

CITY OF MINNEAPOLIS

MINNEAPOLIS CITY COUNCIL
STANDING COMMITTEE ON TRANSPORTATION AND
PUBLIC WORKS

In Re: The Stormwater Utility Appeal of
Zimmerschied, Inc., 4400 and 4430 Lyndale Ave. No.

**FINDINGS,
CONCLUSIONS
AND RECOMMENDATION**

BACKGROUND

In March 2005, the City of Minneapolis adopted a stormwater utility ordinance. Prior to that time charges for storm sewers and sanitary sewers had been combined and had, in all but a few cases, been collected based on the amount of drinking water used by a property owner. Property owners complained about the fairness of this system and at least one even brought a court action challenging the system. See JAS Apartments, Inc. v. City of Minneapolis, 668 N.W.2d 912 (Minn. Ct. App. 2003). The Minnesota Legislature adopted amendments to Minnesota Statutes § 444.075 which, as of January 1, 2006, prohibit a city from charging for storm sewer or stormwater services based on the amount of water consumed. Minnesota Statutes § 444.075 subd. 3b (4). Accordingly, the City of Minneapolis adopted a new method for establishing stormwater charges. This method is set out in Chapter 510 of the Minneapolis Code of Ordinances. As a part of this process and pursuant to the Ordinance, a stormwater charge was established for the properties at 4400 and 4430 Lyndale Avenue North, which are owned by Zimmerschied

Inc. Zimmerschied Inc., through John Zimmerschied disputes the amounts of the fees and has appealed.

Based on the files, records and proceedings of the City of Minneapolis in regard to the stormwater charges for the subject properties, the Committee makes the following:

FINDINGS

1. Zimmerschied, Inc., the Appellant, owns and/or operates the properties at 4400 and 4430 Lyndale Avenue North.
2. In March, 2005, Zimmerschied, Inc., disputed the charges alleging that the property did not use the City's stormwater system. Public Works staff assigned to the Stormwater Utility examined the issues raised by Appellant. Staff reviewed the property and determined, based on Hennepin County Property Records, that the gross lot area of 4400 Lyndale Avenue North was 23,180 square feet and that the gross lot area of 4430 Lyndale Avenue North was 56,653 square feet. The Appellant has not disputed these figures. Using aerial photographs, it was calculated that the actual 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 gross lot areas that are called for by the ordinance based on the land use classification of the properties. Initial stormwater charges for all properties are calculated by applying stormwater coefficients determined based on the land use classification of the property involved. As a result of using estimates of actual percentages of impervious surface rather than using a percentage of impervious surface based on the land use classification of the property, an adjustment to the stormwater

charges was made to lower the number of Equivalent Stormwater Units (ESUs). As a result the calculation of Equivalent Stormwater Units (ESUs) was changed from:

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

to

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

This resulted in a change in the 2006 monthly charge for 4400 Lyndale Avenue North from \$104.17 per month (11.36 ESUs X 2006 ESU rate of \$9.17) to \$72.72 per month (7.93 ESUs X 2006 ESU rate of \$9.17). This resulted in a change in the 2006 monthly charge for 4430 Lyndale Avenue North from \$305.64 per month (33.33 ESUs X 2006 ESU rate of \$9.17) to \$150.11 per month (16.37 ESUs X 2006 ESU rate of \$9.17).

3. On June 28, 2006 a Notice of Appeal dated June 20, 2006 was received by the Department of Public Works from Zimmerschied Inc. by and through John Zimmerschied. The Notice of Appeal was made pursuant to Minneapolis Code of Ordinances § 510.70 (a). The Notice of Appeal is Exhibit 3 to the Report prepared for the Committee. The Notice of Appeal followed the Appeal Procedure described in Minneapolis Code of Ordinances, § 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.

