

MEMORANDUM TO COUNCIL

November 25, 2003

Create a local improvement district to construct street improvements in the SW 19th Avenue Local Improvement District. (Hearing; Ordinance; C-10004)

I. SUMMARY

On November 19, 2003, the Council conducted a hearing to consider the creation of a local improvement district to construct improvements on SW 19th Avenue. A second reading of the ordinance is scheduled for December 3, 2003.

Notices of an LID formation were mailed by the City Auditor on October 28, 2003. The notices indicated that the deadline to submit written remonstrances was at 5:00 PM on November 12, 2003.

On November 19, 2003, attorney Jason Sieminski of Davis Wright Tremaine hand-delivered a letter at the Council hearing, one week after the filing deadline, objecting to formation of the local improvement district. (See a copy of the letter as Attachment 1.) The letter was submitted on behalf of the owners of two of the five properties within the LID, representing 36.7% of the assessable square footage of the district. This letter is not properly a remonstrance. It was received after the filing deadline. Also, the owner of these properties had previously agreed to waive rights to remonstrate against the formation of an LID for street improvements on SW 19th Avenue.

A timely remonstrance was received from the owner of one of the five properties, which represents 27.6% of the assessable square footage of the local improvement district. This remonstrance is addressed separately in Exhibit E of the SW 19th Avenue LID Formation ordinance. City Council retains jurisdiction over formation of the local improvement district since the total remonstrance level is less than the 60% threshold set by the City Charter.

II. SPECIFIC RESPONSES TO THE LATE OBJECTION

The late objection was submitted on behalf of Scott Edwards, the owner of property at 8205 WI/ SW Barbur Blvd. State ID #1S1E21CB 3200; Tax Account #R991211240; tax lot 3200, previously tax lot 124; Auditor's record #134161 (the "north parcel"); and on behalf of Cora Edwards, the owner of the property with State ID #1S1E21CB 3900; Tax Account #R991210910; tax lot 3900; previously tax lots 91 and 110; Auditor's record #134160 (the "south parcel") at WI 8201-8205 SW Barbur Blvd. Mr. Sieminski filed the objection on behalf of both property owners.

A portion of only the north parcel is proposed for assessment. The south parcel is not proposed for assessment. A waiver of remonstrance was signed by the previous owner of these two parcels, Richard Edwards (now deceased), on December 31, 1991. A copy of the waiver is attached as Attachment 2. Davis Wright Tremaine

has represented the property owners of these parcels in regard to the Council's consideration of a previous proposal to form a local improvement district for this street.

ISSUES RAISED BY THE LATE OBJECTION

Issue No. 1: Cora and Scott Edwards did not receive proper notice of the formation of the SW 19th Local Improvement District.

Findings:

- a. Notice of the LID formation was provided in accordance with the provisions of the City Code. The City Auditor mailed notice of the LID Formation Hearing on October 28, 2003, to the owner of each benefited property, including Scott Edwards and Cora Edwards, within the proposed district based on Multnomah County property tax records as of the filing date of the ordinance. (See Exhibit A of the SW 19th Avenue LID Formation Ordinance.) Posting notice occurred on October 28, 2003, and legal notice was published of the formation occurred on November 3 and November 4, 2003.
- b. Subsection 17.08.070.A.4 states that "A record shall be kept of the mailing, posting and publication of any notice required by this Ordinance. Any mistake, error, omission or failure with respect to publication, posting or mailing notice shall not affect City Council's jurisdiction to proceed or otherwise invalidate the local improvement district proceedings when notice is provided by at least one of the methods in this Section." Even if the mailed notice was not properly delivered, notification was provided by the other two means acceptable under the City Code.
- c. The City's records indicate that Mr. Edwards, the owner of record for the north property, was sent notification of the proposed LID on August 19, 2003, when petitions were originally circulated. Mr. Edwards verbally acknowledged receiving the petition in a September 25, 2003 telephone conversation with Andrew Aebi, Local Improvement District Administrator for the City of Portland. Notice was sent on September 26, 2003, when the petition to form the Local Improvement District was determined to be valid. Mr. Edwards attended the Resolution of Intent Hearing held on October 22, 2003, at which he testified in opposition to the proposed LID. At this hearing, Mr. Aebi testified to City Council members, and to the audience, that an LID formation hearing would be held in November if Council passed the Resolution of Intent for the SW 19th Avenue LID, which was in fact the case.

Issue No. 2: Cora and Scott Edwards request that Council accept their objections as a remonstrance.

