

July 14, 2005

TO: The Honorable Mayor and City Council Members

FROM: John Szerlag, City Manager 

SUBJECT: Proposed Revision to Our Sanitary Sewer Service Ordinance which would eliminate Connection Requirement

The attached memorandum from the City Attorney's Office and City Management indicates that it is possible to eliminate mandatory connection to public sanitary sewers within a given time frame i.e. 18 months. This is good news as we will no longer be dependent upon revisions to state law to expunge time frames to hook-up to a sanitary sewer. However, I still think it's prudent to pursue changes at the State level because then hook-ups could be required upon septic failures; which is something we can't do with a change to our City Code.

Given the above, a resolution has been prepared for your consideration which instructs City Administration to modify our sanitary sewer ordinance to eliminate the 18 month sanitary sewer connection requirements. In addition, staff will be preparing a cost analysis to install sanitary sewers in all areas of the City where septic fields are currently used. We will then start a public notification campaign advising property owners on the benefits of our new ordinance.

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June 30, 2005

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CITY OF TROY
CITY MANAGER'S OFFICE

TO: John Szerlag, City Manager

FROM: Lori Grigg Bluhm, City Attorney *LB*
Brian Murphy, Assistant City Manager/Services *BPM*
Mark Stimac, Director of Building and Zoning *MS*
Steven Vandette, City Engineer *SV*

SUBJECT: Analysis of Proposed Revisions to Chapter 19 – Sanitary Sewer Service Elimination of Connection Requirement

Introduction:

At the City Council meeting of June 6, 2005, city staff was requested to consider revising ordinance Chapter 19, Section 19.02.04 that requires structures to be hooked up to newly available sewer lines within 18 months of publication of the availability of a new sanitary sewer. This request was made in connection with Council's approval of a Sewer Benefit Fee project within Charnwood Hills that would require homeowners to connect to the new sewers within 18 months after completion of the sewers in late 2006.

This report analyzes the ordinance revisions that would be needed to defer connection to the sewer while staying in compliance with state law. Also, potential consequences of these revisions are identified.

Enabling Legislation:

As early as 1913, the Courts have recognized the ability of municipalities to require property owners to connect to sanitary sewer systems. In *Hutchinson v. City of Valdosta*, 227 US 303 (1913), the Court required Ms. Hutchinson to connect to the City sewer within 30 days. The Court rejected her financial hardship arguments, and held that the health and welfare of the citizens required connection to the sewer at the earliest possible date. According to the U.S. Supreme Court, "It is the commonest exercise of the police power of a state or city to provide for a system of sewers, and to compel property owners to connect therewith. "

In Michigan, the Legislature adopted P.A. 1957, No. 185, which provided a financing mechanism to build sanitary sewer systems. This act was followed by P.A. 1961, No. 151, which authorized municipalities in urban counties (75,000 or more inhabitants) to pass legislation requiring all structures where water is used or available for use to connect to available sewer. This act was further refined in 1970, when the Michigan Legislature extended the authority to the rural communities as well as the urban communities. (P.A. 1970, No.191) Since "available sewer" was not defined under

state statute, the Michigan legislature again amended the law in 1972. According to P.A. 1972, No. 288, "available sewer" was now defined as a sewer line that was 200 feet or less from a structure. The Michigan legislature again re-visited the statute in 1978 (P.A. 1978, No. 368). At this time, the legislature extended the time for completing the mandatory connection from six months to eighteen months. The amendment also made it clear that it applied only to those structures that emanate sewage (as opposed to the earlier version which was tied to parcels where water was used or available).

