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BEFORE THE ARBITRATION SERVICE OF PORTLAND, INC.

CITY OF STAYTON,)
)
Claimant,)
)
v.)
)
JCNW FAMILY, LLC,)
)
Respondent.)
_____)

DEPOSITION OF DAVID W. KINNEY
Taken in behalf of the Respondent

VOLUME I
(Pages 1 - 69)

Stayton, Oregon
April 22, 2015

1 STAYTON, OREGON, WEDNESDAY, APRIL 22, 2015, 9:14 A.M.

2 /////

3 **DAVID W. KINNEY,**

4 having been first duly sworn, was examined and testified
5 as follows:

6 /////

7 **EXAMINATION**

8 BY MR. LOISELLE:

9 Q. Please state your full name and spell your
10 last name for the record.

11 A. My name is David Witmer Kinney,
12 K-I-N-N-E-Y.

13 Q. And how are you employed?

14 A. I am self-employed as a community
15 development consultant.

16 Q. What is your relationship to the City of
17 Stayton?

18 A. I am now retired as their former public
19 works director.

20 Q. When did you retire?

21 A. May 27th or -8th, 2014.

22 Q. And how long were you the public works
23 director?

24 A. From July of 2008 through May of 2014.

25 Q. We have met a few times before. I think we

1 have worked together to develop the development
2 agreement for Phase 2; is that correct?

3 A. Correct.

4 Q. But other than work directly related to the
5 Phillips Estate and JCNW, you and I haven't had any
6 other connection; is that correct?

7 A. That is correct.

8 Q. Okay. Good morning and thank you for
9 giving us this opportunity to go through this
10 deposition.

11 Have you had your deposition taken before?

12 A. Many, many, many years ago.

13 Q. Okay. Was it a matter that you were a
14 party in?

15 A. It was a City of Stayton dispute with a
16 property owner.

17 Q. Okay. Have you ever provided sworn
18 testimony in a trial proceeding?

19 A. No, I have not.

20 Q. Okay. Did you have a chance to confer with
21 counsel this morning?

22 A. This morning, no. I spoke -- no.

23 Q. Okay. And have you had a chance to confer
24 with counsel about the deposition?

25 A. I spoke with Wally Lien and -- I forget

1 your --

2 MR. KUHN: Rick.

3 THE WITNESS: -- Rick last Friday
4 afternoon.

5 BY MR. LOISELLE: (Continuing)

6 Q. Okay. How long was that meeting?

7 A. Approximately two hours.

8 Q. Okay. Did you confer with anybody else in
9 preparation for your testimony?

10 A. No, I did not.

11 Q. Did you review any documents?

12 A. I reviewed files that I had in my personal
13 computer.

14 Q. On your personal computer?

15 A. Yes.

16 Q. Have you produced those to counsel as part
17 of the production in this matter?

18 A. Yes, I have. I did find a flash drive.
19 There is a few more files that I will send to legal
20 counsel.

21 Q. Okay. You just found those?

22 A. Yes.

23 Q. Okay. And while it's unlikely, I will
24 reserve the opportunity to leave the deposition open to
25 examine you about those additional files if we find

1 something that's noteworthy enough that we need to do
2 that.

3 A. Okay.

4 Q. Well, let's make sure that we're on the
5 same sheet of music regarding the process. As you know,
6 you gave an oath today. Do you understand?

7 A. Yes, I do.

8 Q. And if this matter proceeds to arbitration
9 and you testify, you understand the oath you have
10 provided at the arbitration will be the same?

11 A. Mm-hmm, I do.

12 Q. Okay. So if your testimony today is
13 different from the testimony you provide at an
14 arbitration, there will be a transcript of the
15 proceedings today and I have the opportunity to use that
16 transcript to impeach your testimony. Do you understand
17 that?

18 A. I understand that.

19 Q. Okay. I am sharing that with you like I do
20 with everybody and not isolating this to some special
21 occasion. Okay?

22 A. I understand.

23 Q. Okay. You're doing a good job of being
24 patient while I go through my questions before you
25 respond. I will try to be patient and allow you to

1 finish your response before I ask my next question.

2 Okay?

3 A. That's fine.

4 Q. And I also understand that you and I are
5 looking at each other and we can see gestures. Those
6 don't show up very well on a transcript. So if you
7 provide a gesture or an huh-uh or an uh-uh, I'm going to
8 ask you to respond audibly. Okay?

9 A. I will do that.

10 Q. All right. Now, the court reporter from
11 time to time may let us know that we are talking too
12 fast or too softly. You have a soft voice. We will
13 repeat the question and make sure we get a clear
14 transcript. Okay?

15 A. That's fine.

16 Q. This isn't an endurance contest. We don't
17 have to blitz through all of the information without a
18 break. So if you need to go to the restroom or need to
19 make a phone call or just clear your head for a minute,
20 we can take a break. Okay?

21 A. That works fine, and I will let you know if
22 I need to take a break.

23 Q. Great.

24 If I have a question pending, I'm going to
25 ask you to respond to the question before we take a

1 break. Okay?

2 A. Okay.

3 Q. And if my questions are confusing or are
4 unclear, will you ask me to repeat the question?

5 A. I will do that or I will ask you to restate
6 it.

7 Q. Thank you.

8 And if you respond to a question, may I
9 assume you understood it?

10 A. If I respond, I will indicate that I have
11 understood.

12 Q. Okay. Do you have any questions regarding
13 the process we're going to be engaged in this morning?

14 A. No, I don't.

15 Q. Okay. What is your educational background?

16 A. I have an undergraduate degree from
17 Grinnell College in Grinnell, Iowa, and a master's in
18 public administration from the University of Oregon.

19 Q. When did you receive your master's degree?

20 A. 1984.

21 Q. Any other education?

22 A. No other advanced education.

23 Q. Okay. Do you have any sort of continuing
24 education requirements to maintain your master's
25 certificate?

1 A. No, I do not.

2 Q. And will you share with me your work
3 history from graduation forward?

4 A. My work history, I initially worked for the
5 City of Veneta in Oregon west of Eugene from the -- from
6 1978 until 1988. I worked for the City of Stayton as
7 the city administrator from 1988 to 1994. I served as
8 a -- and then became self-employed after I left the City
9 of Stayton. And I was the interim city manager in
10 Silverton, the interim city manager in Sweet Home. I
11 did consulting work for the Oregon Garden project during
12 its development, and I have worked for a number of small
13 cities and private clients from 1994 to 2008.

14 In 2008, I came back to the City of Stayton
15 as a public works director and worked for the City of
16 Stayton until 2014. I also worked for some other small
17 city clients.

18 Q. Okay. Again performing various types of
19 public administration responsibilities?

20 A. Public administration responsibilities.

21 Q. Okay. You said you worked for the City of
22 Veneta; is that right?

23 A. That's correct.

24 Q. What did you do for them?

25 A. I was their planner and then their city

1 administrator.

2 Q. The City of Stayton, you were the --

3 A. The city administrator from 1988 to '94.

4 Q. Okay. And then you mentioned being
5 self-employed. Is that similar to your capacity today
6 as a community --

7 A. Yes, it is.

8 Q. Did you have a company or did you act as a
9 sole proprietor?

10 A. A sole proprietor.

11 Q. And it sounds like from that point until
12 the time you came back to the City of Stayton, you
13 worked for various different municipalities doing a
14 variety of different consulting arrangements?

15 A. That's correct. As well as some private
16 clients.

17 Q. Okay. What do you mean private clients?
18 What are you talking about?

19 A. Individual property owners who were doing
20 land development activities.

21 Q. What would be your role with the private
22 owners?

23 A. In many of those cases, I was assisting
24 them in the preparation of land use applications and
25 having those reviewed by public entities.

1 Q. Okay. Anything else?

2 A. The other project I was involved in was the
3 development of the Oregon Garden, and I was the City of
4 Silverton's joint venture director from '95 through
5 2001. And that was -- involved grants as well as --
6 obtaining federal and state grants for project
7 development as well as managing some of their public
8 construction projects.

