

Minutes
Water Resource Management Utility Meeting
(Formerly Stormwater Utility)
June 10, 2008

Please note: Minutes are unofficial until approved by the Water Resource Management Utility (formerly Stormwater Committee) at their next regularly scheduled meeting.

Present: Alderman Ken Harenda, Alderman John Hopkins, Alderman Bill Moore, Mayor Jack Chiovaturo and Commissioner Jim Kern

Others Present: Greg Kessler (Director of Community Development), Nicole Hewitt (Division Engineer), Cathy Schwalbach (Stormwater Engineer), JP Walker (City Engineer), Chuck Trevorrow (Stormwater Supervisor), City Attorney Mark Attorney Blum & Sue Hanley (Administrative Supervisor Utilities & Streets)

Meeting called to order at 4:51 pm by Alderman Harenda. Roll call and declared a quorum with all members present.

Old Business

SW 01-08 Minutes from May 13th Meeting

Motion by Alderman Hopkins to approve the minutes from the May 13th Water Resource Management Committee meeting. Seconded by Commissioner Kern and upon voting the motion passed unanimously.

SW 07-06 Resident Request for Corrective Action Regarding Drainage Concerns

Remains tabled

SW 09-08 Comprehensive Plan Update

Harenda: We received a timetable at the last meeting for the Master Plan Update and Greg is here tonight to give us an overview of the process and how it ties into the Water Resource Management Utility.

Kessler: I handed out an email update for the 2020 Comprehensive Plan Update. We have had several Neighborhood meetings as well as other meetings and will be having an Agricultural and Undeveloped Landowners Focus Group meeting on July 9th for landowners who filled out the farming survey to discuss the farming in New Berlin, what kind of crops they are growing and what kind of issues they are seeing. The Comprehensive Plan Steering Sub-Committee meeting is July 16, 2008 and Mr. Kern is the representative from the WRM Committee. I also passed out a copy of the Neighborhood Area Planning map, which was also sent out to everyone in New Berlin. Each of the 10 neighborhoods will have 2 meetings to discuss various issues. You are more than welcome to attend any of these meetings.

We are working on several components of the plan including a water conservation plan and how that fits into our 3-dimensional water resource planning efforts and will be using the City of Waukesha's plan as a model to develop our plan. One of the consultants that is part of the team that we hired is Applied Ecological Services and their job is to focus on 3 areas within the City and analyze those environmental resources, their features, wetlands, floodplains and so forth and help us develop alternative ways in dealing with stormwater management, alternative BMP's (Best Management Practices) such as looking at the use of rain gardens and retention swales. They conducted their site inventory a few weeks ago and are evaluating the data and the information we provided them and we hope to have some recommendations in the near future. They will be developing model framework for us as we move forward and how we management and regulate development using a green footprint and be more green in general with how we regulate any new development in the City. The email includes a summary going back to April 10th of this year and explains the extent we have gone to notify the public, including a

website and quarterly notices on utility billing on where to find information. We are going to develop an email group for the Water Resource Management Committee so it is easier for us to email you updates, since this committee is a partner in the process.

Hewitt: I spoke with HNTB and they are currently working on the BMP Maintenance tracker and compiling data for that so that we can track the maintenance of all of the facilities in our area, including private and public. They are reviewing the SLAMM Analysis that we did and looking at the hotspots, focusing on the BMP's and looking at the old Stormwater Management Plan and what updates need to be done on that. They are also reviewing the Utility as a whole.

Kessler: There are a lot of pieces to the puzzle that we are juggling at this point. There is no new documentation in terms of plan elements or draft chapters that I can share with you. They will be shared with you when they are available and after they have gone through the Subcommittee and your WRM Committee they will be made available on the website for the public?

Harenda: On the maintenance tracker, are we working with Nick Roethel (IT Director)?

Hewitt: Catey Barnish (Mapping Coordinator) is coordinating directly with HNTB as far as the data exchange.

Kessler: If you ever have any questions or comments, please email or call me. Don't wait until you are frustrated and it is 6 months down the road. There are a hundred of pieces to this puzzle that we are trying to juggle and manage as a team with our consultants and staff and I don't always do the best job in the PR end of it with the to let the Committees and the partners know what is going on. I try to provide these updates, but at any point in time you have questions, please call me.

