

**GIG HARBOR CITY COUNCIL
SPECIAL MEETING
ENTERING INTO A COST REIMBURSEMENT AGREEMENT
WITH THE DEPARTMENT OF ECOLOGY**

June 1, 2004 6:00 p.m. – Conference Rooms A/B

PRESENT:

Council members: Steve Ekberg, Jim Franich, Bob Dick, Paul Conan, John Picinich, Frank Ruffo and Mayor Wilbert. Councilmember Young was absent.

Staff: Mark Hoppen, John Vodopich, Steve Osguthorpe, Maureen Whitaker and City Attorney Carol Morris.

Mayor Wilbert opened the meeting at 6:02. John Vodopich, Community Development Director, explained that this special meeting is for the purpose of considering entering into a cost reimbursement agreement with the Department of Ecology (DOE) for the processing of the city's water rights. He explained that the city applied for additional water rights in 2000, but the application has not yet been reviewed. There is a provision in state law that allows a water right applicant to enter into a cost reimbursement program with DOE with the caveat that the applicant must pay for the review of all the pending water right applications that were submitted prior to theirs. He went on to explain that there are no guarantees that the water rights will be issued. What DOE will commit to is the hiring of a third party consultant to review the applications prior to ours and issue a decision. They have indicated to the city that if we enter into this agreement by June 7, 2004, they will commit to a decision date by September 1, 2004, after which there is a thirty-day appeal period. If we do not enter into the agreement at least tentatively, the DOE staff is indicating that the wait could be two to three years. Mr. Vodopich further stated that the cost of the program is anticipated to be \$53,625.00, which was not anticipated in the 2004 Budget, however adequate funds do exist to cover this expenditure. He continued that in the packet that was delivered to each council member on the previous Friday, that there was a copy of a memorandum from the city attorney and an email response received today from DOE staff Zack Tyler that addresses each of the points raised by the city attorney. Mr. Vodopich summarized by saying that the city administrator and himself recommend that the city enter into this contract since it appears to be the only "light at the end of the tunnel" that would at least give us decision on our water rights.

City Administrator Mark Hoppen added that he felt that as coercive as this mechanism seems, it is a product of Washington Water Law, which is "first in time, first in right." He stated that if we choose not to do this immediately, we should remember that the person performing this work is a consultant, consultant's need work and there is some likelihood that this consultant will take on other work if it is not ours. This consultant has performed up to 75% of the work to date, as stated in DOE's response. Mr. Hoppen advised the council to take positive action on this contract.

Councilmember Ekberg asked why could we not wait until the next council meeting to discuss this issue. Mr. Hoppen responded that this decision is up to council and comes down to a decision in judgment. He added that there is some possibility that we could delay it but with risk.

Mr. Vodopich added that the Master Builders Association will be taking this matter up at their next meeting with their legislative committee next Tuesday evening and they initially indicated that there may be a willingness on their part to contribute to this effort financially – to what extent, Mr. Vodopich did not know.

Councilmember Franich asked for clarification on DOE's waiting list that was included in the packet distributed to council. Mr. Vodopich indicated that the city was number seventeen and twenty on the list with two applications and clarified that by entering into this contract with DOE that we do not jump to the top of the list, we are in fact paying for the review of those applicants in front of us. Councilmember Dick added that we will be helping them get the others ahead of us done so they can get to ours. An example of the water purveyors on the list was given by Mr. Vodopich as Washington Water and Rainier View, who submitted an application in 1992. Mr. Hoppen further clarified the legal precept of this program.

Carol Morris expressed her opinion that she thought that DOE should be processing their own permits – which everyone agreed.

Councilmember Dick asked if we had an idea how many applications were processed last year. Mr. Vodopich responded that he had looked up this information on DOE's website and between bienniums for 2003 and 2005, their goal is to process 1,000 per year. In the first quarter of 2004, they only processed 182 of which 14% of those were funded through this process. Mr. Dick went on to clarify that DOE splits the applicants into two lists, one for municipals and one for others. Mr. Dick asked if they were still processing about 100 per year and were receiving about 1,000 applications a year. Mr. Vodopich clarified that as of April 1, 2004, there were 1,280 pending water right change applications and 5,292 pending new water rights requests. Dave Brereton, Director of Operations further clarified that both of our applications were "new" applications were considered as new (additional) "withdrawals."