9 Q. Okay. Would your duties on those public
10 construction projects be similar to your duties as the
11 public works director for the City of Stayton?

12 A. Similar.

13 Q. Okay. Who were some of the private owners
14 you worked with? Give me two or three of them.

15 A. Roger Roberts. There was property owners
16 who had a large industrial tract at the west end of
17 Stayton. A few people in Mill City. And those are some
18 typical examples.

19 Q. Okay. Have you ever worked in the trades?

20 A. No, I did not.

21 Q. Have you ever received any education in the
22 trades?

23 A. No, I did not.

24 Q. What were your job duties as the city
25 administrator for the City of Stayton during your first

1 tenure?

2 A. The city administrator position supervises
3 all of the employees of the city and serves as the
4 manager for the city's general day-to-day operations.

5 Q. Mr. Campbell described six or seven
6 different departments that he supervised. Was that
7 similar to your role?

8 A. Yes, it was. The same departments.

9 Q. The same departments.

10 And why did you leave that position?

11 A. The direction of the city council and the
12 direction I wanted to see the city go differed, and I
13 felt it was time to leave.

14 Q. So you had a difference of opinion about
15 the prospective of the course of the city?

16 A. The direction of the city, that's correct.

17 Q. All right. So you resigned?

18 A. I did.

19 Q. And then you returned?

20 A. I was asked to come back by then city
21 administrator Don Eubank.

22 Q. Okay. How do you know Don Eubank?

23 A. Primarily by playing golf with him.

24 Q. Okay. How frequently did you do that?

25 A. Probably once every two weeks during -- in

1 2006 through 2008.

2 Q. Okay. Did your job duties change when you
3 came back the second time?

4 A. The public works director position was
5 focused solely on that department.

6 Q. Tell me what your job duties were.

7 A. To serve as the manager of that department,
8 which included the water, the sewer, the storm drainage,
9 streets, and parks facilities.

10 Q. Your role required you to secure funding
11 for those public improvements?

12 A. That was part of the responsibilities,
13 that's correct.

14 Q. Did you provide oversight to the
15 contractors doing those works?

16 A. Day-to-day oversight, no, in most cases.

17 Q. Did you prepare the contracts?

18 A. In consultation with legal counsel, yes.

19 Q. Okay. And who did you report to?

20 A. The city administrator.

21 Q. Okay. Was that Mr. Eubank?

22 A. It was Mr. Eubank and then Mr. Campbell.
23 And there was an interim time period where Christine
24 Shaffer served as city administrator.

25 Q. When did Mr. Eubank stop working as a city

1 administrator?

2 A. I think July of 2013.

3 Q. And you stayed on for about another year?

4 A. That's correct.

5 Q. And why did you leave?

6 A. My working relationship with Mr. Campbell
7 was not what I would have liked to have been.

8 Q. Okay. How was your working relationship
9 with Mr. Eubank?

10 A. It was fine. We had a good working
11 relationship.

12 Q. And how was it different with Mr. Campbell?

13 A. We did not have the daily communication
14 that I would liked to have seen.

15 Q. Did you ask him about it?

16 A. We had a couple of conversations.

17 Q. You are being a bit nonspecific about it,
18 and I know this may be a little bit uncomfortable, but I
19 have to probe into it a little bit. So pardon me for
20 doing that.

21 A. That's fine.

22 Q. You say that your daily communication
23 wasn't what you expected it to be. Was it the frequency
24 or was it the content?

25 A. Both.

1 Q. Okay. How about the attitude?

2 A. I just did not feel it was a solid
3 professional working relationship.

4 Q. Did he treat you respectfully?

5 A. I did not feel like I was given a lot of
6 respect.

7 Q. Okay. Did you have an opportunity to take
8 this issue up with city council?

9 A. No. I reported to Mr. Campbell and that
10 was the appropriate relationship.

11 Q. And it sounds like you made efforts to try
12 to cure the relationship and it -- those efforts were
13 unsuccessful?

14 A. I don't think either of us went out of our
15 way to cure the relationship.

16 Q. Okay. Did some of the strain or difference
17 of opinion relate to how his office and your office was
18 to relate to developers and third parties with the city?

19 A. That never really came up during.

20 Q. Okay. Did any of the difference of opinion
21 relate to the way the city affairs were being managed as
22 it related to the Phillips Estate?

23 A. I don't think Mr. Campbell was happy with
24 the way I was handling the Phillips Estate.

25 Q. What were his frustrations?

1 A. I can't tell you.

2 Q. Was Mr. Eubank happy with the way you were
3 handling it?

4 A. I think the working relationship that Don
5 and I had related to this project was fine.

6 Q. Okay. Mr. Campbell told you that he was
7 unhappy with your performance as it related to the
8 interaction with the developer on the Phillips Estate
9 project?

10 A. I don't recall him saying that
11 specifically.

12 Q. What do you recall him telling you?

13 A. I recall him asking me whether or not I was
14 working for Mr. Martinak.

15 Q. What did you tell him?

16 A. And my answer was a simple no.

17 Q. Was there an issue that he was frustrated
18 about?

19 A. You would have to ask Mr. Campbell.

20 Q. Was he frustrated with the way that the
21 negotiations were proceeding on reimbursements for the
22 work that was occurring out on the site?

23 A. He questioned my conclusion related to
24 system development charge reimbursements.

25 Q. What were his concerns about your

1 philosophy or approach?

2 A. You would have to ask Mr. Campbell because
3 I can't tell you.

4 Q. Okay. So he just expressed the general
5 frustration, and he didn't get into the sausage making
6 on exactly why?

7 A. He did not provide me with specifics.

8 Q. Okay. Other than the reimbursements, did
9 he express any frustration regarding any other aspect of
10 the development process on the Phillips Estate?

11 A. I don't recall.

12 Q. Okay. Did Mr. Campbell express frustration
13 with you concerning your interaction with other
14 developers in the city?

15 A. No, I don't recall any.

16 Q. Okay. Do you believe that your strained
17 relationship related primarily to the manner in which
18 you were managing the Phillips Estate project?

19 A. No, I think it was broader than that. I
20 don't think he liked the way I managed the department.

21 Q. Okay. And this was just one of those
22 factors?

23 A. This was one of those issues.

24 Q. Okay. Did he tell you any other issues
25 that he had?

1 A. There was a dispute with the supplier of a
2 piece of equipment at the wastewater treatment facility
3 that we were having difficulty getting up to operating
4 parameters.

5 Q. Okay.

6 A. And there was a lengthy dispute with
7 that -- the dryer manufacturer.

8 Q. Okay. And it sounds like maybe the fact
9 that it was lengthy created some frustration?

10 A. It was lengthy. It was costly. It was
11 involved dealing with the engineers, dealing with
12 contractors, dealing with the suppliers.

13 Q. Okay. Any other issues?

14 A. I think he was not happy with the way we
15 were approaching street maintenance activities as well.

16 Q. Okay. Generally describe what was the
17 problem there.

18 A. His -- he was looking to the city to
19 develop a more extensive pavement management system that
20 we had been employing before.

21 Q. Okay. Was it the manner in which the work
22 was being managed or financed?

23 A. I think it was the approach and the
24 management.

25 Q. Okay. Any other issues that you can

1 recall?

2 A. No.

3 Q. All right. Let me come back real quick to
4 the SDC reimbursement issue. You explained that your
5 perspective on that was different than Mr. Campbell's.
6 Correct?

7 A. That's correct.

8 Q. Tell me what your general approach was to
9 evaluating and confirming reimbursements for the city.

10 A. The oversizing thing -- to do the analysis
11 of the oversizing, the city has a responsibility to pay
12 for the oversized cost of the -- of installing a
13 facility. In this case, we were discussing storm sewer
14 pipes. The city asked the city engineer, John Ashley,
15 to prepare an analysis of what he saw as being the
16 appropriate reimbursement requirements. I met with
17 Mr. Ashley several times to go over those numbers. And
18 based on conversations, we came to a conclusion of what
19 an appropriate cost for reimbursement would be. My
20 recollection is we also had some conversations with
21 Mr. Lien about what were eligible and ineligible cost
22 for reimbursement.

