

OFFICE OF THE CITY MANAGER
DES MOINES, IOWA

ITEM 94

CITY COUNCIL COMMUNICATION 97-043
JANUARY 20, 1997 AGENDA

| SUBJECT: | TYPE: | SUBMITTED BY: |
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| ORDINANCE AMENDING CITY CODE— ESTABLISHMENT OF STORMWATER MANAGEMENT UTILITY | ◆ RESOLUTION ORDINANCE RECEIVE/FILE | HAROLD E. SMITH, CITY ENGINEER TERRENCE L. TIMMINS CITY SOLICITOR |

SYNOPSIS —

Council approval is recommended of an ordinance amending Chapter 21, Subchapter 8 of the City Code, entitled "Establishment of Stormwater Management Utility," by adding and amending certain definitional provisions, to clarify the intended scope of application of the stormwater management charge, all in response to an appeal filed by Jann Realty with respect to its property at 1901 Bell Avenue.

FISCAL IMPACT —

Adoption of the ordinance will assure the continued application of the stormwater management charge on a comprehensive basis throughout the City, and will ensure continued revenues for the utility at current levels.

RECOMMENDATION —

Approval and adoption of ordinance amending Chapter 21, Subchapter 8 of the City Code, entitled "Establishment of Stormwater Management Utility."

BACKGROUND —

Appeal of Stormwater Charge by Jann Realty

Effective on July 1, 1996, pursuant to Ordinance No. 13,217 adopted on July 24, 1995, the City's stormwater management charge was increased from \$3 per month per Equivalent Residential Usage (ERU) to \$4 per month per ERU. That rate increase appeared on the August 1996 bills which the Des Moines Water Works sent to the "contributors and users" of the stormwater management utility system. Under the City's stormwater management ordinance, the owner or occupant of a property subject to the stormwater management charge may appeal the calculation of that charge "within 90 days after any billing showing a recalculation of" the charge.

During the latest stormwater utility appeal period, which ended November 31, 1996, the utility received an appeal from Jann Realty requesting that application of the stormwater management charge be discontinued as to its property at 1901 Bell Avenue, and requesting a refund of all charges paid by Jann Realty since inception of the utility in 1994.

Jann Realty's appeal was initially reviewed by the Engineering and Legal Departments, and was denied. Jann Realty then filed a further appeal with the City Manager, as allowed by the stormwater management ordinance. Jann Realty's appeal was based on its assertion that it did not meet the definition of a "contributor or user" of "the City's stormwater drainage system," and could, therefore, not be charged, in that stormwater from its property is directed into privately-owned channels and

storm sewers on its property, which then connect to other privately owned storm sewers, which, in turn, discharge into Gray's Lake. Part of the Gray's Lake property is privately owned and is leased to the City, while the City owns the remainder of Gray's Lake.

Upon further review of Jann Realty's appeal, staff recommended, and the City Manager concurred, that the appeal should be granted in recognition "that the ordinance does not provide absolute clarity on" the definitional issue raised by Jann Realty in its appeal. On that basis, staff negotiated a settlement with Jann Realty, pursuant to which:

- a) Jann Realty's claim for a refund of charges already paid for the property at 1901 Bell Avenue would be paid, but retroactive only until the August 1996, billing;
- b) the stormwater charge will not be reinstated as to that property until City Council enactment of an ordinance adding and amending necessary definitions clarifying the application of the stormwater management charge as to Jann Realty's property; and
- c) Jann Realty would be afforded an opportunity to lobby against the enactment of the ordinance clarifying the application of the stormwater management charge.

Ordinance Clarifying Application of Stormwater Management Charge

The Jann Realty appeal afforded staff the opportunity to review the stormwater management ordinance to determine if the original intent of imposing the stormwater management charge upon all properties within the City had been carried out. As a result of that review, staff determined that questions could arise as to the application of the stormwater management charge to properties near the Des Moines and Raccoon Rivers which may not drain directly into a City-owned storm sewer, or which may not be directly protected by a flood control levee. On that basis, staff determined that it would be appropriate to add definitions for "stormwater drainage system" and "flood protection system" to the ordinance, and to amend the definitions of "contributor or user" and "stormwater management utility system."

Under the proposed ordinance, "**stormwater drainage system**" would be defined to mean "the system of publicly or privately owned or operated rivers, creeks, ditches, drainage channels, pipes, basins, street gutters, and lakes with the city. . . through which or into which stormwater runoff, surface water, or subsurface water is conveyed or deposited." The ordinance would define "**flood protection system**" to mean the system of levees, flood walls, floodgates, storm sewer gatewells, and stormwater pumping stations lying adjacent to rivers, creeks, and streams within the city. . . , including associated control and operating equipment and facilities whether adjacent to such rivers, creeks, or streams or remotely located, which are intended to provide flood protection to properties adjacent to such rivers, creeks, and streams." The ordinance would amend the definition of "**stormwater management utility system**" to include both the flood protection system and the stormwater drainage system. Finally, the ordinance would amend the definition of "**contributor or user**" to mean "any person, firm, corporation or other entity or organization owning, operating, or otherwise responsible for property within the city. . . which directly or indirectly discharges stormwater, or surface or subsurface waters, to any portion to the stormwater management system, including direct or indirect discharges to the city's stormwater drainage system, or which is directly or indirectly protected by the city's flood protection system or stormwater drainage system."

