

MINUTES

MILWAUKIE CITY COUNCIL WORK SESSION
October 3, 2006

Mayor Bernard called the work session to order at 5:35 p.m. in the City Hall Conference Room.

Council Present: Councilors Barnes, Collette, Loomis, and Stone.

Staff Present: City Manager Mike Swanson, City Attorney Gary Firestone, Finance Director Stewart Taylor, Community Services Director JoAnn Herrigel, Program Coordinator Beth Ragel, and Engineering Director Paul Shirey.

Media: Dennis McCarthy, *The Oregonian*

Discussion of the intergovernmental agreement between the City and Metro regarding the Texaco/City Hall Parking Lot site

Mr. Swanson prepared a Q&A form that addressed the issues being raised and which he presented to the Neighborhood District Association (NDA) leadership. They will be posted to the City's website and be the subject of a *Pilot* article. The most important had to do with the issue of the City's closing the Farmers' Market, and the response was 'not a chance.' The City is not nor will be making plans to close the Market. During some of the discussions leading up to this, he thought the City could have been more clear about how much the Market did mean and recognized it as an important part of the City's past, present, and future. There were a number of specific questions regarding the actual intergovernmental agreement (IGA) between the City and Metro. He did not wish to go through and read all of the questions and answers but did go over some of the highlights. One of the issues was that the IGA did require that the City provide indemnification with regard to contamination. The site being a former gas station would have issues. Implicit in the question was that the City was being exposed to a great deal of risk. The piece that was not clear because it was not included in the agreement was that this was an issue that was worked on very hard during negotiations. The City did not accept the indemnification lightly. Metro will not buy property and assume the indemnification. It was a policy, and Metro comes to the table with \$750,000. In order to make the deal happen, someone has to accept the liability for contamination of the site. However, this was after Metro spent \$39,000 studying and tracking the contamination. They also spent about \$20,000 to decommission and remove the tanks. He talked with Phil Whitmore of the Centers program who informed him that Metro would remove any contaminated soil it finds prior to any final sale of the site. Milwaukie was left with the decision of accepting the indemnification which the staff felt at most was a \$40,000 risk in return for Metro's investment of \$750,000. The answer was that the City felt the risk had been analyzed and that Metro had minimized it to the extent possible through its significant investment.

Another issue was that the agreement was arrived at in a non-public process. If one looked at the record there was an initial hearing before the Council at which the agreement was considered. At that time his recommendation was that it was not in a form that was acceptable and that more work needed to be done. The complicating factor at the time was that the closing on the sale of the property

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from the Olson family to Metro was scheduled several days prior to the next Council meeting. The agreement would have been required in order to close. At the initial meeting the Council delegated to the city manager the authority to negotiate, and specifically mentioned the contamination issue, and to execute the agreement so it would be available at the time of closing. The City and Metro worked on the issues and arrived at an agreement acceptable to both parties, but the closing date was changed. Instead of executing the agreement according to his authority, he and Mr. Firestone talked and decided that the reason he had been given that authority no longer existed. There was adequate time to bring the matter before Council prior to closing. It appeared that someone looked at the first half of the record and saw that the city manager was given the authority to negotiate and sign the agreement but did not see the follow up which was it was brought back to Council because the reason for the delegation was no longer appropriate. The Council considered the agreement in an open public meeting.

Mayor Bernard asked which level of testing Metro had undertaken on the site.

Mr. Shirey replied that Metro did Level 1 which researched previous uses on the site and moved to Level 2 because there was an indication of contamination and soil staining from the gas station. Both steps were done.

Mayor Bernard understood Metro removed that tanks at which time more testing was done, and then DEQ certified the site. In the history of the station, there was a pile of dirt on the property for years after the tanks were replaced about 9 years ago. All of that soil was removed from the site once it was certified clean. He felt comfortable with the test results, and any further work would be at a low cost.

Mr. Firestone added there has been a series of investigations and actions on the site over the past 20 years. Tanks and soil were removed, and the owners had DEQ involved so there was oversight. Metro's was probably the third or fourth set of investigations, and to some extent the investigation by Metro relied on previous action with DEQ's continued involvement. There was a good set of knowledge regarding contamination on site.

