



CITY COUNCIL REPORT

October 4, 2007

TO: Phillip L. Nelson, City Manager

FROM: Brian P. Murphy, Asst. City Manager/Economic Development Services
Carol Anderson, Parks and Recreation Director
Steven J. Vandette, City Engineer

SUBJECT: Fetterly Drain Work

In response to comments and questions raised at the October 1, 2007 City Council meeting, this report gives an overview of the status of the current work on the Fetterly Drain and on tree removals within the drain easement and adjoining properties. Since this work is somewhat related to proposed development of the area by the Garrett Family Limited Partnership, information on the approval status of these developments is also provided.

EXECUTIVE SUMMARY

The Fetterly Drain widening and deepening work is being done under the authority of the Oakland County Drain Commission.

The OCDC has authorized this work under an agreement with Ladd's, Inc., Real Estate & Development who obtained approval of their engineering plans and authorization to proceed utilizing their own contractors. The contractors are required to stay within the existing 40' wide county drain easement for the Fetterly Drain.

The City of Troy, although lacking jurisdiction, has been monitoring the tree removal and drain work several times per week during visits to the site by engineering and parks and recreation staff. We communicate regularly with Pat and Lon Ullman as they keep us abreast of activities and we monitor the site to assure that all city regulations and requirements are being met. Our assessment of the current situation is that while the contractor has gone outside the county easement onto city property, the encroachments have been minor and were not done in willful violation of the easement line; one exception being tree removals on city property at the confluence of the Fetterly and Gibson drains that were done with the City's knowledge and permission.

Tree removals have occurred on private property owned by the Garretts that exceeds the 25% limit on trees 4-10 inches in diameter, as provided by Chapter 28 - Tree Regulations and the City's Landscape Design and Tree Preservation Standards; however, upon notice to the property owner, any further removals have ceased.

A City Council resolution adopted on October 20, 2003 prohibited any payment for land, regional detention, drain improvements, wetland mitigation or easements related to development of the Oak Forest subdivisions, but it has no authority over the current activities.

An MDEQ permit application to enclose a portion of the Fetterly Drain, place fill in wetlands and construct a storm water management system (detention basin) discharging to the drain for the purpose of developing the Oak Forest South site condominiums is scheduled to have a MDEQ public hearing at 7 pm Thursday, November 8, 2007 in the Troy City Council Chambers. City staff is reviewing the application and will submit comments at this hearing.

A previous MDEQ permit application for Oak Forest North has been withdrawn, but is expected by the MDEQ to be re-submitted at a later date.

All previous approvals of Preliminary Site Plans for the development of the Oak Forest North and Oak Forest South Site Condominiums, which straddle the Fetterly Drain, have expired. No new plans have been submitted to the city for these developments.

FETTERLY DRAIN JURISDICTION

The Fetterly Drain is a legally established county drain under the jurisdiction of the Oakland County Drain Commission (OCDC). In accordance with the Michigan Drain Code, the Drain Commissioner is authorized to contract or make agreements with any private entity with respect to construction, operation or maintenance of county drains. Pursuant to their authority, the OCDC entered into an agreement with Ladd's Inc. (Joel and Dale Garrett) to clean out the Fetterly Drain from Square Lake to the Gibson/Renshaw Drain near the south end of Willow Grove; a distance of approximately 2,930 feet. The work consists of widening and deepening the drain, all within the existing 40' wide county drain easement and in accordance with engineering plans reviewed and approved by the OCDC. The Engineering Department, and our consultant, Hubbell, Roth and Clark, Inc., reviewed the plans and provided comments, but no incorporation of these comments into the plans or city approval of them was a pre-requisite for approval by the OCDC.

ACCESS TO DRAIN DURING CONSTRUCTION

The Garretts own various properties from which the drain easement is accessible from Willow Grove. These are the same properties that were proposed for site condo development, but are currently not approved by the City due to the expiration of the preliminary site plans (attachment "B", 2004 to 2007 portion of the Oak Forest Subdivisions and Site Condominiums City Council Timeline).

