

**BEFORE THE ARBITRATION SERVICE OF PORTLAND, INC.**

620 SW 5th Ave.  
Suite 1010  
Portland, Oregon 97204  
(503) 226-3109, 1-800-423-1216, fax (503) 226-3072  
www.arbserve.com

CITY OF STAYTON,	)	
	)	ASP No. 141222
Claimant,	)	
	)	
v	)	
	)	<b>SIXTH</b>
JCNW Family LLC,	)	<b>SUPPLEMENTAL AWARD</b>
	)	
Respondent.	)	

This Sixth Supplemental Award is entered in response to the information obtained at an October 10, 2016 hearing, conducted (1) to determine the status of the development and implementation of the temporary storm water drainage plan outlined in the Fifth Supplemental Award and (2) to further develop an appropriate remedy to address Respondent’s breach of key provisions of the Development Agreement.

**HISTORY**

The findings, conclusions, directives, requirements and goals set forth in the Final Award, as further developed through five supplemental awards, are devoted to guiding the parties – principally the Respondent – through the development of an appropriate remedy to the storm water issues created as a result of Respondent’s breach of the Development Agreement. The path taken is briefly summarized:

1. The Development Agreement was entered into between the parties in June

2013 after lengthy negotiations over the drainage of storm water.<sup>1</sup>

2. Development of the retention basin solution was guided by the agreement Respondent had entered into with the Santiam Water Control District (SWCD) and a Memorandum of Understanding the City had entered into with the SWCD – both of which restricted the diversion of water from the Phillips subdivision to waterways controlled by the SWCD.
3. The retention pond was constructed in October and November of 2013. The retention basin was not properly designed and it failed.<sup>2</sup>
4. The City initiated an arbitration action against JCNW for breach of the Development Agreement. The action was adjudicated in May of 2015 resulting in a Final Award being entered on August 12, 2015, finding that the

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<sup>1</sup> As discussed in the Final Award: “During the years leading up to the signing of the June 2013 Development Agreement, the City and Respondent had extensive discussions about how the planned stormwater drainage system for diversion of the water to Mill Creek would be paid for. It was anticipated by all concerned that the ultimate expense would be shared between the City, Respondents and others who would benefit. It was hoped that the sharing of the cost would be accomplished through a mechanism that required participation by all benefitted by the system.

In the spring of 2013, it became apparent that a funding mechanism could not be developed in time to accommodate the timeline the developers were working with. Rather than wait for the City to develop a funding mechanism, the representatives for the developer initiated a discussion around the development of a solution in the form of a retention basin to be constructed on what was designated as Tract A. This solution would allow the development to go forward in a timely manner.

The general requirements for this solution were set forth in the Development Agreement. The Development Agreement requires, in pertinent part, that (1) Respondent will manage stormwater coming onto Tract A from all City and Phillips’ property sources at the developer’s expense and in accordance with City standards and regulations and with the City approval of such management systems (see Ex #3), (2) Respondent would install on Tract A, an “on-site storm detention/retention basin and outfall structure . . .”

<sup>2</sup> As stated in the Final Award: “The design of this pond was based upon (1) infiltration tests conducted the previous summer and (2) a very rough estimate of the amount of water that would come into the basin from the Quail Run Subdivision. Facts regarding the lack of testing and flawed engineering were withheld from Claimant until revealed in this arbitration process. As discussed above, the design of the pond was flawed because the infiltration testing was inadequate and the estimates relied upon for water flowing into the basin from the Quail Run Subdivision were not based upon the collection of actual data from the site. Because the design was flawed, the retention basin failed to accomplish the ultimate objective of accommodating the infiltration of all water flowing into the pond except under the circumstances of a 50 year storm event. Finally, the retention pond was constructed based on a final design that was not approved by the City.”

Respondent had breached the Development Agreement.<sup>3</sup> Based on the findings and rulings set forth in the Final Award, a remedial plan was adopted.