Mr. Swanson added far from merely executing the agreement and the indemnification clause there was a great deal of research into the matter to determine if there was an acceptable level of risk for the City. It was determined the risk was minor in comparison to Metro's investment in the property. The agreement did provide for the joint offering to be made through an open competitive process. There was some concern about an unsolicited proposal. The City has committed to a joint open competitive process. In the past year there was a sole source proposal that the City did not accept because its commitment was for an open competitive process. Those were the instructions staff got from Council, and that was the direction staff continued to take.

There was some concern about the City's losing interest in the City Hall parking lot when Texaco was acquired by Metro. The City owns approximately half of the block. The City was given a 5% interest in the Texaco property, and there was no change to the City's 100% interest in the City Hall parking lot. Rather than the City's ending up with only 5% of the entire block, it ended up with approximately 52.5% of the entire site. Metro granted the City an undivided 5% interest because it was managing the property and needed the ownership interest to exercise authority.

Councilor Collette asked Mr. Swanson to respond to the comment that the Market was not consulted before anything happened. She understood there have been surveys in the past that were part of the public record.

Mr. Swanson understood there were contacts with Market representatives. Some felt they were not consulted, and the City was now putting together a meeting with the Market Transition Team that would seek input from the market stakeholders before any move was made. He believed the Market was consulted prior to anything happening, but they did not feel that way. The City would go back to ensure the Market was part of the process through the transition.

Councilor Loomis added his personal feeling about the situation was that with Mayor Bernard also being the Market business manager he assumed all that discussion had taken place. He thought the ball had been dropped. He just assumed it had been done since Mayor Bernard was also the Market business manager. He may have dropped the ball when he assumed that. That line got blurred a lot during Council because Mayor Bernard talks about the Market, and a lot of people think it is a City Market. Councilor Loomis supported the Market and wanted to keep it. He did not know what kind of deal there was with the parking lot and how to help. It was separate from the City. The City supports it through Riverfest, but the lines get blurred sometimes during discussions. He apologized for assuming that everyone had been notified.

Mayor Bernard thought it was a good assumption. There was information available at the community booth as soon as plans were formed. There was also information before the market started that the City was going to repave the lot to make it more usable for the Market which was a City investment. He and the market master, his partner in the Farmers' Market, had gone to the riverfront and discussed the matter. A transition team was formed, but he had not gone to each vendor because he did not feel there was enough information. There was nothing to predict at this point beyond what was at the community booth. There was information at the booth, but he agreed a better job could be done. He looked forward to working with the transition team.

Mr. Swanson also apologized and wanted to communicate how important the Market was to the City of Milwaukie. It was a very important contributor, and it has grown over the years where people could come together. It was a signature event 25 times each year. He took responsibility for not having communicated that effectively. He provided the question and answer sheet to correct any mis-impressions. The committee dealing with the Texaco/Metro site will work hard and not be rubberstamping anything. He was sure many of the committee members had their own ideas and signatures they would want to add to the project. The transition group would follow through on the Market.

Councilor Collette had heard the downtown parking issue as an impending perfect storm. She understood only 50% of the downtown spaces were used on a regular basis and asked where the unused spaces were located.

Mr. Swanson replied parking was a critical issue that occupied a great deal of time and thought. It was a question that would have to be answered. He did not feel it had been answered well to date. There were a lot of vacant spaces, but there were complaints about the 15-minute spaces in front of Curves for example. He understood that people liked to park close. It was a challenge. He had talked with Mike McMenamin about the Masonic Lodge, and the issue was parking. The City would find a resolution.

Mr. Asher would provide a map because a survey had been done. Staff was counting cars and spaces to determine where there was over- and under-capacity. The downtown was a lot larger than most people thought, so there were mental maps that there were cars everywhere. When one counted there were spaces. They may not be totally convenient, but there were spaces. On the other hand perception was a reality, and there was a parking problem. He did not intend to diminish that by saying there were spaces available. Ms. Mangle was in the process of updating and implementing the downtown traffic management plan. It was impossible to answer any question about downtown parking embedded in any one project. It was a much larger issue. It was an issue for the neighborhoods, Library, and all the projects. It was a project in and of itself, so he did not wish to oversimplify it.

Councilor Collette added when the buses were moved, that would free up some spaces.

Councilor Stone asked Mr. Swanson speak to the part of the IGA that talked about amending zoning and development ordinance regulations to permit a five-story – the IGA under recital C says the letter of intent was a landmarks signature mixed-use project of four to five stories with retail uses on the ground floor and residential uses on the higher floors. It went on to say on page three that the City would exert its best efforts to amend its zoning and development ordinance regulations to put a project on block 14 consisting of residential over ground floor retail a minimum of five stories. The concern was the height of the building, and the way it was written gave the City no flexibility. It did not say the City ‘may’ amend; it says ‘will.’