4. Lois Eberhart and Robert Carlson were designated to hear the appeal. At the time of the appeal, neither of the designees was a person regularly assigned to utility billing or the stormwater utility. Written notice was issued of a time and place for the review. In attendance for the review were the designees of the Director of Public Works and the property owner. The designees listened to the property owner, examined the property with the property owner, and reviewed the drawings that were furnished. In addition the designees reviewed the written record and consulted with the Office of the City Attorney.

5. Pursuant to Minneapolis Code of Ordinances § 510.70 (e) the Director's designees sent a written copy of the designees decision to the Appellant. This decision is Exhibit 4 to the Report furnished to the Committee. The decision of the designees was to make no further adjustment to the stormwater charge. The designees concluded that Appellant had not made the showing required to entitle Appellant to further rate reductions pursuant to the terms of the ordinance. The designees found that Appellant had failed to establish that his property was not benefited by the stormwater system. Based on their observations of the property, the designees did not believe that all runoff from a 100 year storm event would be retained on the property. Appellant did not submit any report of an engineer purporting to claim that all runoff would be retained on the site during a 100 year storm event.

6. By letter dated November 28, 2006, with receipt by the Minneapolis City Clerk on November 28, 2006, the Appellant filed what purports to be an appeal of the assessment of the charges, which was treated, at least in part, as a request for review by the City Council based on the written record pursuant to Minneapolis Code of Ordinances § 510.70 (f). The appeal is attached as Exhibit 1 to the Report to the Committee. The appeal claims that the City's stormwater charge is "not justified". Appellant claims: "...there is very little runoff because the entire property slopes toward a low area on the property and therefore there should be minimal stormwater tax." and that: "...when Lyndale Avenue overflows its curbs, water from the street flows onto our property rather than from our property to the street." Appellant further complains that the new rate based on adjusted property surface area is a 7000% increase over stormwater fees he paid previously which were based only on water usage. Appellant also claims it is too much relative to the actual current revenue of the property.

7. In Minneapolis Code of Ordinances § 510.30 the City Council found that "...improvement to the water quality in the storm and surface water system and its receiving waters are a benefit and provides services to all property within the city."

8. The "Stormwater Management System", "Sewer System" or "System" is defined in Minneapolis Code of Ordinances § 510.10 and includes, among other things, storm sewers that exist at the time the Ordinance is codified or that is later established, all appurtenances necessary in the maintaining and operating the same including, and as a partial list, "natural and man made wetlands; channels; ditches; rivers; and streams; wet and dry bottom basins, ..."

9. Appellant operates a commercial business on the property. It is not a residential property. The property has been developed with structures and other improvements. The property is non-residential developed property within the meaning of the definition in Minneapolis Code of Ordinances § 510.10 and § 510.60 (a)(3).

10. The runoff coefficient for the property at 4400 Lyndale Avenue North was established based on the property's land use classification as "Mixed Commercial Residential, Apartment". The table contained in Table 1 found in Resolution 2005R-064 designating utility rates for sewer rental and stormwater service shows that the appropriate runoff coefficient for properties in this land use classification is .75. The runoff coefficient for the property at 4430 Lyndale Avenue North was established based on the property's land use classification as "Industrial Warehouse -- Factory". The table contained in Table 1 found in Resolution 2005R-064 designating utility rates for sewer rental and stormwater service shows that the appropriate runoff coefficient for properties in this land use classification is .90. These runoff coefficients would properly result in stormwater charges for these properties, respectively, of \$104.17 per month and \$305.64 per month. Pursuant to a review requested by the property owner, the Director of the Department of Public Works conducted a review of the actual percentage of the properties that are impermeable and pursuant to the ordinance used "information and data deemed pertinent by the Director" to adjust the runoff coefficients for the property, respectively, to .52 and .44 resulting in adjusted stormwater charges of \$72.72 per month and \$150.11 per month, respectively. These downward adjustments were within the reasoned discretion of the Director pursuant to the provisions of the Ordinance and were appropriate under the circumstances.