5. The parties stipulated to the inclusion of a provision in the Final Award “granting to the Arbitrator continued jurisdiction over the issues raised in this arbitration action and . . . authority . . . to resolve any and all impasses between the parties that may arise relating to the implementation of the remedial plan.”
6. Given Respondent’s lack of progress in implementing the remedial provisions set forth in the Final Award, a Second Supplemental Award was adopted by the Arbitrator on October 26, 2015, authorizing what was called “a less complicated” and more tenable plan which promised to promptly address the storm water drainage issues before the winter rains began to fall for the winter of 2015-16. The new temporary remedial plan was to be implemented in two phases. The Respondent breached its obligation to implement the new temporary remedial plan.

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<sup>3</sup> “Based on the previously stated findings of fact and discussion, the Respondent is hereby found to be in breach of sections 1, 3 and 10 of the Development Agreement in the following particulars:

a. The storm detention/retention basin and outfall structure, provided for in section 12 d (3) of said Agreement, was constructed using a design not approved by the City, as required by sections 1 and 10 of said Agreement. The evidence supports the conclusion that said basin was built using a design not approved by the City.

b. The storm detention/retention basin and outfall structure was not constructed in conformance with City standards and directives, as required by section 3 of said Agreement. The evidence supports the conclusion that said basin was not built in accordance with the standards and conditions of approval clearly articulated by the City engineer during the plan review process (see Ex #31, pages 3 and 4 of 8; Ex #32, page 3 of 4; and Ex #33).”

7. On January 14, 2016, a Third Supplemental Award was adopted recognizing the fact that the remedial plan adopted in the Second Supplemental Award had failed: “Respondent has failed to take advantage of the opportunity extended to him in the October 26 Supplemental Award.” A new plan was adopted and additional requirements imposed on Respondent. The Arbitrator indicated that penalties would be imposed for non-compliance of the new obligations.
8. Respondent and affected property owner Roberts had not entered into any arrangement for the use of the Roberts property to accommodate run-off from the retention basin, the original punch list had not been completed, and improvements to the retention basin and weir could be made to improve the management of stormwater.
9. After the October 10, 2016 hearing, the punch list was completed and some work was initiated by Respondent to improve the function of the weir and improve ditches on the Sun property. Marion County has indicated that it is willing to work with JCNW to develop a stormwater drainage plan using the ditch along side Golf Club Road. No agreement has been reached between JCNW and the owner of the Roberts property or the SWCD.
10. On September 15, 2016, a Fifth Supplemental Award was adopted to address the information and issues presented and discussed at an August 5, 2016 status hearing. It was determined at the status hearing that the storm water drainage plan would not be built by October 2016, as a result of Respondent’s

failure to obtain the permission or easements from affected property owners. With the realization that the storm water plan could not be built by October, this supplemental award directed Respondent to promptly develop an emergency plan by working with the SWCD and affected property owners to develop a plan that would legally accommodate water spilling over the weir during the winter of 2016-17. Requirements were imposed on Respondent to urgently act to have a plan in place to address anticipated stormwater needs by November 1, 2016. The SWCD was identified as a “necessary participant” in the development of the temporary plan for the winter ahead. Respondent was warned that sanctions would be imposed for non-compliance. This award scheduled a status hearing for October 10, 2016.

11. On October 10, 2016 at status hearing was conducted. In addition to the parties, representatives from the following interests also attended and participated: the SWCD, Marion County, and adjacent property owner Roberts. It was learned at this hearing that (1) Respondent had a new plan to direct the storm water across the Roberts property into a ditch controlled by Marion County that runs along Golf Club Road (some of the water from this ditch would run north to Mill Creek and some of the water would run across private property to the Salem Ditch), (2) Marion County legal and public works representatives were learning about the extent of their potential involvement for the first time, (3) Respondent did not attempt to work out any arrangements for SWCD to accommodate stormwater for the coming

winter, (4) Respondent and affected property owner Roberts had not entered into any arrangement for the use of the Roberts property to accommodate runoff from the retention basin, (5) the original punch list had not been completed, and (6) improvements to the retention basin and weir could be made to improve the management of stormwater.