Moore: I assume most of the people who attended C & H meetings are business owners?

Kessler: Neighborhoods C was the neighborhood industrial park had about 50 people in attendance and it was a mixture with a strong component of businesses from the industrial park that attended and we generated some good discussion. Some people have attended every meeting.

Moore: H also was mostly manufacturing also?

Kessler: H was mostly the Town Corporate Park area, but there is also a sizable residential population in that area and there were probably more residential people that attended that meeting. We will go back to those neighborhoods once we formulate policies, programs, recommendations and draft chapters and some of these neighborhoods will have 3 meetings.

Moore: I just asked because I wanted to make sure both residents and businesses are represented at the meetings and give input.

Kessler: I sent out the email today and as part of the economic development component of this, we are expressly inviting in real estate brokers who are practitioners in New Berlin, selling and leasing buildings. We are also holding a SWAT analysis with a selected group of invitees of the region who are experts in economic development and business and who understand where southeastern Wisconsin is in terms of development. This will hit the business component. I will get you a copy of that email that I sent out.

Harenda: Please keep us informed.

Kessler: Right now we are in the gathering staff and have only had a couple of Subcommittee meetings.

SW 10-08 Update on Underground Storage at Eisenhower High School

Hewitt: The School District had this item on their agenda last night to present the easement document, but I have not heard whether there was any action on this item. Hopefully by the next meeting we should know and move forward.

Harenda: When we put this out for bid again, I assume we will be using similar specification and not changing any of the technology.

Hewitt: It will be basically the same bid package.

Harenda: Are you getting any feedback from the school district if they are looking at potential additional storage capacity? I know there are some limitations on what can do and can't do because of the sub continental divide?

Hewitt: I have received information back from the people that are analyzing what they are going to be doing as far as improvements and what they are looking at doing with this site, but in talking with Dr. Kreutzer they won't be able to move forward with that because of costs right now, so I think that is being put on the back burner and they are looking for us to move forward to what is proposed as of today. We will clarify that. So there wouldn't be any additional storage at this time.

Chiovero: Dr. Kreutzer said that they do have a facility plan and you are right, they don't know where they would get the funds to go through with that, but he was saying that if there is any additional storage that would be needed in the future based on their plans that we look at that? Have we looked at that?

Hewitt: They have supplied what they would like to do. I was supposed to be receiving a formal letter, I have not received that. I have received a document via email and have looked that over. It does not propose any additional storage in the actual facility, it is more or less proposing additional storm sewer to go to Sunny Slope Road.

Chiovero: OK. Dr. Kreutzer just wanted to make sure that he had covered all the bases. I know a lot of their storage issues and water issues are with some collapsed tiles going to Deer Creek. I just want to make sure if we need to make this thing a few feet larger or something like that.

Hewitt: As of now I have not received any proposals to add additional storage.

Chiovero: Can you follow up to make sure. I think they covered it. I know JP you were part of that facility team, I don't know if there was anything that came up that you are aware of. We just want to cover all the bases. I really would hate two years from now and say we really needed that thing to have X amount of additional storage and we didn't do it.

Hewitt: I will follow up on that.

Harenda: The City Attorney is here, is there anything on the language of the easement that needs to be looked at?

Hewitt: this has all been going through his office.

Attorney Attorney Blum: I have had conversations with their attorney. It is a different firm that was working with the District previously on this issue and we did discuss some modifications to our standard Stormwater Easement form and the changes they requested were agreeable to see and the changes I in turn wanted to see where acceptable to them. I emailed yesterday afternoon to them an agreement that was acceptable in principle to both sides. I think Nicole provided some answers to questions Dr. Kreutzer had about some specifics of the project. We haven't heard back as to whether they took action on it.

SW 11-08 Update and Discussion on Underwood Creek Project Status

Hewitt: The Underwood Creek project is a very long project and we went for DNR approval. They reviewed it but did not get approval for the entire project. This is the scaled back version of the actual

plan and we have met with the DNR and they seem agreeable with permitting this so now we have drafted a Chapter 30 permit for this project. What we are bringing before you today is whether or not we want to acquire temporary access agreements or permanent easements.