Councilmember Franich asked if the \$53,625 was just an estimate or are we charged by the hour and if the contract could be less. Ms. Morris responded that the dollar amount could be less or it could be more. She further stated that we did not know how much it is going to be as it is DOE's estimate. She added that we did talk to some people in the City of North Bend who had entered a contract like this with DOE and we need to follow up with them to determine how similar their situation is to ours. Mr. Hoppen added that the City of North Bend started at "ground zero" and we are 75% through the analysis process. Ms. Morris further stated that the under the Procedure section of the agreement, a refund would be given if necessary after thirty days after the contract has been terminated.

Councilmember Ruffo inquired as to what basis could DOE do this. Ms. Morris pointed out that there was a new law that DOE asked the legislature to pass to authorize RCW 90.03.265 that allows the applicant to pay for the processing of those applications ahead of them. Mr. Ruffo asked what our ability was to share this cost with the development community. Ms. Morris stated that we could take this cost and plug it into our numbers when calculating connection fees. Mr. Dick stated that this could be part of the cost of providing water and we could adjust our fee schedule if this becomes necessary to spread the cost fairly among all applications. Ms. Morris further stated that she did not think that we would want to pass this cost onto our water service customers and as Mr. Dick clarified, it is more like a capital charge than it is an operating expense.

Mr. Vodopich responded to Councilmember Ruffo's question regarding the "what ifs" pertaining to not participating in such an agreement. Dave Brereton had spoken with Jill Walsh of DOE, who is responsible for working on our water rights and she indicated that DOE's priorities are to process water change applications first, which are changes in existing water rights and whereas we have two new water rights, her best case scenario would be two to three years. Mr. Vodopich further clarified that in 2001 the legislature created a new two-line system that puts requests for water right changes and transfers on one line and requests for new rights that normally take longer on another. Councilmember Dick thought that we were on the list for water right changes. Mr. Hoppen replied that that was not correct.

Further discussion took place between council and staff in regards to the difficult position that DOE has placed the city in. Councilmember Ruffo expressed the idea of possible litigation with the state and suggested that they go into executive session to discuss this matter further. Carol Morris made the suggestion that if we waited until the next council meeting then she could research Mr. Ruffo's ideas.

Councilmember Dick thought that delaying the decision a week probably would be of no great consequence but delaying it for any length of time could create an uncertain situation. Mr. Hoppen further clarified that this was not the most perfect "deal" but he felt that we would not get certainty out of this and this is all that we were going to get. Mr. Hoppen suggested council not to delay this decision.

Councilmember Franich suggested that we contact those applicants that are ahead of us on the list to see if we could work an agreement to share the costs. Mr. Hoppen stated that since none of the applicants that are before us on the list have spent any money to get their permits acted on so far, that he didn't believe that they would share any costs with us now, especially since they are closer to getting their applications reviewed. Councilmember Ruffo said that after a little discussion with Mr. Ekberg, that that suing the state would cost far more than the cost of the contract and he would follow Mr. Hoppen's recommendation. Mr. Hoppen further expressed that he did not see any reason to be beholden relative to our subsequent actions to any outside organizations. He felt that we were better off giving ourselves a free hand. There is \$250,000 in the ending fund balance for water that he did not want to desperately intrude on, but maybe we can conserve and in some way minimize the impact.

The Mayor expressed concern that there was no guarantee at all and Mr. Hoppen further explained that there were not many good examples but just the evidence that they responded this quickly says that they would like to have some success with this process, although we have no guarantee. Further deliberation about cost sharing took place. Mr. Hoppen stated that strategically there is no reason for the other applicants to participate in cost sharing since the city's moratorium has been publicized.

MOTION: Move to take the staff's recommendation to approve entering into the agreement with the Department of Ecology as presented and amended in the amount of fifty-four thousand, six hundred twenty-five dollars (\$54,625.00).
Ruffo / Ekberg -

Councilmember Franich expressed his concerns that we are giving the Department of Ecology an open-ended check and felt that this was a pathetic way for the state to do business and he could not support this motion.

Councilmember Conan also expressed his opinion that he was in agreement with Councilmember Franich but felt that the state has us "over a barrel" and that we must do something and he felt that it is an unfortunate situation. He stated that maybe connection fees could be a way to pay for this, even though we have the funding.

