

To: Salem City Council

Agenda Item: 4 (a)

From: E.M. Easterly



Re West Bank Basin Stormwater SDC small conveyance funds land purchase appeal
Oral Testimony Document #7

Date July 13, 2020

Mayor Bennett and Members of the Salem City Council:

I am asking for the City Council to review the manner in which staff formulated the November 25, 2019, recommendation to Council to purchase real property at 298 Taybin Rd. NW. Please understand, I am not asking the City to void the purchase. Rather, I am asking Council to evaluate whether the land purchase recommendation was an abuse of staff discretion which led to a procedurally inappropriate and perhaps illegal use of System Development Charge (SDC) funds. Procedurally, this appeal focuses upon the City's failure to follow its own Salem Stormwater Master Plan policies. Legally, the appeal focuses on the City's failure to follow State statutes, namely (ORS 223.307) that details the "Authorized expenditure of system development charges" and (ORS 294.358). (See Attachment A).

As a remedy, I ask that the City return all Stormwater SDC funds expended and identify a more appropriate and legitimate revenue source to fund this claimed "Natural Environment Stewardship" land purchase along the edge of Wallace Marine Park.

Let me be as blunt as possible I am charging the Public Works staff with a level of hubris fostered by decades of well-intended recommendations that, whether intentional or not, skated around adopted City policies and the City's legal obligations. The defendants in this appeal are those City staff members who disregarded their responsibilities to Council and inappropriately recommended the use of Stormwater SDC funds to purchase the Taybin property.

The relationship between staff and Council must be one of trust. Council relies upon accurate and legally correct information from staff. The staff recommendation which council adopted last November to purchase a parcel of land in West Salem was an inappropriate application of staff's discretionary responsibility. Staff recommended using Stormwater SDC funds to purchase property at 298 Taybin Rd NW. That recommendation met neither the legal requirements of ORS 223.307 nor the policy requirements of the Salem Stormwater Master Plan. As I detailed in my Document #4 written testimony, the Stormwater Master Plan identifies no stormwater project along Wallace Marine Park in the west bank stormwater basin and only grants \$200,000 for small conveyance projects.

The Taybin purchase was an abuse of discretion because staff's recommendation did not follow adopted City Council policies and procedures. The November 25, 2019, staff report demonstrates a pattern of recommended action justified with generalizations unspecified in City policy. For example, the staff report states, "The City is interested in acquiring the Property for stormwater detention ..." but never details a proposed detention project. For example, the staff report claims "Natural Environment Stewardship" and "Efficient Infrastructure" will be the result of the purchase without describing what stormwater infrastructure will be developed or why stormwater SDC moneys are the appropriate funding mechanism to support the natural environment. Transparency is missing; the decision-making body (City Council) has not been fully advised. This pattern of ignoring inconvenient City policies and procedures and not following the rule of law is not new; indeed, it has been acknowledged by City

legal staff.

Therefore, my appeal this evening focuses upon the City staff's abuse of discretion when applying Council adopted policies and procedures and staff's failing to provide full and transparent disclosure of the information and reasoning which support its recommended action.

This issue is important for the City Council members to understand. In short, the City management misinformed the City Council about an expenditure of Stormwater SDC funds to purchase property. City management minimized the actual purpose of the purchase – “a potential future use for Marine Drive construction” (a Transportation Infrastructure, not a Stormwater Infrastructure) and misled the City Council by claiming that the funding source was appropriate and implying that State laws and Council priorities were followed.

This pattern of less than transparent staff responses has continued. Over the last four months I have submitted a list of questions that have not been fully answered. The questions focus on the apparent use of Stormwater SDC funds for a purpose not within staff discretion or supported by law or policy. The responses from various staff show a lack of concern about fiduciary policy or the procedural responsibilities attached to Stormwater SDC expenditures.

First, this council, upon staff recommendation, authorized the expenditure of un-allocated moneys from the Stormwater SDC revenue fund contrary to the specific legal requirements of the Salem Stormwater Master Plan. The approved expenditure failed to meet Oregon budgetary legal requirements. My Document #3 describes the expenditure of “Unspecified” Stormwater SDC moneys for an un-budgeted project as a misapplication of Oregon budget law.