23 The numbers that we came up with were then
24 forwarded across the street to the city hall to
25 Mr. Campbell and Ms. Shaffer, and there was concern on

1 their part that the reimbursement costs were higher than
2 they should have been, and Mr. Campbell then spoke with
3 Mr. Ashley and some adjustments were made.

4 Q. All right. I think I understand the nature
5 of the problem now, and I will come back to it a bit
6 later. So at least now I know what the issue was.

7 To kind of fill out the -- your work
8 experience, since you left the city, what has been your
9 involvement with the city?

10 A. None.

11 Q. You haven't signed any independent
12 contracts or provided any consulting?

13 A. No.

14 Q. Have you done any consulting work with any
15 other municipalities?

16 A. I have been continuing to work for the
17 cities of Mill City and Scio as their land use
18 consultant.

19 Q. Okay. And not to get too into the sausage
20 making again or into the weeds, the monthly revenue
21 that's generated off of those consulting arrangements,
22 rough estimate?

23 A. Approximately \$5,000 a month.

24 Q. Okay. And if you were going to parlay that
25 on a part-time versus full-time basis, what -- how --

1 A. I'm probably working about halftime.

2 Q. Halftime. Okay.

3 So you would have the capacity to work
4 another \$5,000 a month to -- in a consulting
5 arrangement; is that fair?

6 A. If the appropriate project came up and I
7 was interested in doing it.

8 Q. Sure. Sure.

9 Are you seeking other assignments at this
10 time?

11 A. Selectively.

12 Q. All right. You're in a position where you
13 can do that?

14 A. Yes.

15 Q. Are you engaged in any other employment
16 activity or business activity at the present time?

17 A. No. Other than a couple of other smaller
18 clients.

19 Q. In your consulting role?

20 A. Yes.

21 Q. Okay. Have you ever acted as a developer?

22 A. No, I have not.

23 Q. Have you ever been licensed as a developer?

24 A. No, I have not.

25 Q. Or as a contractor?

1 A. No.

2 Q. Any other relevant work experience related
3 to public administration, construction, or development
4 that I haven't touched on?

5 A. No, I don't think so.

6 Q. All right. Let's shift gears and let's
7 talk about your role and involvement in the Phillips
8 Estate project. Okay.

9 Was your first involvement after Bill
10 Martinak and JCNW had purchased the property?

11 A. Yes.

12 Q. Okay. And had the -- had an agreement
13 already been reached with the city to proceed with the
14 development?

15 A. The city's planning commission had approved
16 the development plan and Phase 1 construction plans had
17 been reviewed and approved by Ed Sigurdson, who was the
18 city engineer at that point in time.

19 Q. Okay. Did the original development plan
20 have this project rolling out in phases?

21 A. That's my recollection.

22 Q. Okay. And it's also your recollection that
23 the Phase 1 development agreement was already -- already
24 executed and in play?

25 MR. LIEN: Object to the form of the

1 question. I don't know what "in play" means.

2 BY MR. LOISELLE: (Continuing)

3 Q. Not only had the agreement been signed, but
4 there was work towards actually executing the agreement?

5 A. No. The construction had not started at
6 that point.

7 Q. All right. And tell me what you generally
8 understood to be the development plan for the Phillips
9 Estate project when you first became involved.

10 A. The first plan showed three phases with, my
11 recollection is, approximately 80 lots.

12 Q. Okay. As far as infrastructure, what was
13 in place and what needed to be built?

14 A. The site was vacant, and all of the public
15 improvements needed to be constructed.

16 Q. What was the plan regarding the stormwater?

17 A. Stormwater plans at that point in time
18 showed on-site storm sewers in the proposed streets as
19 well as an off-site extension of a drainage swale that
20 went from the northwest corner of the property to the
21 north to Mill Creek.

22 Q. And at that time was there an estimate or
23 proposal for what those off-site improvements would
24 cost?

25 A. There were some rough numbers thrown

1 around. I don't recall that there was a final
2 construction estimate. My recollection is is
3 approximately 350- to 500,000.

4 Q. And was there an understanding about how
5 that would be funded?

6 A. The city had proposed using a type of
7 financing called advanced financing that had been
8 proposed by the prior public works director Mike Faught.

9 Q. Okay. Was the city going to pay for all of
10 the off-site work?

11 A. No, it was not.

12 Q. What was the city's responsibility, or
13 proposed? And I understand that it wasn't final.

14 A. There was -- it was not finalized, and
15 there was -- the concept of advanced financing was that
16 the developer would construct the improvements and then
17 over a period of 10 years as new development connected
18 to the system that the city would reimburse the
19 developer for the shares of the improvements that were
20 connected to that that benefited the other property
21 owners.

22 Q. Okay. At that time was there a plan to
23 address stormwater issues involving adjacent properties?

24 A. The city had developed a stormwater master
25 plan. Keller Associates had prepared that. It showed

1 in that vicinity some storm drainage, detention basins,
2 and connections flowing to the north toward Mill Creek.
3 I'm not sure that addresses your question.

4 Q. Not completely, but it may be that I am
5 just a little thick headed and I need to grind through
6 this a little bit. So in 2008 there was a master plan
7 that had been accepted by the city?

8 A. It had not been adopted by the city in
9 2008. It had been prepared by Keller Associates, but
10 had not been finalized and approved by the city council.

11 Q. Okay. And that master plan addressed not
12 only the stormwater issues for the Phillips Estate but
13 also adjacent properties?

14 A. It was a city-wide master plan.

15 Q. All right. That included Quail Run
16 development?

17 A. It included all properties inside the city,
18 so, yes, it did.

19 Q. And was the plan -- the tentative plan at
20 that time to utilize the improvement -- the stormwater
21 improvements on the Phillips Estate and the off-site
22 improvements to address the Quail Run stormwater issues?

23 A. I don't remember what the master plan
24 document shows as far as the connection between Quail
25 Run and the Phillips Estate site.

1 Q. At this time, how was stormwater being
2 managed by the Quail Run project?

3 A. When the Quail Run project was developed,
4 there was a pump installed on Quail Run Avenue that then
5 pumped the water -- the stormwater to the south to Shaft
6 Road and it then flowed west.

7 Q. Okay. And we had some testimony yesterday
8 that at some point that pump station failed?

9 A. During severe storms, that pump station was
10 not sufficient to be able to pump water out of the --
11 the street. The street filled up. It created some
12 flooding within the street right of way and also went
13 out up into some driveways and yards.

14 Q. Okay. You see those photos down in
15 Tillamook of people running around main street and
16 boats. Was --

17 A. Not quite so bad.

18 Q. Not quite so bad. All right.

19 So it sounds like the pump station never
20 did really address high water events; that there was a
21 flooding issue?

22 A. During some peak storms, that's correct.

23 Q. Okay. So at the time you became involved
24 in the project, the city was managing the stormwater on
25 Quail Run with a pump station?

1 A. That's correct.

2 MR. LOISELLE: In terms of our pace, are we
3 doing okay?

4 THE COURT REPORTER: Yes.

5 BY MR. LOISELLE: (Continuing)

6 Q. When did the master plan get adopted?

7 A. In 2009.

8 Q. And how did that adoption affect the
9 development plan for the Phillips Estate?

10 A. I don't think it had any significant affect
11 on the design concepts that had been proposed.

12 Q. So you didn't have to reproach the
13 developer and modify the development agreement?

14 A. No, I don't -- not just due to the
15 stormwater master plan.

16 Q. All right. I understand there were some
17 changes, and we will maybe talk about some of those
18 triggering events. At some point an agreement was
19 reached with the developer to change the stormwater
20 strategy for Quail Run. Correct?

