooftops, parking/driving surfaces and other impervious areas is greater or less than typical. We then adjust the number of ESUs to better reflect the property's actual impervious area conditions, which was done in this case, as shown by comparison of the ESUs shown above with the ESUs shown in the next paragraph.

In April, 2005, the property owner disputed the charges. A routine review was conducted. Using aerial photographs, it was calculated that the impervious portions of the properties, including rooftops and parking/driving surfaces, were significantly less than the square footage that would result by applying the 0.75 and 0.90 runoff coefficients to the corrected gross lot areas. As indicated on Exhibit-2, An adjustment to the stormwater charges was made to lower the number of Equivalent Stormwater Units (ESUs) to the amounts indicated in Chart 1 above, using the following formulae:

$$(23,180 \text{ sq. ft.} \times 0.52) / 1,530 \text{ sq. ft.} = 7.93 \text{ ESUs}$$
$$(56,653 \text{ sq. ft.} \times 0.44) / 1,530 \text{ sq. ft.} = 16.37 \text{ ESUs}$$

June 2006 Appeal Resolution

In June 2006, an appeal was received from the property owner, included as Exhibit-3. The notice followed the Appeal Procedure described in Minneapolis Code of Ordinances Chapter 510.70(a), which allows owners of property that disagree: (1) with the class into which their single-family residential developed property is placed; (2) with the calculation of the stormwater charge; (3) with whether their property is benefited by the stormwater utility; or (4) with whether their property is entitled to a credit or the continuation of a credit or on the amount of a credit; to submit an appeal to a designee of the City Engineer/Director of Public Works.

The basis of the appeal, was, first, that there is economic hardship related to low income from the two properties; second, that runoff from the public street (Lyndale Avenue N) enters the property, and third, whether the property benefits from the stormwater utility because of the appellant's belief that most of the stormwater is retained on the site and infiltrates into the soil, and does not drain off to the city storm system.

Two designees of the City Engineer/Director of Public Works (“designees”) considered the appeal. In accordance with 510.70(a), at the time of the appeal the designees were not persons regularly assigned to utility billing or the stormwater utility. In accordance with 510.70(b), written notice was issued of a time and place for review, attached as Exhibit-4. In attendance at the review were the designees and the property owner. The designees listened to the property owner, reviewed the drawings that were furnished, and examined the property with the property owner. The designees observed the low areas on the property where it is quite apparent that some rain water accumulates and either evaporates or infiltrates into the soil. However, the designees also concluded from their observations that in large rain events runoff would leave the property particularly toward the east across poorly vegetated downward slopes, flow onto I-94, and from there into Shingle Creek. The Appellant obtains access to his property from Lyndale, a paved street that is drained by the city’s system, and the property is benefitted by the system. In addition to the review with the property owner, the designees reviewed the written record, reviewed conveyance records of the area to determine that the receiving water body of the area’s runoff is Shingle Creek, and consulted with the office of the City Attorney.

Pursuant to 510.70(e), the designees sent a written copy of the designee’s decision. The decision of the designees was to make no adjustment to the stormwater charges. The July 27, 2006 letter of determination from the Public Works Director’s designees is attached at Exhibit-5. The letter reviewed the previous adjustments made in April 2005, and informed the appellant that the ESUs should not be further adjusted. Under 510.70(f), if the appellant believes the designees’ findings are in error, the appellant may file a written request for a City Council review. In summary, the July 27 letter responded to the basis of the appeal as follows: first, that the Ordinance does not have a provision for lowering fees due to economic hardship; second, that the Department of Public Works would look into whether modifications to the public street can and should be made, in order to limit runoff onto the property, and third, that a credit application process is in place whereby credits against the stormwater billings may be possible if conditions are met.

Actions subsequent to the July 2006 Appeal Resolution

Related to whether modifications to the public Right-of-Way should be made in order to limit runoff onto the property, in September 2006, Public Works observed that because of location of catch basins in the street, and the elevation of rail tracks, stormwater from the public street would not drain onto private property. In December 2006, an experienced Public Works Department field survey crew was sent to shoot elevations to verify the observations on which the conclusions were based in September. A graphic of the survey results is included as Exhibit-6. The survey verified the previous conclusions, that stormwater from Lyndale does not normally flow onto the Appellant’s property, and also verified that stormwater will flow from the Appellant’s property onto Lyndale. There is not currently a public sidewalk adjacent to the property.

Related to applying for stormwater credits, by phone conversation, Public Works staff explained to the appellant the process for applying for possible additional credits, if the properties are capable of retaining a significant rainfall event on-site. It was explained that a professional engineer or registered landscape architect would need to document and certify the site conditions and calculations that would substantiate the properties’ ability to retain the 10-year or the 100-year event. To date, no application for additional credits has been received.