The contractor is not permitted to go on city property at the south end of Willow Grove or on the City's future park site abutting Square Lake. The contractor is required to stay within the county drain easement. City Engineer Steve Vandette spoke to Garrett's contractor at the site just prior to starting work and reviewed all work requirements and limitations with him. The contractor acknowledged that he was aware of these requirements and limitations and would work within all of them.

The following items were discussed on September 6, 2007 with the tree removal contractor on site, with Mr. Dale Garrett later that same day and with Mr. Lon Ullmann on the day the tree removals began.

- They cannot remove any trees on city property except within the Drain easement.

- They cannot access city property on the south side of Willow Grove or the parcel fronting on Square Lake except within the Drain easement.
- The Drain easement is staked. Wetland areas are flagged. The equipment operators acknowledged the staking.
- They will be removing trees from the Drain easement area. Two brush areas (absent of large trees) on Garrett's property will be cleared to stockpile wood chips.
- Trees under 4 inches can be removed without limitations. Trees over 4 inches, up to 10 inches in diameter, are limited to 25% removal.
- Trees can be removed in wetland areas, but stumps must remain. Ground must not be excavated in wetland areas not within the Drain easement.
- No earth moving will be done; a different contractor will do this.

TREE REMOVALS IN DRAIN EASEMENT

Tree removal work started on August 8, 2007. Trees within the 40' wide county drain easement were removed in accordance with the approved engineering plans and agreement with the OCDC.

The county drain easement is not limited by ordinance restrictions on tree removals.

TREE REMOVALS ON PRIVATE PROPERTY

Limited brush and tree clearing was also to be done on Garrett's properties in order to allow access to the drain and chipping of trees removed from the drain easement. Since there is no city approved plan for development, the property owner is only limited by the requirements of City Ordinance Chapter 28 - Tree Regulations, which states:

(D) Tree Protection Prior to Development. To prevent the unnecessary destruction of trees on land where a building permit or subdivision approval has not been issued, the destruction within any five (5) year period, of more than twenty-five (25) percent of the trees on any parcel of real property within the City, without prior approval of the director shall be prohibited.

(Rev. 6-5-89)

Trees that are subject to the 25% removal limit are those within the size range of four (4) inches to ten (10) inches diameter, in accordance with the City's Landscape Design and Tree Preservation Standards.

Jennifer Lawson, Environmental Specialist and Ron Hynd, Landscape Analyst, inspected the site on several occasions and have determined that the trees removed to-date have exceeded the 25% stated by Chapter 28. However, the property owner claimed that the trees were removed upon approval from the Michigan Department of Agriculture, **through an approval of nursery stock** as the property was inspected as a nursery.

City staff received a copy of the nursery stock inspection from the Michigan Department of Agriculture for parcel # 88-20-11-201-012 (parcel with a majority of spruce trees, as evidenced on aerial photos). City Staff reviewed the plant inspection report and determined that the property owner

may ball and burlap or spade out any of the spruce not in the wetlands, however may not cut and destroy any of the spruce on site.

During site inspections, City staff saw no signs of a balling and burlap or spading operation. The spruce trees denoted as nursery stock were being mulched onsite. The provided MDA inspection was for nursery stock, not mulch.

On September 17, 2007, City staff informed Mr. Garrett via FAX that other than harvesting the spruce for nursery stock, additional trees shall not be removed from this site other than trees under 4"; trees within the drain easement; and dead trees.

Any additional trees removed, other than those in the drain easement, would violate Chapter 28, and the City has the authority to issue citations to the property owner for such actions.

EASEMENT REQUEST

Prior to starting the drain work, Ladd's requested an additional temporary 40' easement running parallel along the west side of the county drain easement and across two city owned parcels. The plan that was submitted with Ladd's easement request was reviewed, but not approved. A letter requesting additional information (attachment "L") was sent on September 14, 2007. Upon review and staff approval of the additional information, it would be presented to City Council for granting of an easement. To date, no additional information has been submitted, nor does it appear likely that this easement will be pursued, since the drain work is already in progress and the contractors are primarily staying within the county easement.