21 A. That's correct.

22 Q. Can you tell me how that circumstance arose
23 and how those negotiations went?

24 A. My recollection is that there was a storm
25 event that occurred in, I believe, 2008 where there had

1 been some additional flooding on Quail Run and due to
2 one of those larger storms. There were some discussions
3 back and forth with Mr. Martinak. My recollection is
4 that Mike Brash, who was the city's inspector at that
5 point, had the -- one of the contacts with Bill to talk
6 about the possibility of extending the storm pipe to the
7 north and connecting into what would end up being a
8 future system.

9 Q. Okay.

10 A. Mr. Martinak was receptive to the idea, and
11 a proposal -- the pipe going out of Quail Run extended
12 to the north to the property line and had been designed
13 that way initially. It was capped at the end and could
14 not flow to the north.

15 Q. That's why you had the pump station?

16 A. That's why we had the pump station.

17 The proposal was to extend the pipe into
18 Mr. Martinak's -- into the Phillips Estate's property
19 and put a manhole at the end and allow it to be
20 discharged out into the field and then flow to the
21 northwest.

22 Q. Okay.

23 A. That was proposed. Westech Engineering did
24 a tentative design on it. The city approved that, and
25 it was constructed. And I forget whether it was 2008 or

1 2009.

2 Q. All right. Did the city have an agreement
3 with the developer on payment for the discharge?

4 A. The -- payment for the discharge or payment
5 for the pipe that was installed?

6 Q. Both.

7 Let's talk about the pipe that was
8 installed.

9 A. Payment for the pipe, there was an estimate
10 provided by Westech Engineering, and the city paid for
11 the cost of construction.

12 Q. Okay.

13 A. There was not a payment for any of the
14 discharge.

15 Q. Okay. What was your understanding about
16 the -- strike that question.

17 Was there an agreement or understanding
18 between the developer and the city about compensation
19 for discharge of that water?

20 A. Not that I'm aware of.

21 Q. Did the developer indicate why he was
22 willing to allow the city to discharge the water on his
23 site?

24 A. My recollection and impression was that
25 there had been the flooding issue, and they saw it as a

1 way to assist the city in resolving the issue.

2 Q. Okay. Was it also the developer's
3 understanding that there would be an arrangement made on
4 the final development plan for stormwater after the
5 phases were completed?

6 MR. LIEN: Object to the form of the
7 question.

8 If you know what the developer was
9 thinking, you can testify to it, but...

10 THE WITNESS: No, I can't testify to what
11 the developer was thinking. What I can testify to is
12 that the plan showed there was approximately 13 CFS of
13 stormwater that would come out of the Quail Run
14 development and flow into the Phillips Estate site.

15 BY MR. LOISELLE: (Continuing)

16 Q. Okay. And was there an understanding about
17 reimbursement for the final improvement for the
18 stormwater on the site or the off-site improvements?

19 A. There was an expectation that there would
20 be oversizing costs paid for by the city.

21 Q. Okay. And that was some of the work that
22 you did in 2012 with Ashley; is that correct?

23 A. It would have addressed only a very small
24 portion of that. It would address the discharge pipe --
25 no, it wouldn't have addressed the 17,600 the city spent

1 to put in that pipe. It would have been for oversizing
2 cost for pipes that were installed as part of the
3 Phase 2 construction.

4 Q. So the work you did in 2012 with Ashley to
5 come up with the reimbursement --

6 A. Was for work that they had constructed in
7 2012.

8 Q. All right. Was that work that was
9 constructed in 2012 an interim solution or a final
10 solution to the stormwater?

11 A. The reimbursement was for final pipe
12 installation cost.

13 Q. All right. Did that address the off-site
14 improvements?

15 A. It did not.

16 Q. Okay. And did you ever have the
17 opportunity to start developing a plan for
18 reimbursements on the off-site improvements?

19 A. There were some initial city review, but
20 nothing was ever negotiated or discussed in detail.

21 Q. Did the city ever -- did the city
22 anticipate that it was going to be contributing to those
23 off-site improvements?

24 A. Going back to the original theory of the
25 advanced funding process, I think the city anticipated

1 that there would be a developer share and then
2 reimbursement for those off-site shares.

3 Q. Okay. And as part of that original
4 evaluation, did the city begin the exploration of
5 seeking funding for its proportional share?

6 A. One of the recommendations in the
7 stormwater master plan was that the city adopt a
8 stormwater SDC, which would generate income from other
9 new development that the city could use to pay for
10 oversizing costs of facilities.

11 Q. So it sounds like at least there was one
12 avenue?

13 A. That was one avenue that was available.

14 Q. Okay. Were there other avenues considered?

15 A. I don't recall the city ever having any
16 other viable means of funding.

17 Q. Okay. Do you recall offhand what the
18 anticipated or forecasted revenue stream was going to be
19 from potential SDCs for the next decade?

20 A. Any storm drainage SDC charge had not been
21 developed at that point.

22 Q. Had it been developed at the time you left?

23 A. It was being worked on by Dan Fleishman, I
24 believe, in May, June, July of 2014.

25 Q. Did you see it?

1 A. Dan sent me a draft and asked me -- after I
2 left the city and asked me to take a quick look at it
3 and I gave him some comments back.

4 Q. Okay. Did it provide forecast for
5 revenues?

6 A. The piece that I looked at did not.

7 Q. Okay. Do you know if they were planning to
8 forecast those revenues as part of completion of that
9 plan?

10 A. I don't know.

11 Q. Okay. And since Mr. Fleishman asked you to
12 review this preliminary draft in July of 2014, you
13 haven't seen any further versions?

14 A. No.

15 Q. Let me back up for a minute. Were you
16 involved at all in either negotiation or in a subsequent
17 evaluation of the funding proposals for public
18 improvements related to the stormwater for Quail Run?

19 A. I'm not sure. The Quail Run development
20 occurred in the early 1990s and mid 1990s. Are you
21 talking about during that time frame?

22 Q. I was wondering if you had any involvement
23 in evaluating what the plan was to address stormwater at
24 the time of that development?

25 A. No. I did not review any of those plans at

1 the time of that initial development.

2 Q. Was the pump station program for the
3 stormwater on Quail Run, was that a final solution or
4 was that an interim solution until a final one could
5 be --

6 A. My understanding is that it was planned as
7 an interim solution until the storm drains could flow
8 north through the Phillips Estate property.

9 Q. Okay. And what had the city done in terms
10 of securing funding from the developer for the Quail Run
11 property for stormwater improvements? Do you know?

12 A. No, I don't.

13 Q. Do you know why stormwater issues weren't
14 completed or addressed?

15 A. No, I really don't.

16 Q. Okay. Do you know if there was any funding
17 received from the developer of Quail Run for stormwater?

18 A. I don't know.

19 Q. Who would be -- do you know anybody at the
20 city that would have that knowledge?

21 A. I don't think there's anyone at the city
22 that would know that at this point. The engineer who
23 was involved was Martin Boatwright, who has passed away.

24 Q. Okay. Would the city have records?

25 A. It's possible.

1 Q. You just never saw them?

2 A. I just never saw them.

3 Q. Okay. So at the time you left, had the
4 city developed a plan or a strategy that would have
5 financed the anticipated city contribution to on-site
6 and off-site improvements for stormwater on the Phillips
7 Estate?

8 A. Could you repeat the question?

9 Q. Sure.

10 Maybe I will make it a little bit easier.
11 There was oversizing -- anticipated oversizing expenses
12 that the city was going to be accountable for. Correct?

13 A. Correct.

14 Q. And there was an off-site improvement that
15 the city would have some shared responsibility for.
16 True?

17 A. There was an off-site improvement proposed
18 for both the storm drainage and the sanitary sewer going
19 north.

20 Q. Okay. And the city would have an equitable
21 portion or responsibility for financing that
22 development?

23 A. There was discussions about what an
24 appropriate share would be.

25 Q. Okay.

1 A. And the city consulted with legal counsel
2 in discussing that, and the city also consulted with its
3 engineer to estimate the costs involved.

4 Q. All right. I think you understand now the
5 issue I'm asking about in terms of the capital
6 improvement, on-site/off-site.

7 A. Correct.

8 Q. All right. And I know I am bubbling
9 through this.

10 A. Okay.

11 Q. So pardon me.

12 A. No problem.

13 Q. Had the city developed a plan or strategy
14 for financing its equitable share of that improvement at
15 the time you had left?