Mr. Swanson replied that question kept coming up. The concern has always been that this set it at five stories. In fact it said the City would exert its best efforts which was to do the best that it could. What really controlled it was the land use process and the code amendment process. This agreement cannot provide an exception to the code either in terms of building heights or zoning. If there were a change in height requirements, then it would have to go through the land use process which would include notice, opportunity to be heard, the Planning Commission process that could be appealed to the City Council and ultimately the Land Use Board of Appeals (LUBA). The agreement cannot change the height requirements or the code requirements. It did say if five stories was found to be the most potentially successful option, then the City would try to do everything it could to amend its codes, but it could not do that without going through the Planning Commission. There was a final appeal to LUBA with safeguards through the process.

Councilor Stone assumed it would go through the Planning Commission process, but this implied that it would be done.

Mr. Swanson explained that an agreement could not amend code provisions.

Councilor Stone knew it would have to go through a process. That said the City would go through the process and exert its best efforts to get this done. That was what it was saying. She saw no reason why the City would not do that because it was involved in this IGA with Metro. She heard a lot of people talk about that.

Mr. Firestone clarified the legal effect of the language. Essentially that did commit staff to use best efforts to whatever was agreed through the land use process. Since it would involve a zone change the Planning Commission would hear it initially, and the Council would make the final decision. That language did

impose some obligation on staff, but it did not impose any on the Council. When the Planning Commission and City Council hear it the decisions would be made on land use standards. The IGA would not be relevant and would not affect the discretion to decide the matter. Best efforts was not a commitment to action; if it did then it would say "shall approve" which it could not do. Best efforts was the language used in these agreements to commit the City staff ...

Councilor Stone had a technical question in terms of language use. Why would "the City may" not be used instead? That implied discretion on the City's part to do that. "Will" implied obligation to do it.

Mr. Firestone understood Metro was looking for an obligation that City staff would work on this and let the City Council make the decision.

Councilor Stone did not see a lot of upheaval in terms of the community when the decision was made. She almost felt the Council put the cart before the horse and should have involved the community a little further before settling into this agreement with Metro.

Mr. Swanson explained that was about to happen. A lot of what was heard was that this or that was going to happen. There have been no proposals. The committee has met once, and he felt there would be some strong public opinion coming out of that committee. If there was a proposal to go to five stories there would be a lot of public opinion heard. A lot of people thought they knew what was going to happen, but there was nothing yet. This was still a blank slate. There would be a number of processes in which people would have an opportunity to provide their input.

Councilor Stone had a question about the 5% interest in title to the property. That was the Texaco piece. The City owned the other half of the block, but the interest was really 52.5%.

Mr. Swanson said the City owned half of the block – the City Hall parking lot. Additionally it had a 5% interest in the Texaco lot. He had that 2.5% because it was half the block. The ownership of the entire block was 52.5%. There were two tax lots. The City owned 100% of the City Hall parking lot, which was a separate tax lot. Metro owned 95% of the other half of which the City owns 5%.

Councilor Stone did not understand why it would not be 55%.

Mr. Swanson replied was looking at it as the whole block. The City had 5% of half of the block which was 2.5%.

Councilor Stone said theoretically in terms of block 14 the City owned the most interest. What kind of positions did that put the City in in terms of having a little more control over the agreement and what happened there.

Mr. Swanson responded that Metro did listen to the City and took into consideration what it had to say. Metro was spending \$750,000 out of its Urban Centers money, and there were certain things they would have to see in order to justify that expenditure. Metro would have to see a level of their program element met, or otherwise the City and Metro would have to sit down and talk about what was going to happen.

Councilor Stone would like to see a copy of their program elements. Did the City not have more clout?

Mr. Swanson replied that he has found that Metro wanted to work with the local communities. That was not formal clout. There was a point beyond which the City could not push because that would mean that Metro was spending the

money in contradiction to what they have budgeted for. He would provide a description of the program to everyone.

Mr. Firestone added effectively in this situation neither party could do anything regarding the entire block without the participation of the other. In effect that gave each side the right to say 'no.' If Metro proposed something that was not acceptable to Milwaukie, then it would not happen without the City's approval and concurrence and vice versa. Milwaukie did have clout because it could say 'no', but Metro also had its own requirements.

