

ANDERSON ET AL., V. CITY OF PORTLAND SETTLEMENT

PUB Presentation

Good afternoon, and thank you for inviting me to your meeting this afternoon. My name is Karen Moynahan and I am the Senior Deputy City Attorney assigned to advise the City on matters related to the Portland Water Bureau. I am here today to provide you with a summary of the recent settlement in the *Anderson v. City of Portland* litigation, otherwise known as the “Ratepayer Lawsuit.”

Background

In December 2011, three ratepayers and a ratepayer organization sued the City, claiming that City Council had improperly spent water and sewer funds on 26 programs or activities that Plaintiffs alleged were “unrelated” to the provision of water and sewer services. The City Attorney’s Office initially estimated the value of all the challenged expenditures to exceed \$120 million, nearly half of which was attributable to the Portland Harbor Superfund Site.

Legal Proceedings

The legal issue before the Multnomah County Circuit Court was whether the Portland City Charter authorizes Council’s decisions to spend ratepayer funds on the challenged activities and programs. In March 2014, Judge Bushong ruled that to be authorized by the City Charter, an expenditure had to be “reasonably related” to the provision of water and sewer services. However, in that same opinion, the judge also ruled on what is referred to as the “standard of review,” deciding that it is the court, and not City Council, that makes the determination as to whether an expenditure is reasonably related to the provision of water and sewer services. That standard is problematic because it is City Council that sits as the decisionmaker regarding how ratepayer funds will be expended, and not the court.

Between 2014 and 2016, the court issued numerous opinions regarding the challenged expenditures, and the parties came to agreements regarding others. Ultimately, the court ruled in the City’s favor on all but seven challenged

expenditures: Public Campaign Financing, the Portland Loos, Hurricane Katrina Aid, Dodge Park amenities, Hydro Parks, BES Parks Pass-through Costs, and certain expenditures at Powell Butte. Significantly, the court ruled that the City's expenditure of ratepayer funds to investigate the Portland Harbor Superfund Site was authorized by the City Charter. Ultimately, the court determined that the expenditure \$17 million in ratepayer funds was not authorized by the Portland City Charter, and ordered the City to reimburse the ratepayer funds accordingly.

The Settlement

On December 20, 2018, Council authorized Mayor Wheeler to sign a settlement agreement with Plaintiffs. The agreement required the City to pay Plaintiffs' legal counsel \$3 million, from General Fund sources, which it has done. Additionally, by September 30, 2019, the City must reimburse the Water Fund \$5.5 million and the Sewer Fund \$1.5 million, also from General Fund sources. Finally, it provides that the lawsuit will be dismissed with prejudice, meaning that these plaintiffs cannot bring these claims back before the court in the future.

The City Attorney's Office recommended that City Council approve the settlement agreement because we believe that it is a good, fair settlement for several reasons:

1. It reduced the total award from \$17 million to \$10 million.
2. It dismissed the case without a final judgment, which would enshrine the judge's ruling on the standard of review.
3. It brought finality. An appeal would present risks to both Plaintiffs and the City. Additionally, on appeal, the \$17 million judgment would be subject to the 9% statutory interest rate per annum, greatly increasing the City's potential liability.

Attorneys' Fees

The payment of attorneys' fees to the Davis Wright Tremaine law firm was a matter of concern to all the commissioners. The City Attorney's Office recommended the payment of \$3 million in attorneys' fees because it is consistent with standard attorneys' fees awards, which, in most contingency or class action lawsuits, amount to at least one-third of the court's award.

Therefore, a \$3 million fee award on a \$10 million settlement is entirely consistent with, if not slightly less than, a standard contingency fee award.

Additionally, this lawsuit was filed as a “Common Fund” lawsuit. Under the “Common Fund Doctrine,” an attorney who brings a case that results in the payment of funds to benefit members of the public, who are not paying for the attorney’s services, is entitled to recoup his or her fees from the award.

In this instance, the court awarded \$17 million as “unauthorized expenditures” to be reimbursed to the water and sewer funds. Because the City Attorney’s Office believed that Plaintiffs’ attorneys would have been awarded at least \$3 million in fees out of the \$17 million award had this matter remained before the Circuit Court, it recommended that Council authorize the settlement.

I am happy to answer any questions that you might have about the settlement.