16 MR. LIEN: Object to the form of the
17 question.

18 THE WITNESS: Do you want to restate it
19 or --

20 BY MR. LOISELLE: (Continuing)

21 Q. Do you understand the question?

22 MR. LIEN: You can answer it if you want.
23 My objection is for the record.

24 THE WITNESS: Okay.

25 The city had looked at potential costs, but

1 there was never any agreement or finalization of what an
2 appropriate share would be.

3 MR. LOISELLE: Okay. It's been about an
4 hour. Let's take a five-minute break.

5 THE WITNESS: Sure.

6 (A recess was taken.)

7 BY MR. LOISELLE: (Continuing)

8 Q. Thank you for taking the break. I
9 apologize for being a little more extended than we
10 planned it.

11 A. Oh, no. That's fine.

12 Q. Did you have the opportunity to confer with
13 counsel during the break?

14 A. Just about that memo that I pulled up that
15 I had said I had a couple of files.

16 Q. I will clarify that just in a second. This
17 is kind of, again, my practice or routine and it's not
18 isolated solely to you, but during the break sometimes
19 there's conferences between the deponent and the
20 attorney and they want to clarify something for the
21 record, and I just want to make sure that you had that
22 opportunity before we proceed.

23 A. And there was nothing to clarify for the
24 record.

25 Q. Okay. Good. You did hand us a document.

1 MR. LOISELLE: And, Mr. Lien, are we going
2 to Bates label that document at some point?

3 MR. LIEN: Yeah.

4 MR. LOISELLE: Will there be a number on
5 it?

6 MR. KUHN: I can do it.

7 MR. LIEN: At this point, we will just call
8 it 53 and 54.

9 MR. LOISELLE: Okay.

10 MR. LIEN: And I just hand wrote it on my
11 copy.

12 MR. LOISELLE: We will do the same thing
13 for right now.

14 BY MR. LOISELLE: (Continuing)

15 Q. And that document was just additional
16 information you had on your own computer that you
17 discovered just before the deposition?

18 A. That's correct.

19 Q. All right. I want to get back to the
20 negotiations as these phases were unrolling, because my
21 understanding is that over time the different phase
22 developments began to evolve and change a little bit.
23 Is that your understanding?

24 A. That's correct.

25 Q. Was there a reason from the city's point of

1 view why those phases began to evolve and change?

2 A. Clearly dealing with the storm drainage
3 issue and the off-site sanitary were the driving reasons
4 for changing the phasing.

5 Q. And did the involvement of the Water
6 District, did that have an effect on how the facing
7 unrolled?

8 A. It certainly affected the storm drainage
9 issues. The Water Control District had no objections to
10 discharge to Mill Creek but was clear that there would
11 be no discharges to the Salem ditch.

12 Q. Okay. When did issues first begin
13 percolating between the Water District and the city
14 related to stormwater discharge?

15 A. I don't know when they started to
16 percolate. It was before I came back to the city in
17 2008.

18 Q. Okay. Was there a lawsuit between the city
19 and the Water District when you started working in 2008?

20 A. I don't think the lawsuit had been filed
21 yet. It was close.

22 Q. Okay.

23 A. I think the claim came in in 2009 or '10.

24 Q. Okay. Lawsuits have lots of collateral
25 issues, but what was the main thrust of the problem that

1 lawsuit was intended to address?

2 A. The Water Control District was concerned
3 that the volume of storm drainage coming from within the
4 city posed a threat and over -- threat to overwhelm
5 their irrigation system that was downstream of Salem
6 ditch. That was the -- I think the primary concern.

7 Q. The lawsuit was filed in 2009 approximately
8 give or take a month or two.

9 A. I don't remember when papers were signed.
10 I don't know whether it was 2009 or 2010. During 2007,
11 '8 and '9, as I mentioned earlier, the city's stormwater
12 master plan had not been adopted. It had been prepared
13 but not adopted until 2009.

14 Q. All right.

15 A. During that the Water Control District was
16 testifying related to that stormwater master plan. They
17 filed the lawsuit, a LUBA appeal, with the city over the
18 stormwater master plan. The city won the LUBA case that
19 the Water Control District did not have sufficient
20 standing and didn't have sufficient to prevail on that
21 issue. Subsequent to that, the city did make
22 adjustments to the water -- the water master plan to
23 address some of the concerns of the Water Control
24 District. They were not satisfied that that was a
25 sufficient outcome, and they filed a lawsuit later after

1 the stormwater master plan.

2 Q. Okay. And who represented the city in that
3 lawsuit?

4 A. Mr. Lien represented the city during the
5 LUBA appeal, and in the negotiations with the Water
6 Control District to settle the other lawsuit, David
7 Rhoten and Larry Andrews handled it. And there was
8 another attorney involved.

9 MR. LIEN: If you remember. If you don't
10 remember, just --

11 THE WITNESS: I don't remember. I don't
12 remember. Pam Abernethy -- it ended up going to a
13 mediation process, and Pamela Abernethy was the --

14 BY MR. LOISELLE: (Continuing)

15 Q. The mediator?

16 A. The mediator.

17 Q. And there was a mediated result?

18 A. There was a mediated result.

19 Q. And what was the outcome?

20 A. There was a memo of understanding signed
21 between the parties that stipulated a variety of
22 outcomes. That the Water Control District would not
23 file any further litigation for a period of time, and
24 the city would do some public improvements to the storm
25 drainage system and that the city would also manage the

1 flow of water into the -- primarily the Salem ditch but
2 also some of the ditches on the southwest part of the
3 city. And when I say "ditch," it's irrigation canals.

4 Q. And did some of those agreements affect the
5 stormwater plan for Quail Run and the Phillips Estate?

6 A. That the discharge from those areas needed
7 to flow north to Mill Creek. And at the same time,
8 there was also a separate agreement reached by
9 Mr. Martinak an JCNW with the Water Control District.

10 Q. And did that affect the manner in which the
11 city approached the negotiations on the Phase 2
12 development agreement?

13 A. Yes, it did.

14 Q. And how did they affect those?

15 A. That the design of stormwater discharge
16 needed to be directed to the north and that the city was
17 looking to -- looked at the modified design for Phase 2
18 and Phase 3 to be a detention facility on site.

19 Q. For both phases, Phase 2 and Phase 3?

20 A. Phase 2. And the development agreement
21 stipulates that Phase 3 would come back at a later point
22 in time for a subsequent agreement.

23 Q. Okay. But as far as Phase 3 is concerned,
24 was it contemplated that water would be detained on site
25 or that it would be discharged north?

1 A. I think the anticipation was that if
2 Phase 3 was developed as developable lots that you would
3 have to do off-site improvements with storm drainage.

4 Q. Okay. And was it also anticipated that
5 once Phase 3 would be developed that the city would have
6 some responsibility for those off-site improvements?

7 A. I don't think there was a conclusion
8 reached.

9 Q. It sounds like originally before Phase 2
10 development agreement and before the lawsuit by the
11 Water District there was some understanding that the
12 city would have some sharing responsibility for on-site
13 and off-site stormwater improvements related to this
14 development. Correct?

15 A. I don't think you can -- there wasn't
16 any -- an agreement reached. I think there had been
17 discussions back and forth in terms of what the
18 cautionary would be for storm drainage facilities and
19 for sanitary facilities going to the north and -- I
20 don't think -- there was no agreement reached. I mean
21 that was part of the difficulty. There was never
22 anything finalized between the city and the developer of
23 how to proceed.

24 Q. I hear you there that there was never a
25 final agreement. That's part of the reason why we have

1 this lawsuit right now.

2 A. Right. I understand that.

3 Q. But there was an understanding or
4 expectation that the city would have some responsibility
5 for that development? There was just a disagreement on
6 how much?

7 MR. LIEN: Object to the form of the
8 question.

9 THE WITNESS: And what I would say is that
10 there were discussions back and forth with Bill, with
11 Steve Ward from Westech over what was seen as being an
12 appropriate share of cost to the developer and an
13 appropriate share of cost to the city.

14 BY MR. LOISELLE: (Continuing)

15 Q. Okay. So there was an under --

16 A. Now, where people thought the appropriate
17 share was was far apart.

18 Q. Okay. That's what I was getting at. I
19 understand that the final proportion of the total
20 development cost was never finalized. It's pretty clear
21 that that's the case. But there was an understanding
22 that the city was going to have some contribution to
23 that final improvement?

24 MR. LIEN: Object to the form of the
25 question. You keep saying "the city" and, you know, to

1 the extent that he is a public works director, I'm not
2 sure that he can represent what the city was thinking.
3 All he can represent is what he was thinking.

4 MR. LOISELLE: Well, I'm going to disagree
5 with you. You can argue all you want.

6 BY MR. LOISELLE: (Continuing)

7 Q. I want your answer.

8 A. My understanding was that the city had an
9 obligation for oversizing facilities, and the cost
10 sharing for benefits to other properties, as I talked
11 before about the advanced financing concept, was that
12 the developer would pay for the cost of the improve --
13 using the sewer as the example, the cost of the
14 improvement and then the developer would receive a
15 reimbursement from the city as other development
16 connected to it because it was constructed to be of
17 sufficient size and location to serve not only the
18 Phillips Estate development but also the other
19 properties as you moved north. That -- there was never
20 anything finalized. I mean that's all I can come back
21 with and say is there was never anything finalized in
22 terms of how that was going to come to pass.

23 Q. Okay. I'm not arguing with you about that.
24 I understand why you are being careful, and I also agree
25 that it doesn't look like there was ever a document

1 signed that said the city is going to pay X and Bill is
2 going to pay Y.

3 A. Right.

4 Q. Wasn't part of the problem during these
5 negotiations related to the fact that those SDC fees
6 could not be used for preexisting development costs for
7 infrastructure related to preexisting development?

8 A. SDCs have to be used for paying for
9 oversizing cost and extending utilities to new
10 development areas.

11 Q. And in specific negotiations with Mr. Ward,
12 didn't Mr. Ward have direct conversations with you about
13 how the city would fund the equitable share of the
14 capital improvement requirements for the Quail Run
15 property?

16 A. For the Quail Run property?

17 Q. Let me back up. I don't know if that's
18 troubling you a little bit.

19 A. I don't recall.

20 Q. You don't recall that conversation? Let me
21 make sure that we are on the same sheet of music.

22 A. I'm not sure I'm understanding the
23 question.

24 Q. Quail Run discharging water onto Phillips
25 Estate?

1 A. Mm-hmm.

2 Q. Correct?

3 Unfortunately, I have to have you say yes.

4 A. Yes, that's correct.

5 Q. As part of the final solution for the
6 stormwater plan for the Phillips Estate and the adjacent
7 properties, the cost associated with addressing the
8 Quail Run water, that's a cost that cannot be
9 compensated through an SDC fee arrangement. Correct?

10 A. The oversizing of pipes to serve new
11 development can be. The city -- the cost to benefit
12 existing development cannot be paid for with SDCs.

13 Q. Okay. Now we are aligned and on the same
14 sheet of music.

15 A. Okay.

16 Q. On those costs to address the Quail Run
17 properties, the properties that are in existence or that
18 are contributing to the discharge onto Phillips Estate,
19 did you and Mr. Ward have conversations about how the
20 city was going to fund those capital improvements or
21 that share of the capital improvement?

22 A. I know we had conversations about financing
23 all of it. I don't recall a specific discussion of just
24 the funding of any -- any city funding of cost for just
25 water coming out of Quail Run.

1 MR. LOISELLE: Well, let's go ahead and
2 mark this as an exhibit. Can you mark this as
3 Exhibit 105?

4 (Exhibit No. 105 was marked for
5 identification.)

6 BY MR. LOISELLE: (Continuing)

7 Q. What's the date on that first page of that
8 one, by the way?

9 A. May 11th of 2012.

10 Q. Okay. Unfortunately, I don't know if I
11 have three copies of that. That's one of the drafts of
12 the Ashley memorandum. I have other versions of it,
13 but --

14 MR. KUHN: Is there a Bates number on it?

15 MR. LOISELLE: Yes. I will have him read
16 that in. I thought I had four copies.

17 I will get it in a second, Rick.

18 MR. KUHN: Okay.

19 BY MR. LOISELLE: (Continuing)

20 Q. Let me see it real quick.

21 A. (Complying.)

22 Q. Just to identify this for the record,
23 Exhibit 105 is a memorandum from Ashley Engineering
24 Design dated May 11, 2012, from John Ashley to Dave
25 Kinney. And the Bates label number on the first page is

1 ASH00798, and it runs through 811.

2 A. Okay.

3 Q. Are you familiar with that document?

4 A. Yes, I recognize the document.

5 Q. And what is it?

6 A. It is an estimate of reimbursement cost
7 from Ashley Engineering for the qualified public
8 improvements for Phases 1, 2, and 3 of Phillips Estate
9 subdivision.

10 Q. You had mentioned before a break that you
11 had engaged in some discussions with Mr. Ashley about
12 reimbursement and then shared those with Mr. Campbell.
13 Does this memorandum reflect some of those preliminary
14 discussions?

15 A. No. This was done two years prior.

16 Q. Okay. All right. What was the purpose of
17 this memorandum?

18 A. This memorandum was a review at the staff
19 level to try to estimate what the obligations of the
20 city would be related to this project.

21 Q. Okay. And it was done after Phase 1
22 construction had been completed and during the course of
23 Phase 2. Okay. Thank you.

24 There was a section in this memorandum that
25 addressed the reimbursement cost proposal or exposure

1 for off-site storm drainage. Correct?

2 A. Yes.

3 Q. Did you have the opportunity to review this
4 before I started asking you questions about it?

5 A. Not that section, no, I did not.

6 Q. Let's go ahead and -- I want you to read
7 the off-site storm drainage section and then I'm going
8 to ask you some questions about it.

9 A. (Reading.)

10 Okay.

11 Q. Does that help refresh your recollection
12 concerning the city's evaluation of its cost exposure
13 for off-site improvements?

14 A. This was John's memo back to the city and
15 his professional analysis of what those costs would be?

16 Q. Okay. As a public works director, were you
17 authorized to retain Mr. Ashley to perform that
18 evaluation?

19 A. Yes, I was.

20 Q. And you were the one that was responsible
21 for managing that work?

22 A. Yes, I was.

23 Q. And you collaborated or corresponded with
24 Mr. Ashley concerning that review?

25 A. Yes, that's correct.

1 Q. Okay. Before the review began, did you
2 provide Mr. Ashley with any sort of parameters
3 concerning the city's expectations around the cost
4 review?

5 A. Expectations from what his findings would
6 be or expectation --

7 Q. Sure.

8 A. The answer is no. He was given authority
9 to take a look, use the city's SDC's ordinances and to
10 his professional estimate of what the appropriate cost
11 sharing would be.

12 Q. Okay. And was it his job to provide a
13 comprehensive review of all elements of the Phillips
14 Estate development?

15 A. Yes.

16 Q. And that included off-site storm drainage?

17 A. It included all of the items that were
18 shown on the full set of plans.

19 Q. Now, I have found in the document
20 production three different versions of the memorandum.
21 Do you know if there were more than three versions
22 prepared?

23 A. I don't recall.

24 Q. Do you recall that there were three
25 versions prepared?

1 A. I am sure that John, as his practice was,
2 was to send a draft to the city and ask for Dan and me
3 to take a look at it and give feedback, and then make
4 modifications before preparing the final versions.

5 Q. Okay. So is that your recollection, that
6 that's, in fact, what occurred?

7 A. I am sure that's what occurred.

8 Q. All right. So your practice was to have
9 your engineer prepare an initial assessment and provide
10 you with an opportunity to review and comment?

11 A. That's correct.

12 Q. And then the engineer would go back and
13 consider those comments and make adjustments to the
14 memorandum?

15 A. That's correct.

16 Q. And then was your goal then to work to a
17 final working memorandum that you would share with the
18 city, staff, and counsel?

19 A. The next step would have been to review it
20 with legal counsel and with the city administration to
21 see whether or not this was the direction we were
22 headed.

23 Q. Okay. And do you recall going through that
24 process on this effort?

25 A. We ended up going into the development

1 agreement process after this was completed is my
2 recollection and that this was just one of the things we
3 used in that process.

4 Q. Okay. All right.

5 In the off-site storm drainage, what was
6 the proposed public improvement during this time period?
7 Do you recall?

8 A. On the set of plans that showed Phases I,
9 II and III, it included the construction of all of the
10 lots on the site and then a drainage swale and ditch
11 line that goes all the way north to Mill Creek from the
12 Phillips Estate subdivision site, and it also included
13 the extension of the sanitary sewer line going that
14 direction as well.

15 Q. Did it also include some off-site
16 improvement to address the water flowing to the Mill
17 Creek area?

18 A. It covered from Phillips Estate all the way
19 to Mill Creek.

20 Q. Okay. The proposed reimbursement cost,
21 there's a breakdown for the different phases?

22 A. That's correct.

23 Q. Okay. And in Phase 1, at least the
24 memorandum I have, indicates that there were no
25 anticipated reimbursement costs?

1 A. That's correct.

2 Q. And in Phase 2 the same thing, there were
3 no anticipated reimbursement costs?

4 A. That's correct.

5 Q. And in Phase 3 there were anticipated
6 reimbursement costs. Correct?

7 A. That was John's conclusion, is that if that
8 was constructed he saw that there was a need to do some
9 reimbursements.

10 Q. Okay. And what was the anticipated
11 reimbursement cost?

12 A. John's memo indicates the estimated
13 reimbursement cost is \$500,000 -- 504,800.

14 Q. Okay. And which version was that?

15 A. It's on May 11th of 2012.

16 Q. Okay. I'm going to show you an earlier
17 version, and it's dated May 8th, 2012, and it's Bates
18 labeled ASH00813. And I'm just going to show you two
19 pages from this that specifically relates to the
20 off-side storm drainage. And those are Bates labeled
21 819 and 820. And you can pardon my arrows, but I want
22 you to take a look at that.

23 A. (Reading.)

24 MR. LIEN: Are we marking this as 106?

25 MR. LOISELLE: That's my only copy I have,

1 so I just described the Bates label.

2 MR. LIEN: But I mean are we going to make
3 it an exhibit to this deposition?

4 MR. LOISELLE: No.

5 MR. LIEN: When we take a break, we can
6 make copies.

7 MR. LOISELLE: Sure.

8 THE WITNESS: Okay.

9 BY MR. LOISELLE: (Continuing)

10 Q. All right. In this earlier version, there
11 was an anticipated reimbursement cost for Phase 3 of 1.4
12 million.

13 A. I see that in the notes, yes.

14 Q. Do you know why there was an adjustment
15 between May 8th and May 11th from 1.4 million to the
16 \$500,000 number you just noted?

17 A. There are two notes on that version from
18 John asking questions about some assumptions he used. I
19 don't recall the discussion of why John made the change
20 from 1 million down to \$500,000.

21 Q. Okay. Do you know what he was originally
22 presuming to develop the \$1.4 million estimate? Did he
23 share that with you?

24 A. In terms of his methodology, no.

25 Q. Okay. I'm going to show you another

1 version dated May 25th, 2012. The Bates label on the
2 first page is ASH00778. And will you take a look at
3 that memorandum? It looks like there's been some
4 further adjustments made.

5 A. I don't see the -- I don't see any
6 significant differences.

7 Q. Okay. So at least in 2012, it appears
8 through the evaluation of your -- of the city's
9 engineer, the city did anticipate that it would have a
10 financial contribution to on-site and off-site
11 improvements related to the stormwater system that was
12 being developed by JCNW?

13 A. The engineer's -- Mr. Ashley's memo went
14 through and provide the city with his professional
15 opinion, and you will also note in the memorandum there
16 was a notation that the city did not have a stormwater
17 SDC in place and did not have a financing mechanism
18 available to assist with reimbursement. This memo was
19 written before consultation with legal counsel in terms
20 of what was an appropriate share, if any, for the
21 future, and I think it was -- we didn't know at that
22 point what was going to be built in Phase 3 and didn't
23 know what would happen with the off-site improvements.

24 Q. Okay. But it does -- I want to make sure
25 that we are aligned at least on what we agree on first

1 and then we can talk about what we don't agree on here
2 in a bit.

3 At least at this time the city had an
4 expectation it had a financial contribution to these
5 improvements and, two, there was a problem funding it.
6 There wasn't a funding mechanism identified. Correct?

7 A. And the city I think clearly explained that
8 to Bill and to Steve Ward that the city didn't have
9 funding available to -- to address the off-site
10 improvement cost.

11 Q. Okay. And that was part of the challenge
12 that the city was having in its negotiations with the
13 developer for final phasing of this project?

14 A. That's correct.

15 Q. Okay. And that's plagued us?

16 A. That has plagued this project from day one.

17 Q. Okay. And that's the issue that's
18 unresolved today?

19 A. Correct.

20 Q. And as far as you are aware, there's never
21 been an agreement reached between the city and the
22 developer concerning final allocation of responsibility
23 for those improvements?

24 A. I would agree with that.

25 Q. Okay. And as you sit here today, are you

1 aware of a funding source the city has identified for
2 anticipated responsibility for those improvements?

3 A. For the storm drainage, I understand the
4 city has now adopted a storm drainage SDC.

5 Q. That happened last night. Right?

6 A. I don't know when it happened. Is that
7 when it happened? I didn't know.

8 Q. Okay. Two nights ago.

9 A. All right. I was not aware of that.

10 Q. Okay. But prior to Monday --

11 A. Prior to that, I was not aware of any.

12 Q. Okay. And it sounds like you are unaware
13 of the particulars related to what fee has been adopted?

14 A. I know nothing.

15 Q. Okay.

16 A. At this point.

17 Q. And you don't know anything about the
18 anticipated revenue stream that the city expects to
19 secure from that?

20 A. No. I've not been involved in any
21 discussions with anyone related to that.

22 Q. And you don't know if it would provide
23 funding sufficient to capitalize the cost of the
24 stormwater system that's finally contemplated for this
25 project?

1 A. I do not.

2 Q. During your negotiations with the
3 developer, did the developer express concerns regarding
4 reimbursement for the cost associated with water dumping
5 on his site?

6 A. I can recall a number of times Bill being
7 not happy that he had ever agreed to allow the water to
8 go that direction.

9 Q. Okay. And as far as you are aware, had
10 there ever been a final resolution between the city and
11 Mr. Martinak about what the appropriate reimbursement
12 would be for discharging water onto the site?

13 A. I'm not aware of any agreement.

14 Q. Okay. Like the final resolution of the
15 stormwater improvements was that another can that had
16 been kicked down the road for a later resolution in this
17 development process?

18 A. I think the city's perspective was that the
19 water was going to flow there, it was flowing there now,
20 the city had paid for the cost of extending that pipe
21 and that was the obligation.

22 Q. So it was the city's expectation they would
23 just have to pay for the pipe and wouldn't have to pay
24 for the actual discharge of the water?

25 A. I don't recall any discussion at the city

1 level saying that it was going to pay for the discharge
2 of the water.

3 Q. Okay. At some point were there
4 negotiations between the city and the developer about
5 abandoning in Phase 3 development and capping this
6 development at Phase 2?

7 A. I would say that my expectation was that I
8 never expected to see a Phase 3 constructed.

9 Q. That may have been your expectation based
10 on your observation, but was there actually negotiations
11 between the city and the developer about stopping at
12 Phase 2?

13 A. The only conversation I recall is Bill came
14 into the public works office one day and made an
15 overture about transferring the ownership to the city.