Carol Morris pointed out that before everyone voted, there a couple changes on page 2 of the memo of Ecology's comments should read, "following the Department of Ecology's review of the draft ROE's, Golder will incorporate Ecology's comments and edits into their work product and Golder will then prepare final ROE's incorporating these revisions.

Ms. Morris also stated that there is a typo on the next page and it needed to be fixed as there is no subsection G-I.

Mr. Hoppen stated that there are fixed costs to our water system that we cannot avoid regardless of the number of connections that we have. He posed the question to council, "are we going to be better off with fewer or greater connections?" Mr. Hoppen further stated that there was no risk to the water rates if you take a long view and as Councilmember Ruffo said, "we have the opportunity to do something or just wait and see until Ecology processed the permit in maybe 2-3 years to see what happens." He went on to explain that we don't know what fixed costs that we'll have to absorb in the future which could drive rates up beyond our expectations.

Mr. Conan stated that he knew that we have to do this, but was not happy that the state was pretty much making us do this essentially by dragging their feet and not doing their job and making us pay to do their job.

Mr. Hoppen further stated that he can't believe that there is a statute that actually authorizes us to do this, but understood the Washington Water Law and how they thought of it from their bureaucratic perspective.

Mayor Wilbert expressed that she was not in favor of this and believed that we are tossing money to the wind and this won't get us any closer to the end result.

Mr. Dick also expressed that he too, did not like this either. He went on to state that the length of time that we have been vigorously pursuing getting permission to do what we have in place and getting DOE to move forward. He mentioned that he was encouraged when the Legislature decided to split the applicants into two lists and thought that it was going to benefit us. He went on to say that he thought that when DOE said that when they were going to spend the money that was appropriated for them to process ten times more applications that they ever had before, that they might have actually meant it. He further stated his disappointment with the numbers that staff presented and that in spite of all the extra effort that the Legislature threw at it, which probably wasn't enough, but at least it was an effort, and now felt very disappointed and frustrated to see that they aren't moving faster. He thought that this is worth moving forward on and encouraged the staff to find out what we could do that is outside the box. We added that the city needs to do this and be assertive with the state and try and encourage them to move faster and devote real effort to the problem. He further stated that it is important enough to the community to do this and is in support of this. He said that it is a modest expense and none of us feel like we ought to have to spend it, but \$53,625 to try to get a decision which we are fairly confident about seems to be money well-spent. He hoped that we could get others to participate and bear this cost, but it may be that some of the other developers in the city who will benefit from the water will also share in the cost with us.

Mr. Hoppen stated that the chief beneficiary is the small person and would hope that other entities like Master Builders might see fit to donate to this. He went on to say that it would only be appropriate.

Mr. Franich expressed that every time that we give in to this sort of tactic, we are not keeping the feet to the fire, we are actually helping to take the feet away from the fire. Mr. Hoppen agreed that there was some truth to Mr. Franich's concern, only to the extent that you actually believe that DOE operates like a person, like a rational decision making body. He said that we hired a lobbyist this year, which was money well spent. He further explained that it had opened his eyes to the true reality of the way that things work in Olympia, and DOE is a lot closer to that than we are. He further stated that he didn't think that DOE operated as a rational decision maker, rather they operate based on many environmental factors that surround them from other entities within the state and Legislature.

Mr. Picinich had an opportunity to express his dissatisfaction and frustration with DOE and stated that he would like to postpone this vote tonight and wait until the next

meeting. He suggested that staff talk to Washington Water and Rainier View and hold off for another two weeks.

The Mayor asked if she should now call for the question. Mr. Vodopich asked if the motion included the corrections that the city attorney had mentioned. Mr. Ruffo stated that he would amend the motion to make sure that all corrections were included.

MOTION: Call for the question.
Conan – Six voted in favor.

MOTION: Move to take the staff's recommendation to approve entering into the agreement with the Department of Ecology as presented and amended in the amount of fifty-four thousand, six hundred twenty-five dollars (\$54,625.00).
Ruffo / Ekberg – Four voted in favor, Councilmembers Franich and Picinich voted no. The motion carried four to two.

There were no further comments and the special City Council meeting ended at 6:45 p.m.

CD recorder utilized:

Disc #1 Tracks 1 – 10.

Jim Franich, Mayor Pro tem

Maureen Whitaker, Assistant City Clerk