

ARBITRATION SERVICE OF PORTLAND

City of Stayton,

Claimant,

vs.

JCNW Family LLC,

Respondent.

ASP No. 141222

**FIFTH SUPPLEMENTAL
AWARD**

A Fourth Supplemental Award was issued in April 2016 to account for the successes and failures of the directives and requirements set forth in awards issued in August 2015 and January 2016, and to develop a workable plan for the development and construction of a permanent storm water drainage system from the Phillips property to Mill Creek. The Fourth Supplemental Award required that a hearing take place to assess the progress of the plan set forth therein. This hearing was conducted on August 5, 2016. Based on the information provided by the parties at the hearing, the plan set forth in the Fourth Supplemental Award is altered as set forth below.

INFORMATION LEARNED FROM THE HEARING

The Claimant, Respondent and Santiam Water Control District (SWCD) (by invitation) provided information at the hearing that is generally summarized below:

1. The storm water drainage plan, outlined in the Fourth Supplemental Award and approved by the Claimant, will not be built before the end of October 2016 primarily as a result of the inability to obtain the required Public Utility Easements.
2. The Claimant represented that, at this point in time, it would not seek to initiate a condemnation action against the affected property owners to secure the needed easements because (a) it didn't believe it had the authority to do so, (b) it didn't have the financial resources to pay for the easements, and (c) the city council was not inclined to exercise the City's condemnation powers under the circumstances presented.
3. At the hearing, an alternative route to Mill Creek was identified which would avoid the need to acquire easements from property owners who presently are opposed to granting the required easements.

4. The alternate route crosses through a significant wetlands area and would require (a) the approval of the property owners in the area and (b) permit approval from the governmental agencies that govern the wetland resource.
5. The development of the stated alternate route cannot be achieved in time to address the storm water runoff this coming winter. This route would also require revision of the Drainage Study and construction plans.
6. In an effort to address the storm water run off for the 2016-17 winter, it is anticipated that the parties will have to work with the SWCD and affected property owners to develop a temporary storm water drainage plan (referred to herein as the “temporary plan”) that controls and directs the storm water north and west to the Salem Ditch over the approximate route the water traveled during the winter of 2015-16.
7. The temporary plan for winter 2016-17 will require prompt action to obtain approval from affected property owners and to work out an acceptable arrangement involving the parties and the SWCD.
8. It is reported that the following property owners will have to give consent for a temporary plan to be implemented: Roberts, Weitman Trust (or its successor), and Bauman. It is not clear if the plan would involve land owned or controlled by Marion County.
9. All items set forth on the punch list relating to the construction of the retention pond and weir still need to be completed.
10. It remains to be determined if the Memorandum of Understanding (MOU), entered into between the SWCD and the Claimant on February 24, 2014 has been complied with.

FURTHER IMPREMENTATION OF THE GOALS OF THE FINAL AWARD

To further implement the goals established in the Final Award, and subsequent supplement awards, this Fifth Supplemental Award is entered, as follows:

It is essential that a storm water drainage facility be planned, approved and constructed as soon as possible to direct overflow storm water from the Phillips property to an approved location. It was established in the above-referenced hearing that Respondent’s proposal, as adopted in the Fourth Supplemental Award, has failed. Two possible alternative storm water drainage plans have been identified:

- Respondent outlined a plan that would proceed north to Mill Creek across different parcels and through a significant wetlands resource; however, as noted above, one of the property owners has already indicated that it is unwilling to grant a necessary easement; and
- It was suggested that a storm water drainage plan – temporary and permanent – could be developed to the west to the Salem Ditch (controlled and managed by the SWCD).