12. After the October 10, 2016 hearing, the punch list was completed and Respondent unilaterally, without a permit and in violation of the City Municipal Code, drilled an orifice in the weir, and made some effort to improve ditches on the Sun property. Marion County has indicated that it is willing to work with JCNW to develop a stormwater drainage plan using the ditch along-side Golf Club Road. No agreement has been reached between JCNW and the owner of the Roberts property or the SWCD.

### **DISCUSSION**

The various remedies developed through the Final Award and subsequent supplemental awards have not succeeded in addressing the consequences of Respondent's breach of the Development Agreement. At this stage, eighteen months from the date of the original arbitration hearing, it is time to move forward with a different remedy that will address the issues presented.

The Arbitrator has the authority to impose sanctions on Respondent, in the form of fines and/or attorney fees, for Respondent's failure to perform the obligations outlined in the various awards. The Arbitrator believes this approach will not produce a remedy to the issues presented, because of Respondent's inability to develop agreements with the SWCD and all of the affected property owners. Given the history, it is not likely that Respondent can implement a timely and reasonable remedy. It's time to turn the task of developing and implementing a temporary and

permanent storm water drainage plan over to the City, or in the alternative to impose a fine sufficient in size to provide funds for the City to carry out remediation on its own.

The City entered into this Development Agreement for the protection of the interests of the taxpayers of the City of Stayton. The failure of the Respondent to properly engineer, and build infrastructure should not come at the costs of the taxpayers. The taxpayers should not be burdened with paying for the Respondents failures and negligence.

### **RULING**

Based on the above findings and discussion, this ruling is entered as follows:

- 1. Claimant shall undertake the task of obtaining a Temporary Public Utility Easement from Mr. Roberts and the Sun Family for a period beginning immediately and extending through at least July 1, 2107 for the discharge of storm water from the Phillips Estates pond over and across their respective properties. Claimant shall also undertake the task of obtaining approval from Marion County for the allowance of the status quo for storm water from the Phillips Estates pond through the county ditch along Golf Club Road from its entry point from the Roberts property to the culvert at the Sun property for the period from now until July 1, 2017. Claimant shall further undertake the task of obtaining all approvals necessary of the Santiam Water Control District for the discharge of storm water into the Salem Ditch for the period from now until July 1, 2017. If Claimant is successful in obtaining all such approvals by December 15, 2016, then Claimant shall be entitled to take over development of a permanent facility as provided and conditioned in the following rulings. In the event such approvals are not forthcoming, the Claimant shall not be obligated to take over any aspect of the remediation, which responsibility shall rest with Respondent alone.*
- 2. In the event Claimant has obtained all the approvals required in Ruling #1 hereof,*

*Claimant shall be entitled to take over development of a permanent facility for the discharge of storm water from the Phillips Estates pond northerly to Mill Creek. The take over of responsibility for the permanent facility shall place the sole power, authority and control of the completion of the permanent facility with the Claimant, and is subject to, and conditioned upon the requirements of the following rulings.*

- 3. Respondent shall be responsible for all costs associated with the approvals necessary to legalize the status quo, and for completion of the construction of the permanent storm water facility.*
- 4. Within ten (10) days from the date of this Sixth Supplemental Award, Respondent shall pay over to the Claimant the sum of \$500,000.00, which Claimant shall hold in trust as a deposit account for expenses the Claimant will incur in implementation of the temporary and permanent solution. Claimant shall be entitled to draw from this deposit account as it incurs expenses in obtaining the approvals for the status quo, and in creating the permanent solution. All expenses incurred by Claimant from the date of this Sixth Supplemental Award forward shall be entitled to be paid from the deposit account, including reasonable staff time expended on the matter, engineering, design and construction. The Claimant shall account to Respondent on a quarterly basis as to the status of the deposit account. Respondent shall have no right to contest any charged expense. At any time the deposit account is reduced to a balance of \$50,000.00 or less, upon notification of such, Respondent shall be required to deposit an additional \$100,000.00 so that Claimant always has a fund of Respondent's money upon which to pay for the expenses it is incurring in this remediation. Within thirty (30) days of completion of the permanent facility, and verification by the Claimant that such is fully functional, and all expenses have been paid, any sums remaining in the deposit account shall be refunded to Respondent.*