There have been challenges to the state enabling legislation. The early cases challenged the ability of a local government unit to mandate sewer connections unless and until it was proved that the existing septic system was a health hazard. The Court has repeatedly rejected this argument. Under the state statute, local governments can mandate connection, even when a septic tank is functioning properly. According to *Township of Bedford v. Bates*, 62 Mich. App. 715 (1975), the Court stated "The clear thrust of the new act was to avoid the necessity of individual determinations..." Property owners aggrieved by the mandatory connection provisions have also argued that the required abandonment of their septic in favor of mandatory sewers constitutes a taking under the Fifth Amendment to the Constitution. The courts have also rejected this argument. In *Bedford*, the Court looked to cases in other states before finding the takings claim "without merit." In *Renne v. Waterford Township*, 73 Mich. App. 685 (1977), the Court also explained that the theory of "vested rights" for functioning septic systems was inapplicable, and did not excuse property owners from complying with a mandatory connection directive. In *Renne*, the Plaintiffs also unsuccessfully argued that the 200-foot measurement that was used to determine which properties would require connection was arbitrary. The Court stated that although connection could be required for all properties, the 200-foot measurement was upheld as "a reasonable upper limit on the reach of the statute." (The Attorney General has also opined that a city may adopt an ordinance that is more stringent than the current 200-foot measurement in OAG 1978 No. 5372). The *Renne* Court also rejected the Plaintiff's argument that they had a right to a vote or even a public hearing on the financing and construction of the sewer system.

These challenges were unsuccessful, largely because section one of the enabling legislation "makes it quite evident that the Legislature was concerned with the health hazards posed by septic tank systems". (*Renne*) According to the state law,

Public sanitary sewer systems are essential to the health, safety and welfare of the people of the state. Septic tank disposal systems are subject to failure due to soil conditions or other reasons. Failure or potential failure of a septic tank disposal system poses a threat to the public health, safety and welfare; presents a potential for ill health, transmission of disease, mortality and potential economic blight and constitutes a threat to the quality of surface and subsurface waters of the state. The connection to available public sanitary sewer systems at the earliest, reasonable date is a matter for the protection of public health, safety and welfare and necessary

in the public interest which is declared as a matter of legislative determination. (MCL 333.12752)

MCL 333.12753 (1) states: "Structures in which sanitary sewage originates within the limits of a city... shall be connected to an available public sanitary sewer in the city...IF REQUIRED by the city..." (Emphasis added) According to section (3),

the connection ... shall be completed promptly **but not later than 18 months** after the date of occurrence of the last of the following events or before the city.. requires the connection. (a) publication by a notice by the governmental agency ... of the availability of the public sewer system in a newspaper of general circulation. (b) Modification of a structure so as to become a structure in which sanitary sewage originates.

This enabling legislation provides local communities with the ability to finance expensive sewer projects by spreading the cost of the improvements to all the persons who benefit. If the community makes the decision to do the improvements, then all persons must connect. The law, as it is currently written, requires this connection within 18 months, or a shorter time "for reasons of public health." (MCL 333.12753(4)) There is at least one city that has adopted an ordinance that allows functioning septic systems within 200 feet to postpone connection to a newly available sewer system until septic system failure. Although Troy's representative, Bob Gosselin, proposed an amendment to the state statute that would expressly allow communities to have ordinances that allowed a postponement of the sewer connection until a septic system failed, this proposed legislation has been in Senate committee since February 2005.

It is uncertain whether this legislation will pass. However, if the Troy City Council desires to postpone the mandatory connection to the sewers for the Charnwood Hills area, then Council could eliminate the provisions of its ordinance that mandate connection to the sewers when they are installed. Since the State and City have declared that the eventual elimination of septic systems furthers the health, safety, and welfare of the community, Troy should continue its efforts to install new sewer systems. However, if the mandatory connection provision of Chapter 19 is eliminated, then Troy would need to advance the financing for any new sewer improvements. It is unknown when (and if) the property owners would be connecting to the system. It would only be at that time, when a voluntary connection is made to the system, that the City would be reimbursed for some of the costs of the new sewer system.

Revisions to Chapter 19 of Troy's Ordinance- No Connection Required:

In 1965, the City of Troy adopted an ordinance that required property owners to connect to available sanitary sewers within six months after notification of an available sewer line. The Troy ordinance was again amended in 1973 to incorporate the recent state law revisions that established a 200- foot measurement as "available" sewer. This ordinance also allowed for connections outside the 200- foot measurement when there were serious threats to health, safety, and welfare. In 1993, the Troy ordinance

expanded the time for the mandatory connection from six months to eighteen months. In 2003, the ordinance was again amended to implement the EPA/ MDEQ Phase II storm water requirements.