Second, the November 25th purchase authorization included the expenditure of funds for purposes unrelated to the Salem Stormwater Master Plan – purchase a “potential” transportation R-O-W and demolition of a dwelling; directly contradicting state law. Both the original staff report and Mr. Fernandez's June 2nd memo affirmed this fact. My Document #4 details the legal inappropriateness of these two expenditures.

Third, the November 2019 council authorization to purchase the Taybin parcel reflects Council reliance upon and trust in staff recommendations. The staff recommendation appears to be a continuation of staff abuse of discretion that has occurred over a number of years regarding the application of the Salem Area Comprehensive Plan policies and subordinate master plan policies.

This query began last winter. I sought to identify a dwelling in the vicinity of Roth's for a family facing possible eviction. I learned in early February that the City had purchased the home at 298 Taybin Rd NW for over \$400,000. I wanted to check out whether that residence might be available. I noted from Polk County Assessor's records that the property had an assessed value of \$121,000 and had sold in May 2019 for \$199,500. Mid-March I submitted an email inquiry, the first of many queries over the last four months, to City Manager Powers asking, “What 2019-2020 Capital Improvement Budget line item funded this purchase?”

Mr. Clint Dameron responded on his behalf citing the November 25, 2019, Council action. I next turned to the November 25th 2019 Council minutes where I learned (a) the dwelling was to be removed, (b) a stormwater detention facility and a potential future transportation right-of-way were envisioned and (c) the purchase was funded by stormwater system development charges.

The November staff report did not describe the type of stormwater detention facility or project being proposed so I turned to the Salem Stormwater Master Plan to identify just what stormwater detention facility was included in that Plan. I found none.

So began my exploration of the 2000 Salem Stormwater Master Plan, the adopted Stormwater SDC

study and most significantly the Stormwater SDC budget account.

In April I inquired of CFO Barron: “Since **no** Stormwater SDC funds beyond planning and fund administration were budgeted for expenditure in the fiscal 2019-2020 budget, please explain how City Council could authorize a capital expenditure of Stormwater SDC funds in the amount of \$401,764.52 in fiscal 2019-20.”

Mr. Barron's reply did not answer the question. He explained: “The “Stormwater – Unspecified” project is the budget that is used for costs exceeding project estimates and for mid-year projects.” He also stated: “the City of Salem believes that it is appropriately using its Stormwater SDC funds.” That certainly has been past Public Works practice but does that practice comply with Oregon budget law? I say it does not. I await answers to the questions and challenges raised in in my Document #3.

Later I pointed out to the Salem Budget Committee that the Taybin land purchase was not among Stormwater SDC projects identified in the West Bank basin 309 project list which should be the primary focus for expending Stormwater SDC moneys. [Staff subsequently explained that the land purchase expenditure authorization was included as part of the 5 percent pipe and ditch infrastructure improvement allocation.](#) Mr. Atchison's actual words read: “5% Stormwater SDC small project allowance.” I challenged that claim in my May 20th memo and again in my Documents #2 and # 4.

[Staff also recommended using Stormwater SDC funds to remove a dwelling from the property. Yet there is nothing in the Stormwater Master Plan which justifies using Stormwater SDC funds to remove a dwelling, which is the demolition of capital not a capital infrastructure improvement.](#)

On June 5th Public Works Director Fernandez sent me a copy of his written report describing the City's response to my May 20th appeal. Mr. Fernandez recommends that my appeal be denied but offered no concrete evidence or sustainable legal justification supporting of his conclusion. My Document #4 challenges, in detail, his analysis and conclusions.

[By law Stormwater SDC funds must be used for stormwater infrastructure improvements. The November staff report recommended the land purchase claiming the purchase supported “Reliable and Efficient Infrastructure” without describing that stormwater infrastructure and without explaining how or why Stormwater SDC funds may be utilized to facilitate “Natural Environment Stewardship”.](#)

I have no doubt that City management was well intended when it recommended that Council authorize the purchase of 298 Taybin Rd NW with Stormwater SDC funds. Yet the implementation of Council's approval appears to ignore applicable City adopted Stormwater Plan requirements and the legal requirements of state statute specifying the use of SDC funds. [Over the last four months the City bureaucracy has sought to offer explanations which justify the November 2019 purchase recommendation while avoiding many of my direct questions and, thus, avoiding the legally questionable disclosure of the reasons for the purchase. I have submitted a list of those questions for Council review at Appendix B.](#)