11. In its' letters of appeal the Appellant appears to claim that the properties received minimal benefits from the City's stormwater management activities. In some places, the Appellant claims the runoff is "very little" or "very minimal compared to a similar sized property". In another place, however, Appellant claims: "...a property with no runoff". Appellant does not have any structures or other facilities on the property designed to manage stormwater. The data submitted regarding the property does not prove that all stormwater is retained on site. It does not prove that all stormwater during a "100 year flood" or even during a "10 year flood" would be retained entirely on site. Plaintiff has not submitted an engineer's report or any expert testimony of any kind showing that all stormwater is retained on the site. The Director's designees are of the opinion based on their casual observations of the property that the property would not retain a 100 year flood event. Appellant claims that during large rain events, water flows from Lyndale Avenue onto his property. Officials from the Minneapolis Department of Public Works went to the site and determined based upon their visual inspection that it was unlikely that rain water would flow from Lyndale Avenue to Appellant's properties. The Department conducted a survey of this site by an experienced field survey crew. This survey confirmed the earlier conclusion. The elevations and grade are such that rain water does not normally flow from Lyndale onto Appellant's properties, and further that rain water flows from Appellant's properties onto Lyndale public right-of-way.

12. Appellant has not demonstrated that the property is not benefited by the existence of the City's stormwater system. The properties are located adjacent to and accessed from a major City street which is part of the City's stormwater system. Appellant's properties are benefited by the City's stormwater system.

13. Appellant's dominant claim appears to be that the amounts of the charges are too high relative to the revenue Appellant receives from the property and too high relative to prior stormwater charges that were based on drinking water use.

14. Minneapolis Code of Ordinances § 510.60 (c) provides for a system of stormwater charge credits. A credit can be granted for non-residential developed property such as that of the Appellant pursuant to the Rules provided for by the Ordinance. These Rules provide substantial credits for those who employ structural or nonstructural best management practices or other stormwater practices on site that significantly reduce the quantity or significantly improve the quality of stormwater runoff from their property that enters the system as defined in 510.10. Appellant has not applied for such credit and has not, at this point, provided evidence establishing eligibility for such credit.

Based on the foregoing Findings, the Committee recommends that the Council make the following:

CONCLUSIONS

I. That the City of Minneapolis has adopted a system of charging for the City's storm sewers and the stormwater management system by adopting Chapter 510 of the Minneapolis Code of Ordinances.

II. That this system of charges is authorized by Minnesota Statutes § 444.075, by the general powers of the City under the Minneapolis City Charter, supplemented in part by various special laws of the State of Minnesota, including but not limited to Laws of Minnesota for 1994, Chapter 587, Article 9, § 4. Pursuant to Minnesota Statutes § 444.075 subd. 1a. the authority granted by Minnesota Statutes § 444.075 is "...in addition

to all other powers with reference to the facilities otherwise granted by the laws of this state or by the charter of any municipality.”

III. Minnesota Statutes § 444.075 Subd. 3b provides:

Subd. 3b. Storm Sewer Charges. Storm sewer charges may be fixed:

- (1) by reference to the square footage of the property charged, adjusted for a reasonable calculation of the stormwater runoff; or
- (2) by reference to a reasonable classification of the types of premises to which service is furnished; or
- (3) by reference to the quantity, pollution, and difficulty of disposal of stormwater runoff produced; or
- (4) on any other equitable basis, including any combination of equitable bases referred to in clauses (1) to (3), but specifically excluding use of the basis referred in Subd. 3a, clause (1); and otherwise without limit.

IV. In a typical case, in which a property owner has not asked for an individual analysis of their property, Minneapolis Code of Ordinances § 510.60 (3) normally results in stormwater charges for non-residential developed property, pursuant to the Ordinance, being calculated by a combination of reference to the square footage of the property charged adjusted for a reasonable calculation of the stormwater runoff determined by reference to a reasonable classification of the types of premises to which the service is furnished.