Troy's current ordinance is based on the enabling legislation, and incorporates several provisions from state law. This includes the purpose provision of MCL 333.12752, which states that the elimination of septic systems is in the interest of the health, safety, and welfare of the City. (Chapter 19, Section 19.02)

In order to implement the direction given by City Council, Chapter 19 of the City Code would need to be revised eliminating the requirement for connecting a structure from which sanitary sewage originates to an available public sewer. The following changes would be necessary:

Deletions from the Ordinance

~~USE OF PUBLIC SEWERS REQUIRED~~

~~19.02 Public sanitary sewer systems are essential to the health, safety and welfare of the people of the State and the City of Troy. Septic tank disposal systems are subject to failure due to soil conditions or other reasons. Failure or potential failure of septic tank disposal systems poses a threat to the public health, safety and welfare; presents a potential for ill health, transmission of disease, mortality and potential economic blight and constitutes a threat to the quality of surface and subsurface waters of the State and the City of Troy.~~

~~The connection to available public sanitary sewer systems at the earliest, reasonable date is a matter for the protection of the public health, safety and welfare and necessary in the public interest which is declared as a matter of legislative determination.~~

~~(Rev. 02-26-73)~~

~~19.02.04 Structures in which sanitary sewage originates located in the City of Troy in the area served by the system for which there is an available public sanitary sewer of the system shall not be used or occupied, after the effective date hereof, unless said structures are connected to the sewage disposal system: Provided, that structures within the City of Troy in which sanitary sewage is originating on the effective date hereof or in which sanitary sewage originates before availability of the system or any part thereof to service said structures shall be connected to said system within eighteen (18) months after publication of a notice by the City of Troy in a newspaper of general circulation in the City of Troy of the availability of the system.~~

~~19.02.05~~

~~A. When the structure in which sanitary sewage originates has not been connected to an available sanitary sewer system before use and occupancy or within the eighteen (18) month period provided in this Chapter, the City of Troy shall require the connection to be made forthwith after notice, which may be by first class mail or~~

~~posting on the property, to the owner of the property on which the structure is located. The notice shall give the approximate location of the public sanitary sewer of the system, which is available for connection of the structure involved and shall advise the owner of the requirements and of the enforcement provisions of this Chapter.~~

~~B. Any property from which sanitary sewage emanates which is not connected to an available public sewer within 90 days after the date of mailing of the written demand is hereby declared to be a threat to the health, safety, and welfare of the people and a public nuisance and the City may forthwith enter upon or in the property and install, construct and make such connections to abate the nuisance and to serve the property as are necessary or desirable, in the sole discretion of the City. The owner or occupant of any property who fails or refuses to connect the property to an available public sewer upon written demand shall forfeit a sum not exceeding \$100.00 and shall be liable to the City for the costs incurred in making the connection to the sewer, which sum, including contingencies, shall be recoverable, jointly and severally from the owner or occupant, in an action at law or may be assessed against such property and shall be collected and treated in the same manner as taxes.~~

~~C. If the City attempts to enter onto property for the purpose of ascertaining if it is the property from which sanitary sewage emanates, or to install, construct, and make connection of the property to the sewer, and is refused such entry, the City shall make complaint in writing to the Judge stating the facts of the case so far as may be known to the complainant. The Judge may issue a warrant directed to the Police Chief commanding him to take sufficient aid, and being accompanied by the Building Inspector of the City, between the hours of sunrise and sunset, to enter upon or in the property to the extent and for the duration required to enforce and carry out the provisions of this act.~~

~~(Rev. 06-07-93)~~

~~19.02.06 Where any structure in which sanitary sewage originates is not connected to an available public sanitary sewer system within 90 days after the date of mailing or posting of the written notice, the provisions of this Chapter shall be enforceable through the bringing of appropriate action for injunction, mandamus, or otherwise, in any court having jurisdiction. Any violation of this Chapter is deemed to be a nuisance per se.~~

~~Properties upon which the structure is more than 200 feet distance from the public sewer will be exempt from the provisions of this section unless deemed to be a serious threat to the health, safety and welfare of the people by the Building Department Inspector. Single family homes existing in areas zoned other than residential may be temporarily exempt from the provisions of this section provided that on-site sewage systems meet the approval of the Building Department Inspector and continue to function in a manner which does not threaten the health, welfare, and safety of the community as determined through periodic inspections by the Building Department Inspector.~~

(Rev. 01-13-03)

The current text of Sections 19.02.01, 19.02.02 and 19.02.03 should be moved and renumbered to become Sections 19.05.03, 19.05.04, and 19.05.05 respectively based on the current numbering.