16 Q. The ownership?

17 A. For the detention basin area.

18 Q. All right. Why did you think that Phase 3
19 would never get developed?

20 A. Because I didn't see that the cost that
21 could be generated from the project would be enough to
22 cover the cost of the off-site improvements.

23 Q. In other words, it wasn't enough money to
24 justify --

25 A. I didn't see that the selling of the lots

1 would generate enough money to allow them to move
2 forward with the final phase.

3 Q. Okay. So were there negotiations regarding
4 a modification to the final proposal other than Bill's
5 suggestion during that one visit?

6 MR. LIEN: Object to the form of the
7 question. What do you mean "final proposal"?

8 MR. LOISELLE: That's a fair objection.
9 Thank you, Counsel. That's a really poor question.

10 THE WITNESS: Okay. Rephrase it.

11 MR. LOISELLE: I can rephrase it.

12 THE WITNESS: Yes.

13 BY MR. LOISELLE: (Continuing)

14 Q. The project had a phase development
15 process --

16 A. Correct.

17 Q. -- where in Phase 3 there would be this
18 final capital improvement to address stormwater. That
19 was your original anticipation. Correct?

20 A. If Phase 3 was developed into lots and that
21 meant the storm drainage basin went away, there would
22 have to be some off-site storm drainage facilities
23 provided to allow the water to get to Mill Creek.

24 Q. Okay. And at some point you began to form
25 the belief that maybe Phase 3 wouldn't occur. Correct?

1 A. I think that was developed during the
2 development agreement negotiations.

3 Q. Okay. Were there negotiations between the
4 city and the developer about modification to the
5 original plan for addressing stormwater?

6 A. During the development agreement,
7 negotiations that we were all involved in, Phase 1 had
8 been completed, Phase 2 was being proposed, and Phase 3
9 was the west end of the west third of the site. During
10 that development agreement phase, we talked about how to
11 modify that phasing so that it was basically Phase 1,
12 Phase 2A and 2B, and then a Phase 3, which was -- ended
13 up being the detention basin. Phase 2A and 2B had a
14 couple of things that it allowed for. One is it allowed
15 for the street connectivity to occur. It allowed for
16 the water lines to be looped within the subdivision.
17 And it allowed the street connection from Quail Run to
18 be extended into the -- to connect with the entire
19 property.

20 That gave the developer a few more lots.
21 It also -- at the west end at the Quail Run connection,
22 and it also allowed the city to guarantee that it had
23 the looping of the water system and the streets were
24 completed.

25 Q. Okay.

1 A. The detention basin was the way to handle
2 the stormwater runoff from essentially Phases I and II
3 and the Quail Run development.

4 Q. Okay. And then the 2B, what was the plan
5 there?

6 A. 2B is that last street before you get to
7 the detention basin.

8 Q. Okay.

9 A. And a few lots at the end.

10 Q. Okay. And was there ever a final
11 resolution of the total phasing of the Phillips Estate
12 project?

13 A. The design concept allows for full built
14 out, but that still means you have to resolve that
15 off-site watering -- or storm and sanitary issue.

16 Q. Okay. And the Phase 2 development
17 agreement contemplates that there will be a Phase 3
18 development process initiated by the developer?

19 A. And it anticipated there would be a
20 separate agreement to talk about those improvements and
21 those costs.

22 Q. Okay. And is it fair to say that the
23 detention pond concept and improvement was an interim
24 solution and was not a final solution to stormwater for
25 the Phillips Estate and the adjacent properties

1 including Quail Run?

2 A. Yes. I would agree that the overall
3 concept for the full development of the site is that
4 that detention pond and retention basin ends up being a
5 interim solution until something off-site is built. The
6 design reviews that we were looking at wanted to make
7 sure that it functioned properly for basically Phases I
8 and II and handled the storm drainage for Phases I and
9 II.

10 MR. LOISELLE: Another five minutes.

11 THE WITNESS: Sure.

12 MR. LOISELLE: And then I'm fairly
13 confident we are going to wrap this up before noon, so
14 you can sneak out of here after that.

15 THE WITNESS: Okay.

16 (A recess was taken.)

17 BY MR. LOISELLE: (Continuing)

18 Q. All right. I just have a few more minutes.
19 Thank you for taking a break. Like we did after the
20 last break, I'm going to ask have you had an opportunity
21 to confer with counsel?

22 A. Besides talking about bone fishing in
23 Galveston, that's fine.

24 Q. And I presume you don't want to alter or
25 change or supplement your testimony?

1 A. No.

2 Q. Okay. I just want to ask you some
3 relationship questions.

4 Mike Brash, how long have you known him?

5 A. Mike was hired by the city I think in the
6 end of 2008.

7 Q. Okay.

8 A. And that was the first time I had met him.

9 Q. Okay. Did he report directly to you?

10 A. Yes, he did.

11 Q. For lack of a better term, was he your eyes
12 and ears out in the field?

13 A. He was the public works inspector. I
14 relied on him heavily to do all of the field inspection
15 and working with the contractors.

16 Q. Okay. Regarding the Phase 2 development
17 process and the Phase 2two work that was conducted by
18 the developer, did Mr. Brash review and approve the site
19 work that was performed?

20 A. Yes, he did. He was out there with Bill's
21 supervisor on a regular basis.

22 Q. Okay. And he accepted the work that was
23 performed?

24 A. There were a number of items I think at the
25 very end that were listed as -- on a punch list of

1 things that needed to be completed that were still
2 outstanding in May of 2014 when I left the city.

3 Q. Okay. Other than those items, the city was
4 satisfied with the work that was performed by the
5 developer?

6 A. I believe so.

7 Q. Okay. And how would you describe your
8 relationship with Mr. Brash?

9 A. It was a good working relationship.

10 Q. Okay. If you were a public works director
11 in another community, would you hire him as your eyes
12 and ears in the field?

13 A. Absolutely.

14 Q. Okay. So it sounds like you believe he is
15 honest and trustworthy?

16 A. Yes.

17 Q. Your relationship with Bill Martinak, how
18 would you describe your relationship?

19 A. Bill and I have always had a good
20 relationship.

21 Q. Is he honest and trustworthy?

22 A. I think so.

23 Q. How about with Westech? What's your
24 general impression of their reputation?

25 A. I have worked with Steve Ward for a number

1 of years in different capacities. He was the city
2 engineer for the City of Mill City. When I was working
3 up there both as their planning consultant as well as an
4 interim city administrator position up there, Steve
5 designed their water -- Steve and his firm designed
6 their water system improvement project, and I worked
7 closely with him on that project as well as some other
8 highway-related projects.

9 Q. Okay. If you had an occasion to hire a
10 civil engineer to work on public improvement for one of
11 your clients, would you hire Westech?

12 A. I would use Westech for a standard
13 development design.

14 Q. Okay. And specifically Mr. Ward, is he
15 honest and trustworthy?

16 A. Steve and I worked well together and had a
17 good working relationship, and I would say he is honest
18 and trustworthy.

19 MR. LOISELLE: Okay. Those are all of the
20 questions I have. Thank you.

21 THE WITNESS: Okay.

22 Thank you, guys.

23 (Deposition adjourned.)

24 --oOo--

25

1 STATE OF OREGON)
) ss.
2 COUNTY OF WASHINGTON)

3 I, Maureen Kelly, RPR, OR-CSR, hereby
4 certify that, pursuant to the Oregon Rules of Civil
5 Procedure, **DAVID W. KINNEY**, personally appeared before
6 me at the time and place set forth in the caption
7 hereof; that at said time and place I reported in
8 stenotype all testimony adduced and other oral
9 proceedings had in the foregoing matter; that thereafter
10 my notes were reduced to typewriting under my direction;
11 and the foregoing transcript, Pages 1 to 69, both
12 inclusive, constitutes a full, true, and correct record
13 of such testimony adduced and oral proceedings had and
14 of the whole thereof.

15 Witness my hand and CSR seal at Tualatin,
16 Oregon, this 27th day of April, 2015.

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MAUREEN KELLY
Certified Shorthand Reporter
Certificate No.: 00-364

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