I encourage Council members to review the questions I have raised to staff and see if you are satisfied with the responses given. [The answers I have received to these and other questions fail to affirm that the November approval \(a\) conforms to the requirements of ORS 294.338\(2\) and ORS 294.358 \(Appendix A\), \(b\) meets policies of the Salem Stormwater Master Plan, and \(c\) complies with the obligations of ORS 223.307.](#)

[In essence, staff's November recommendations were an abuse of discretion because those recommendations did not comply with state statutes or follow adopted City Council 2000 Stormwater Master Plan policies. Nor have the subsequent documents or belief declarations offered by staff](#)

provided substantial evidence that the November recommendation complied with state statutes and Salem Stormwater Master Plan obligations. In summary, staff has provided no concrete evidence to support their beliefs and conclusions.

I conclude by asking Council to review how staff exceeded its discretion when it recommended to Council the authorization to purchase the Taybin property with Stormwater SDC funds.

I urge Council to clarify for staff the need to confine staff recommendations to use SDC funds to those projects that totally comply with City policies and State statutes.

I ask Council to rescind this use of Stormwater SDC funds and offer alternative moneys to fund the Taybin land purchase.

Appendix A

ORS 223.307¹

Authorized expenditure of system development charges

- (1) Reimbursement fees may be spent only on capital improvements associated with the systems for which the fees are assessed including expenditures relating to repayment of indebtedness.
- (2) Improvement fees may be spent only on capacity increasing capital improvements, including expenditures relating to repayment of debt for such improvements. An increase 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. The portion of the improvements funded by improvement fees must be related to the need for increased capacity to provide service for future users.
- (3) System development charges may not be expended for costs associated with the construction of administrative office facilities that are more than an incidental part of other capital improvements or for the expenses of the operation or maintenance of the facilities constructed with system development charge revenues.
- (4) 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 \(Preparation of plan for capital improvements financed by system development charges\)](#).
- (5) Notwithstanding subsections (1) and (2) of this section, system development charge revenues may be expended on the costs of complying with the provisions of ORS [223.297 \(Policy\)](#) to [223.314 \(Establishment or modification of system development charge not a land use decision\)](#), including the costs of developing system development charge methodologies and providing an annual accounting of system development charge expenditures.
[1989 c.449 §5; 1991 c.902 §29; 2003 c.765 §6; 2003 c.802 §22]

ORS 294.358¹

Expenditure and resource estimate sheets

- (1) The sheet or sheets containing the estimate of expenditures shall also show in parallel columns the actual expenditures for the two fiscal years next preceding the current year or the actual expenditures for the two budget periods preceding the current budget period, the estimated expenditures for the current year or current budget period and the estimated expenditures for the ensuing year or ensuing budget period.
- (2) The sheet or sheets containing the estimate of budget resources shall also show in parallel columns the actual budget resources of the two fiscal years next preceding the current year or the actual budget resources for the two budget periods preceding the current budget period, the estimated budget resources for the current year or current budget period and the estimated budget resources for the ensuing year or ensuing budget period.
- (3) The estimate sheets shall be made a part of the budget document. [Formerly [294.376](#)]

ORS 294.338 Compliance with Local Budget Law required prior to expenditure or tax certification;

(2) Subsection (1) of this section does not apply to the expenditure of grants, gifts, bequests or devises transferred to a municipal corporation in trust for specific purposes or to other special purpose trust funds at the disposal of municipal corporations. A municipal corporation may not make an expenditure under this subsection unless the governing body of the municipal corporation enacts appropriation ordinances or resolutions authorizing the expenditure.

ORS 294.398 Estimate of unappropriated ending fund balance for each fund. A municipal corporation may include in its budget an estimate of unappropriated ending fund balance for each fund, for use in the fiscal period following that for which the budget is being prepared. The estimate authorized by this section represents cash or net working capital which will be carried over into the year following the ensuing fiscal year or ensuing budget period for which the budget is being prepared. It shall not in any way reduce the cash balance or net working capital which becomes part of the budget resources provided in ORS 294.361 (1) to (3). The unappropriated ending fund balance authorized by this section shall become a budget resource at the close of the ensuing fiscal year or ensuing budget period for the succeeding year or budget period. Except as provided in ORS 294.338 (2) and 294.481, no appropriation or expenditure shall be made in the year or budget period for which the budget is applicable for the amount estimated pursuant to this section.