V. As a result of Appellant’s protest of the stormwater charge assessed to Appellant’s property, the property was examined individually. The area of impervious surface of the property was determined based upon an examination of Appellant’s

property to determine the square footage of the property that is impervious to stormwater runoff. Accordingly, the charge was fixed by reference to the square footage of the property charged, adjusted for a reasonable calculation of the stormwater runoff .

VI. Pursuant to Chapter 510 of Minneapolis Code of Ordinances and the Rules issued pursuant thereto, a property owner who applies for a credit can have the charge adjusted based on the quantity, pollution qualities and difficulty of disposal of storm water produced pursuant to Minnesota Statutes § 444.075 subd. 3b (3). Appellant has not yet applied for such credit.

VII. In JAS Apartments, Inc. v. City of Minneapolis, 668 N.W.2d 912 (Minn. Ct. App. 2003) it was established that methods for sewer charges that are specifically set out in 444.075 are methods that the legislature has deemed “equitable” for the purposes of the “equitable” language of Minnesota Statutes § 444.075 subd. 3. JAS Apartments, Inc. v. City of Minneapolis, 668 N.W.2d at 915

VIII. In JAS Apartments, Inc. v. City of Minneapolis, supra, the court held that any conflict between the statutes proportionality clause contained in 444.075 Subd. 3(b) and a specific authorization for sewer charges based on a method listed therein, (water consumption in that case) must be resolved in favor of the specific authorization. The Court ruled that sewer charges which were set by a specific means set out in the statute are presumptively valid under the statute. The Court held that authorization of a specific method of determining a sewer charge prevailed over the general proportionality language.

IX. Charging the Appellant for stormwater services by reference to the square footage of the property charged with an adjustment for a reasonable calculation of stormwater runoff pursuant to 444.075 Subd. 3b (1) based on a reasonable calculation of the area of the property with surfaces that are impermeable to stormwater runoff is just and equitable for the purposes of Minnesota Statutes § 444.075 subd. 3.

X. The method for calculating the storm sewer charges of Appellant was specifically authorized by 444.075. That specific authorization prevails over the more general provision contained in Minnesota Statutes § 444.075 subd. 3(b). 668 N.W.2d at 915.

XI. Minnesota Statutes § 444.075, Subd. 3c. (a) provides that:

Minimum charges for the availability of water or sewer service may be imposed for all premises abutting on streets or other places where municipal or county water mains or sewers are located, whether or not connected to them.

This provision provides an affirmative grant of power to impose minimum charges for people that are not connected to a water system or a sanitary sewer system or other system. It does not remove or limit authority for those that are users of the system that are being charged pursuant to one of the methods listed in § 444.075 Subd. 3b.

XII. Appellant is liable for stormwater charges for the properties at 4400 and 4430 Lyndale Avenue North.

XIII. 23,180 square feet is a reasonable estimate of the area of the property at 4400 Lyndale Avenue North based upon data received by the Department of Public

Works. 56,653 square feet is a reasonable estimate of the area of the property at 4430 Lyndale Avenue North based upon data received by the Department of Public Works.

XIV. Based on an individual review of the properties the appropriate adjusted runoff coefficients for the properties, respectively, are .52 and .44.

XV. The appropriate number of equivalent stormwater units (ESU) for the properties, respectively, are 7.93 and 16.37.

XVI. The appropriate stormwater charges in 2006 for the subject properties, respectively, are \$72.72 and \$150.11 per month pursuant to Chapter 510 of the Minneapolis Code of Ordinances.

XVII. The amount of the current revenue of the property is not a factor in determining the stormwater charge pursuant to Chapter 510 of the Minneapolis Code of Ordinances.

Based on the foregoing Conclusions, the Committee makes the following:

RECOMMENDATION

1. That the appeal of Zimmerschied, Inc. is denied.
2. That the Minneapolis City Council adopt these Findings, Conclusions and Recommendations and make them part of the record herein.

BY THE COMMITTEE:
