



Sam  
Adams  
Commissioner

August 12, 2010

184090

## MEMORANDUM TO COUNCIL

Susan D.  
Keil  
Director

Create a local improvement district to construct street and stormwater improvements from south of NE Whitaker Way to north of NE Prescott Ct in the NE 136th Ave Phase I Local Improvement District (Hearing; Ordinance C-10036)

Two letters were received prior to Council's adoption of Resolution No. 36803 on July 28, 2010; however there was not sufficient time for staff to prepare a response. Council was informed at this hearing that these issues would be addressed in a memorandum to Council to be distributed at the subsequent LID Formation Hearing, which was subsequently scheduled for August 25, 2010.

Neither of these letters is a remonstrance under Section 17.08.070 of City Code and therefore need not be overruled as remonstrances. Section 17.08.070 of City Code and Section 9-403 of the City Charter prescribe the procedure for remonstrances, which may not be submitted until after Council adopts a resolution initiating local improvement district formation proceedings. Both letters were received prior to Council adoption of Resolution No. 36803 initiating local improvement district formation proceedings for the NE 136th Avenue Phase I LID.

### **I. SPECIFIC RESPONSES TO THE SUBSTANTIALLY LETTERS FILED BY STEVE MORASCH ON BEHALF OF PUBLIC STORAGE AND BY MIKE ECKSTEIN ON BEHALF OF SUPREME STEEL.**

A letter was received after 5:00 PM on July 27, 2010, from Steve Morasch, of counsel to Public Storage, owner of the property with State ID #1N2E23AC 1900; Tax Account #R700700550; Property ID #R253969 at 13515 NE Prescott Court; legal description REYNOLDS MTN VIEW, LOT 28-31&36-43; future lien #149539 (see Attachment 1).

A substantially similar letter was received after 5:00 PM on July 27, 2010 from Mike Eckstein, representative of Supreme Steel (a.k.a. Camron Western Constructors, Inc.), owner of the property with State ID #1N2E23AC 3700; Tax Account #R700700130; Property ID #R253954 for the vacant lot south of 13650 NE Whitaker Way; legal description REYNOLDS MTN VIEW, LOT 7 EXC PT IN ST, LOT 18; future lien #149530 (See Attachment 2).

## ISSUES RAISED BY THE LETTERS

Issue No. 1: When our client signed the waiver of remonstrance, it was for “street improvement costs” but not right-of-way acquisition.

Findings:

- a) Public Storage signed a Declaration of Deed Restrictions signed on October 20, 1981 (of which a copy is included in the record of Resolution No. 36803). Therefore, Public Storage cannot remonstrate against formation of a local improvement district to improve NE 136th Avenue. No such deed restriction or waiver of remonstrance applies to the Supreme Steel property.
- b) The Declaration of Deed Restrictions stated that “...future owners shall be also obligated to pay their proper share for the development and improvement of said abutting street.” Therefore, Public Storage cannot remonstrate against formation of a local improvement district to improve NE 136th Avenue. Right-of-way acquisition is a normal and customary aspect of street improvement projects, albeit not on all street improvement projects. No such deed restriction or waiver of remonstrance applies to the Supreme Steel property.
- c) Section 17.28.020 of Portland City Code states: “The owner(s) of land abutting any street in the City shall be responsible for constructing, reconstructing, maintaining and repairing the sidewalks, curbs, driveways and parking strips abutting or immediately adjacent to said land.” This requirement is irrespective of whether a current or prior owner of said property has signed a waiver of remonstrance, deed restriction, etc.
- d) Policy 11.10.G of the Portland Transportation System Plan states: “Include sidewalks on both sides of all new street improvement projects, except where there are severe topographic or natural resource constraints.” This requirement is irrespective of whether a current or prior owner of said property has signed a waiver of remonstrance, deed restriction, etc.
- e) The Federal Americans with Disabilities Act (ADA) of 1990 requires that all facilities designed, constructed, or altered by, on behalf of, or for the use of a public entity must be readily accessible and usable by individuals with disabilities, if the construction or alteration is begun after January 26, 1992. “Facility” includes a new street or road. It includes both indoor and outdoor areas where human-constructed improvements, structures, equipment or property have been added to the natural environment.<sup>1</sup> This requirement is irrespective of whether a current or prior owner of said property has signed a waiver of remonstrance, deed restriction, etc.

---

<sup>1</sup> 28 C.F.R. 35.104.

- f) The existing 50' right-of-way is not sufficient to build all elements of the project including, but not limited to:
1. A street of sufficient width, which will support current and future uses; e.g., in this location in a freight district, to provide a width adequate for truck turning movements into driveways; and
  2. Curbs, which will contain stormwater falling in the street area so that it is properly drained in lieu of on adjacent private property; and
  3. Sidewalks, which will provide pedestrian access to and along the properties benefiting from the local improvement, and to provide a safe area for pedestrians to walk or use wheelchairs in lieu of on private property or travelling in the street area, and with the sidewalks preferably separated from the curb to avoid obstructions from vehicles parked against the curb (e.g., mirrors, opening car or truck doors, etc.).

Issue No. 2: Public Storage will be paying to purchase land that it already owns.

Findings:

- a) Any right-of-way acquisition will be made with financial compensation to the property owner, unless the property owner voluntarily elects to donate the right-of-way in lieu of compensation. Because compensation will be made at fair market value, the above statement is neither relevant nor applicable to the takings clause of the Fifth Amendment to the United States Constitution.
- b) Costs of right-of-way acquisition will be allocated on the same basis as the LID assessment methodology; i.e., by benefit to property. While the City may not assess right of way acquisition costs only against individual properties from which right of way was acquired (unless there was a requirement to dedicate right-of-way prior to the formation of the LID or a voluntary agreement to donate right-of-way), the City may apportion the costs of acquiring right of way among the benefited properties in accordance with the LID assessment methodology.<sup>2</sup> There is no prior right-of-way dedication requirement for either Public Storage or for Supreme Steel.
- c) The improvements to be made, including but not limited to, streets, curbs, sidewalks and stormwater drainage, will be designed to serve current and future usage of this property. Therefore the right-of-way taking will be for a project that will provide special benefit to this property; i.e., this project does not involve a right-of-way taking for a project with more generalized community benefit for which local improvement district funding would not be appropriate.

<sup>2</sup> See, e.g., ORS 310.140 and *Hutchinson v. City of Corvallis*, 134 Or App 519, rev den 321 Or 512 (1995).

Issue No. 3: Sidewalks are unnecessary on this project.

Findings:

- a) A property owner who tendered petition support for the project specifically requested that sidewalks be constructed to serve his business.
- b) Mixing pedestrians and vehicles in the same shared area would arguably be most dangerous in a freight district, where long vehicle lengths would maximize the potential for truck drivers not to see pedestrians walking in the roadway area. The City has a duty and obligation to provide a safe pedestrian environment on NE 136th Avenue to the extent that right-of-way can be acquired and there are no topographical or other constraints to building sidewalks.
- c) See finding “c” in response to Issue No. 1.
- d) See finding “d” in response to Issue No. 1.
- e) See finding “e” in response to Issue No. 1.

Issue No. 4: We are also willing to consider an arrangement by which the private property owners themselves undertake engaging a private contractor to improve NE 136th Avenue without the involvement of the City.

Findings:

- a) The improvements could be constructed under a permit in lieu of by an LID. However, the City will only issue a permit to a single property owner or entity. If multiple property owners were to be involved, a legal entity similar to a homeowners’ association would need to be formed. Such an entity is not currently in place.
- b) Absent an HOA-type arrangement, a private construction effort offers no guarantee that improvements would ultimately be constructed. Further, only the City would have the necessary eminent domain authority to acquire right-of-way in the event that property owners were not willing to donate their right-of-way.
- c) The LID offers a cost-effective mechanism not only for property owners to share in the costs of the project but also ensuring that all benefitting properties participate in lieu of one or more properties getting a “free ride”, thereby increasing the costs on the remaining financially-participating property owners.
- d) Financing over 5, 10 and 20 year terms will be offered to all property owners in the LID. A permit job would require property owners to pay for costs up-front without financing, and also to provide a financial guarantee to the City in exchange for receiving a permit from the City Engineer to construct improvements in the public right-of-way.

**II. RECOMMENDATION**

It is the recommendation of the Local Improvement District Administrator that the City Council form the NE 136th Avenue Phase I Local Improvement District at the second reading on September 1, 2010.

Respectfully submitted,

A handwritten signature in cursive script that reads "Andrew H. Aebi".

Andrew H. Aebi  
Local Improvement District Administrator

**Aebi, Andrew**

---

**From:** Morasch, Steve [SMorasch@SCHWABE.com]  
**Sent:** Tuesday, July 27, 2010 4:32 PM  
**To:** Aebi, Andrew  
**Subject:** RE: NE 136th Avenue LID: Public Storage - Agenda Item #1082 for Council Consideration on 7/28/10 at 9:30 AM  
**Attachments:** 3767\_001.pdf

Andrew,

Our client has asked me to attend the hearing tomorrow and submit the attached letter. I will be bringing copies of the letter to the hearing but wanted to make sure you got it.

Thanks,

Steve

**Steve C. Morasch**

Schwabe Williamson & Wyatt  
700 Washington Street, Suite 701  
Vancouver, WA 98660  
Direct Dial: (360) 905-1433  
Facsimile: (503) 796-2900

---

**From:** Aebi, Andrew [mailto:Andrew.Aebi@portlandoregon.gov]  
**Sent:** Monday, July 26, 2010 11:36 AM  
**To:** Morasch, Steve  
**Cc:** Benjamin, Keith S.; Christopher Tucker (ctucker@publicstorage.com)  
**Subject:** NE 136th Avenue LID: Public Storage - Agenda Item #1082 for Council Consideration on 7/28/10 at 9:30 AM

Steve et al,

The first link below is to this week's Council agenda. The second link below is to the agenda item for the NE 136th Avenue LID.

<http://www.portlandonline.com/auditor/index.cfm?c=26997&>

<http://www.portlandonline.com/auditor/index.cfm?c=50265&a=310413>

If you have any questions or wish to schedule an in-person meeting to discuss any questions you might have, please contact me at 503-823-5648.

Regards,

Andrew Aebi

8/12/2010

184090

Andrew Aebi, Local Improvement District Administrator, City of Portland  
503-823-5648 fax: 503-823-7371 e-mail: [andrew.aebi@portlandoregon.gov](mailto:andrew.aebi@portlandoregon.gov)  
Note: e-mail address changed on 3/02/10  
[www.portlandoregon.gov](http://www.portlandoregon.gov) - services menu - local improvement districts

---

To comply with IRS regulations, we are required to inform you that this message, if it contains advice relating to federal taxes, cannot be used for the purpose of avoiding penalties that may be imposed under federal tax law. Any tax advice that is expressed in this message is limited to the tax issues addressed in this message. If advice is required that satisfies applicable IRS regulations, for a tax opinion appropriate for avoidance of federal tax law penalties, please contact a Schwabe attorney to arrange a suitable engagement for that purpose.

---

NOTICE: This communication (including any attachments) may contain privileged or confidential information intended for a specific individual and purpose, and is protected by law. If you are not the intended recipient, you should delete this communication and/or shred the materials and any attachments and are hereby notified that any disclosure, copying or distribution of this communication, or the taking of any action based on it, is strictly prohibited. Thank you.



Vancouvercenter, 700 Washington Street, Suite 701, Vancouver, WA 98660 | Phone 360.694.7551 | Fax 360.693.5574 | www.schwabe.com

**STEVE C. MORASCH**  
Admitted in Oregon and Washington  
Direct Line: 360-905-1433  
E-Mail: smorasch@schwabe.com

July 28, 2010

Portland City Council  
City Hall  
1221 SW 4th Ave.  
Room 110  
Portland, OR 97204

Re: NE 136th Avenue Local Improvement District  
July 28, 2010 Hearing

Dear City Council:

We represent Public Storage, the owner of the property located at 13515 NE Prescott Court. We understand that you will be considering initiating the local improvement district ("LID") formation proceedings for a segment of NE 136<sup>th</sup> Avenue on which Public Storage has frontage, but no current access. We request the City Council consider not forming the LID or alternatively we request the City reduce the scope of the proposed LID such that the financial obligations of the property owners along NE 136<sup>th</sup> Avenue are minimized.

#### **Right-of-Way Acquisition**

As you may know, the improvements to NE 136<sup>th</sup> Avenue require a roughly five foot wide strip of land from all the property owners. When our client signed the waiver of remonstrance for this project in 1981, it was for "street improvement costs" but not right-of-way acquisition. See Declaration of Deed Restrictions recorded at Book 1562, page 1866 of the Official Records of Multnomah County. To the extent that the proposed LID requires acquisition of right-of-way, it is beyond the scope of the waiver of remonstrance in the 1981 Declaration of Deed Restrictions. Our client hereby remonstrates against any LID that includes right-of-way acquisition.

Further, the LID is set up such that the District, through the City, acquires this land from the property owners and then requires the same property owners to pay for all elements of the acquisition after the improvements are completed. In other words, Public Storage will be paying to purchase land that it already owns. Furthermore, the expense of doing so is more than the simple valuation of the property itself, as Public Storage will be responsible for paying for the



improvements, damages, appraisal, insurance, negotiation, and contingency to acquire the land needed for the project.

The Takings Clause of the Fifth Amendment is applied to the states through the Fourteenth Amendment. The Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 US 40, 49 (1960)(emphasis added). Where is the fairness in acquiring property from a land owner, paying the landowner for it, and then turning around and assessing the land owner for the costs of acquiring the land? It is fundamentally unfair to require a land owner to pay for the costs of acquisition of the land owner's own property.

