



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

Date: January 31, 2006

To: Honorable Sandra Colvin Roy, Chair Transportation & Public Works Committee

Subject: Appeal of Stormwater Utility Fee from Custom Plastics Laminates, 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
Lois Eberhart, Public Works Interagency Coordinator, 673-3260

Approved by: _____
Klara A. Fabry, P.E., City Engineer, Director of Public Works

Presenter: Rhonda Rae, Director of Engineering Services

Permanent Review Committee (PRC) Approval _____ Not applicable X
Policy review Group (PRG) Approval _____ Not applicable X

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

From the start of the Stormwater Utility Program in March 2005 until August 2005, the property at 1720 Marshall Street NE, operated as Custom Plastic Laminates, Inc., was billed a monthly stormwater fee of \$458.93. The monthly fee was arrived at by applying the 2005 Equivalent Stormwater Unit (ESU) rate of \$8.52 to the 52.63 ESUs appearing in billing records for the property. The 52.63 ESU figure was the result of multiplying 89,485 square feet, the gross lot area that was shown in the system, by 0.90, the runoff coefficient assumed for the property's industrial land use category, and dividing the product by 1,530, the square footage of one ESU.

$$(89,485 \text{ sq. ft.} \times 0.90) / 1,530 \text{ sq. ft.} = 52.63 \text{ ESUs}$$

On July 21, 2005, a dispute form was received from the property owner, accompanied by two drawings. The dispute form and drawings are attached as Exhibit 1. The reason given for the dispute was a statement that the property does not use the city storm system because the property is excavated such that runoff flows directly to the Mississippi River. No adjustment was made based on the reason given. An adjustment to the stormwater charge was made, however, to correct the number of Equivalent Stormwater Units (ESUs) from 52.63 to 42.21, thereby reducing the monthly charge from \$458.93 to \$368.07. This adjustment resulted from a routine review of the property for accuracy of the billing system's gross lot area. During review, it was observed that the gross lot area of 89,485 square feet used to calculate the monthly fee was incorrect. The actual gross lot area was corrected to 75,584 square feet in accordance with Hennepin County property records as demonstrated on Exhibit 2. Further, using the drawings submitted with the dispute form, and using aerial photograph, it was calculated that the impervious portion of the property was only 64,581 square feet, less than the 68,017 square feet that would result by applying the .90 runoff coefficient to the corrected gross lot area of 75,584 square feet. An aerial photograph was printed and annotated with the Account Number, corrected lot area, impervious area, and resulting ESUs, and is attached as Exhibit 3. The gross lot area and impervious area were changed in the billing system to 75,584 square feet and 64,581 square feet, respectively, resulting in the number of 42.21 ESUs, and therefore on August 4, 2005 a change in the monthly fee was processed, reducing the amount from \$458.93 to \$368.07, retroactive to March 2005. The Stormwater Dispute Note Pad indicating the change is attached as Exhibit 4.

$$64,581 \text{ sq. ft.} / 1,530 \text{ sq. ft.} = 42.21 \text{ ESUs}$$

On October 25, 2005, a notice of appeal was received, accompanied by a copy of the October 14, 2005 billing for the monthly stormwater fee of \$368.07. The notice of appeal is attached as Exhibit 5. 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, whether the property benefits from the stormwater utility, and second, that the charge was not calculated correctly. Two designees of the City Engineer/Director of Public Works ("designees") considered the appeal. In accordance with 510.70(a), the designees are 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 6. In attendance at the review were the designees, the property owner, and the property owner's attorney and engineer. The designees listened to those in attendance, 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. Pursuant to 510.70(e), the designees sent a written

copy of the designee's decision, attached as Exhibit 7. The decision of the designees was to make no adjustment to the stormwater charge.

Current Action

On January 9, 2006 the Appellant filed a written request for review by the City Council based on the written record, as permitted by 510.70(f), if the Appellant believes that the decision on an appeal has been in error. The request is attached as Exhibit 8. The basis for the request is 510.70(a)(3), based on whether [the] property is benefited by the stormwater utility, arguing that the property minimally drains to the street and thus receives minimal benefit from the utility, and that the stormwater charge is therefore too high.

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 deny the appeal and adopt the attached Findings, Conclusions and Recommendations.