Findings:

- a. A waiver of remonstrance was signed by Richard B. Edwards on December 31, 1991 before a notary public. (See Attachment 2.) In the waiver, Mr. Edwards agreed "not to remonstrate against the street improvements and the assessment of this property for its proportionate share of the cost thereof." The waiver encompassed Tax Lot 124, now the north parcel. The waiver is binding upon the owner of property and all subsequent purchasers, transferees and assignees. The waiver was recorded with Multnomah County. Scott Edwards subsequently became the owner of the north parcel. Because of the prior waiver, the letter dated November 19, 2003 cannot serve legally as a remonstrance even if it had been filed in a timely manner.
- b. No motion was made by a member of City Council at the first reading of the LID Formation

Ordinance on November 19, 2003 to accept this letter as a remonstrance, nor to waive Subsection 17.08.070.B, which requires that a remonstrance be submitted at least seven (7) calendar days prior to the LID Formation Hearing.

- c. Section 9-403 of the City Charter states: "If an objection, remonstrance or petition is signed by the agent or attorney of any property owner, the agent or attorney's authority to sign shall be filed with the Auditor within the time provided for the remonstrance or petition or the signature shall be disregarded." Mr. Sieminski, acting as an attorney on behalf of Scott Edwards and Cora Edwards, filed the letter of objection on behalf of both property owners. After the filing deadline, an authorization to act on behalf of Scott Edwards was received. No filing was made regarding Mr. Sieminski's authority to act on behalf on Cora Edwards in the formation of this LID. (See Attachment 3.) In both instances, the Charter requires that the request for treatment as a remonstrance be disregarded. In regard to Cora Edwards, the filing required by the Charter was never made. In regard to Scott Edwards, the Charter directs that the late filing must be disregarded.

Issue No. 3: The ordinance presented to the City Council to form the SW 19th Local Improvement District proposes the same square footage-based assessment as was rejected by the City Council in 1998.

Findings:

- a. In 1998, the entire portion of the north parcel was proposed for assessment. The ordinance now before the City Council proposes to assess only 11,558 square feet of the 48,717 total square feet of property in the north parcel. The Bureau of Environmental Services (BES) has agreed to fund all of the stormwater related-costs associated with the project. As a result of both the adjustment in the assessed square footage, and the funding from BES, the estimated amount of assessment at \$46,525.97 is 43% less than the February 1998 estimated assessment \$81,884.20. While the proposed assessment methodology of square footage remains unchanged, the majority of the square footage in this property would not be assessed.
- b. The proposed LID is much smaller than the 1998 proposal, as it omits the portion of SW 19th Avenue that extends between SW Evans to SW Moss, as well as SW Evans Street from 19th Avenue to Barbur Blvd. The only aspects in common between the proposed LID and the one proposed in 1998 is the portion of SW 19th Avenue from the south line of Evans to 230 feet south. The project scope of the proposed LID is approximately one-quarter the scope of the 1998 proposal.

Issue No. 4: The proposed LID allocates a substantial portion of the assessment upon the property owned by Mr. Edwards.

Findings:

- a. The 1998 LID proposal initially proposed to fully assess the entire square footage of both the north parcel and the south parcel. The current proposal exempts the south parcel from assessment altogether. The current proposal also exempts a significant portion of the north parcel, based upon the following:
 - 1. The proposed assessment only includes the north parcel to the maximum depth of the property with the second-largest depth from the street (which in this case is the south parcel); and

2. The proposed assessment includes an exemption for future right-of-way, allowing for the possibility of SW 19th Avenue being widened in the future if the Barbur Boulevard Rentals building were to be redeveloped; and
 3. An exemption for the possibility of SW Evans Street being extended west of SW 19th Avenue.
- b. The current proposal assigns only 36.7% of the benefit to the north parcel. No benefit is assigned to the adjacent south parcel. The two properties combined therefore only have 36.7% of the benefit. Therefore, the combined assessment is only 36.7%, despite the properties having a combined 50% of the abutting frontage along SW 19th Avenue.
 - c. Local improvement district assessments are an incurred charge, and are not considered taxes.

Issue No. 5: There is no access to the two properties, due to prior development on the north parcel and the surrounding neighborhood, design restrictions, and the absence of need.

Findings:

- a. Although the owners are related, Multnomah County's property records show that the north parcel and south parcel property are separate parcels held under different ownership. While the north parcel currently has access through the south parcel, this need always be the case. If there is any future change in ownership, access to the north parcel could occur by SW 19th Avenue. The Portland Office of Transportation previously confirmed that SW 19th Avenue would be available to provide legal access to the north parcel for future development of this property. (See a copy of this memorandum as Attachment 4.)
- b. The north parcel is currently used by Barbur Boulevard Rentals for commercial uses. The north parcel is currently zoned as R1. Commercial uses are not an allowed use in R1 zones. The owners, therefore, are operating as a nonconforming use. The City's zoning code provides for the continuation of nonconforming use unless the use is abandoned. Current access is from SW Capitol Hill Road via the south parcel, but would change to SW 19th Avenue if there were a change to the use.