In 2003, City Council granted an easement across the City's southern parcel, but that approval was subject to review and approval of site engineering plans to be submitted at a later date. There was no resolution pertaining to the north parcel abutting Square Lake.

ENCROACHMENT ON CITY PROPERTY

Jennifer Lawson, Environmental Specialist and Ron Hynd, Landscape Analyst, have inspected the site several times per week since the work began and have determined that although minor encroachments have occurred, mostly due to some difficulties maneuvering large equipment within tight working areas, they are not willfully violating the limits of the easement or trespassing on city property. At the south end of the drain, permission was given by Ron Hynd for the contractor to go outside the easement and onto City property to remove several dead ash trees and trees along the banks of the drain that had fallen into the water. This area needed to be cleared and the eroded banks stabilized. This is the largest encroachment onto City property, but it was done for the betterment of the drain and with our knowledge and permission.

PREVIOUS COUNCIL ACTIONS AND RESTRICTIONS

Pursuant to the belief that there was City Council action years ago that would prevent the clearing of land or any drain improvements without City approval, a resolution adopted on October 20, 2003 may come closest to supporting that belief, but it has no authority over the current activities.

Resolution #2003-10-526 states:

...BE IT FINALLY RESOLVED, that NO PROPOSAL SHALL BE SUBMITTED to City Council that includes any payment for land, regional detention, drain improvements, wetland mitigation or easements related to development of the Oak Forest subdivisions.

The resolution deals with the prohibition of any City financial participation on items including drain improvements, regional storm water detention and land exchanges among others. Since the current activity is privately funded and being done under the jurisdiction of the OCDC, there is no City financial liability or authority.

MDEQ PERMITS AND DETERMINATIONS

On May 29, 2007 the Michigan Department Of Environmental Quality (MDEQ) held a public hearing pursuant to an application for a wetland permit (MDEQ file #07-63-0048-P) to fill and mitigate for wetlands that would be impacted by the proposed Oak Forest Site Condominiums. City Engineer Steve Vandette and Environmental Specialist Jennifer Lawson attended and provided verbal and written comments (attachment "G"). Among the items raised was the fact that the site plans had expired, that the new plans included 7 more lots than previously approved by the city and that would result in greater impact on wetlands, and that the wetland assessment of October 17, 2001 expired in 2004. The applicant, Garrett Family Limited Partnership, subsequently withdrew the MDEQ permit application.

Another MDEQ permit application (file #07-63-0082-P) that was submitted last April 17th (attachment "F") is still being processed. Wattles Square, Inc., the applicant, seeks to enclose a portion of the Fetterly Drain, place fill in wetlands and construct a storm water management system (detention basin) discharging to the drain for the purpose of developing the Oak Forest South site condominiums. Once again, the MDEQ is being asked to permit activities that have not yet been approved by the City of Troy, since no Preliminary Site Plan for this development has been approved. Although site plan approval is not required by the MDEQ, the submittal is somewhat unusual in that local approval typically occurs first. City Engineering staff is currently reviewing this MDEQ application and will provide comments at the MDEQ public hearing scheduled for 7pm Thursday, November 8, 2007 in the Troy City Council Chambers.

On August 7, 2007 the OCDC notified the MDEQ by letter (attachment "H") that they intended to clean out the Fetterly Drain and that it is their understanding that no MDEQ permit is required for this work.

On August 9, 2007 the MDEQ advised the OCDC that the Fetterly Drain is a stream pursuant to regulation under the state Inland Lakes and Streams Act and that while there are some permit exemptions for certain activities within county drains, the MDEQ determined that the proposed Fetterly work did not qualify for exemptions. The OCDC responded with their letter of August 21 saying that the Drain Code allows the Drain Commissioner to contract or make agreements with any private corporation in respect to any matter connected to the construction, operation or maintenance of any drain and that the State of Michigan does not have jurisdiction over this activity (attachments "I" & "K", MDEQ and OCDC letters). Their letter also included a copy of a 1994 MDEQ letter supporting the Drain Commissioners position. To date there has been no response from the MDEQ.