Harenda: What are the benefits and costs of going with a permanent easement?

Hewitt: A permanent easement we would have access to doing maintenance in those areas whereas a temporary easement, the property owner would be responsible for the ongoing maintenance. Typically now we do not do maintenance on these areas and do not have permanent easements. As far as the costs, I don't know we haven't worked out those numbers.

Harenda: We own this easement already correct?

Attorney Blum: You own the creek bed itself. The issue is that if you want to go in there and work, you need some access easements to do the work necessary. There is a cost in that regard. The issue is one of policy for the Committee in general. You have looked at the property owners or the business owners being responsible for maintenance and stormwater improvements. You have always had an agreement that says if they don't perform the maintenance, we have the right to access it for that purpose. That is usually in the context of a pond or something of that nature. The question is in this situation what do you want to do. If you leave it to the property owner to do the maintenance you may get some inconsistency in performance. If we do it on a regular schedule, there is a cost to the City to do the maintenance as well as the front end easement acquisition cost.

Harenda: The Utility in the past has left it to the property owners to maintain these. If we start doing one we have to do them all, but to do the actual construction we would get the temporary easement, do the work and then turn it back to the property owner to maintain.

Hopkins: This is basically Phase 2 of the project. The area in question was heavily flooded this weekend. I have to give a tip of the hat to the Street department, the Utility department and the Police Department for the work that they did. I don't know what the flooding would have been if we would not have gone through Phase 1. We are moving forward but there is still work to be done. From a cost standpoint we are probably better off going with a temporary easement and that is what I would recommend.

Kern: Do you have concerns going forward since you know how spotty maintenance is based on individual owners. What do you think if there is limited maintenance? You invest all of this money in the project, would you lose a lot of the benefit of the project if maintenance is spotty.

Hopkins: You take that chance. It is just like ditches, some people take care of them and some people let them get overgrown with weeds, etc. I think there is a danger of that, but we have to educate the people of the advantages of cleaning up their own property.

Kern: What kind of maintenance would it be? Cutting the lawn or would they be expected to go in the creek?

Hewitt: There would not be any work in the actual creek. It would typically be what they are doing now.

Hopkins: Keeping wood piles away from the creek. We actually had a shed go down the creek this weekend, which is obviously too close to the water.

Kern: Do you educate property owners what not to put near the creek, what to plant?

Hewitt: That is what we intend to do, especially when it involves erosion matting and things like that so they don't go out there and remove it and we have to go back and put it into place so there are a lot of issues that we try to educate them on.

Hopkins: I can guarantee you there are 3 landowners that we would have to go onto their land to do some work that would keep up their properties. The creek is getting dangerous close to their homes.

Harenda: I agree with Alderman Hopkins that we should look at a temporary easement. If we look at a permanent one, we would have to look at doing this across the City and we don't have the manpower to do that. We are doing more with PR to educate the people throughout the City, including the current newsletter about maintaining ditch lines, keeping debris out. I think Commissioner Kern makes a good point, I assume we were doing this on past projects. Every time we do a major project we should be putting a flyer or handout as maintenance guidance for property owners that about these areas, if you do all this, this is how we recommend how you maintain this. It is a very good idea.

Trevorrow: What has happened in the past, people have called in and said the City put this structure in or did ditching and they are going by hearsay. What I'm trying to get to, if present homeowners agree to this, when the properties are sold are the future buyers aware of it. When we get the mapping system, is there some way to throw up a red flag when the property is sold to notify the new buyers about the maintenance of these structures.

Attorney Blum: We are going to need a Temporary Limited Easement to do the work from the property owners. We can add a paragraph to the document that they acknowledge this is their responsibility to maintain once the work is completed by the City. That then would be recorded and would come up in a title search when someone buys or sells the property.

Moore: Are you planning on putting in any hard surface?

Hewitt: There is rip rap going in to stabilize the banks with erosion control matting behind that to stabilize the banks further up. No asphalt or concrete.

Moore: What is the plan with the Rhoda property where it looks like the house is right into the project area and within a few feet of the stream itself. How are you going to work around that house?

Hewitt: We will work from both sides and get the rip rap to stabilize the bank.

Moore: I wonder if anybody that puts their house that close to the stream should have some responsibility. I assume this is done at the City's expense?