ORS 294.471 Supplemental budget in certain cases; no increase in property taxes permitted.

(1) Notwithstanding requirements as to estimates of and limitation on expenditures, during the fiscal year or budget period for which the original budget was adopted, the governing body of a municipal corporation may make one or more supplemental budgets under any of the following circumstances:

(b) A pressing necessity that could not reasonably be foreseen when preparing the original budget or a previous supplemental budget for the current year or current budget period and that requires prompt action.

Appendix B

Over the last four months I have asked City staff many questions. The questions below were asked but not answered.

April 21st email to Mr. Barron:

1. When did the Salem City Council execute a FY2020 Stormwater SDC Capital Improvement Program budget modification?

April 27th letter to Mr. Barron:

2. How does the City justify the budgeting of expenditure of capital funds on Design and Analysis when there are no CIP authorized Stormwater SDC funded projects?
3. Who are the members of the Stormwater CIP committee and why has that committee not applied Stormwater SDC revenue to CIP identified Stormwater SDC funded expenditure projects?

May 7th letter to Mr. Atchison:

4. Is the City of Salem permitted to use Park SDC fees to fund an identified 309 listed street expansion or transportation project?

May 12th / May 18th letter to Mr. Atchison:

5. What stormwater infrastructure did this purchase accomplish?

May 20th Memo to Council:

6. How much of the \$200,554 small conveyance pipe and ditches moneys has been expended between 2000 and 2019?
7. Is there any restraint other than amount of SDC revenue available that limits expenditure of the full \$200,554 small conveyance pipe and ditch allowance in one year on a single project?
8. What are the processes that allow the City to expend more than \$200,554¹ from Stormwater SDC revenue on small conveyance pipe and ditch projects in a single year?
9. In 2020 the City expended \$401,764.52 stating that the funding source was from the Stormwater SDC 5% small conveyance improvement allowance. How does the City justify this more than doubling the allowed expenditure of the small conveyance pipe and ditch adopted allocation? Adding the inflation factor offered in the 2019 draft Stormwater Master Plan brings the original 5% allowance to \$334,524 not \$401,000 plus expended in 2020.
10. What are the pipe and ditch improvements secured with the \$401,764.52 expenditure?
11. What are the stormwater infrastructure improvements resulting from the 2020 land purchase?
12. What other non-stormwater infrastructure benefits are secured by this stormwater SDC funded purchase?

¹ The draft 2019 Stormwater Master Plan update offers an inflation multiplier of 1.668.

June 12th letter to Council:

13. When and what mid-year project using Stormwater small conveyance 5% allocation funds was last approved by the Salem City Council?
14. Was that prior mid-year Stormwater SDC expenditure similar to the FY2020 Stormwater land purchase?
15. How could a \$400,000 plus Stormwater SDC expenditure be approved by the Salem City Council without first moving Not Allocated – “Unspecified” moneys to an actual Stormwater SDC funded project within the 2019-2020 budget?
16. Has the City affirmed that the land purchase expenditure is permitted under the small conveyance improvements allocation included in the Salem Stormwater Master Plan?
17. What was the urgency to purchase the Taybin parcel in October 2019 and how did that urgency result in staff ignoring basic budgeting processes and recommend the utilization of Stormwater SDC funds contrary to SDC expenditure policies, i.e. buying land for a potential non-stormwater infrastructure purpose?

June 17th memo to Council:

18. What is the improved stormwater **detention**² capacity that was achieved by this City of Salem land acquisition?
19. What is the new Stormwater infrastructure capacity that was accomplished by the Taybin land purchase?
20. Which Stormwater Master Plan policy or “infrastructure” did the Taybin land purchase accomplish?
21. How is authorizing the use of Stormwater SDC funds to demolish a residential dwelling comply with the Salem Stormwater Master Plan?
22. How is the expenditure of stormwater SDC money for any non-stormwater infrastructure benefit legally justified?

July 2nd email to Glenn Davis:

23. Who was the source of the “late 2017 proposed development at 298 Taybin Road NW” and who were the principals who initiated the proposed development?
24. What was the development proposal?
25. What constrained the City's ability to respond to such a proposal in 2017 or 2018?

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.”