The remaining portions of the Ordinance should be renumbered to account for the deletion of Section 19.02

Septic System Inspection Program:

Even if Council eliminates the mandatory connection provisions, the property owners with septic systems are still subject to the inspection program required by Chapter 19. If the inspection reveals a septic system failure, then a connection to available sewer may be more economical than a repair of the septic system. However, under this system, there is a potential to prejudice home-owners who purchase property without notification of the availability of a public sewer or the eventual requirement to hook-up to the public sewer. In addition to the additional record keeping responsibilities and potential enforcement problems and financing issues caused by delaying the connection, the City of Troy has previously encountered situations where a purchaser is not provided with notification of the availability of a new public sewer. The purchaser is surprised when they learn that the previous owner was actually required to complete the mandatory hook-up, thereby incurring unexpected costs.

Development Standard implications:

The City's development standards deal with technical and plan requirements for sewers and other public improvements; not with the requirement for sewers to be installed. Section 4.07(C) of Chapter 41, Subdivision Control requires that all lots be served by a public sewer:

C. Sewage Disposal

Sewage systems must be constructed to plans approved by the City Engineer. All lots must be served by a public sewer.

Chapter 39, Zoning, may require the addition of similar language that would pertain to non-residential zoning districts since Chapter 19 would remove the requirement for connection to available public sanitary sewer systems. Except for this revision, revisions to the City's development standards are not needed.

Although connections would not be required in all zoning districts, it's unlikely any new development that is required to build a sewer would not utilize it and instead install an onsite system. However, in rare instances there may be circumstances that produce a new structure with sewer already available to it but the owner decides to install a septic system rather than connect to the available sewer.

Potential Impacts:

The adoption of ordinance revisions not requiring connection to available sewers may provide an opportunity to construct sewers citywide. A single contract or perhaps a series of contracts could take advantage of lower pricing for large quantities of sewer work. Structures adjoining these new sewers would not have to connect, nor pay any benefit fee, until the actual connection is made, presumably at the request of the owner or as the result of a failed septic system that was identified during regular inspection (every four years) of all septic systems, as required by Chapter 19. This would allow property owners to pay for the connection utilizing the Sewer Benefit Fee, which allows for payment over 40 years or all at once, and the fee itself could be lower as a result of a large sewer construction program. An exception the 40- year payment period would be for new structures or a lot split which would require that the Benefit Fee be paid before a building permit is issued.

Engineering has analyzed all locations throughout Troy where sewers are missing and determined that most properties, (sixty-seven percent (67%)) are located on major roads where most sewer extensions would serve only one side of the street; this is "single sided" vs. "double sided. " This condition can result in a very high cost when a sewer extension is needed on only one side of a street and to service only a few lots. For example, there is one lot that would require a 1,200-foot sewer extension to service just the one lot. Excluding Charnwood, approximately 29,460 feet of sewers would need to be constructed to service only 132 lots scattered across the city but by spreading the cost among all lots in all zoning districts, the cost could be reduced to perhaps \$25,000 per lot. This would be higher than Charnwood at approximately \$15,700 per lot but Charnwood is "double sided " where the cost would naturally be somewhat lower. A rough estimate for constructing sanitary sewers citywide to service all properties and complete our system is approximately \$3 million. The Sewer Fund could finance this cost, which is the funding source for all sewers constructed by the city and could be accomplished without bonding or increasing taxes.

Recommendation:

We recommend that if City Council wishes to continue to consider deleting the connection requirement in Chapter 19 that staff be directed to return to council with specific language for Council's consideration and action.