Hewitt: At the Utility's expense.

Moore: I am just surprised that anybody would put their home that close to the stream and then expects the City...

Hewitt: The stream does move over the years, I am not sure when the house was built, and has encroached by erosion of the stream.

Hopkins: in this particular case the stream was actually further away from the house than it is now. The prior owner who died maybe 8 years ago lived alone; let that stream fill up with trees and debris that fell in there. We complained and couldn't do anything then. When he died Mr. and Mrs. Rhoda bought that property and he went in himself and took out all of the fallen debris. By then the channel had moved closer to his house and he has kept up that property since the day he has moved in.

Moore: OK. You don't feel any concern about the City taking care of that even though it close to his house?

Hopkins: Anything that the City can do to help stabilize that bank it would make them happy.

Harenda: A lot of the projects we are working on in the northwest side of the City are because things were done differently 40-50 years ago. We are taking corrective measures to resolve the flooding problems. With the movement of the stream itself after last weekend it may have shifted somewhat.

Hopkins: This house was built probably built in the early 50's.

Attorney Blum: Now that we are undertaking the application for the Chapter 30 permit there is apparently a requirement by the DNR even though the City is doing the work that the property owner needs to sign off on the permit. By doing so they make themselves responsible for whatever takes place in furtherance or in action upon the permit that is issued. My understanding there is some discussion about providing indemnification in the event that these people incur any liability as a result of this permit the City obtains and the work the City does that we would be protecting them from that. I just want to give the Committee the heads up; a violation of those permits can result in direction to take remedial action and could also contain penalties and fines that could be levied by the DNR. If the City is responsible why shouldn't we pay for that? That is probably something we can all agree on but the problem is if the property owner undertakes some action on their property that somehow results in a DNR enforcement action we could end up arguing as to whether it is the City's responsibility or something the owner undertook themselves. In order to get the Chapter 30 permit to do this work we apparently are going to give the property owners that sign on to this indemnification agreement, which could result in some exposure to the City depending on the circumstances and how this unfolds. There is that liability exposure.

Harenda: We still have our ordinances to enforce maintenance and upkeep.

Attorney Blum: Indeed. I am not saying there are not defenses; I don't want it to be a surprise if that situation arises.

Harenda: Is that the case on all prior Chapter 30 permits?

Attorney Blum: If is being done on private property then my experience in the past that the DNR does require the property owner to sign on even though it may be a 3rd party actually doing the work in furtherance of the chapter 30 permit. This is nothing unusual. I got a call saying can we put together some indemnification language and we have had a meeting with staff on this and I want to make sure the Committee understands this.

Moore: I see at least 2 homes, one being Rhoda and one being Cooper and to a certain extent the Kaufman home that are fairly close. The first two are on the outside curves and I can see the stream possibly eating away at that. Of course we have seen the horror pictures recently of the homes disappearing into the nearby stream. What if the damage occurs to homes because of the stream continuing its meander, then the people say the people just reconstructed this a few years ago and now it is damaging our homes so we are going to come against the City.

Attorney Blum: Anything can happen in terms of a claim being made, but as a practical matter, if we are stabilizing a stream bank and we are not redirecting the stream or requesting permission from the DNR to fill it or move it, we are just stabilizing what is there and that is the extent to what is done and during the course of the construction work that we don't do damage to the property otherwise I don't see where there is a reasonable likelihood of a claim being made under those circumstances.

Moore: They cannot come against the City.

Attorney Blum: Anyone can come with anything against the City. With that being said, do I think they have a likelihood of winning? No, because we are not moving the stream, we are stabilizing what is there, so as long as that is the action we are taking, it is a reasonable response for the City to make. I don't see how that could be construed as somehow being a substantial factor which would the test under the law in the property falling into the creek. This is an existing condition that these property owners have been dealing with for some time. Anybody who lives along a waterway knows, those banks can change, lakes

or streams for that matter and you always run that risk when you have water running through the property.

Moore: Are we doing this work in order to decrease downstream flooding, decrease flooding for these homeowners, what is our prime goal?

Hewitt: We picked the most significant problem areas along this stream as far as the erosion and bank deterioration to do work on because the DNR was not going to allow us to do work to the extent we wanted to along the entire stream, but because of permitting and requirements, and we could not afford the funding.