Councilor Collette commented that 8 of the 9 people on the committee were Milwaukie residents. Metro appointed 4 people that included Dave Aschenbrenner and Gary Klein. The third was Brad Olson and the fourth was a real estate broker who had put together some of the more innovative small-scale mixed-use development around town that include projects she thought Milwaukie would be happy with. She felt the team was heavily weighted toward a project that would fit Milwaukie.

Mayor Bernard noted the committee was expanded to include a fifth member that was Mary King.

Additional Matters

Ms. Herrigel introduced Robert Russell who just joined the community services department as the code enforcement assistant.

The Council agreed to schedule a joint work session with the Metro Council on November 21, 2006.

Citizen Advisory Council Recommendation

Mr. Swanson said the memo before Council requested that it give direction on a recommendation regarding the Citizen Advisory Council (CAC) Wastewater Strategic Plan. This was before the City Council two weeks ago and it was deferred to this meeting because of time constraints. Since that time, he changed his mind but did not have the time to re-do the memo. He suggested setting a date outside the normal meeting schedule. He would provide a brief review followed by a brief CAC presentation on its process and recommendation. The meeting would then be opened up for testimony from interested citizens. With that he felt the Council would have more information in terms of it making its own recommendation. The CAC presented its recommendation to the Board of County Commissioners (BCC) on Thursday, and he understood the BCC had scheduled a hearing on October 26 and November 2. County Administrator Mantay said an evening meeting might be scheduled at which the BCC would take testimony. He suggested the Council meet to prepare a recommendation that could be forwarded to the BCC for its process that would begin October 26.

The group agreed to hold a special meeting on October 19, 2006 at 6:00 p.m.

Mr. Swanson felt there were a lot of people who would like to provide testimony. The Council may deliberate toward a decision, and notice would be provided in the newspaper and on the website.

Councilor Stone had been frustrated that the group did not convene as a Council before it talked publicly in terms of a work session to talk about the pros and cons before hearing public testimony. With the issues the Council had in the past that would have been helpful to have an understanding of the issue as a Council. She felt more prepared when she listened to public testimony. The Council still needed to deliberate because it might hear something that would

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make the group change its mind. That was the point of public testimony. She liked feeling prepared and had an understanding of both sides of the issue when it went forward.

Mayor Bernard thought the Council had an opportunity to have those questions answered.

Councilor Collette suggested another combined work session. This issue more than most had been considered in depth as a group. She had no problem taking 30 minutes or so prior to the special session.

Mayor Bernard agreed that would be a good plan.

Councilor Stone had read everything the other Councilors had read and had attended the meeting. The Council has not talked about this as a group.

Councilor Loomis commented the issue was not new. The decision may be new. He agreed with Councilor Stone that Councilors should be able to express how they feel in an informal discussion. A perfect example was the IGA. He assumed everyone had read it at length, but he did not remember it.

Councilor Barnes noted that she and Councilor Loomis had been excused from that meeting and did not vote on the matter.

Councilor Stone had a question about the IGA that was considered in September when there were three Council members at the meeting. She asked if that was actually in the packet or if it was handed out at the meeting on that day. She did not believe it was in the packet and that the Council got the IGA at the meeting.

Councilor Collette recalled it was discussed at a couple of meetings.

Mr. Swanson said it was not in the packet delivered one week prior to the Council meeting. It was delivered later or sent via e-mail.

Councilor Collette said it was discussed at an earlier meeting.

Councilor Loomis recalled telling Mr. Swanson at the first meeting to go forward with the IGA.

Councilor Stone asked if that was the September 20, 2005 meeting.

The Council agreed to discuss the CAC recommendation at the October 17, 2006 work session and to hold a special meeting on October 19, 2006.

Mr. Swanson provided copies of a letter from the Oregon Department of Transportation (ODOT) regarding a left-turn signal at Oak Street and Hwy 224.

Councilor Loomis distributed copies of the art that would be installed at the entrance to North Clackamas Park.

Mr. Firestone announced an executive session pursuant to ORS 192.660(2)(h) to consult with legal counsel concerning legal rights and duties regarding current litigation or litigation likely to be filed.

Mayor Bernard adjourned the work session at 6:31 p.m.

Pat DuVal

Pat DuVal, Recorder