5. *Within ten (10) days from the date the Respondent pays over the \$500,000 deposit to the Claimant, Respondent shall post a performance/security bond with Claimant for the additional sum of \$750,000, which bond shall secure payment to the Claimant for any costs that are incurred by the Claimant over and above that which is then on deposit with Claimant.*
6. *Within ten (10) days of the date of this Sixth Supplemental Award, Respondent shall turn over to Claimant all of its computer files, books and records regarding the Phillips Estate pond, any and all plans for remediation, including engineering, easement acquisition, permitting and any other documents that have any relevance whatsoever to the remediation of this failure of the Phillips Estates pond. In addition, Multi/Tech Engineering (Mark Grenz) shall turn over all of its computer files, books, records, maps, engineering, survey and all other information relative to this project directly to Claimant. The Claimant shall have the legal right to use all such information in the creation of the permanent facility, and to retain such information in the Claimant's files.*
7. *Respondent shall pay over to Claimant all of Claimant's attorney fees, costs and disbursements incurred in this matter from August 29, 2015 (which is the date of the First Supplemental Award which was the last time Claimant was awarded its fees) until such time as Claimant has accomplished construction of the permanent storm water facility to take the storm water to Mill Creek. The amount to be awarded shall be established pursuant to the process established in ORCP 68, however no 25% automatic reduction in the fees shall be imposed. All fees awards shall be done by pleadings without a hearing. Claimant shall be entitled to reimburse itself for any awarded attorney fees from the deposit account established in Ruling #4 hereof.*
8. *Copies of this Sixth Supplemental Award shall be distributed to Mr. Roberts, the Sun*

*family, SWCD, Marion County, DEQ, DSL, all northerly downstream owners between the Phillips pond and Mill Creek, and any other person or agency that is deemed relevant for notice of this Award as determined by Claimant.*

9. *Respondent shall execute a Hold Harmless Agreement in favor of Claimant for all activities engaged in by Claimant to implement the permanent storm water facility within ten (10) days from the date of this Sixth Supplemental Award. The form of the Hold Harmless Agreement shall be in substantially the same form as previously issued by Respondent in favor of Claimant in this proceeding.*
10. *Immediately upon the date of this Sixth Supplemental Award, Respondent, and any agent, representative, surrogate, employee or contractor of Respondent, and specifically including Bill Martinak, shall completely remove themselves from all matters relating to the remediation. This removal includes a directive commanding that there be no communication whatsoever from Respondent, Mr. Martinak or anyone else on behalf of Respondent to any one. This includes, but is not limited to refraining from communication with any affected property owner, city staff, any governmental agency, any member of the Stayton City Council or the Stayton Mayor.*
11. *The Stop Work Order that prohibits the issuance of any building permits within the Phillips Estate subdivision shall remain in effect, and shall only be lifted at such time as the permanent storm water facility is constructed and determined by the Claimant to be properly functional and sufficient.*
12. *In the event Respondent does not comply with any of the mandates contained in this Sixth Supplemental Award, Claimant shall impose, and Respondent shall pay, an automatic fine in the amount of \$1,000.00 per day against Respondent and payable to Claimant for each day Respondent is unable or unwilling to comply. Such fines shall be come a lien on all properties owned or controlled by JCNW.*
13. *This Arbitration is terminated upon issuance of a Seventh Supplemental Award for*

*attorney fees, costs and disbursements pursuant to Ruling #7 hereof.*

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2016.

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Daniel L. Harris, Arbitrator