Current Action

The property owner has paid none of the stormwater utility fees since the beginning of the program in March 2005, although the property owner has paid the water and sanitary sewer bills on the same properties. Chapter 510 Subd. 510.80 provides that the same administrative procedures for special assessments shall be applied to the stormwater charge as are applied for water use under Chapter

509. In September 2006, October 2006, and November 2006, the Utility Billing office sent a series of letters to the property owner in carrying out Chapter 509, attached as Exhibit-7, explaining that the unpaid fees for 4430 Lyndale Av. N. will be assessed against the property, and further explaining that a party disagreeing with the assessment may appeal to the District Court. The letters are attached as Exhibit x. On November 28, 2006, the property owner sent a letter to Mayor R. T. Rybak, attached as Exhibit-1, regarding the planned assessment by the Utility Billing Office to business property taxes for a portion of the overdue stormwater charges. The November 28 letter is attached as Exhibit x and is being regarded as a written request for a City Council review under 510.70.(f).

Recommendation

It is the recommendation of the City Engineer/Director of Public Works, upon the advice of legal counsel from the City Attorney's office, that the City Council uphold the denial of the appeal and adopt the attached Findings, Conclusions and Recommendations. The Utility Billing Office will continue with its collection process under Chapter 509. An appeal to District Court of the special assessment (to property taxes) of the unpaid amounts, pursuant to 509.1080(b)(6), may ensue.

Analysis

It is true, as alleged by Appellant, that Section 510.70(a)(3) provides that a basis of appeal is whether the property is benefited by the stormwater utility. The extent of benefit by itself, however, is not a ground for appeal. If the property is receiving benefits, then it can be charged pursuant to Ordinance for stormwater using one of the approved methods listed in Minnesota Statutes § 444.075 subd. 3b or pursuant to other law.

In this particular case the method that is directly involved is the method contained in 444.075 Subd. 3b(1). The storm sewer charges for the subject properties have been calculated by reference to the square footage of the property charged, adjusted through examining the square footage of the surface of the property that is impermeable to stormwater runoff and adjusting the charges accordingly. In this case, the charges were adjusted downward from the charges that would have applied had the normal runoff coefficient for that class of property been applied. It is clear that the property is receiving benefits from the existence of the City's storm sewer system. This is particularly true for properties like this that receive vehicles accessing the property from streets which are drained by the City's system. The City through its extensive system of drains has benefited this property.

The City has an interest in stormwater. As specifically mentioned in Section 510.30 of the Minneapolis Code of Ordinances our stormwater utility is established in furtherance of implementing the goals and strategies of the Local Surface Water Management Plan, our Combined Sewer Overflow Report and our National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to the U.S. Cleanwater Act. As the Council is well aware, we are being given more and more responsibility as time goes on under the Clean Water Act and pursuant to our NPDES permits for the quality of runoff. More and more the City is providing grit chambers, retention ponds, and other best management practices to improve the quality of stormwater and to decrease the velocity and peak loads of runoff.

This Appellant is being charged pursuant to a specific method approved by statute. This Appellant is being charged by reference to the square footage of the property as adjusted for a reasonable calculation of stormwater runoff. The stormwater runoff was adjusted based upon the amount of surface on the property that is impermeable to stormwater runoff. The just and equitable and proportionality language contained Minnesota Statutes § 445.075, Subd. 3, is not analyzed independently when one is using a method for fixing the storm sewer charge that the legislature has specifically approved in Minnesota Statutes § 444.075, Subd. 3b. In JAS Apartments, Inc. v. City of Minneapolis, 668 N.W.2d 912 (Minn. Ct. App. 2003), the Court in a challenge to our prior system of charging for stormwater services based on consumption of water held that when the statute establishes a specific method that can be used to collect storm sewer charges that method has been

deemed “equitable” by the legislature. 668 N.W.2d at 915. Also, the Court held that when interpreting the proportionality clause in 444.075, Subd. 3, that the proportionality clause is superceded by specific methods for collecting storm sewer charges that have been approved by statute.

Appellant, like other property owners, does have a way to reduce its stormwater charges. Appellant can obtain a credit as defined in 510.10. Appellant has not yet applied for such a credit or proposed to carry out activities that qualify for such a credit.

Conclusion

The system established by the Council is a reasonable system. In this case, once the property owner complained about the charge, the subject property was individually analyzed and the calculation was then based upon an actual determination of the square footage of surface that is impervious to stormwater runoff rather than based upon an estimate reached using a runoff coefficient for specific types of property. This Appellant has had the benefit of an individual analysis of the property’s impermeability. Classifications in the ordinance are reasonable. They are authorized by Minnesota Statutes § 444.075, by the City charter and by other State law. The appeal should be denied. The current charge as already adjusted downward by the Department of Public Works staff should be affirmed. The Committee should adopt the attached: “Findings, Conclusions and Recommendations”.

Attachments

Exhibit 1: November 28, 2006	Appellant Correspondence (two pages)
Exhibit 2: May 10, 2005	ESU Quantity Billing Changes and Map (three pages)
Exhibit 3: June 20, 2006	Letter of Appeal (six pages)
Exhibit 4: July 13, 2006	Review Meeting Confirmation Letter (one page)
Exhibit 5: July 27, 2006	Determination of Appeal (three pages)
Exhibit 6: December 2, 2006	Survey Elevations Graphic
Exhibit 7: September, October and November 2006	Utility Billing Notices