### **Proposal**

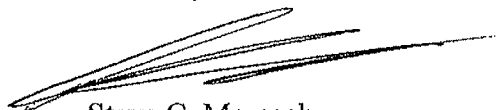
From what we can determine, the need to acquire private property for the improvements is a result of the City including sidewalks along NE 136<sup>th</sup> Avenue. We would prefer the City not form an LID at all. If the City insists on forming an LID, we believe the industrial nature of the immediate and surrounding area suggests sidewalks are unnecessary; therefore we request the City Council modify the LID to reflect the removal of sidewalks from the project. This will save property owners the significant costs associated with acquiring the land for the sidewalks, and the costs of constructing the sidewalks themselves.

We are also willing to consider an arrangement by which the private property owners themselves undertake engaging a private contractor to improve NE 136<sup>th</sup> without the involvement of the City in an attempt to further reduce the costs of the improvements. That would make the LID unnecessary, but we would need time to have these discussions. Delaying the formation of the LID would allow time for this discussion.

Finally, we have talked with the other property owners and we believe all of them – even those that support formation of an LID – are in support of doing the improvements without a sidewalk to eliminate the need of property acquisition. We request that the City not form the LID, or if the LID is formed, it should be without sidewalks so that property acquisition is not necessary.

Thank you for your consideration of this matter.

Sincerely,



Steve C. Morasch

SCM:lrb

**Aebi, Andrew**

---

**From:** Mike Eckstein [MikeEckstein@canronpdx.com]  
**Sent:** Tuesday, July 27, 2010 6:59 PM  
**To:** Aebi, Andrew  
**Subject:** Portland City Council - July 28, 2010 Hearing; NE 136th LID  
**Importance:** High  
**Attachments:** PCC-LID.pdf

184090

Dear Sir,  
Attached please find our letter concerning tomorrow's agenda item.

CANRON  
WESTERN CONSTRUCTORS INC.  
4600 NE 138<sup>th</sup> Ave  
Portland, Oregon 97230

Phone: 503-255-8634  
Fax: 503-253-3907

July 27, 2010

Portland City Council  
City Hall  
1221 SW 4th Ave.  
Room 110  
Portland, OR 97204

RE: NE 136<sup>th</sup> Avenue Local Improvement District  
July 28<sup>th</sup>, 2010 Hearing

Dear City Council:

I'm General Manager of the Supreme Steel operation (Carron Western Constructors, Inc.) located at the property owned by Supreme Steel at 4600 NE 138<sup>th</sup> Ave. We understand you will be considering initiating the local improvement district ("LID") formation proceedings for a segment of NE 136<sup>th</sup> Avenue on which Supreme Steel has frontage, but no current access. We request the City Council consider not forming the LID or alternatively, we request the City reduce the scope of the proposed LID such that the financial obligations of the property owners along NE 136<sup>th</sup> Avenue are minimized.

As you may know, the improvements to NE 136<sup>th</sup> Avenue require a roughly five foot wide strip of land from all the property owners. When the waiver of remonstrance was signed for this project, it was for "street improvement costs" but not right-of-way acquisition. To the extent that the proposed LID requires acquisition of right-of-way, it is beyond the scope of the waiver of remonstrance, and we hereby protest against any LID that includes right-of-way acquisition.

Further, the LID is set up such that the District, through the City, acquires this land from the property owners and then requires the same property owners to pay for all elements of the acquisition after the improvements are completed. In other words, Supreme Steel will be paying to purchase the land that it already owns. Furthermore, the expense of doing so is more than the simple valuation of the property itself, as Supreme Steel will be responsible for paying for the improvements, damages, appraisal, insurance, negotiation, and contingency to acquire the land needed for the project.

It is fundamentally unfair to require a land owner to pay the costs of acquisition of the land owner's own property.

CANRON  
WESTERN CONSTRUCTORS INC.

It would appear, the need to acquire private property for the improvements is a result of the City including sidewalks along NE 136<sup>th</sup> Avenue. We would prefer the City not form an LID at all. If the city insists on forming an LID, we believe the industrial nature of the immediate and surrounding area suggests sidewalks are unnecessary. Therefore, we request the City Council modify the LID to reflect the removal of the sidewalks from the project. This will save property owners the significant costs associated with acquiring the land for the sidewalks, and the costs of constructing the sidewalks themselves.

We are also willing to consider an arrangement by which the private owners themselves undertake engaging a private contractor to improve NE 136<sup>th</sup> without the involvement of the City in an attempt to further reduce the costs of the improvements. That would make the LID unnecessary. We would need time to have these discussions; delaying the formation of the LID would allow time for this discussion.

Finally, we have talked with the other property owners and we believe they are supportive of doing the improvements without a sidewalk to eliminate the need of property acquisition. We request that the City not form the LID, or if the LID is formed, it should be without sidewalks so that property acquisition is not necessary.

Thank you for your consideration of this matter.

Yours truly,

A handwritten signature in black ink, appearing to read 'M. Eckstein', with a long horizontal line extending to the right.

Michael Eckstein, General Manager

Canron Western Constructors, Inc. (Supreme Steel)