Requirements Imposed

Given the present circumstances – especially the fact that the winter rains are likely to begin falling in earnest by mid-November – the following requirements are imposed:

1. The Respondent will immediately begin the process of contacting and seeking approval from those property owners whose land would be impacted by the first alternative – running north to Mill Creek. Respondent will also immediately open discussions with the applicable permitting agencies to determine the viability of obtaining the permits required to implement this alternative.
2. The Respondent will continue its expedited efforts to develop a temporary plan by securing all necessary easements, permissions and approvals to allow storm water to pass from the Phillips property to the Salem Ditch during the winter of 2016-17; this provision includes a requirement that JCNW and the Claimant work closely with SWCD to develop a plan that addresses the SWCD's reasonable expectations and requirements. To that end, Respondent will develop a map confirming the details of the route of the temporary plan, which will include the location of the proposed ditch and the names of the owners of the lands the drainage ditch will cross over. Respondent will submit a completed map to Claimant, the arbitrator and the SWCD on or before **September 22, 2016**.
3. The Respondent will promptly proceed to secure Public Utility Easements (or permission in other forms as approved by the arbitrator) from the property owners identified on the map. Said easements/permissions will be obtained by Respondent no later than **November 1, 2016**. Further, Respondent will immediately begin working with the Public Works Department with Marion County to determine if permits or easements are required from the county for the temporary plan to proceed to the Salem Ditch.

4. The Respondent will complete all items on the working punch list by **October 15, 2016**.
5. The SWCD is a necessary participant in the process of developing the temporary storm water drainage plan, designed to direct excess storm water to the west of the Phillips property to the Salem Ditch. As such, the parties will work with the SWCD in the development and implementation of this temporary plan. This will include the following obligations imposed on the parties relating to the SWDC: inviting input on all aspects of the plan, sharing information relating to all aspects of the development of the plan and construction of the temporary facility, sharing data relating to water flows, and reasonably addressing the concerns and requirements of the SWCD relating to the development of a temporary plan. The SWCD will be copied on all essential communications relating to the development of the temporary plan. The SWCD is directed to copy counsel for the parties with any essential communications directed to the Arbitrator. The Arbitrator will apprise counsel for the parties of all contacts between the Arbitrator and the SWCD.

Status Reports

To monitor and direct the efforts outlined above, the Respondent will provide the following reports to Claimant and the Arbitrator (and the SWCD as directed by the Arbitrator), in conformance with the following schedule:

1. Report on acquisition of Public Utility Easements over the properties to the north between the Phillips pond outfall and Mill Creek. Report at least every 30 days beginning September 30, 2016, until said easements are obtained and approved.
2. Report on the status of obtaining the permits necessary to construct a storm water drainage system to the north to Mill Creek at least every 30 days beginning September 30, 2016 until said permits are secured
3. Report on the overflow and pond height measurements on the first day of each month, from December 1, 2016 to May 1, 2017.
4. Report on the status of obtaining Public Utility Easements/permissions over the properties to the west between the Phillips property and the Salem Ditch. Report every 14 days beginning September 22, 2016 until said easements are secured.

5. No later than September 22, 2016, report on the status of developing an understanding with the SWCD for the acceptance of storm water from the Phillips property into the Salem Ditch for the winter of 2016-17.
6. Assuming all easements and approvals are obtained for the passage of water to the Salem Ditch for the winter of 2016-17, report weekly on the status of construction of any facilities that will need to be completed to implement this plan, beginning one week after all easements and approvals have been obtained.
7. A follow up hearing to address any and all issues relating to the above-stated requirements will be called by the Arbitrator on his own initiative or at the request of either party.

Sanctions

The Arbitrator will impose sanctions to enforce the requirements and deadlines set forth in this supplemental award. Sanctions may include an award of all or a portion of the unreimbursed attorney fees and costs incurred by Claimant since the last cost bill was addressed with a supplemental money award. A hearing will be conducted on or about October 10, 2016 to determine the status of the development and implementation of the temporary plan for water to pass to the west of the Phillips property to the Salem ditch. If substantial progress has not been made towards the implementation of the temporary plan, at the time of the hearing, the Arbitrator will begin imposing appropriate sanctions.

Authority

This arbitration proceeding was initiated with the Arbitration Service of Portland (ASP) with the consent of the parties and has continued with the consent of the parties through the issuance of supplemental awards designed to implement the goals and requirements of the Final Award. As such, the authority to act, as granted and controlled by the ASP process and rules, shall continue unless determined otherwise.

Dated this 15th day of September, 2016

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Daniel L. Harris, Arbitrator