

ANDERSON ET AL., V. CITY OF PORTLAND SETTLEMENT

December 20, 2017 Council Briefing

Good morning, Mayor Wheeler and Commissioners. I am 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 the information that you need to decide whether to adopt the ordinance that authorizes the settlement of the *Anderson v. City of Portland* litigation, otherwise known as the “Ratepayer Lawsuit.”

- I will begin by explaining to you how this lawsuit arose and the legal issues that were before the court.
- Next, I will walk you through the legal proceedings in the Multnomah County Circuit Court that culminated in the judge’s June 30th, 2017 ruling.
- Finally, I will walk you through the nuts and bolts of the settlement agreement that is before you today, and I will explain to you why the City Attorney’s Office and the Chief Financial Officer recommend that you approve this settlement.

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. Their challenges to Water Bureau expenditures included the restoration of the Bull Run cabins and house, operation of the decorative fountains, assistance to the residents of New Orleans in the wake of Hurricane Katrina under a mutual aid agreement; the construction of Powell Butte amenities required by the 2003 Conditional Use Master Plan; upgrades to Dodge Park; and basic amenities at City-owned water tank sites, or “Hydroparks.” Most of the challenged Water Bureau expenditures were first incurred between 2003-2005.

Plaintiffs also challenged expenditures made by the Bureau of Environmental Services, such as for land acquisitions to assist in stormwater control, invasive species control and, most significantly, for costs related to the City's investigation of the Portland Harbor Superfund Site.

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 Judge Stephen Bushong of the Multnomah County Circuit Court was whether the Portland City Charter authorized Council's decisions to spend ratepayer funds on the challenged activities and programs. In a threshold decision of 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. The City, of course, agrees with that portion of the decision. 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 for the City because it is City Council that sits as the decisionmaker regarding how ratepayer funds will be expended, and not the court. Council must have the ability and the confidence to review a proposed expenditure, such as the proposed filtration plant, and decide whether it is a sound and logical investment of ratepayer funds. Therefore, the City's position regarding the "standard of review" was that the court has the jurisdiction to review an expenditure of ratepayer funds to determine whether City Council had *abused its discretion*, but not to make its own determination as to whether the expenditure was reasonably related to the provision of water and sewer services. That's Council's job.

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.

In June 2017, after a "remedy" trial on the costs of the disallowed expenditures, Judge Bushong ruled that \$17 million was not authorized by the Portland City Charter, and ordered the City to reimburse the ratepayer funds accordingly. A final judgment has not yet been entered, at the parties' request.

The Settlement

Council is being asked today to adopt an ordinance that would authorize Mayor Wheeler to sign a settlement agreement with the Plaintiffs. The agreement requires the City to pay Plaintiffs' legal counsel \$3 million, from General Fund sources, by December 29, 2017. 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 recommends that City Council adopt this ordinance and approve the settlement agreement. We think that it is a good, fair settlement for several reasons:

1. It reduces the total award from \$17 million to \$10 million.
2. It dismisses the case without a final judgment, which would enshrine the judge's ruling on the standard of review. While another Multnomah County judge would likely look to Judge Bushong's decision for guidance in the future should a similar lawsuit be filed by another party, there would be no legal precedent stating that a circuit court judge, and not City Council, gets to decide whether an expenditure of ratepayer funds is reasonably related to the provision of water and sewer services.
3. This settlement brings finality. An appeal presents 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.

I'd like to address a final matter that is surely weighing on your minds, the payment of attorneys' fees to the Davis Wright Tremaine law firm. The City Attorney's Office recommends the payment of \$3 million in attorneys' fees because it is consistent with standard attorneys' fees awards. In most contingency or class action lawsuits, where attorneys litigate a matter at substantial risk to their law firms' finances, attorneys recoup 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. We are confident that Plaintiffs' attorneys would have been awarded at least this amount in fees out of the \$17 million award had this matter remained before the Circuit Court. Therefore, the City Attorney's Office recommends that you authorize this settlement.

I will now turn this presentation over to Mr. Ken Rust.