Moore: Are we trying to decrease flooding or stabilize the stream bank?

Hewitt: We are stabilizing the stream at this point at these specific locations.

Moore: If we are trying to stabilize the stream and not necessarily decrease flooding and don't stabilize the stream and somebody's home gets damaged, are we sure they can't come against us because we tried to stabilize the stream and it failed.

Attorney Blum: you are getting the DNR as well as Staff reviewing this to make a recommendation as to proceeding. It would seem to me it would be difficult where we obtained a Chapter 30 permit where the DNR agreed this is an appropriate way to deal with this situation and to protect the lands and the water course; I find it hard to believe there would be a basis for a claim on that. Again, can I guarantee it, no, but I just don't see it.

Moore: Once the work is done, does the DNR come and inspect?

Attorney Blum: I am sure they will be observing throughout the course of the project which is their normal procedure.

Moore: Do they then sign off on it?

Hewitt: They will release the permit and that basically releases us from being liable of the terms of the permit.

Attorney Blum: The DNR is issuing the permit saying that we can do this work in the waterway that they have jurisdiction for. The question is, are we approving the work as set forth in the approved plans and if we have, they will agree the permit has been complied with. It ends at that point. Is that a get out of jail free card? No, but you are making your best efforts in stabilizing this stream bank which is an aid of these property owners that live on the stream. Obviously it is still possible, weather being one of them, that you can get a lot of water and these efforts would not be sufficient. I don't think we are going to be penalized to make an attempt to try and deal with it.

Hopkins: Just for informational purposes. I think Cathy and JP can verify that this project has been the #1 project on this Committee's list for 5-6 years and we finally got it going into the second phase of what is planned.

Schwalbach: It was one of the highest priority projects in the Stormwater Management Plan.

Kern: The end result is to stabilize the stream. The end result should be less flooding.

Hewitt: Because of the stabilization there will be less erosion which would cause less sediment being carried down to other locations

Kern: Looking at the whole Underwood Creek project, there should be less flooding than prior to the project.

Mr. Walker: When you factor in the work we have done in Phase 1 which was debris clearing and cleaning of the box culvert to our eastern border, that work has significant impact on historic flooding issues, so there was a tremendous increase in protection because of that work. When you factor in this work that just adds to the protection.

Kern: When you add it all up, the intent of the project is to reduce the flooding issues.

Harenda: Are you looking for any action or just direction as to whether we want to go with temporary or permanent easements?

Hewitt: Direction at this point.

Harenda: Consensus wise, the committee would like to go with temporary at this time. We are not approving any motion on this for any Chapter 30. You are going to apply for this and bring it back at a later date correct? When is this work scheduled to be done?

Hewitt: Right. The timetable is all dependent on the permitting process and funding once we get the estimates.

Harenda: What is the timetable on the Chapter 30, later this summer or later this fall?

Hewitt: Once it is submitted it is 90 days which includes the public hearings.

Moore: One thing I don't see on the map is floodplain delineation.

Hewitt: I don't see it either. It is on other plans for the design and construction plans.

Moore: Are any of these homes in the floodplain?

Hewitt: Off the top of my head, quite a few of them are in the floodplain.

Hopkins: Or very close.

Moore: one of my concerns is people building in the floodplain and then homes in the floodplain saying City you have to do something about it. The only reason I bring this up is I hope as we look at other homes within floodplain that this doesn't provide such a precedence that we are always going to take care of homes within floodplains that should have known they are within floodplains.

Harenda: The point is we are stabilizing the banks here. The storms this weekend this would not have done much to abate the flooding within those areas, but our new construction of course we are not building in floodplains or flood fringes. We are dealing with past construction and have set priorities on these projects.

Hewitt: Just because we are doing work that helped that floodplain it also helped upstream people that are not in floodplains, it is not just benefitting people along that creek.

Hopkins: This whole area, Gatewood subdivision as an example drains into this area.

Motion to adjourn at 5:41 p.m. by Commissioner Kern. Seconded by Alderman Hopkins and upon voting the motion passed unanimously.

Respectfully submitted by Sue Hanley, Administrative Supervisor Utilities & Streets