With the proposed amendments to the ordinance, all properties which contribute directly or indirectly to the stormwater drainage system or are protected by the stormwater drainage system or flood protection system will be included under the ordinance. This definition revision would apply to all property along the rivers as well as upland properties. If enacted, these definitional changes would, without question, make the City's stormwater management charge applicable to the Jann Realty property at 1901 Bell Avenue, and all other properties similarly situated.

Policy Considerations Supporting Application of Stormwater Management Charge to Jann Realty Property

In negotiating settlement of the Jann Realty appeal, City staff members took the position that the intent of the stormwater management ordinance was that all properties within the City are served in one way or another by the stormwater management utility, and that all properties should, therefore, pay the stormwater management charge. The attorneys for Jann Realty, on the other hand, argued that since stormwater from Jann Realty's property at 1901 Bell Avenue did not flow into a City-owned storm sewer, Jann Realty derived no benefit from the stormwater management utility and should not be required to pay a stormwater management charge for that property.

This argument ignores the multiple functions of the stormwater management utility, and the fact that properties in the City derive benefit and services from the utility in a variety of ways. The stormwater management utility has three primary functions:

- (1) development, operation, and maintenance of the stormwater drainage system;
- (2) development, operation, and maintenance of the flood protection system; and
- (3) development, operation, and maintenance of a regulatory system and stormwater management system improvements directed at protecting and preserving water quality in all lakes, basins, rivers, streams, and creeks within the City of Des Moines.

It is staff's position that if a property derives benefit or services in any of these three functional categories, it would be appropriate to apply the stormwater management charge to that property. In the case of Jann Realty, it is staff's view that Jann Realty derives benefit and services from the stormwater management utility in at least two of the three categories.

First of all, although stormwater from Jann Realty's property at 1901 Bell Avenue drains into privately owned and operated storm sewers, and then into the privately-owned portion of Gray's Lake, Jann Realty still derives benefits from the City's stormwater drainage system, in that the City's stormwater drainage system actually protects the property at 1901 Bell Avenue from being flooded by stormwater coming onto that property from upstream. There are approximately 382 acres of property in the watershed, including a large portion of the Wakonda Golf Course, which drains through the Jann Realty property. In 1976, Jann Realty's predecessor in interest, Massey-Ferguson, approached the City to modify the stormwater culvert which comes under Bell Avenue from the south. Massey-Ferguson was concerned with the appearance of the ditch into which the culvert drained, and very likely with the possibility that its parking lot could flood if a high enough volume of water came through that culvert. The City worked with Massey-Ferguson to pipe the ditch and to design an overflow structure at the end of the culvert to divert excess water into a concrete drainage channel, thus providing adequate drainage and reducing the risk of flooding on the company's property. The function of the stormwater management utility in such circumstances would be to regulate drainage in that watershed to protect the Jann Realty property from upstream drainage, to regulate drainage over Jann Realty's property to assure that the watershed continues to have an adequate outlet, and to protect properties downstream from the Jann Realty property from excessive stormwater flows.

The proposed ordinance would clarify this issue by defining the City's stormwater drainage system to include private storm sewers and drainage channels, such as those constructed on the Jann Realty property. By including such privately owned or operated drainage facilities within that definition, the City can regulate such facilities and thus achieve one of the functions of the stormwater management utility, which is to assure adequate drainage for its citizenry. The Jann Realty property, as well as properties upstream and downstream from the Jann Realty property, benefit from the City's performance of that function.

Finally, staff takes the position that Jann Realty, like all other property owners within the City, benefits from the stormwater management utility's water quality protection function. The ordinance establishing the stormwater management utility explicitly recognized water quality protection as a function of the utility, so that the City could utilize the revenues of the utility to meet its obligations in that regard under Federal law. Under Federal law, the City is required to obtain an National Pollutant Discharge Elimination System (NPDES) permit for its stormwater discharges, to begin studying those discharges, and to eventually implement a regulatory system and water quality improvements to eliminate pollutants from those discharges. Each property within the City discharges stormwater runoff which could adversely impact water quality in the various basins, lakes, streams, creeks and rivers within the City, and it is, therefore, appropriate that each property in the City be charged to defray the stormwater management utility's expense of studying and regulating those discharges, and of developing the necessary facilities to improve the quality of those discharges.

In this regard, special note should be taken of the fact that stormwater which is discharged from the Jann Realty property at 1901 Bell Avenue flows directly into Gray's Lake, and can impact the quality of surface waters in the lake and in the Raccoon River. Gray's Lake is a major public recreational facility within the City, which the City operates and maintains for the benefit of all its citizenry. As such, the City has a compelling interest in maintaining good water quality within that body of water, and a critical interest in regulating the quality of stormwater discharges into the lake. Under those circumstances, it is especially appropriate that Jann Realty contribute to the City's stormwater management utility to help underwrite those regulatory expenses.

Conclusion and Recommendation

Based on the foregoing, it is staff's recommendation that the City Council enact the ordinance amending the definitional provisions of the stormwater management ordinance to clarify application of the stormwater management charge. Staff has been informed that the Belin, Lamson, McCormick, Zumbach & Flynn Law Firm and company representatives of Jann Realty will appear before the City Council at the January 20, 1997, meeting to oppose enactment of the ordinance on policy grounds. As part of the negotiated settlement, staff agreed to recommend that the Council give the ordinance consideration at three separate meetings in order to afford Jann Realty a full opportunity to participate in the Council's consideration of the ordinance.