Issue No. 6: The City Council should reject the LID because there is no special benefit to the properties.

Findings:

- a. Section 17.08.070.C.2.e of the City Code requires a determination on the assignment of benefits to properties within local improvement districts upon formation. The Code requires that the formation ordinance state "the assessment methodology or methodologies by which benefit within the local improvement district will be assigned." The City Code requirement is consistent with Oregon law, which prescribes that LID assessment methodologies be based on benefits to properties within the LID.
- b. The portion of the north parcel that is not zoned R1 is not proposed for assessment. Approximately 36,540 square feet or about 75% of the total area of the property is zoned R1 residential. The remaining portion of the property zoned General Commercial (CG) is not proposed for assessment. Access to the north parcel is currently from SW Capitol Hill Road

through the south parcel. The street improvement will serve future redevelopment as well as its related traffic impacts. According to the *Trip Generation, 6th Edition*, published by the Institute of Traffic Engineers in 1997, multifamily dwelling units generate an average of 6.63 trips per dwelling unit. At a range of 22 to 66 residential units, the improved street would therefore handle between 146 and 438 trips per day, which is significantly more than the current trip volume on SW 19th Avenue. According to data in the Bureau of Maintenance's Pavement database on file as of 11/21/03, SW 19th Avenue south of Evans currently has a trip count of 45 trips per day. Therefore, the north parcel would generate between 76% and 91% of the 146 to 438 trips per day, but is proposed to be assessed only 37.6% of the total LID costs being assessed to property owners.

- c. Analysis of special benefits from local improvement districts considers both current and future development of the site. The zoning on the north parcel would allow for development of up to 22 to 66 residential units. While the current use of the property does not anticipate access by SW 19th Avenue, the legal right of access exists. The north parcel could use SW 19th for reasonably anticipatable future uses.
- d. The benefit to the north and south parcels under the proposed LID will include, but is not limited to:
 - 1. Improved access for emergency vehicles, including police, fire and ambulances. The street is currently unsafe for vehicles traveling over 5-10 mph. The street improvements will include paving, curbs, drainage and sidewalks. This will make the street safer for all motor vehicles. The paving also makes it possible for emergency vehicles to enter and exit faster because they would not have to slow for potholes thereby allowing for faster emergency response times; and
 - 2. Improved access for pedestrians and cyclists. Pedestrians using the sidewalks will be separated from motor vehicles; and
 - 3. Improved mass transit access. There is a transit stop on Barbur Boulevard, located approximately 200 feet southwesterly from its intersection with SW 19th Ave. Studies have shown that persons will walk one quarter of a mile to a transit stop. With improved pedestrian access to these parcels, it is more likely that there will be increased usage of mass transit; and
 - 4. Eliminating responsibility for maintenance for the abutting portion of SW 19th Avenue, which extends for 112 feet on the north parcel and 118 feet on the south parcel.
- e. The benefit to the north parcel under the proposed LID will include, but is not limited to improved access, providing for use of this property upon any future residential redevelopment. This use is reasonably anticipated because of the property's R1 zoning. Under the City's zoning for medium density multi-dwelling, between 22 and 66 apartment units could be placed on the site. The City's zoning code allows for additional units in exchange for additional amenities.

Issue No. 7: The City Council should reject the LID because three-fifths of the area, in terms of property ownership oppose the LID.

Finding:

- a. Two of the four property owners signed petitions in favor of the LID representing 35.7% of the

district's assessable area. The north and south parcels, encompassing 36.7% of the district's assessable area, are subject to a waiver of remonstrance, provided by the property owner in 1991. (See Attachment 2.) As a result, 72.4% of the district's assessable area are counted in favor of the LID. Only 27.6% of the total assessable area remonstrated against the formation of the LID.

- b. Although the City Council revised Title 17, effective January 10, 2003, it did not direct that all previously provided waivers be released and no longer be relied upon. Without a waiver, property owners could be asked to pay for street improvements on their own at the time of development. By waiving remonstrance, the cost of the improvements is delayed and the owner is given the opportunity to share the costs with others within a local improvement district.

Issue No. 8: The waiver was for a street improvement planned by the City of Portland and designed to serve this property, and does not encompass street improvements "benefiting" the property.