Analysis

This property is located directly along a Minneapolis City street, Marshall Street N.E., as it intersects with another City street, 18th Avenue N.E. Both of these streets are drained by the City's extensive system of storm sewers. Additionally, it is clear that part of the roof of the building of the property drains into City provided storm sewers.

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 charge for the subject property has been calculated by reference to the square footage of the property charged, adjusted for a reasonable calculation of the stormwater runoff. The adjustment has been made 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 charge was adjusted downward from the charge that would have applied had the normal runoff coefficient for that class of commercial property been applied. As a result, the property is being charged for stormwater based upon the fact that the property has a large area of surface that is impermeable to stormwater runoff that has to be handled by the public or by other people in some fashion. Clearly, some of this water runs into the street. It also appears from the analysis done by the Public Works Department that the greater percentage of the property drains into the river. Nonetheless, it is clear that the property is receiving benefits from the existence of the City's storm sewer system. This is particularly true for a property like this that has a large parking lot that receives cars accessing the property from two adjacent streets which are drained by the City's system. The City through its extensive system of drains has benefited this property. As a result, the property doesn't qualify for exclusion from the system.

It is reasonable to charge the property based upon the stormwater that it sheds, even though a substantial percentage of this water will in most cases travel to the river without traveling through hardware or structures owned by the City. The City has an interest in the stormwater runoff. 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 that is entering the river. More and more the City is providing grit chambers, retention ponds, and other best management practices to

improve the quality of stormwater runoff when it enters the river and to decrease the velocity and peak loads of such runoff. This Appellant is in essence asking for a large credit for the fact that much of its water goes directly into the Mississippi River, even though Appellant has not applied for a credit and has not established that it is doing anything either to improve the quality of the water or to retain the water during times of intense rain so that flooding problems and erosion problems will be minimized. This Appellant is not like a property owner who owns the bottom of a basin and can claim that it is not shedding any stormwater and that its property is gathering stormwater and therefore shouldn't be charged for the cost of stormwater running off its property.

This property contains substantial man-made impermeable surface and is shedding untreated stormwater from parking lots and roofs into the environment. Additionally, Appellant is not in a remote location far removed from the storm sewers. It directly adjoins the storm sewers and uses the well-drained access to benefit its business and could likely use more of the system if it or a subsequent owner desired to.

We disagree with Appellant regarding a number of fundamental points about the stormwater utility and about Minnesota Statutes § 444.075. 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.

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 the stormwater runoff. The stormwater runoff was adjusted based upon the amount of surface on the property that is impermeable to stormwater runoff. The Appellant claims that the rate should include an adjustment for stormwater which is currently being discharged into the river, even though it is being discharged without treatment and without retention over a period of time to minimize flooding and erosion impacts. In Section 510.10 of our Ordinance, we define the stormwater management system as including rivers, streams and natural and manmade wetlands, among other things. The runoff from the property is therefore entering the City's "stormwater management system".

Appellant, like other property owners, does have a way to reduce its stormwater charges. Appellant can obtain a credit based on either improving stormwater quality or reducing stormwater quantity that is discharged into the stormwater management system 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.

We disagree with Appellant's reading of Minnesota Statutes § 444.075, Subd. 3c. This subdivision is an affirmative grant of authority to stormwater utilities to impose minimum charges for water or sewer service even on premises that are not actually connected to the system. While this section seems to be mostly directed to sanitary sewer service and water service, it needs to be noted that it does not say "only minimum charges". It is not a limitation, it is an empowerment for there to be minimum charges for those who are not connected. It doesn't limit other authority. It particularly doesn't change the language from Minnesota Statutes § 444.075, Subd. 1a which provides that:

"The authority hereby granted 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."

A recent unpublished case has followed the holding in JAS Apartments v. City of Minneapolis, supra, and held, among other things, that:

“The latitude and discretion provided to municipalities by Minn. Stat. § 444.075 is broad.”

Golden Rule Estates Owners Association v. City of Cross Lake, 2005 WL 1514436 at page 5 (Minn. Ct. App. 6/28/2005).

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 Dispute form received July 21, 2005 with two drawings
- Exhibit 2 Hennepin County property records map
- Exhibit 3 Annotated Aerial Photograph
- Exhibit 4 Stormwater dispute note pad
- Exhibit 5 October 25, 2005 notice of appeal
- Exhibit 6 Notice of time and place for review
- Exhibit 7 Letter of designee's decision
- Exhibit 8 Written request for review by City Council