Findings:

- a. Section 17.42.010 of City Code requires the owner of the north parcel to maintain the abutting 112 linear feet of SW 19th Avenue and the owner of the south parcel to maintaining the abutting 118 linear feet of SW 19th Avenue until the street is improved to City standards and is accepted for maintenance by the City. Recent efforts by another property owner to maintain the portion of SW 19th Avenue on the other side of the centerline abutting his property have proven to be ineffective. Improving the street will prevent stormwater runoff from the public right-of-way of SW 19th Avenue from encroaching upon properties abutting the street, and would eliminate maintenance responsibilities all of abutting property owners, including the Edwards.
- b. The north parcel is specially benefited by the street and storm sewer improvements. The north parcel is 48,717 square feet in size and abuts SW 19th Ave along the entire length of the eastern boundary of the property. This property, which is over one acre in size, predominantly drains towards SW 19th Avenue, exacerbating drainage problems on the street. The street improvement is designed to mitigate the impacts of stormwater runoff from all of the properties in the district, including those owned by the Edwards. As noted above in response to Issue No. 3, BES has agreed to fund all of the stormwater related-costs associated with the project.

Issue No. 9: No evidence was offered that the square foot method of apportionment reasonably and accurately reflects the "special benefit" to individual properties within the proposed district. This is inconsistent with Section 17.12.020 of the City Code.

Findings:

- a. Section 17.12.020 of City Code was repealed by Ordinance No. 177124, effective January 10, 2003. Therefore, any restrictions that it may have previously included are no longer controlling. Portland City Auditor's Office website, as of November 25, 2003 (<http://www.portlandonline.com/auditor/index.cfm?&a=19141&c=28845>)
- b. The LID Formation Ordinance states, "The Local Improvement District Administrator recommends that Council apportion local improvement district costs on a square footage basis. Each parcel of land within the local improvement district receives special and peculiar benefit from the project in the amounts set forth in Exhibit D." Finding No. 9.

- c. Exhibit E of the LID Formation Ordinance does not include any specific findings with respect to Mr. Edwards' property because no objection was received by the filing deadline. However, since the question of benefit was raised at the LID Formation Hearing, there are specific benefits that will accrue to the north parcel as noted above in response to Issue No. 6.
- d. Section 17.08.070.D.6 of the City Code charges the City Council with responsibility for final determination of the district's boundaries, apportioning costs among the included properties and the assessment formula.

Issue No. 10: There has been no showing that the estimated apportionment meets the "rough proportionality" test weighing the impacts of the proposed development and the burden imposed on the properties.

Findings:

- a. The proposed improvements to SW 19th are not conditions imposed by the City upon development of these properties. Rather, the assessment is for recovery of the improvement costs, to improve the street to City standards. The theory underlying LID assessments is that the improvements for which they are levied support recovery in proportion to the special benefits bestowed. King v. City of Portland, 38 Or 402, 419, 63 P 2 (1900), aff'd, 184 US 61, 46 L E 431, 22 S C 290 (1901). Indeed, a property cannot be assessed unless it is specially benefited. PCC 17.08.070.D.3; Paulsen v. City of Portland, 16 Or 450, 459, 19 P 45 (1888), aff'd, 149 US 30, 37 L E 637, 13 S C 750 (1892). The legal tests for "special benefits" examines whether the property additionally gained in convenience, accessibility, and use of the property. State Highway Comm. v. Bailey, 212 Or 261, 306, 319 P2d 906 (1957). Evidence of special benefit is inferred from the enhancement conferred by the improvement to abutting properties. Stanley v. City of Salem, 247 Or 60, 64-66, 427 P2d 406 (1967). The benefits to be considered are not limited to present uses; future and reasonably anticipated prospects may be considered. Western Amusement Company, Inc. v. City of Springfield, 274 Or 37, 45, 545 P2d 592 (1976). The "rough proportionality" test referred to in Mr. Sieminski's letter is simply not applicable.
- b. As noted above in response to Issue No. 6, there are varied and numerous benefits that will be enjoyed by the north parcel that are proportional to the financial "burden" imposed by the LID, in ways that are relevant to the formation of an LID. Under various forms of ownership, the Edwards' properties consist of 113,745 square feet. 67,570 square feet of these properties are proposed to be included in the LID. However, only 11,548 square feet of this property is proposed for assessment.

RECOMMENDATION

This LID would provide street improvements at a greatly reduced cost for the benefit of the neighborhood and specifically for the properties abutting the street. Therefore it is the recommendation of the Local Improvement District Administrator that this local improvement district be formed by the City Council, which retains jurisdiction to do so.

Respectfully submitted,

Andrew H. Aebi
Local Improvement District Administrator

Attachments:

- Letter from Jason Sieminski dated 11/19/03 (Attachment 1)
- Waiver of remonstrance signed by Richard Edwards on Dec. 31, 1991 (Attachment 2)
- Fax from Jason Sieminski to Andrew Aebi received 11/21/03 (Attachment 3)
- Memo from Carl Snyder to Andrew Aebi dated 10/14/03 (Attachment 4)